

# 2008 SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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## INTRODUCTION

During this survey period, there were a number of cases in several different areas of the law that warrant discussion. Of course, the disciplinary arena is always a productive vineyard of cases of interest in professional responsibility. This year, there were two cases of particular interest because of the conduct by the lawyers therein. *In re Colman*<sup>1</sup> and *In re Fieger*<sup>2</sup> involved issues of conduct that most lawyers would never even dream of committing. Even more interesting are the lawyers' reactions to such accusations. In both cases, there appeared to be no recognition that their conduct could even be questioned, let alone be criticized.

There are also a couple of legal malpractice cases worthy of consideration.<sup>3</sup> In both cases, the underlying legal issues are complex but the ethics issues involved are worth a moment of discussion. Finally, a claim of prosecutorial misconduct was raised in a criminal case.<sup>4</sup> The case is particularly interesting because it caused the Indiana Supreme Court to consider the issue of whether such conduct put the criminal defendant in grave peril.<sup>5</sup> In the end, none of these issues are things that would normally confront beginners but, rather, arise in veteran lawyers' practices. That makes their resolution by the Indiana Supreme Court all the more important because of its relevance to the practicing lawyers.

## I. DISCIPLINARY ISSUES

### A. *Anything Anybody Will Pay: The Case of David Colman*

During the survey period, the supreme court issued a per curiam opinion in the attorney discipline case of *In re Colman*.<sup>6</sup> For his misconduct, the respondent lawyer received a suspension from the bar for at least three years before he may seek leave to apply for reinstatement.<sup>7</sup> Such a suspension is a severe sanction in attorney discipline, but is significantly better than two of the justices on the court

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1. 885 N.E.2d 1238 (Ind. 2008) (per curiam).

2. 887 N.E.2d 87 (Ind. 2008).

3. See *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191 (Ind. 2008); *Querrey & Harrow, Ltd. v. Trancon. Ins. Co.*, 885 N.E.2d 1235 (Ind. 2008).

4. *Bassett v. State*, 895 N.E.2d 1201 (Ind. 2008), *cert. denied*, 129 S. Ct. 1920 (2009).

5. *Id.* at 1208-09.

6. 885 N.E.2d 1238 (Ind. 2008) (per curiam).

7. *Id.* at 1244.

wanted.<sup>8</sup> The case represents not just a look at the ways in which a lawyer can get in trouble, but some insight into the thinking of the supreme court justices as they review these kinds of cases.

Many attorney discipline cases are resolved through a settlement between the respondent lawyer and the Indiana Disciplinary Commission (Disciplinary Commission).<sup>9</sup> The disciplinary action in *Colman*, however, was tried to completion before a hearing officer appointed by the court.<sup>10</sup> The hearing officer found in favor of the Disciplinary Commission on all three counts alleged against the respondent lawyer.<sup>11</sup> The court found that the hearing officer's conclusions were supported by the evidence and accepted them completely.<sup>12</sup>

In count one, the respondent, Colman, first became acquainted with G.A., an elderly gentleman, when he represented him in a civil lawsuit.<sup>13</sup> Some years later, G.A. broke his hip and was hospitalized. G.A. called the respondent to the hospital to discuss G.A.'s desire to have a will.<sup>14</sup> G.A. told the respondent that he wanted the respondent to be his beneficiary.<sup>15</sup> The respondent contacted another attorney named Paul Watts to prepare the will, name the respondent as the primary beneficiary, and name the respondent's son as the contingent beneficiary. Watts prepared the will in keeping with Colman's instructions but "did not discuss the will with G.A., nor did he charge G.A. for his services."<sup>16</sup> He likewise did not do any sort of assessment as to what G.A.'s mental condition was at this time.<sup>17</sup> The respondent lawyer did obtain a written statement from a psychiatrist as to G.A.'s competence to sign the will.<sup>18</sup> The supreme court noted that when Watts' file was produced as part of Colman's disciplinary action, it "consisted of an empty file folder and a post-it note."<sup>19</sup> A paralegal for Watts appeared at the hospital with the will, reviewed it with G.A. and, after G.A. had

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8. Two Justices authored separate opinions in this case. They agreed with the outcome but not the severity of the sanction imposed on Colman. *See id.* at 1245 (Shepard, C.J., dissenting); *id.* at 1246 (Dickson, J., dissenting) (both arguing for permanent disbarment).

9. Such settlements are contemplated by Indiana Admission and Discipline Rule 23, section 11(c). IND. ADMIS. & DISC. R. 23(11)(c). These agreements, however, are conditional in the sense that despite the parties' agreement, the supreme court can reject a proposal that the court does not believe is an appropriate resolution of the case. *Id.*

10. *Colman*, 885 N.E.2d at 1240. Under Admission and Discipline Rule 23(14)(h), the hearing officer is required to render a written report—essentially findings of fact and conclusions of law—to the court to determine whether the Disciplinary Commission has proved its case by the standard of clear and convincing evidence. IND. ADMIS. DISC. R. 23(14)(h).

