RECENT DEVELOPMENTS IN PROFESSIONAL RESPONSIBILITY

J THOMAS PARKER*

INTRODUCTION

This Survey Article examines the significant developments in the Indiana law of professional responsibility from October 1, 2011 until September 30, 2012. The Indiana Supreme Court's attorney disciplinary orders and changes the court makes to the Indiana Rules for the Admission and Discipline of Attorneys and the Indiana Rules of Professional Conduct are central to the subject of professional responsibility. Before examining the Indiana Supreme Court's most significant decisions, the Article will take time to consider some trends and lessons that can be found in less noteworthy decisions. The Indiana Supreme Court publishes its decisions via the Internet,[1] as well as through traditional media, making the review of attorney discipline decisions quite easy.

From the first of October 2011 until the last of September of 2012, the Indiana Supreme Court issued eighty-five orders in regards to the discipline of the practicing bar.[2] Of those eighty-five decisions, many can be categorized as "housekeeping"; they track the progress of individual matters rather than present the court's definitive analysis and conclusions about specific allegations.[3] Even these housekeeping matters, however, are worth considering. For example, there were several cases where the court suspended individuals for failing to cooperate[4]

---

* Chief of Staff, Indiana Prosecuting Attorneys Council. B.A., 1983, Indiana University, Bloomington; J.D., 1986, Indiana University Robert H. McKinney School of Law; LL.M., 2000, The Judge Advocate General's Legal Center and School, United States Army. The opinions expressed herein are solely those of the author and do not represent a statement of law or policy by the Indiana Prosecuting Attorneys Council or its staff.

1. The Indiana Supreme Court's 2013 disciplinary decisions are available at *Orders and Opinions Regarding Final Resolution in Attorney Disciplinary Cases 2013*, COURTS.IN.GOV, http://www.in.gov/judiciary/2768.htm (last visited Sept. 18, 2013).

2. The court's 2012 disciplinary decisions are available at *Orders and Opinions Regarding Final Resolution in Attorney Disciplinary Cases 2012*, COURTS.IN.GOV, http://www.in.gov/judiciary/3997.htm (last visited Sept. 18, 2013), and its decisions from 2011 are available at *Orders and Opinions Regarding Final Resolution in Attorney Disciplinary Cases 2011*, COURTS.IN.GOV, http://www.in.gov/judiciary/3711.htm (last visited Sept. 18, 2013).

3. Memorandum decisions are, by definition, short on analysis, but the facts and the conclusions in professional responsibility decisions are worth studying as cautionary tales. *See, e.g.*, *In re* Hilgendorf, 956 N.E.2d 1083 (Ind. 2011) (mem.).

4. "It shall be the duty of every attorney against whom a grievance is filed under this Section to cooperate with the Commission's investigation, accept service, comply with the provisions of these rules, and when notice is given by registered or certified mail, claim the same in a timely manner either personally or through an authorized agent." IND. ADMISSION & DISCIPLINE R. 23, § 10(e) (2013).

with the disciplinary commission[5] and then later reinstated them once they were shown to be cooperating.[6] It can only be assumed that many of these attorneys must believe the grievance to be baseless, but the lesson is that cooperation with the disciplinary commission is required *and* the better course of action.[7]

Several other cases mentioned the work of the Judges and Lawyers Assistance Program ("JLAP").[8] Given the purposes of the JLAP, this should be seen as a positive:

> The purpose of the Judges and Lawyers Assistance Program is assisting impaired members in recovery; educating the bench and bar; and reducing the potential harm caused by impairment to the individual, the public, the profession, and the legal system. Through the Judges and Lawyers Assistance Program, the Committee will provide assistance to judges, lawyers and law students who suffer from physical or mental disabilities that result from disease, chemical dependency, mental health problems or age that impair their ability to practice; and will support other programs designed to increase awareness about the problems of impairment among lawyers and judges.[9]

Although the attorneys named in the Indiana Supreme Court's orders were subjected to the disciplinary commission's scrutiny, the attorneys generally were cooperating with the commission and JLAP and addressing issues that impacted the performance of and commitment to their professional duties.[10] Practitioners should be aware of the assistance available; it is confidential, at least when there

---

5. *See, e.g.*, *In re* Nafe, 969 N.E.2d 7 (Ind. 2012) (mem.) (non-cooperation); *In re* Nafe, 969 N.E.2d 15 (Ind. 2012) (mem.) (same).

6. *See, e.g.*, *In re* Nafe, 969 N.E.2d 588, 588-89 (Ind. 2012) (mem.) (suspension lifted because attorney was found to be cooperating with disciplinary commission); *In re* Nafe, 969 N.E.2d 16 (Ind. 2012) (mem.) (same).

7. The Indiana Supreme Court has stressed this point:

> Unfortunately, we are seeing a limited number of lawyers who do not timely respond to Commission requests for information. The Commission's requests for information cannot be ignored and to do so is an independent violation of Ind. Professional Conduct Rule 8.1(b). As with the respondent in this case, lawyers who choose to disregard Commission requests will do so at their peril. In the future, we will have far less tolerance for lawyers who fail to cooperate timely with the Commission and, as here, will not hesitate to take significant action.

In re Hill, 840 N.E.2d 316, 319 (Ind. 2006).

8. *See, e.g.*, *In re* Thornburg, 969 N.E.2d 586 (Ind. 2012) (mem.) (citing JLAP after respondent pled guilty to operating vehicle while intoxicated), *order corrected by In re* Thornburg, 969 N.E.2d 591 (Ind. 2012) (mem.); *In re* Buckley, 969 N.E.2d 1 (Ind. 2012) (mem.) (citing JLAP in connection with respondent's possession of marijuana and paraphernalia).

9. IND. ADMISSION & DISCIPLINE R. 31, § 2 (2013) is the rule that refers to the Judges and Lawyers Assistance Program. *See id.* § 1.

10. *See, e.g.*, *In re Thornburg*, 969 N.E.2d at 586; *In re Buckley*, 969 N.E.2d at 2.

is no disciplinary action pending.[11]

A final introductory observation concerns the court's styling of the cases it considered. The previous Survey Article to examine professional responsibility in Indiana[12] discussed three opinions styled as "*In re Anonymous*."[13] Styling an opinion in that fashion conceals the attorney's name from the public.[14] During this Survey Period, all of the court's orders named the attorney/respondent in question.[15] As was noted in the previous Survey Article, this is not to necessarily indicate a particular trend, but as one contemplates the conduct at issue in any individual case, it is well to keep in mind that the conduct was deemed to be of a degree that both the attorney and the conduct should be remembered.

