SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

The Indiana Supreme Court issued seven per curiam opinions during the reporting year for this Article (October 1, 2015 to September 30, 2016).[1] Six of those opinions addressed the disbarment of wayward lawyers.[2] It is a customary practice of the court that a disbarment will occur via a per curiam opinion. The lone per curiam opinion of instructional value during the year addressed the not uncommon situation of ex parte communication with a judge.[3] Additionally, the court issued an Order of Discipline in an independent matter arising from another ex parte communication situation.[4]

An "ex parte" communication is a one sided outreach to a judicial officer about a pending matter without notice to or input from the opposing party.[5] Ex parte communications with a judicial officer are generally prohibited by both the Rules of Professional Conduct for lawyers and the Code of Judicial Conduct for judges.[6] This notion is elementary to lawyers; however, it is a common source of discipline action year-in and year-out.

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1. *See Orders and Opinions Regarding Final Resolution in Attorney Disciplinary Cases 2015*, IND. JUD. BRANCH, http://www.in.gov/judiciary/4389.htm [https://perma.cc/BNM6-PAAL] (last visited May 9, 2017) (displaying two per curiam opinions in 2015); *see also Orders and Opinions Regarding Final Resolution in Attorney Disciplinary Cases 2016*, IND. JUD. BRANCH, http://www.in.gov/judiciary/4730.htm [https://perma.cc/NNN5-5MHE] (last visited May 9, 2017) (displaying five per curiam opinions in 2016).

2. *See In re* Bean, 60 N.E.3d 1021 (Ind. 2016); *In re* Lehman, 55 N.E.3d 821 (Ind. 2016); *In re* Durham, 55 N.E.3d 302 (Ind. 2016); *In re* White, 54 N.E.3d 993 (Ind. 2016); *In re* Johnson, 53 N.E.3d 1177 (Ind. 2016); *In re* Steele, 45 N.E.3d 777 (Ind. 2015).

3. *In re* Anonymous, 43 N.E.3d 568 (Ind. 2015). Discipline actions are captioned with the title "*In re* Anonymous" when a lawyer receives a private reprimand for the misconduct, but the court believes that the actions of the lawyer and the court's ruling has heightened instructional value to the bar at large.

4. *In re* Drendall, 53 N.E.3d 404, 405 (Ind. 2015) (involving ex parte communication with a judge during a proceeding).

5. *Ex parte*, BLACK'S LAW DICTIONARY (10th ed. 2014).

6. *See* IND. PROF'L CONDUCT R. 3.5(b) (2016); *see also* IND. JUDICIAL CONDUCT R. 2.9 (2016). Throughout this article, when rules or codes are cited in text, they always refer to Indiana unless otherwise stated.

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I. EX PARTE PER CURIAM OPINION

The facts surrounding this discipline action were succinctly laid out by the court in its opinion:[7]

> Respondent was hired by the maternal grandparents of a young child who were concerned about the child's welfare. At the time, the child was living with the grandparents in White County, the putative father's paternity had not yet been established, and the child's mother allegedly was an unemployed drug addict who was unable to properly care for the child but nevertheless was threatening to remove the child from the grandparents' home.
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> On June 11, 2014, Respondent prepared an "Emergency Petition" seeking to have the grandparents appointed as the child's temporary guardians. Respondent dispatched an associate attorney in her office to the White County Courthouse with instructions to present the Emergency Petition for judicial consideration. The associate attorney presented the Emergency Petition to the judge, who reviewed the Emergency Petition and signed the proposed order appointing the grandparents as temporary co-guardians of the child. The order was directed to be served on the child's mother and putative father.
>
> Respondent did not provide advance notice to the mother or the putative father before causing the Emergency Petition to be presented to the judge. Respondent also did not comply with Trial Rule 65(B*)*, which required Respondent to certify to the court the efforts (if any) made to give notice to adverse parties and the reasons supporting a claim that notice should not be required.[8]

The court has consistently recognized that there are situations that justify the issuance of temporary emergency relief based upon an ex parte communication.[9] This relief is frequent and "critical in domestic relations or custodial cases."[10] The court created Trial Rule 65(B) and (C) to specifically permit and define this form of extraordinary relief.[11]

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7. *In re Anonymous*, 43 N.E.3d at 569.
8. *Id.*
9. *See id.* at 570; *see also In re* Anonymous, 786 N.E.2d 1185, 1186 (Ind. 2003).
10. *In re Anonymous*, 43 N.E.3d at 570.
11. IND. R. TR. P. 65 (2016):

(B) Temporary restraining order—Notice—Hearing—Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

> (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

This permissive form of ex parte communication has many elements, and ethical misconduct occurs when a lawyer fails to abide by these elements.[12] The communication must assert "specific facts shown by affidavit or by the verified complaint."[13] It cannot make general non-factual assertions in an unverified averment.