11. *Colman*, 885 N.E.2d at 1240.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

consulted with the respondent lawyer, had G.A. execute the will.<sup>20</sup> The supreme court found that even though Watts put G.A.'s will on paper, the respondent lawyer "actively participated in the preparation of the will" in which he was the primary beneficiary.<sup>21</sup>

A little more than a week later, the respondent lawyer petitioned to have a guardian appointed over G.A.<sup>22</sup> In the petition to establish guardianship, the respondent affirmatively stated that he was G.A.'s lawyer.<sup>23</sup> The respondent was thereafter appointed as G.A.'s guardian.<sup>24</sup> He then moved G.A. from the hospital to a nursing home.<sup>25</sup> Three weeks later, G.A. decided he wanted to leave the nursing home but was prevented from doing so.<sup>26</sup> Through the assistance of a friend, G.A. was able to retain another lawyer and challenge the guardianship.<sup>27</sup> This put the respondent lawyer in a completely adverse position as to G.A.'s challenge to the guardianship.<sup>28</sup>

In its discussion, the supreme court immediately noted that the respondent's participation in the preparation of G.A.'s will constituted a violation of Rule 1.8(c), "which prohibits a lawyer from preparing an instrument for a non-relative that gives the lawyer or a person related to the lawyer a substantial gift."<sup>29</sup> This is an old concept in the law of professional responsibility that was even mentioned in the original Code of Professional Responsibility—adopted in Indiana in the 1970's.<sup>30</sup> Note that the supreme court did not discuss (and did not hesitate to find) that the respondent lawyer's *participation* in the creation of G.A.'s will was essentially synonymous with his *creation* of the will. It is a fair reading of the opinion to infer that whatever the extent of Watts's involvement in the creation of G.A.'s will, the responsibility for the will lay at the respondent's feet.<sup>31</sup>

There was an additional allegation connected with this count of the disciplinary case—the guardianship. The Disciplinary Commission and the court

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20. *Id.* at 1240-41.

21. *Id.* at 1243. Watts is not mentioned after this point. Although the court does not make an affirmative statement about Watts, their recitation of his involvement in the preparation of G.A.'s will leaves the clear impression that the court is critical of his behavior here. *See id.* at 1240, 1243.

22. *Id.* at 1241.

23. *Id.* at 1243.

24. *Id.* at 1241.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1243 (citing IND. PROF. CONDUCT R. 1.8(c)).

30. Under the Code, Ethical Consideration 5-5 provided: "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer *selected by the client.*" IND. CODE OF PROF. RESPON. 5-5 (emphasis added).

31. *Colman*, 885 N.E.2d at 1243.

were critical of the respondent's treatment of G.A.'s guardianship proceeding.<sup>32</sup> The court highlighted its concern by noting that the respondent contended that his participation in the guardianship proceeding was in the role of "G.A.'s guardian, not as his attorney."<sup>33</sup> The court was cognizant of the fact that when the respondent filed the guardianship petition, he explicitly stated that he was G.A.'s lawyer.<sup>34</sup> The court was also able to infer that G.A. believed the respondent to be his lawyer.<sup>35</sup> By becoming G.A.'s guardian, the respondent was put in complete charge of all the property he stood to inherit under G.A.'s will.<sup>36</sup> The court reasoned that such total control over these assets could have provided an incentive for the respondent to preserve G.A.'s property rather than expend it for G.A.'s care and comfort.<sup>37</sup> By putting himself in that position, the respondent had an impermissible conflict of interest and thereby violated Rule 1.7(b).<sup>38</sup> When analyzing this conduct under Rule 1.7(b), the conflict is clearly between G.A.'s interest in managing his own life and property, versus the respondent's interest in protecting his expectation in all the property under G.A.'s will. As the court noted, the guardianship allowed the respondent to essentially lock in his right to G.A.'s estate by freezing G.A. out of the ability to dispose of property.<sup>39</sup>

The court noted that the hearing officer found in the respondent's favor on count two; thus, the court did not disturb that result.<sup>40</sup>

In count three, the hearing officer found that the respondent had committed misconduct based on the following facts. In 1995, respondent represented a client identified as M.M. in two matters: (1) a criminal case in Evansville for allegedly possessing marijuana and (2) a dispute with Indiana University in Bloomington over a grade M.M. received in a course.<sup>41</sup> There was "no written fee agreement"<sup>[42]</sup> with M.M., the terms of the representation were not clearly

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32. *Id.* at 1241, 1243.

33. *Id.* at 1243.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*; see also IND. PROF. CONDUCT R. 1.7(b). Rule 1.7 provides,

(a) [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, a former client or to a third person or by a personal interest of the lawyer[, unless] . . . .

(b) (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; and . . .

(4) The client gives informed consent in writing.

39. *Colman*, 885 N.E.2d at 1243.

40. *Id.* at 1241.

41. *Id.*

42. There is no requirement for a written fee agreement in criminal defense representations

established," the respondent did not bill M.M., and respondent never told M.M. what he owed.<sup>43</sup> On March 31, 1995, M.M. was arrested again after a confidential informant bought marijuana from him.<sup>44</sup> A search of M.M.'s Bloomington condominium revealed 100 pounds of marijuana and almost \$200,000 in cash.<sup>45</sup> Somehow, the authorities failed to find \$20,000 hidden in the condominium and \$30,000 in a bank safe deposit box.<sup>46</sup> M.M. told the respondent where to find the money and respondent recovered it almost immediately.<sup>47</sup> Respondent deposited the \$50,000 into his personal account at the Indiana University Credit Union and not in an attorney trust account.<sup>48</sup> Respondent thereby commingled his own funds with those belonging to his client.<sup>49</sup> The respondent suggested that M.M. transfer ownership of his condominium to the respondent for the purposes of avoiding an eventual forfeiture of the condominium as part of the criminal prosecution and satisfying part of the respondent's legal fee.<sup>50</sup> About three weeks after M.M.'s arrest, the respondent appeared at the Marion County Jail with a document he prepared entitled "Sale Agreement" wherein the quid pro quo for the condominium and its contents was the respondent's pledge to forego attorney fees in the Indiana University matter and the criminal cases.<sup>51</sup> The agreement also contained a provision wherein M.M. agreed to reimburse the respondent for all expenses associated with the condominium if it was eventually forfeited.<sup>52</sup> Furthermore, it was eventually determined that M.M. had about \$65,000 in equity in the condominium and its contents.<sup>53</sup> The respondent told M.M. not to tell anyone about the transaction, and M.M. did not even tell the lawyer that was handling the federal forfeiture case.<sup>54</sup> The respondent, meanwhile, did not assume the mortgage on the condominium or make timely payments.<sup>55</sup> As a result of the

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under Indiana Rule of Professional Conduct 1.5. Contingent fee agreements must be in writing under Rule 1.5(c) but those are not permitted in a criminal case and there was no likelihood of the contingent fee being efficacious in the dispute with Indiana University. It is clear from rule 1.5 that the terms and amounts of the fee agreement *should* be in writing, but it is not clear that a written agreement was *required* in this context. See IND. PROF. CONDUCT R. 1.5.