I. JUDICIAL CONDUCT

The Indiana Supreme Court issued one order during the Survey Period involving a seated judge.[16] Two counts were brought against Judge Jeffrey Harkin of the Hammond City Court, the first of which the supreme court

---

11. IND. ADMISSION & DISCIPLINE R. 31, § 9 (2013); *see also* IND. LAWYERS ASST. R. 8; IND. RULES OF PROF'L CONDUCT R. 8.3(d) (2013). In fact, the vast majority of individuals who avail themselves of JLAP assistance do so voluntarily and confidentially. *See* INDIANA SUPREME COURT, ANNUAL REPORT: 2010-2011, at 40 (n.d.) (reporting that JLAP fielded 246 calls for assistance during fiscal year 2011, its highest ever since 2001), *available at* http://www.in.gov/judiciary/supreme/files/1011report.pdf. The court has shown it will go to fairly great lengths in guiding individuals toward successful rehabilitation. *See, e.g.*, *In re* Strup, 961 N.E.2d 992 (Ind. 2011) (mem.) (attorney continued on probation after second conviction for operating a motor vehicle while intoxicated and continuing to drink while a member to a JLAP agreement). On the other hand, the court will continue to monitor an individual's progress and impose stricter measures when warranted. *See In re* Strup, 968 N.E.2d 1292 (Ind. 2012); *see also In re* White, 970 N.E.2d 145 (Ind. 2012) (mem.) (period of suspension modified to allow automatic reinstatement).

12. The previous Survey Article covered the period from October 1, 2009 to September 30, 2010. Charles M. Kidd, *2010 Survey of the Law of Professional Responsibility*, 44 IND. L. REV. 1407 (2011).

13. *See id.* at 1407-14.

14. The previous Survey Article described anonymous orders thusly:

> Opinions carrying the "Anonymous" caption can . . . have wide application within the Indiana bar. Most people will immediately appreciate that disciplinary cases resulting in a lawyer's permanent disbarment from the practice of law are not usually the result of a single bad act, but rather, the end product of a long series of actions that usually harm both the public and the bar at large. . . . As a general matter however, "Anonymous" opinions indicate that the respondent lawyer who is the actual subject of the disciplinary action has committed some misconduct warranting sanction. In these instances, the lawyers received one of the lowest levels of rebuke, the private reprimand.

Id. at 1407.

15. *See supra* notes 1-2.

16. *In re* Harkin, 958 N.E.2d 788 (Ind. 2011) (per curiam).

discussed the relevant facts at length.[17] In short, Judge Harkin operated a traffic school and diversion program for several years despite repeated findings of irregularity by the Indiana State Board of Accounts and despite receiving a similar opinion from the Lake County Prosecutor's Office.[18] In fact, the judge did not terminate the school until "counsel [for the Indiana Commission on Judicial Qualifications] informed him of the Commission's belief that [he] was abusing his authority by diverting litigants' cases through a *de facto* deferral program that was not authorized by the county prosecutor."[19] The case was presented to the supreme court as a result of an agreement indicating Judge Harkin had "abused his judicial authority."[20] The court concluded that the scheme violated four provisions of the Indiana Code of Judicial Conduct: "to comply with the law; to act at all times in a manner that promotes public confidence in the integrity, independence, and impartiality of the judiciary; to uphold and apply the law; and to perform judicial and administrative duties competently."[21] The court did not cite any aggravating factors, but it did cite some mitigating factors—e.g., the school had been in operation "for decades" before Judge Harkin assumed the bench, and deputies from the prosecutor's office had known of the program for years while appearing before the court but had "not voice[d] any objections to it until . . . July 26, 2010."[22]

As one might guess, the second count involved a traffic matter where the judge browbeat a *pro se* litigant ("Aubrey") into admitting to a seat belt violation when Aubrey wished, instead, to argue two points of law.[23] On this count, the

---

17. *See id.* at 789-91.

18. *Id.* at 790.

19. *Id.* at 791; *see also* IND. CODE § 34-28-5-1(h) (2013) (setting forth statutory authorization for prosecutor deferral programs).

20. *In re Harkin*, 958 N.E.2d at 791.

21. *Id.* (internal quotation marks omitted) (citations omitted) (quoting IND. CODE OF JUDICIAL CONDUCT R. 1.1, 1.2, 2.2 and 2.5 (1993)).

22. *Id.*

23. It is worth reprinting the discussion between the defendant (Aubrey) and Judge Harkin (Respondent):

Respondent: Mr. Aubrey—Seatbelt violation. Admit or deny?

Aubrey: I deny. I have some paperwork though to back me up.

Respondent: Well . . . Let me ask you something. Was it under your arm?

Aubrey: Yes.

Respondent: Do you have a medical excuse for that from a medical doctor?

Aubrey: No.

Respondent: Then you have no paperwork to convince me of anything.

Aubrey: Well, under law that I was . . . uh

Respondent: Are you a lawyer?

Aubrey: No.

Respondent: Ok. Good. Don't hurt yourself.

Aubrey: It's just that under 9-19-10-2. Uhh . . . "Each occupant of a motor vehicle equipped with a safety belt shall have a seat belt properly fastened." It does not say

supreme court accepted the parties' agreement and found that Judge Harkin's

> statements [to the defendant] violated the Code of Judicial Conduct's provisions that required him: . . . to act at all times in a manner that promotes public confidence in the integrity, independence, and impartiality of the judiciary; to perform all duties of judicial office fairly and impartially, to refrain from 'act[ing] in a manner that coerces any party into settlement, and to be patient, dignified, and courteous to litigants."[24]

Although the court specified the several rules that Judge Harkin had violated, it seemed particularly taken aback by the portion of the judge's statement where he threatened to increase penalties should the defendant persist with his desire to proceed on the merits.[25] In fashioning an appropriate sanction, the court agreed with the parties and imposed a sixty-day suspension[26] but noted this was "a significant blemish on a sitting judge's reputation."[27]

> what properly is. The same thing in the driver's manual—page 75. "Indiana law requires that a driver and all passengers to [sic] use seat belts at all times when the vehicle is in operation. Operators of busses [sic] are also required to use seat belts."
> **Respondent**: Is this an accurate description of your vehicle? That it's an '05 vehicle?
> **Aubrey**: Yes.
> **Respondent**: Okay. I believe that the automotive industry, since well before 2005, has installed seat belts that include a shoulder harness.
> **Aubrey**: Yes.
> **Respondent**: There you go.
> **Aubrey**: Well, how are you supposed to know if nobody's ever told you?
> **Respondent**: I'll tell you what—let's have a trial on this, okay? Then it gets about [ten] times as expensive. October 6.
> **Aubrey**: Uh . . .
> **Respondent**: Do you admit the seatbelt violation?
> **Aubrey**: I do.
> **Respondent**: Alright. $25. Step around and get a to-pay card.

Id. at 791-92 (alterations in original). Mr. Aubrey's "ignorance of the law" argument would have undoubtedly failed. *See* Winehart v. State, 6 Ind. 30 (1854). It is interesting in passing to contemplate whether his other argument—that "properly" was not defined—would have gotten any further. It might be asked, however, whether his second argument was any more specious than an argument a licensed practitioner might bring. *See* Corcoran v. Abstract & Title, 143 A.2d 808, 812 (Md. 1958) (Prescott, J., dissenting) (questioning "definitions of *properly*" indicated in judge's opinion).

24. *In re Harkin*, 958 N.E.2d at 792 (third alteration in original) (internal quotation marks omitted) (citations omitted) (quoting IND. CODE OF JUDICIAL CONDUCT R. 1.2, 2.2, 2.6(B), and 2.8(B) (1993)).

25. *Id.* (citing *In re Young*, 943 N.E.2d 1276, 1279 (Ind. 2011)).

26. *Id.*

27. *Id.* (quoting *In re* Hawkins, 902 N.E.2d 231, 246 (Ind. 2009)).

II. EXTRAJUDICIAL STATEMENTS

Undoubtedly, the most significant order for the Survey Period involved the former Marion County Prosecuting Attorney, Carl J. Brizzi.[28] The case afforded the Indiana Supreme Court an opportunity to make some pointed clarifications about the rules on extrajudicial statements by attorneys in litigation.

Mr. Brizzi was charged in two counts for statements regarded to violate the rules of professional conduct; each count involved statements made about two homicide cases.[29] The court described the first count and Mr. Brizzi's statements:

> Respondent conducted a press conference on April 10, 2008, announcing the filing of a murder charge against Bruce Mendenhall for the murder of Carmen Purpura, who was last seen at an Indianapolis truck stop. Mendenhall had murder charges pending in Alabama and Tennessee, and he had been previously convicted of murder in Tennessee. According to media reports, Respondent's statements included the following:
>
> • DNA testing of blood taken from Purpura's parents matched blood inside the cab of Mendenhall's truck.
> • "When the officer opened up the cab of the truck, you can imagine his surprise, because the cab of the truck was literally awash with blood." Purpura's blood "soaked" the seats of Mendenhall's truck.
> • Enough blood matching the DNA of Purpura's parents was found inside the cab of Mendenhall's truck to determine that she could not possibly be alive.
> • The "DNA analysis of [the blood] shows that it's not just the blood of one victim, but the blood of several victims."
> • The victims were shot after their heads were wrapped in plastic wrap and duct tape.
> • A .22 caliber handgun used by Mendenhall in the killings was found in his truck.
> • Mendenhall had admitted to the police when arrested that Purpura had been shot in the back of the head at the Indianapolis truck stop, then left inside a vehicle parked at a nearby restaurant, but that he denied being the murderer.
> • Respondent was confident that he had enough evidence to convict Mendenhall.
> • Respondent was "working with the other jurisdictions to see the quickest way and the best way to punish [Mendenhall] with the ultimate punishment—a capital sentence."[30]

---

28. *In re* Brizzi, 962 N.E.2d 1240 (Ind. 2012) (per curiam).
29. *Id.* at 1242.
30. *Id.* (alterations in original).

The court described the second count as follows:

> On or about June 1, 2006, seven family members, including three children, were discovered murdered in their east side Indianapolis home. The County Prosecutor's Office issued a press release on June 6, 2006, after Desmond Turner and James Stewart were charged with the murders. The press release included the following:
>
> > Brizzi said, "According to the probable cause affidavit, Desmond Turner and James Stewart thought there was a large amount of money and drugs at 560 North Hamilton Street. They weren't going to let anyone or anything get in the way of what they believed to be an easy score. There was no money in that house. There were no drugs. Seven bodies were carried out, including those of three children. I would not trade all the money and drugs in the world for the life of one person, let alone seven. Turner deserves the ultimate penalty for this crime."
> >
> > Regarding the swiftness with which the death penalty was filed, Brizzi said "The evidence is overwhelming. There are several aggravators present, any one of which would merit the death penalty. To do otherwise would be a travesty."[31]

The Indiana Disciplinary Commission charged that Brizzi's statements violated the general rule, Rule 3.6(a),[32] requiring all attorneys to refrain from making extrajudicial statements that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[33] The Commission also charged Mr. Brizzi with violating Rule 3.8(f), the prosecutor's rule.[34] Rule 3.8(f) requires that prosecutors "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[35]

---

31. *Id.* at 1242-43. For further discussions of the criminal cases Mr. Brizzi discussed, see Turner v. State, 953 N.E.2d 1039 (Ind. 2011); Stewart v. State, 945 N.E.2d 1277 (Ind. Ct. App. 2011).

32. *Brizzi*, 962 N.E.2d at 1243.

33. *Id.* ("'A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.'" (quoting IND. RULES OF PROF'L CONDUCT R. 3.6(a) (2013))).

34. *Id.* ("The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. . . ." (alterations in original) (quoting IND. RULES OF PROF'L CONDUCT R. 3.8(f) (2013))).

35. *Id.* (quoting IND. RULES OF PROF'L CONDUCT R. 3.8(f) (2013)).

The hearing officer in the case found in Mr. Brizzi's favor on both counts.[36] As to the first count, the hearing officer concluded that the evidence was insufficient to show that at least some of Mr. Brizzi's statements had been made, and that Brizzi did not recall making them.[37] Other statements, the hearing officer concluded, "were previously documented in the media and/or the probable cause affidavit."[38] As to the statements about the death penalty, the hearing officer, likewise, found the evidence insufficient to show "that these comments had a substantial likelihood of heightening public condemnation of Mendenhall or would materially prejudice an adjudicative proceeding."[39] As to the second count, the hearing officer reached many of the same types of conclusions. Although it was proved that Mr. Brizzi made the statement at a press conference, the evidence was not sufficient "to prove a substantial likelihood of heightening public condemnation of Turner and Stewart or of materially prejudicing an adjudicative proceeding[] in the matter."[40] Delay from the time of the statements until trial was also seen as a factor, as was the fact that the trial judge had not heard of the statements until the disciplinary hearing.[41] Finally, on the second count, there had been no showing that the trial court was unable to assemble panels of unbiased jurors in either Turner's or Stewart's cases.[42]