43. *Colman*, 885 N.E.3d at 1241.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1241-42.

52. *Id.* at 1242. Another lawyer, designated as R.K. by the supreme court, represented M.M. in the federal forfeiture case. *Id.* Neither M.M. nor the respondent told R.K. about the deal transferring the condominium to the respondent. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

federal criminal action, M.M. went to prison and asked respondent for some of his money back.<sup>56</sup> The respondent refused.<sup>57</sup>

The supreme court found that the respondent mishandled M.M.'s funds by failing to deposit them in an approved trust account, thus commingling the funds with his own.<sup>58</sup> The court also agreed with the hearing officer's determination that the sale agreement on the condominium was unreasonable because it did not set out the value of the legal services the respondent had performed or would perform in the future.<sup>59</sup> As such, this constituted a business transaction with a client in violation of Rule 1.8.<sup>60</sup> The court also found that the respondent was guilty of charging M.M. an unreasonable fee in violation of Rule 1.5.<sup>61</sup> Having

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56. *Id.*

57. *Id.*

58. *Id.* at 1243; *see also* IND. PROF. CONDUCT R. 1.15(a). Rule 1.15(a) provides in pertinent part:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

IND. PROF. CONDUCT R. 1.15(a). Similarly, IND. ADMIS. DISC. R. 23 § 29(a)(1) provides in pertinent part:

Attorneys shall deposit all funds held in trust in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts" and shall inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Commission.

59. *Colman*, 885 N.E.2d at 1243.

60. *Id.* IND. PROF. CONDUCT R. 1.8(a) provides:

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

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

61. *Colman*, 885 N.E.2d at 1243. IND. PROF. CONDUCT R. 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."

ascertained that the facts proved constituted violations of the Rules, the supreme court turned its attention to determining the appropriate sanction to impose on this lawyer. The list of factors the court relied on in fashioning a sanction in this case is one of the reasons that this case is an important component of this year's survey Article.

The court began its discussion of appropriate sanction noting,

[r]espondent's individual ethical violations are troublesome, but in the aggregate they raise the larger concern that [r]espondent fails to understand and honor the fundamental principles of the attorney-client relationship. Rather than seeing the relationship as one of undivided loyalty to the client, [r]espondent appears to view that relationship as a chance for personal financial gain wholly apart from compensation for legal services rendered whenever the opportunity arises.<sup>62</sup>

The easiest way to appreciate the considerations that were important to the court is to view them in list fashion. Thus, the aggravating factors found by the hearing officer included: (1) the respondent "demonstrated a pattern of misconduct"; (2) the respondent's "conduct was in part based on selfish [or] dishonest motives"; (3) the respondent "engaged in multiple violations"; (4) the respondent "was dealing with a vulnerable client in the case of G.A."; (5) the respondent "refused to acknowledge any wrongdoing"; (6) the respondent had a prior private reprimand from 1978 for communicating directly with a represented party; (7) the respondent had a prior private reprimand in 1995 for lending a client \$3000 and failing to advise her to seek independent legal advice; (8) the respondent had been previously suspended for eighteen months in 1996 for a federal criminal conviction for filing a false tax return; and (9) although the hearing officer found the respondent's skill to be a mitigating factor, the court noted that M.M.'s testimony about the condominium seemed a confession to fraud and perjury in the federal forfeiture action (clearly not really mitigating factors).<sup>63</sup>

Finally, although not technically designated as an aggravating factor, the court also noted that "even if G.A. was competent to execute a will, his frailty and vulnerability were demonstrated by [r]espondent's filing of a guardianship proceeding, as G.A.'s attorney just days after will's execution."<sup>64</sup>

This case illustrates the potential problem articulated in comment 1 to Indiana Professional Conduct Rule 1.8: "A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client."<sup>65</sup>

The supreme court then ordered the respondent suspended from the bar for

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62. *Colman*, 885 N.E.2d at 1243.

63. *Id.* at 1242.

64. *Id.* at 1244.

65. IND. PROF. CONDUCT R. 1.8 cmt. 1.

at least three years, after which he may be readmitted to the bar only if he proves by clear and convincing evidence, among other things, genuine remorse for his misconduct, a proper understanding of the ethical standards imposed on members of the bar, and his willingness to conduct himself in conformity with such standards.<sup>66</sup>

The imposition of the three-year suspension was derived by the 3-2 majority of the supreme court.<sup>67</sup> The Chief Justice and Justice Brent Dickson clearly agreed with the finding that the respondent had committed misconduct, but they dissented as to the sanction imposed.<sup>68</sup> Both issued opinions explaining why they independently came to the conclusion that this lawyer should be permanently disbarred.<sup>69</sup> These opinions are another factor meriting coverage of *Colman* in this Article. They give a glimpse into the personal thought processes of the authoring justices that is not normally seen in disciplinary cases.