The Indiana Supreme Court upheld the hearing officer's conclusion in Count 1, primarily because there had been difficulty in ascertaining whether or not Mr. Brizzi made some of the statements as alleged.[43] The court took the remarkable step, however, of going ahead and analyzing "[f]or future guidance . . . the hearing officer's conclusions that the statements, if made, did not violate the rules charged."[44] As to Count 2, the supreme court similarly accepted the conclusion "that **no actual prejudice** resulted,"[45] but it disagreed that Rules 3.6(a) and 3.8(f) were not implicated, and it issued Mr. Brizzi a public reprimand.[46]

The court's examination of the allegations and the rules allowed it to provide clarifications on at least two points. First, it specified that there need not be "**actual prejudice** to a criminal defendant or to an adjudicative proceeding."[47] Instead it is the "substantial likelihood" element of both Rule 3.6(a) and Rule 3.8(f) that must be considered and regardless of any actual prejudice; the statements must be considered against "the 'substantial likelihood' standard *when*

---

36. *Id.* at 1243-44.
37. *Id.* at 1243.
38. *Id.*
39. *Id.*
40. *Id.* at 1244.
41. *Id.*
42. *Id.* Turner, as it turns out, was charged and convicted in three battery cases that were tried between the time of Mr. Brizzi's press conference and his murder trial. *Id.*
43. *Id.* at 1244-45.
44. *Id.* at 1245.
45. *Id.*
46. *Id.* at 1249.
47. *Id.* at 1245.

made."[48] Second, Rule 3.6(b) provides a number of so called "safe harbors";[49] these are things that an attorney may pass along to the media and others. As discussed in the *Brizzi* decision, the hearing officer found that Brizzi's statements—if and when made—were already a matter of public record and protected by the "safe harbor" provision of Rule 3.6(b)(2).[50] The supreme court had not previously considered this point and, thus, clarified that "public record" would have a rather narrow definition and henceforth mean "only . . . public government records, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access."[51] Finally, although the supreme court did not touch directly on this point, practitioners should consider Mr. Brizzi's motives. Under the rules, it is proper for a prosecutor to make "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose."[52] The supreme court concluded, on this point, that Mr. Brizzi's statements "stepped beyond the bounds,"[53] but one has to wonder if Mr. Brizzi was motivated to attract attention or if he had other goals in mind. Ironically, despite Brizzi's impassioned statements, the death penalty charge against Turner was dismissed when he "waived his right to a trial by jury[,]"[54] and Mendenhall has never been

---

48. *Id*. (emphasis added). Regardless of the rule of which an attorney might run afoul, the error is complete when made and without respect to whether there was harm to a client or other party. *See, e.g.*, *In re* Johnson, 969 N.E.2d 5, 5-6 (Ind. 2012) (mem.) (finding that client trust "accounting failures" did not result in harm to client, but attorney was, nonetheless, subject to discipline); *see also In re* Faw, 961 N.E.2d 1001, 1001-02 (Ind. 2012) (mem.) (determining that prosecutor, with apparent conflict of interest, failed to appropriately seek the appointment of a special prosecutor when subordinate employee's husband was arrested for theft).

49. *Brizzi*, 962 N.E.2d at 1247-48.

> Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

IND. RULES OF PROF'L CONDUCT R. 3.6(b) (2013).

50. *Brizzi*, 962 N.E.2d at 1243.

51. *Id.* at 1247.

52. IND. RULES OF PROF'L CONDUCT R. 3.8(f) (2013).

53. *Brizzi*, 962 N.E.2d at 1248.

54. *Id*. at 1244.

charged in Indiana.[55] Although not addressed in the *Brizzi* decision, actions motivated by an attorney's interest in seeking publicity, rather than in a client's interest, are frowned upon.[56]

III. UNAUTHORIZED PRACTICE OF LAW

In 2007, the Indiana Supreme Court accepted attorney Brian Nehrig's resignation from the bar, suspended him from the practice of law for a period of at least five years, and struck his name from the Roll of Attorneys.[57] Disciplinary proceedings against Mr. Nehrig were, therefore, "dismissed as moot";[58] as is typical in cases where an attorney resigns in the face of disciplinary proceedings, the supreme court chose to forego a public discussion of the allegations against him.[59] The supreme court's decision, in this regard, was made despite the fact that the court, as well as the Indiana Disciplinary Commission, had already considered the allegations to be of such magnitude that Nehrig's suspension had been deemed warranted, pending final resolution of the matter.[60]

---

55. *Id*. at 1242.

56. During the Survey Period, the Indiana Supreme Court had at least one occasion to remark on such behavior. *See In re* Baker, 955 N.E.2d 729, 729 (Ind. 2011) (mem.) (attorney, "[w]ithout invitation," offered to represent alleged murder suspect even though a public defender had already been appointed).

57. *In re* Nehrig, 871 N.E.2d 970, 970 (Ind. 2007) (mem.).

58. *Id.*

59. *Id.*

> (a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may resign as a member of the bar of this Court, or may consent to discipline, but only by delivering an affidavit and five copies to the Supreme Court Administration Office and providing a copy to the Commission. The affidavit shall state that the respondent desires to resign or to consent to discipline and that:
>
> (1) The respondent's consent is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting his or her consent;
>
> (2) The respondent is aware *that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline the nature of which shall be specifically set forth*;
>
> ****
>
> (c) . . . *the affidavit required under the provisions of (a) above shall not be publicly disclosed* or made available for use in any other proceeding except upon order of this Court.

IND. ADMISSION & DISCIPLINE R. 23, § 17(a) & (c) (2013) (emphasis added). In one case during the Survey Period, the court did specify why it was accepting an attorney's resignation. *See In re* Tebik, 971 N.E.2d 1212, 1213 (Ind. 2012) (mem.) (unauthorized practice of law).

60. *See In re* Nehrig, 867 N.E.2d 1289, 1289-90 (Ind. 2007) (mem.). The applicable portion of Indiana Admission and Discipline Rule 23 states that

The 2007 allegations against Mr. Nehrig ultimately came to light, however, because he was again subject to the court's scrutiny for engaging in the unauthorized practice of law while suspended.[61] As it turns out, Nehrig's 2007 disciplinary proceedings arose as a result of a scheme whereby he and another party had defrauded mortgage companies from profiting on properties subject to foreclosure.[62] A key element of their scheme to preclude the mortgage companies from perfecting their claims had been the "alteration of sheriff's deeds."[63] While barred from the practice of law, Nehrig worked from the law office of, and under the supervision of, attorney John McManus, Jr.[64] Among other things, Nehrig was back in the real estate game working on "short sales."[65] Aside from his work with McManus, "Nehrig also spent a substantial amount of time outside the law office facilitating additional short sales and providing other services for third parties, such as working on tax issues, negotiating settlements of credit card disputes, and negotiating loan modifications."[66] Clearly establishing that he was engaged in the practice of law, "Nehrig opened a checking account in the name of 'Brian Nehrig d/b/a McManus & Associates,'" that "[h]e used . . . to deposit checks that were made out to the McManus Firm for his short sales work."[67] The court remarked that it "ha[d] not attempted to provide a comprehensive definition of what constitutes the practice of law,"[68] but it specified that a "core element of practicing law is the giving of legal advice to a client."[69] The court had no trouble, then, concluding that Nehrig had been practicing law, and he was in contempt of its disbarment order by practicing law from an actual law office.[70]

> [i]f it appears to the Disciplinary Commission upon the affirmative vote of two-thirds (2/3) of its membership, that: (i) *the continuation of the practice of law by an attorney during the pendency of a disciplinary investigation or proceeding may pose a substantial threat of harm* to the public, clients, potential clients, or the administration of justice, and (ii) the alleged conduct, if true, would subject the respondent to sanctions under this Rule, the Executive Secretary shall petition the Supreme Court for an order of interim suspension from the practice of law or imposition of temporary conditions of probation on the attorney.

IND. ADMISSION & DISCIPLINE R. 23, § 11.1(b) (2013) (emphasis added).

61. *In re* Nehrig, 973 N.E.2d 567, 569 (Ind. 2012) (mem.).

62. *Id*. at 567-68.

63. *Id.* at 567.

64. *Id*. at 568.

65. *Id.*

66. *Id*.

67. *Id*.

68. *Id*. at 568-69 (citing Miller v. Vance, 463 N.E.2d 250, 251 (Ind. 1984)).

69. *Id.* at 569 (citing State *ex rel.* Ind. State Bar Ass'n v. Northouse*,* 848 N.E.2d 668, 672 (Ind. 2006)).

70. *Id.* ("Upon receiving notice of the **order of suspension or disbarment**, the respondent shall not undertake any new legal matters between service of the order and the effective date of the discipline. Upon the effective date of the order, the respondent **shall not maintain a presence or occupy an office where the practice of law is conducted**." (quoting IND. ADMISSION &

The court, similarly, had little difficulty dispatching Nehrig's argument that he had resigned and that the rules were inapplicable to him.[71] For his recalcitrant contempt, Nehrig was fined $1000, and 120 days was added to the period of his disbarment.[72] Mr. McManus received a public reprimand for his role in supporting Nehrig's unauthorized practice.[73]

Attention is most often given to the Rules of Professional Conduct when one thinks about the topic of professional responsibility. Attorneys who have been suspended or disbarred and those who may have contact with them must be cognizant that the ethical requirements come from other sources. *In re Nehrig* is an example of how the Rules of Professional Conduct are linked to the Admission and Discipline Rules. Familiarity with the requirements of the Admission and Discipline Rules is necessary, as the Indiana Supreme Court seems to have regular occasion to deal with attorneys who continue to practice while suspended or disbarred.[74]

While this Article will not discuss all of the cases examining instances of the unauthorized practice of law, one case, *In re Hill*[75] should be briefly considered. In that case, the Indiana Supreme Court found an attorney in contempt for continuing to practice while suspended.[76] In this instance, the attorney, Danny Ray Hill, believed he was still authorized to practice law in Illinois, and his contact with and advice to individuals in Illinois was proper, despite contacting them while in Indiana.[77] The supreme court had the opportunity to again express that "the core element of practicing law is the giving of legal advice to a client."[78] Additionally, the court clarified that correspondence with a client indicating that one is an attorney and in Indiana would constitute the practice of law in Indiana.[79]

DISCIPLINE R. 23, § 26(b) (2013)).

71. *Id.* at 569 (citing *In re* McLaren, 850 N.E.2d 400 (Ind. 2006)). The court, nevertheless, amended Rule 23 a few days later by adding subsection (d) to Section 26: "*Duties of Attorneys who have Resigned*. An attorney whose resignation from the Bar has been accepted pursuant to Section 17 of this rule shall comply with the provisions of this section applicable to a disbarred attorney." IND. ADMISSION & DISCIPLINE R. 23, § 26(d) (2013).

72. *Nehrig*, 973 N.E.2d at 569. The court found that Nehrig's conduct "was on-going, pervasive, and deliberate, and it exposed the public to the danger of misconduct by Nehrig, who has yet to prove his remorse, rehabilitation, and fitness to practice law through the reinstatement process." *Id.*

73. *Id.*

74. *See, e.g.*, *In re* Rawls, 969 N.E.2d 14, 15 (Ind. 2012) (mem.) (disbarred attorney fined for contempt and sentenced to seven days of incarceration). *See also In re* Tebik, 971 N.E.2d 1212 (Ind. 2012) (mem.); *In re* Patterson, 969 N.E.2d 593 (Ind. 2012) (per curiam); *In re* Wolfe, 961 N.E.2d 994 (Ind. 2011) (mem.).

75. 969 N.E.2d 11 (Ind. 2012) (mem.).

76. *Id.* at 11.

77. *Id.*

78. *Id.*

79. *Id.*

IV. FEES AND RECIPROCAL DISCIPLINE

When an attorney-client relationship comes to an end, attorneys are bound to return unearned fees.[80] In the *In re Earhart*[81] matter, the attorney, who had worked "no more than five hours" before his client committed suicide, refused to return a $10,000 fee, "asserting that he had earned the entire amount."[82] By the time this matter came to the supreme court's attention, Mr. Earhart had returned the fee to his client's widow.[83] This allowed the court to point out that it is not fond of resolution following the initiation of disciplinary proceedings, but that it would also have inured to Mr. Earhart's detriment had he persisted in holding onto the money.[84] Under the circumstances, the court determined that Mr. Earhart had violated the rules by "[c]harging an unreasonable fee[] [and by] [f]ailing to refund an unearned fee upon termination of representation."[85] Accordingly, the court suspended him from practicing law for thirty days.[86]

The Indiana Supreme Court's opinion in the *Earhart* case is typically concise, but the Supreme Court of Kentucky provided greater insight into the issues involved when it considered Mr. Earhart's case for imposition of reciprocal discipline.[87] Although he had been contrite with the Indiana officials, Mr. Earhart believed that his treatment of his client's widow should be deemed "ethical," south of the Ohio River.[88] It was not. Before the Kentucky court, Mr. Earhart argued that his "fee was a classic retainer . . . earned upon receipt."[89] He further intoned "that his conduct was not unethical in Indiana until after the complaint was filed against him."[90] Just as the Indiana court found,[91] the Kentucky court recognized that there was, in fact, precedent in Indiana on this point that preceded the Indiana Supreme Court's consideration of Mr. Earhart's case.[92] The Kentucky court characterized the state of the law in Indiana as one where "true retainers are permissible in Indiana, [but] the Indiana Supreme Court has defined limited circumstances in which they are appropriate."[93] The Kentucky Supreme Court found that an ethics opinion of the Kentucky Bar Association had adopted a