It was not lost on Chief Justice Shepard that this was Colman's fourth disciplinary action<sup>70</sup> and that three had occurred while the chief justice was a member of the court.<sup>71</sup> He noted that he had spent "considerable time going behind the briefs" in an eventually fruitless effort to find some support for the respondent's stern defense that he had done absolutely nothing wrong.<sup>72</sup> Specifically the chief justice noted:

It was not to be so. Respondent's testimony before the [h]earing [o]fficer, the affidavits he made for the purposes of this proceeding, and the letters from him and others revealed an insistence that he acted in accord with the letter and spirit of the rules. . . . Having had several years to reflect on how he handled the will and guardianship of a man in his mid-nineties whom [r]espondent knew to be infirm, [r]espondent reasserted on the stand that he saw no possibility that this dual role might limit his representation or present any conflict. "Not that I could see or can see." "No, absolutely none." This posture of total denial is similarly reflected in [r]espondent's contention that his elderly client's will was not really handled by Respondent but was rather under the care of attorney Watts, who never met, or spoke, or corresponded with the

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66. *Colman*, 885 N.E.2d at 1244 (citing IND. ADMIS. DISC. R. 23, § 4(b)). This last passage is a quote from Admission and Discipline Rule 23, section 4(b) regarding factors a suspended lawyer must prove to demonstrate his fitness to return to practice.

67. *Id.*

68. *See id.* at 1245 (Shepard, C.J., dissenting); *id.* at 1246 (Dickson, J., dissenting).

69. *Id.* at 1245 (Shepard, C.J., dissenting); *id.* at 1246 (Dickson, J., dissenting). Under Admission and Discipline Rule 23(3)(a) disbarment in Indiana is referred to as permanent disbarment because the lawyer is not permitted to petition for reinstatement of his or her license. IND. ADMIS. DISC. R. 23(3)(a).

70. *Colman*, 885 N.E.2d at 1245 (Shepard, C.J., dissenting).

71. *Id.*

72. *Id.*

testator.<sup>73</sup>

This highlights one of the *leitmotif* of the case: the respondent had an established pattern of recognizing a client's vulnerability and then exploiting it mercilessly for self-gain. In the chief justice's opinion, the straw that broke the proverbial camel's back was the respondent's own testimony as to how the reasonableness of his fee might be characterized. His response was, "[a]nything anybody will pay."<sup>74</sup> In the chief justice's analysis, that made any current or future redemption for the respondent impossible thereby militating only one possible sanction—permanent disbarment.<sup>75</sup>

Associate Justice Brent Dickson reached the same conclusion albeit along a different path:

When the respondent was convicted of a federal felony in 1996, this Court unanimously voted not to disbar but only suspend his privilege to practice law for a substantial time. And we later unanimously agreed to reinstate him. . . . On reflection, I should have, but did not, dissent to these [per curiam] decisions. I choose, however, not to make the same mistake a third time, and agree with Chief Justice Shepard that the respondent should be disbarred for his misconduct.<sup>76</sup>

Although the actual sanction for the respondent lawyer was, by consensus, a suspension allowing him to petition for reinstatement after three years, the burden on the respondent to show his fitness to re-enter the practice of law will be heavy indeed.<sup>77</sup>

### *B. What Is a Disciplinary "Proceeding": Geoffrey N. Fieger's Case*

The Indiana Supreme Court was called to decide the case of Michigan attorney Geoffrey N. Fieger who was admitted in Indiana on a temporary basis.<sup>78</sup> Fieger was charged by the Disciplinary Commission with two counts of misconduct in the course of representing a party in an Indiana civil case.<sup>79</sup>

1. *Background.*—In 2001, the Michigan Attorney Grievance Commission<sup>80</sup>

73. *Id.* Unsurprisingly, the *quality* of the evidence (i.e. "made for purposes of this proceeding") was an important factor for the chief justice in his search for some redeeming factor in the respondent's favor. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1246 (Dickson, J., dissenting).

77. *Id.* at 1244 (majority opinion).

78. *In re Fieger*, 887 N.E.2d 87, 88-89 (Ind. 2008). In its opinion, the court noted that it had jurisdiction to discipline the respondent lawyer by virtue of his temporary admission and the court's constitutional grant under. *Id.* at 88 (citing IND. CONST. art. 7, § 4).

79. *Id.* at 88-90.

80. Essentially, an agency with a function parallel to Indiana's Supreme Court Disciplinary Commission. See Attorney Grievance Commission, State of Michigan, <http://www.agcmi.com/> (last visited June 29, 2009).

filed a formal disciplinary petition against the respondent alleging that while he was on his radio program, he made disparaging and threatening remarks aimed at three judges of the Michigan Court of Appeals who had ruled against him in a case.<sup>81</sup> A Michigan hearing panel recommended that he receive a reprimand for his conduct, but allowed him the right to appeal the decision.<sup>82</sup> The reprimand was eventually vacated and Fieger's case dismissed, but the grievance administrators took an appeal to the Michigan Supreme Court and that court agreed to review the decision.<sup>83</sup> The respondent attempted to remove the case to the federal district court and, eventually to the U.S. Court of Appeals for the Sixth Circuit.<sup>84</sup> By late 2005, the respondent's appeal was pending and the grievance administrator's case was pending before the Michigan Supreme Court.<sup>85</sup>

In December 2005, the respondent applied for temporary admission to represent a party in the St. Joseph Superior Court in South Bend, Indiana. In his application, the respondent asserted under oath that no "formal disciplinary proceedings" were pending against him.<sup>86</sup> In January 2006, the Indiana trial court granted the application.<sup>87</sup> About six months later, the Michigan Supreme Court reversed the lower court's decision and ordered that the respondent be reprimanded for his misconduct.<sup>88</sup> The respondent notified the Indiana trial court of this development in August 2006.<sup>89</sup>

In the Indiana disciplinary action, the respondent's admission in Arizona was the subject of the court's attention.<sup>90</sup> The Arizona State Bar Association filed a complaint against the respondent, and he was served with an Arizona "Probable Cause Order."<sup>91</sup> That was the status of the Arizona case when the respondent executed his application for temporary admission in December 2005.<sup>92</sup> On December 30, 2005, the Arizona bar filed their complaint against the respondent alleging several ethical violations, and on January 6, 2006, the respondent filed his application for temporary admission with the Indiana Supreme Court.<sup>93</sup> Three days later, the Arizona complaint was served on the respondent's Arizona attorney and the respondent was notified no later than January 20, 2006 about the

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81. *Fieger*, 887 N.E.2d at 88.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* "He intentionally altered the language of Admission and Discipline Rule 3(2)(a)(4)(V) to add the word 'formal.'" *Id.*

87. *Id.* at 88-89.