80. IND. RULES OF PROF'L CONDUCT R. 1.16(d) (2013).
81. 957 N.E.2d 611 (2011) (mem.).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* (quoting IND. RULES OF PROF'L CONDUCT R. 1.5(a) & 1.16(d) (2013)).
86. *Id.*
87. Ky. Bar Ass'n v. Earhart, 360 S.W.3d 241 (Ky. 2012).
88. *Id.* at 242.
89. *Id*. at 243.
90. *Id.*
91. *In re Earhart*, 957 N.E.2d at 612.
92. *Earhart*, 360 S.W.3d at 243 & n.14 (citing *In re* O'Farrell, 942 N.E.2d 799, 805 (Ind. 2011); *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004); *In re* Thonert, 682 N.E.2d 522, 524 (Ind. 1997)).
93. *Id.*

reasonableness test, and this had been the established, leading guidance in Kentucky.[94] The court explained that "[w]hile Kentucky is generally more tolerant of non-refundable retainers than Indiana, . . . under the facts of this case as established by the Indiana Supreme Court, the . . . fee could not be considered reasonable."[95] Subsequently, the court imposed a reciprocal thirty-day suspension from the practice of law in Kentucky.[96] Thus, it would seem that the Kentucky reasonableness standard, at least under the facts of this case, was found to be the substantial equivalent of Indiana's limited circumstances test.

V. RULE 8.4(d)

Rule of Professional Conduct 8.4(d) warns that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."[97] Because this standard is rather vague,[98] and a number of situations warranted the court's attention, it is well to summarize the types of conduct the court felt qualified as "conduct prejudicial to the administration of justice."

Cecelia Hemphill undertook the representation of a father of two children in a custody dispute, a dispute that was apparently part of an ongoing divorce action but in some way also linked to a child in need of services ("CHINS") action.[99] In discussions with Ms. Hemphill, the father recounted a story from his daughter wherein the daughter said she had been "touched . . . inappropriately" by her mother's "boyfriend."[100] Although the eight-year-old daughter retracted this story, Ms. Hemphill "concluded that Mother's boyfriend had molested [the daughter] and that the children were in grave danger."[101] Thinking that she

---

94. *Id.* at 244 (citing KY. BAR ASS'N ETHICS OP. E-380 (1995)).

95. *Id.*

96. *Id.*

97. IND. RULES OF PROF'L CONDUCT R. 8.4(d) (2013).

98. The Survey Period contains cases where courts have found this rule to be vague or as something of a catchall. In the *Barkes* case, the attorney lied to clients and others and neglected two cases. *In re* Barkes, 970 N.E.2d 663, 663 (Ind. 2012) (mem.). In that case, the attorney was found to have violated six Rules of Professional Conduct provisions to include 8.4(d). *Id.* at 663-64. In the *Szilagyi* case, the attorney forged his former spouse's signature and his secretary/notary's signature on a quitclaim deed. *In re* Szilagyi, 969 N.E.2d 44, 44-45 (Ind. 2012) (mem.). This was deemed to violate Indiana Rule of Professional Conduct 8.4(c), involving dishonesty and fraud, but also Rule 8.4(d). *Id.* at 45. Finally, the facts in the *Kuchaes* case span the period from 1993-2004. *In re* Kuchaes, 961 N.E.2d 996, 997 (Ind. 2012) (mem.). In essence, however, the attorney reopened a suit he had dismissed and pursued a default judgment against the defendants who had not answered probably "because the suit had been dismissed before the deadline for a response." *Id*. Here again, the attorney was found to have violated several Rules of Professional Conduct, but the court did not specify what portion of the scheme implicated Rule 8.4(d). *Id*.

99. *In re* Hemphill, 971 N.E.2d 665, 665 (Ind. 2012) (mem.).

100. *Id*.

101. *Id*. The client had two children, the daughter and a ten-year-old son. *Id*.

needed to speak with the children alone in order to assess this situation, Ms. Hemphill, with the father's permission, picked up the children from school.[102] According to Ms. Hemphill, "she was concerned that without her intervention, the children would be abused for years to come."[103] In fact, although Ms. Hemphill and the children had supper with the father, Ms. Hemphill maintained control over the children for the remainder of the evening and did not get them back to their mother until "8:45 p.m.—nearly six hours after [she] took them from school."[104]

Among other provisions, the disciplinary commission charged that Ms. Hemphill had violated Rule 8.4(d) "by failing to abide by the orders and procedures of the divorce court and the CHINS court."[105] The supreme court disagreed somewhat with the reasoning but reckoned that a violation had occurred:

> Whether and to what extent the CHINS custody order had been adopted by the divorce court is a matter of debate. Even if no order specifically barred Respondent from taking the children to see Father, we conclude that Respondent violated Rule 8.4(d). As the hearing officer noted, Indiana has laws and procedures to deal with allegations of abuse, as well as agencies specifically designed to, charged with, and trained to deal with such allegations. Respondent, however, took matters into her own hands and acted precipitously in disregard for the laws and agencies designed to deal with allegations of child abuse. These actions were prejudicial to the administration of justice in violation of Professional

---

102. *Id*. at 665-66.

103. *Id*. at 666.

104. *Id*. Further details in this story are that the school's secretary did not at first release the children to Ms. Hemphill. *Id.* Although the supreme court provides only few details about the conversation, the secretary "felt intimidated." *Id*. Next, as noted, Ms. Hemphill did not turn over the children to their father following supper. *Id*. In fact, she did not return them to their mother's custody immediately thereafter, either. *Id.* Instead, she "drove with the children through the back roads around Martinsville, looking for a birthday party [the son] had been invited to attend." *Id*. As the supreme court recounted, the disciplinary commission charged that Ms. Hemphill had violated three of the *Rules of Professional Conduct* in addition to Rule 8.4(d), to-wit:

> 4.1(a): Knowingly making a false statement of material fact to a third person in the course of representing a client.
>
> 4.4(a): Using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person.
>
> 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Id. The supreme court accepted the hearing officer's conclusion that the disciplinary commission had not met its burden with respect to the first and third counts, but because of Ms. Hemphill's treatment of the school secretary and the children's mother, it did agree with the hearing officer that Rule 4.4(a) had been violated. *Id.* at 666-67.

105. *Id.* at 667.

Conduct Rule 8.4(d).[106]

The court suspended Ms. Hemphill for six months.[107] More importantly, the court ordered that her reinstatement would not be automatic.[108] A fair reading of the court's discussion of this point would be that it did not favor automatic reinstatement because the conduct had implicated Rule 8.4(d). Although the court did not state this explicitly, it found that Ms. Hemphill had indicated that she took the course of action with the children "because she was serving a higher purpose of protecting the safety of the children."[109] One thought the court might have had in mind is that the justice system is imbued with such higher callings, and it is not for its agents to take matters into their own hands.

In addition to the *Hemphill* matter, the Indiana Supreme Court specifically addressed Rule 8.4(d) in two other cases that warrant brief mention. In the first, *In re Dimick,* the attorney had a client with prospective claims against an attorney, "SAB."[110] The attorney threatened to institute a disciplinary investigation against SAB if he did not settle with her client.[111] This "threat of reporting professional misconduct to obtain a settlement proposal in a prospective civil action . . . violated Indiana Professional Conduct Rule 8.4(d)."[112] The second case, *In re Flatt-Moore,* stemmed from a criminal prosecution where a victim sought restitution.[113] In the criminal case, the deputy prosecutor proposed a plea offer to the defendant's attorney predicated, in part, "on the condition that [the defendant] agree to whatever terms and amounts [the victim] was demanding."[114] In later negotiations, she told the defense counsel, "I don't have authority to make an offer that the victim doesn't agree to. . . . Go sell [the victim]. If they agree, I don't care what it is."[115] This amounted to giving the victim "unfettered veto power in plea negotiations" and was "prejudicial to the administration of justice . . . [because she] surrender[ed] her prosecutorial discretion in plea negotiations entirely to the pecuniary demands of the victim of the crime."[116]

---

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* The court also noted that "[c]onvincing evidence was presented that this incident was not an isolated lapse." *Id.*

110. *In re* Dimick, 969 N.E.2d 17, 17 (Ind. 2012) (mem.).

111. *Id.* at 18.

112. *Id.*

113. *In re* Flatt-Moore, 959 N.E.2d 241 (Ind. 2012) (per curiam).

114. *Id.* at 243.

115. *Id.*

116. *Id.* at 246. In pointing to the importance of prosecutorial discretion the court referenced an older case where it had "emphasized its hope that 'all prosecutors routinely exercise full prosecutorial discretion' and the importance of 'ensuring an optimum environment in which to do so.'" *Id*. at 245 (quoting *In re* Curtis, 656 N.E.2d 258, 260 (Ind. 1995)).

VI. PUNISHMENTS

One of the following types of discipline may be imposed upon any attorney found to have violated the Rules of Professional Conduct:

> permanent disbarment from the practice of law; suspension for a definite or an indefinite period from the practice of law . . . ; suspension for a definite period, not to exceed six (6) months, from the practice of law with provision for automatic reinstatement upon such conditions as the Court shall specify in the order of suspension; a public reprimand; a private reprimand; or a private administrative admonition.[117]

The court may also place an individual on probation[118] and "punish by fine and imprisonment for contempt."[119] The court favors agreed settlements and is apt to note that the court-imposed discipline would likely be more severe but-for an agreement between the attorney and the disciplinary commission.[120] As one would suspect, those who repeat acts of misconduct will receive progressively severe punishment.[121]

The case of attorney Beau White[122] placed an interesting spin on how the court views punishments. As has been noted, attorneys are typically in a better position when they cooperate with the disciplinary commission. In Mr. White's case, he was found to have accepted a fee but failed, it appeared, to do anything toward the representation of the client.[123] The hearing officer's determination was accepted by the Indiana Supreme Court because Mr. White had failed to respond to the disciplinary commission.[124] For his neglect, Mr. White received a sixty-day suspension "**without automatic reinstatement, beginning April 20, 2012**."[125] The court described how it reached this conclusion:

> For neglect of a single case, it is not uncommon for an attorney to receive a private or public reprimand. However, Respondent's failure to respond in any way [sic] the Commission's verified complaint leads us to conclude that, in the interests of protecting the public and the profession, he should be required to demonstrate his fitness before being permitted

---

117. IND. ADMISSION & DISCIPLINE R. 23, § 3(a) (2013).

118. *Id.* § 3(c).

119. IND. CODE § 33-24-3-5(2) (2013).

120. *See, e.g.*, *In re* Barkes, 970 N.E.2d 663 (Ind. 2012) (mem.); *In re* Adolf, 969 N.E.2d 8 (Ind. 2012) (mem.); *In re* LeBeau, 961 N.E.2d 995 (Ind. 2012) (mem.); *In re* Hilgendorf, 956 N.E.2d 1083 (Ind. 2011) (mem.); *In re* Chovanec, 956 N.E.2d 658, 660, 660 (Ind. 2011) (mem.) (Sullivan, J. concurring).

121. *See, e.g.*, *In re* Relphorde, 949 N.E.2d 355, 355 (Ind. 2011) (public defender accepting fees from client's father; court cites to similar instances dating back to 1992).

122. *In re* White, 969 N.E.2d 3 (Ind.) (mem.), *order modified by* 970 N.E.2d 145 (Ind. 2012) (mem.).

123. *Id.* at 4.

124. *Id.*

125. *Id.*

to resume his status as an attorney in this state.[126]

Eight days before his suspension was to commence, Mr. White asked the court to modify its order "to allow automatic reinstatement at the conclusion of his [sixty]-day suspension."[127] He based his request on a plea on the following considerations: he had cooperated with the disciplinary commission, "he admitted his misconduct," and he had voluntarily notified JLAP of a substance abuse issue for which he had entered a course of in-patient treatment.[128] The supreme court granted White's request over the objection of the Disciplinary Commission.[129] What is most intriguing, however, is that while the court granted the request for automatic reinstatement, and it stayed the remainder of his suspension, it saw fit to extend the length of his suspension from sixty to 180 days.[130]

During the Survey Period, the supreme court disbarred two attorneys. Both cases involved attorneys who were convicted of crimes. The first, *In re Patterson*,[131] deserves little mention. In that case, the attorney was convicted in three counts of theft.[132] This was not the first time he was disciplined, and he had been sanctioned twice before.[133] In 2008, he was suspended for at least three years after he "wrote unauthorized checks totaling $10,500 on [his] firm's trust account."[134] In 2009, while suspended, he was found in contempt and subjected to a monetary fine because he had continued to practice law.[135] In this, his third, disciplinary proceeding, the facts in support of his guilty pleas to the theft charges "were based on [his] exercising unauthorized control over funds in excess of $17,000 belonging to [twenty-four] clients or former clients."[136] Given his prior history and the broad amount of harm his clients suffered, it is clear why the court found him in violation of Rule 8.4(b)—commission of a crime—and Rule 8.4(c)—dishonesty.[137] The court, nonetheless, took the steps to assess Patterson's misconduct against "the American Bar Association's *Standards for Imposing*

---

126. *Id.* (citing *In re* Miller, 759 N.E.2d 209, 211-12 (Ind. 2001)).