88. *Id.* at 89.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

complaint.<sup>94</sup> “After the Indiana trial court approved the [r]espondent’s temporary admission, the opposing party [moved] to reconsider [that action] on January 23, 2006.<sup>95</sup> Although temporary admission was withdrawn, the respondent sought reconsideration of that order and, after a hearing, the decision was reconsidered and temporary admission was again restored on June 12, 2006.<sup>96</sup> Although he argued to the Indiana trial court that at the hearing on the motion to reconsider he had “no pending charges,” he never told the court about the case pending in Arizona.<sup>97</sup> By October 2006, Indiana’s Disciplinary Commission had notified the respondent of its investigation of his activities.<sup>98</sup> Thereafter, in November 2006, the respondent notified the trial court for the first time that a matter was pending against him in Arizona.<sup>99</sup>

2. *The Indiana Disciplinary Action.*—At the hearing in the Indiana disciplinary action the hearing officer adopted an “extraordinarily narrow” definition of the supreme court’s “Disclosure Rule.”<sup>100</sup> The respondent argued that his application for temporary admission in Indiana was accurate at the time it was executed, the Michigan disciplinary “proceeding” had been dismissed, and the appeal of that dismissal was not a “proceeding” as defined under Michigan law.<sup>101</sup> Respondent made this argument even though the chapter in which the applicable Michigan law was located was entitled, “Professional Disciplinary Proceedings.”<sup>102</sup> The respondent testified that he intentionally added the word “formal” to the language related to Indiana’s Disclosure Rule<sup>103</sup> to protect himself from a charge of dishonesty in case there was some “complaint floating out there that I don’t even know about or that I don’t recall.”<sup>104</sup> The court made short work of that argument:

Adding the word “formal” would not seem to help if this were really his

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 90. The rule in question is part of Indiana Admission and Discipline Rule 3(2)(a)(4)(v) governing temporary admission. The rule includes the language stating,

“That **no disciplinary proceeding is presently pending** against the attorney in any jurisdiction; or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule **shall have a continuing obligation** during the period of such admission promptly to advise the court of a disposition made of pending charges or the institution of new disciplinary proceedings.”

*Fieger*, 887 N.E.2d at 90 (quoting IND. ADMIS. DISC. R. 3(2)(a)(4)(v)).

101. *Fieger*, 887 N.E.2d at 90.

102. *Id.*

103. For the language of the Disclosure Rule, see *supra* note 100.

104. *Id.*

concern; it would make more sense to say no “known” disciplinary proceedings were pending. In any case, the change in wording shows [r]espondent gave careful consideration to the scope of his duty to disclose and chose not to mention the Michigan action.<sup>105</sup>

The court went on to point out that the relevant consideration was not the scope of the term “proceeding” under Michigan law, but rather the scope under *Indiana*’s Disclosure Rule.<sup>106</sup> In short, this state’s view of the term is quite broad in scope and the respondent should have completely disclosed his troubles in Michigan rather than conceal them through his legalistic interpretation of the rules.<sup>107</sup> For all his trouble, the respondent was barred from applying for temporary admission to the bar in Indiana for two years.<sup>108</sup> Associate Justice Brent Dickson dissented from the court’s main opinion and would have permanently barred the respondent from obtaining temporary admission in Indiana.<sup>109</sup> Associate Justice Frank Sullivan would have adopted the analysis and conclusions of the hearing officer.<sup>110</sup>

One noteworthy part of this opinion is that it required the court to delve into an area that it rarely needs to address—problems with non-Indiana attorneys practicing in our courts. In *Fieger*, the court makes reference to *In re Fletcher*<sup>111</sup>—a case with similar facts to *Fieger*.<sup>112</sup> In the cited *Fletcher* opinion, the court was called upon to address a challenge by a lawyer admitted in Illinois who had been alleged to have committed misconduct while temporarily admitted in Indiana.<sup>113</sup> The court gave an extensive analysis of not only why the respondent was subject to the jurisdiction of the Indiana Supreme Court, but how he had voluntarily submitted to it when he undertook the temporary admission.<sup>114</sup> That case was remanded back to the disciplinary hearing officer for a final adjudication which, in the end, resulted in a separate opinion giving *Fletcher* a two year ban on admission in Indiana.<sup>115</sup>

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105. *Id.* (footnote omitted).

106. *Id.* at 90-91.

107. *Id.* at 91.

108. *Id.* at 92.

109. *Id.*

110. *Id.* That would have been a finding in the respondent’s favor. *See id.* at 90.

111. 655 N.E.2d 58 (Ind. 1995).

112. *Fieger*, 887 N.E.2d at 90, 92.

113. *Fletcher*, 655 N.E.2d at 59.

114. *Id.* at 59-61.

115. *In re Fletcher*, 694 N.E.2d 1143, 1143 (Ind. 1998).