127. *In re* White, 970 N.E.2d 145, 146 (Ind. 2012) (mem.).

128. *Id.*

129. *Id.*

130. *Id.* At the time of his request for automatic reinstatement, Mr. White also explained that he had been working with JLAP. Thus, the court also placed him on a two-year period of probation. *Id.* at 146-47.

131. 969 N.E.2d 593 (Ind. 2012) (per curiam).

132. *Id.*

133. *Id.* at 594.

134. *Id.*

135. *Id.* (citing *In re* Patterson, 907 N.E.2d 970 (Ind. 2009) (mem.)).

136. *Id.*

137. *Id.* at 595. Rule 8.4 declares that "[i]t is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" or "(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." IND. RULES OF PROF'L CONDUCT R. 8.4(b) & (c) (2013).

Lawyer Sanctions."[138] In doing so, it found that his behavior exemplified four of the standards, each of which indicates that "[d]isbarment is generally appropriate."[139]

One might consider that the second disbarment case, *In re Mendenhall*,[140] like *Patterson*, warrants little attention. The attorney in that case was disbarred following convictions for attempted murder and other serious crimes.[141] If Patterson was disbarred for theft, as a class D felony,[142] common-sense would say that Mendenhall, whatever his prior history, should deserve a similar professional fate as his convictions were for much more serious crimes.[143] In fact, the court again turned to the American Bar Association's *Standards for Imposing Lawyer Sanctions* and found that Mendenhall's conduct fit Standard 5.11(a):

> a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or **the intentional killing of another; or an attempt** or conspiracy or

---

138. *Patterson*, 969 N.E.2d at 595.

139. *Id.* Each of the four standards implicated begins with the phrase "[d]isbarment is generally appropriate." *Id.* The four standards were "4.11, 5.11(a), 5.11(b) and 7.1" *Id.* As recounted by the Indiana Supreme Court, these standards read as follows:

> Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potentially serious injury to a client.
>
> Disbarment is generally appropriate when a lawyer engages in serious criminal conduct a necessary element of which includes . . . misappropriation, or theft . . . .
>
> Disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer . . . and causes serious or potentially serious injury to a client . . . .

Id. (alterations in original).

140. 959 N.E.2d 254 (Ind. 2012) (per curiam).

141. *Id.* at 255.

142. *See* IND. CODE § 35-43-4-2(a) (2013). A person convicted of a class D felony can be fined up to $10,000 and sentenced to incarceration for a period "between six (6) months and three (3) years." *Id.* § 35-50-2-7(a).

143. Again, Mendenhall was convicted of, among other things, attempted murder. *Mendenhall*, 959 N.E.2d at 255. Attempted murder is a Class A felony. *See* IND. CODE § 35-41-5-1(a) (2013). A person convicted of a class A felony can be fined up to $10,000 and sentenced to incarceration for a period "between twenty (20) and fifty (50) years." *Id.* § 35-50-2-4.

> solicitation of another **to commit any of these offenses** . . . .[144]

It should be noted, however, that Mendenhall raised an insanity defense at his trial which was rejected by the jury, though they found "respondent was guilty of the criminal charges but suffering from some unspecified mental[ ] illness."[145] Although it would have perhaps found a mental illness to have been mitigating,[146] Mendenhall did not respond to the hearing officer.[147] The nature of Mendenhall's illness, if any, was unspecified and the court was not inclined to give it any weight.[148] The reason this case is worth mentioning, however, is that had Mendenhall availed himself of the assistance available through JLAP, perhaps he would not have committed the crimes with which he now stands convicted.[149]

There is an unfortunate stigma associated with mental health problems that works to preclude individuals in need of help from seeking assistance.[150] More unfortunate still is the fact that some professions, including ours, are marked as among those populations with a disproportionate amount of individuals who suffer from mental illnesses.[151] To be sure, the legal profession cannot countenance attorneys who commit serious crimes. Obvious as it may be, that is undoubtedly a lesson to be learned from Mr. Mendenhall's case. But the profession—and society—can no longer continue to ridicule those with mental illnesses and continue to endorse the stigma associated with help-seeking behaviors. That is the deeper lesson to be learned from *Mendenhall* and like cases.

---

144. *Mendenhall*, 959 N.E.2d at 255 (alteration in original).

145. *Id.* at 256.

146. *Id.* (citing *In re* Sullivan, 850 N.E.2d 908, 908-09 (Ind. 2006) (mem.)).

147. *Id.* at 255.

148. *Id.* at 256.

149. The Supreme Court summarized Mendenhall's violent conduct as follows:

> The probable cause affidavit attached to the complaint indicates that Respondent lured his victim, attorney Edward O. Delaney, to a meeting using a false name, ostensibly to discuss the sale of some property. Respondent then attempted to shoot the victim, but the gun malfunctioned. He then beat the victim and took his wallet before running away. The probable cause affidavit indicates that Respondent may have been motivated by a grudge based on the victim's involvement in a legal action against Respondent's father years earlier.

Id. at 255. For a more complete recitation of the events leading up to Mr. Mendenhall's conviction and ultimate disbarment, see Mendenhall v. State, 963 N.E.2d 553 (Ind. Ct. App.), *trans. denied*, 967 N.E.2d 1035 (Ind. 2012).

150. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, *Attitudes Toward Mental Illness—35 States, District of Columbia and Puerto Rico, 2007*, 59 MORBIDITY & MORTALITY WKLY. REP. 619, 619-25 (2010).

151. *See generally* Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995-1996).

CONCLUSION

It should be concluded that there were a number of noteworthy professional responsibility developments during the period from October 1, 2011 and September 30, 2012. The Indiana Supreme Court's attorney and judicial disciplinary opinions issued during the Survey Period represent a wide range of matters for consideration and reflection. Of greatest importance, were the court's discussion of extrajudicial statements and its pointed analysis of "conduct . . . prejudicial to the administration of justice." Even its more routine orders, however, are worth monitoring and contemplating as they provide insight into the system of attorney discipline and how it works. Additionally, the Indiana Court of Appeals has occasion to discuss the parameters and standards for the practice of law. Programs and other arms of the Indiana Supreme Court, such as JLAP, also work to positively shape the profession and their contributions are worth considering.