## II. MALPRACTICE AND PROFESSIONAL LIABILITY ISSUES

### A. “*For Fear of Walking on The Mines I’d Laid*”:<sup>116</sup> *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*<sup>117</sup>

This case involved protracted litigation over the terms of the 1988 wills of a husband and wife and related trust and tax issues.<sup>118</sup> However, there were other noteworthy issues along the way for the patient reader. Although this Article is not intended to serve as a survey of procedural issues, the supreme court noted that “[t]his case is before us in a rather unusual procedural posture.”<sup>119</sup> A trial court order from litigation in 1994 preceded, and was an indispensable component in, the filing of the malpractice case in 1999.<sup>120</sup> By the time the supreme court was presented with the litigation in 2008, the time for challenging any feature of that order had long since passed.<sup>121</sup> Still, because of the potential involvement of the federal courts and the interpretation of Indiana law by the Internal Revenue Service, the supreme court’s comment on the ruling was vital to both parties.<sup>122</sup>

As briefly as practicable, the facts are as follows: In 1988, Norman Carlson, Sr. and his wife Hilda hired Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos (the law firm) to prepare their wills and a trust a manner that when their son and his wife (Norman Jr. and Margaret) died, their property would pass down in a way that their grandchildren would receive the property and not be subject to federal estate or state inheritance tax.<sup>123</sup> Norman Sr. and Hilda both died in 1992 and their wills were admitted to probate.<sup>124</sup> In 1994, Norman Jr.’s Texas attorney noted a problem with the language in the trust documents that would potentially cause significant tax consequences for their children upon their deaths.<sup>125</sup> Norman Jr. and his wife asked the law firm to file a petition to reform the trust language to give effect to the wishes of Norman Sr. and Hilda.<sup>126</sup> In August 1994, the trial court entered an order that the court, the Carlsons, and the law firm believed would be adequate to reform the trust and achieve the tax reduction goals originally set out in 1988.<sup>127</sup> The supreme court quoted

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116. STING, *Fortress Around Your Heart*, on *THE DREAM OF THE BLUE TURTLES* (A&M Records 1985).

117. 895 N.E.2d 1191 (Ind. 2008).

118. *Id.* at 1193.

119. *Id.* at 1201.

120. *Id.* at 1194-95.

121. *Id.* at 1198-99.

122. *Id.* at 1198-1201.

123. *Id.* at 1193.

124. *Id.*

125. *Id.* at 1194.

126. *Id.*

127. *Id.* at 1194-95.

extensively from this order in its 2008 opinion.<sup>128</sup>

The trial court's order reforming the trust did not, however, resolve the dispute between the Carlsons and the law firm. In June 1999, the Carlsons filed a formal complaint for legal malpractice against the law firm based on the language used to draft Norman Sr.'s and Hilda's wills and trust.<sup>129</sup> The law firm counterclaimed against the Carlsons for unpaid fees.<sup>130</sup> The firm also filed a motion for summary judgment that the trial court granted in part, effectively disposing of the litigation by holding that because of the reformation, the misconduct complained of in the malpractice suit had been resolved.<sup>131</sup> The beneficiaries of the trust appealed the trial court's order.<sup>132</sup> Among its arguments, the law firm claimed that trying to predict the future tax liability from the substantive issues in the litigation was speculative and, therefore, the Carlson's suit was premature.<sup>133</sup> In an extensive discussion of the law of statutes of limitations, the court of appeals explained that the Carlsons were not too early filing suit; they were, in fact, too late.<sup>134</sup> Indiana (like many states) has a two year statute of limitations for bringing malpractice claims by prospective plaintiffs and, here, the Carlsons should have filed after their Texas lawyer told them that the law firm had created this problem.<sup>135</sup> In the view of the court of appeals, however, the law firm had waived the affirmative defense of the statute of limitations by not raising it previously.<sup>136</sup>

After that opinion was issued in June 2007, a petition for rehearing was filed specifically as it related to the statute of limitations issue.<sup>137</sup> On August 8, 2007, the court of appeals issued a corrected opinion.<sup>138</sup> The court noted,

[u]nbeknownst to this court, the parties had entered into pre-suit agreements tolling the statute of limitations. Therefore, the Carlsons did not file their claim in violation of the statute of limitations, and the Lawyers did not waive the defense by failing to plead it. In sum, neither party's attorney erred regarding the statute of limitations. As the parties concede in their petition, the fact that pre-suit agreements existed has no

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128. *Id.*

129. *Id.* at 1195.

130. *Id.*

131. *Id.* This is something of a simplification of the specific rulings of the court, but the issues that are especially noteworthy for the purposes of this work do not hinge on a detailed understanding of the will and trust issues.

132. *Carlson v. Sweeney, Dabagia, Donoghue Thorne, Janes & Pagos (Carlson I)*, 868 N.E.2d 4 (Ind. Ct. App. 2007), *reh'g granted and modified, Carlson II*, 872 N.E.2d 626 (Ind. Ct. App. 2007), *aff'd in part, Carlson III*, 895 N.E.2d 1191 (Ind. 2008).

133. *Id.* at 20.

134. *Id.* at 20-22.

135. *Id.* at 20-21.

136. *Id.* at 21.

137. *Carlson II*, 872 N.E.2d at 626.

138. *Id.*

effect on the outcome or rationale of our previous decision and we grant the petition for rehearing for the sole reason of removing any suggestion that the parties' attorneys acted negligently with regard to the statute of limitations.<sup>139</sup>

This seems like not only an appropriate, but laudable, application of a pre-suit agreement. The decision when to file a malpractice action is, of course, a matter between the plaintiff and his or her lawyer.<sup>140</sup> A careful reading of these opinions, however, leaves the reader with the clear view that these were sophisticated parties dealing with complex issues. A rush to the courthouse may not have served any of the parties or courts involved because of the court's need to diligently process claims.<sup>141</sup> Any specific measurement of harm from the law firm's conduct was very possibly speculative because a number of events had to occur between the execution of the wills and trust and the ultimate determination of the taxes imposed. A possible pre-suit settlement would have been, by definition, the product of extensive negotiation. Use of such a pre-suit agreement could certainly be broad enough to include issues like pre-suit discovery, e.g., depositions. As beneficial the lawyers' use of this agreement seemed to be to the parties in this extensive litigation, a plain reading of the supreme court's opinion reveals the potential problems with protracting litigation through the use of these agreements.

Once the supreme court turned its attention to the issue of reformation under Indiana law, the court noted that the terms of the trial court's 1994 judgment were not properly before the court for decision.<sup>142</sup> The order was now a binding decree and not subject to any sort of collateral attack.<sup>143</sup> However, the reformation issue was the big foundational issue for the entire litigation.<sup>144</sup> Said another way, if the court had found a way to determine that the 1994 order was an ineffective attempt at reformation, the position of the parties could have been vastly different. Fortunately for them, that was not the case. Ultimately, the court held that the terms of the 1994 order reforming the standard established in the trust was adequate, under Indiana law, to constitute an effective reformation of the Carlson trust sufficient to accomplish the goals originally set by the settlors, Norman Sr. and Hilda.<sup>145</sup>

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139. *Id.* at 627.

140. The use of the grammatical plural here is deliberate since there were at least two married couples involved as potential plaintiffs in any possible malpractice claim against the law firm.

141. *See, e.g.*, IND. PROF. CONDUCT R. 1.3 (regarding diligently pursuing client matters); IND. CODE OF JUD. CONDUCT R. 2.5(A) (requiring judges to perform both judicial and administrative duties diligently and promptly).

142. *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos (Carlson III)*, 895 N.E.2d 1191, 1198 (Ind. 2008).

143. *Id.*

144. *See id.* at 1198-1201.

145. *Id.* at 1200-01. This conclusion was certainly important to the parties but the ultimate decider is the Internal Revenue Service. *See id.* at 1196. Specifically, the court explained the

The court did, however, undo part of the trial court's summary judgment order from 1999.<sup>146</sup> As noted earlier, the summary judgment order effectively held that the terms of the 1994 order reformed the trust language sufficiently to overcome the concerns about the tax issues.<sup>147</sup> The court held:

There are at least two problems with the trial court's position. First, as the Beneficiaries point out and the Court of Appeals observed, "[T]he Carlsons have already expended time and money dealing with the Wills; if the Lawyers' work with regard to the Wills is determined to be negligent, these costs may be considered damages flowing from the Wills regardless of whether the IRS assesses a tax penalty. We agree. Summary judgment in favor of [l]aw [f]irm on this point was error. Second, as for the IRS, it is clear that the agency as well as the federal courts are bound by this Court's determination that the Testators' wills were properly reformed in accordance with the laws of this State. . . . What is less clear, however, is what reaction the federal authorities will have to all of this. More precisely is there some reason the I.R.S. may find to avoid the effect of the reformation in spite of this Court's opinion? We have no way to know one way or the other and decline to speculate. Because there is a dispute of material fact on this issue, summary judgment in favor of Law Firm was inappropriate on this point as well.<sup>148</sup>

The case was remanded to the trial court presumably for a resolution of the issues through trial or settlement since the court had held a genuine issue of material fact existed between the parties thereby taking it out of summary judgment.<sup>149</sup> Hence the heading at the beginning of this section—"walking on the mines I'd laid." In this instance, the law firm finally got a decision on the language it had drafted in a couple of wills and a trust twenty years ago. That decision, however, keeps the dispute going into its third decade with the law firm still not off the hook for the tax consequences of its work. It is possible that future decisions in the case will be the subject of future survey articles on professional responsibility.

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importance of its determination should the tax issue end up working its way through the federal courts. *Id.* There is U.S. Supreme Court authority, not discussed here, that explains the importance of a state's highest court's decisions regarding its own law and how that determination impacts tax questions before the IRS. *See id.* The Indiana Supreme Court was also well aware that the parties could seek a Private Letter Ruling (PLR) from the IRS to advance their cause as well. *Id.* at 1201 n.11.

146. *Id.* at 1201.

147. *Id.* at 1195-96.

148. *Id.* at 1201 (citations and footnote omitted).

149. *Id.*; *see* IND. TRIAL R. 56 (providing the summary judgment standard).

*B. Trampoline Litigation: Querrey & Harrow, Ltd. v. Transcontinental Insurance Co.*<sup>150</sup>

In the underlying litigation, a young man was injured while playing on a Jumping brand trampoline.<sup>151</sup> The parties ended up settling the litigation for \$6,300,000.<sup>152</sup> CNA Insurance had provided excess insurance coverage and had to pay \$3,740,000 as part of the settlement.<sup>153</sup> After the settlement concluded, CNA filed suit against the defense lawyers for failing to raise a non-party defense to the personal injury claim.<sup>154</sup> The trial court refused to grant the defendant law firm summary judgment on the issue and they appealed.<sup>155</sup> The court of appeals held that CNA could not sue the law firms because the assignment of legal malpractice claims is not allowed in Indiana, and the doctrine of equitable subrogation is also not recognized.<sup>156</sup> The court also held that the law firm did not represent CNA either; thus, no attorney-client relationship existed between the defendant law firm and the insurer.<sup>157</sup> As a result, no malpractice relief was available for the insurance company.<sup>158</sup>

The insurer sought transfer to the supreme court.<sup>159</sup> In a brief opinion, the court adopted the court of appeals's opinion and noted that the rejection of equitable subrogation was an issue of first impression in Indiana.<sup>160</sup> In all other respects the court adopted the opinion of the court of appeals.<sup>161</sup> The opinion, however, was not unanimous. Associate Justice Frank Sullivan authored a dissenting opinion making the case for equitable subrogation.<sup>162</sup> In his dissent, Justice Sullivan makes the point that the lawyers and law firms should not enjoy a windfall merely because the insured contracted for excess coverage.<sup>163</sup> Justice Sullivan also notes that even if these kinds of suits were allowed, the carrier would not face an easy road to recovery since they would not have the benefit of the confidential information passed between the lawyer and the client in the

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150. 885 N.E.2d 1235 (Ind. 2008).

151. *Querrey & Harrow, Ltd. v. Transcon. Ins. Co. (Querrey & Harrow I)*, 861 N.E.2d 719, 720 (Ind. Ct. App. 2007), *adopted on transfer*, 885 N.E.2d 1235 (Ind. 2008).

152. *Id.*

153. *Id.*

154. *Id.* at 720-21. IND. CODE § 34-51-2-14 (2008) provides, "In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty."

155. *Querrey & Harrow I*, 861 N.E.2d 719, 721.

156. *Id.* at 722-24.

157. *Id.* at 724-25.

158. *Id.*

159. *Querrey & Harrow, Ltd. v. Transcon. Ins. Co. (Querrey & Harrow II)*, 885 N.E.2d 1235 (Ind. 2008).

160. *Id.* at 1236-37.

161. *Id.* at 1236.

162. *Id.* at 1237 (Sullivan, J., dissenting).

163. *Id.* at 1237-38.

underlying case.<sup>164</sup> Although the court of appeals and the supreme court's majority opinion make the law clear, Justice Sullivan's dissent does an excellent job of outlining the major factors to be considered in future cases if carriers were to seek to recover for the shortcomings of defense counsel.

### III. PROSECUTORIAL AND DEFENSE CONFIDENTIALITY: *BASSETT V. STATE*<sup>165</sup>

Bassett was convicted of four murders in 1998 and sentenced to four consecutive life terms without the possibility of parole.<sup>166</sup> In an earlier appeal, the convictions were reversed and Bassett was tried for a second time in 2005.<sup>167</sup> From 2003 until his second trial, Bassett was housed in the Bartholomew County Jail in Columbus.<sup>168</sup> During that time, his lawyer visited him eleven times and they spoke by phone on numerous occasions.<sup>169</sup> The chief deputy prosecutor for Bassett's case learned from a witness that Bassett was trying to hire an assassin from the jail and one of his intended victims was the deputy prosecutor herself.<sup>170</sup> The chief deputy told the elected prosecuting attorney who then undertook an investigation into the allegation.<sup>171</sup> Among the steps in his investigation was the prosecutor's review of the telephone calls between the defendant, Bassett, and his lawyer on jail telephones.<sup>172</sup> After reviewing several conversations, there was no evidence that Bassett was using the phone calls with his lawyer for anything like trying to hire a hit man, and the prosecutor stopped reviewing the calls.<sup>173</sup> He likewise did not tell Bassett's lawyer that he had reviewed the recordings.<sup>174</sup> Defendant and his attorney were not aware that the prosecutor had listened to any of the conversations.<sup>175</sup> It is important to note, however, that the telephone system actually told the parties that all calls were being recorded.<sup>176</sup>

At a sidebar conference during trial, the prosecutor revealed that he had heard the conversations, and Bassett's counsel moved for a mistrial.<sup>177</sup> The court denied the motion.<sup>178</sup> Bassett's claim of prosecutorial misconduct was reviewed by the supreme court beginning with a review of the Indiana Rules of

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164. *Id.* at 1238.

165. 895 N.E.2d 1201 (Ind. 2008), *cert. denied*, 129 S. Ct. 1920 (2009).

166. *Id.* at 1204.

167. *Id.*

168. *Id.* at 1205.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1207. Specifically, "This is Cincinnati Bell with a collect call from the Bartholomew County Jail from \_\_\_\_\_. This call may be recorded." *Id.*

177. *Id.* at 1205.

178. *Id.*

Professional Conduct, Rule 3.8 governing the conduct of prosecutors.<sup>179</sup> Specifically, comment 1 of that rule provides, “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.”<sup>180</sup> The court expressed concern over the notion that a prosecutor would review recorded phone conversations “willy-nilly,” but concluded,

we recognize that the prosecutor’s motivation in listening to the recordings was the investigation of possible criminal activity—and not just any criminal activity but the threat of harm to his own chief deputy. This is not a disciplinary proceeding and, therefore, it is not necessary for us to decide whether the prosecutor committed misconduct unless the prosecutor’s conduct caused Bassett undue prejudice. Said more precisely, a defendant is entitled to relief only “if the misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected.”<sup>181</sup>

After extensive discussion of the history of these inquiries and the nature of the “peril,” the court concluded that the prosecutor had not committed misconduct and, indeed, had done nothing wrong.<sup>182</sup> Part and parcel of the supreme court’s analysis was the trial court’s careful control over the use of the information received from the phone calls including a severe limitation on the information provided and prohibition of the use of an individual’s name during a testimony so as to limit the impact of the information received from the telephone calls.<sup>183</sup> In the end, Bassett’s conviction was upheld and no misconduct was held to have been committed by the prosecuting attorney.<sup>184</sup>

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179. *Id.* at 1208; *see also* IND. PROF. CONDUCT R. 3.8.

180. IND. PROF. CONDUCT R. 3.8 cmt. 1.

181. *Bassett*, 895 N.E.2d at 1208 (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)).

182. *Id.* at 1209-10.

183. *Id.* at 1210.

184. *Id.* at 1215.