The communication must assert that, "immediate and irreparable injury, loss, or damage will result" to the one seeking relief prior to the adverse party or attorney being heard in opposition.[14] One cannot merely assert injuries that are temporary, speculative, or that might occur.

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(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(C) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

12. *Id.*; *see* IND. PROF'L CONDUCT R. 3.5(b) (2016).
13. IND. R. TR. P. 65(B)(1) (2016).
14. *Id.*

The applicant's attorney must independently certify "to the court in writing the efforts" made to give notice to the opponent as well as reasons supporting why the relief should be granted without notice to the opponent.[15] Even if notice has not been attempted, the attorney must certify to the court that no effort at notice was made.[16]

In this particular case, the lawyer did not provide advance notice to the adverse parties that the grandparents filed for an emergency guardianship.[17] Also, the lawyer did not "certify to the [trial] court the efforts (if any) made to give notice to the adverse parties."[18] The court expressed that it does not want to "discourage" practice under Trial Rule 65(B), but utilization of the rule requires strict compliance with the prerequisites to ensure that due process is preserved.[19] The court pointed out that despite good intentions driving the ex parte communication, there is no exemption from complying with the mandatory procedure.[20] Any adverse party must be protected from the appearance of a sham proceeding.

The court has addressed similar misconduct involving Trial Rule 65(B) in discipline cases over several decades. An *In re Anonymous* decision from 2003 addressed distinctions between Trial Rule 65(B) and Trial Rule 65(E).[21] The lawyer represented the wife in a divorce proceeding.[22] In seeking a temporary restraining order, the lawyer "alleged that the Husband *might* sell or dissipate the marital property[,] . . . *might* remove a child from the family home or the court's jurisdiction, or harm or harass the Wife or children."[23] The lawyer did not provide notice to the husband of the filing, nor did the lawyer make a showing to the court "that immediate and irreparable injury, loss or damage would result" before a hearing could occur.[24] Also, the lawyer did not certify to the court in writing the efforts employed to give notice to the husband, or reasons why notice was not given.[25] The court stated that an allegation of what *might* happen does not meet the threshold requirement of immediate and irreparable harm.[26]

Trial Rule 65(E) is specific to the procedure for an ex parte Temporary Restraining Order in domestic relation cases.[27] Trial Rule 65(B) is more general in application to any Temporary Restraining Order whether domestic relations

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15. *Id.* at (B)(2).
16. *In re* Anonymous, 786 N.E.2d 1185, 1189-90 (Ind. 2003).
17. *In re* Anonymous, 43 N.E.3d 568, 569 (Ind. 2015).
18. *Id.*
19. *Id.* at 570.
20. *Id.*
21. 786 N.E.2d at 1187-90.
22. *Id.* at 1186.
23. *Id.* (emphasis added).
24. *Id.*
25. *Id.*
26. *Id.* at 1188.
27. *Id.* at 1187.

oriented or otherwise.[28] The court rejected an argument that Trial Rule 65(E) is an exception to Trial Rule 65(B).[29] The court determined the notice requirements of Trial Rule 65(B)(2) are a requirement for a domestic relations temporary restraining order issued pursuant to Trial Rule 65(E).[30]

The supreme court noted, "the whole purpose of T.R. 65(B)(2) is to provide an orderly and constitutional procedure for obtaining temporary restraining orders without notice."[31] Since this 2003 decision was also captioned *In re Anonymous*, the lawyer received a private reprimand for violating Indiana Rule of Professional Conduct 3.5(b).[32]

In 2000, the court issued an *In re Anonymous* opinion for a violation of Indiana Rule of Professional Conduct 3.5(b) arising from non-compliance with the notice requirements of Trial Rule 65(B) where the lawyer placed a copy of an emergency custody petition in the mail the same day as the lawyer's filing.[33] The mailing went to the attorney for the opposing party.[34] The lawyer "did not certify to the judge what efforts he had made to give appropriate notice" to the adverse party, nor did he certify the reasons supporting the extraordinary relief of an ex parte order.[35]

The lawyer compounded the violation by informing the judge of the ex parte filing and asking the judge to read a report from a guardian ad litem.[36] The opposing party was not notified by the lawyer of the intent to speak to the judge.[37] Later in the same day, the lawyer returned to the court to secure the judge's signed order that granted emergency custody of the child to the paternal grandparents.[38]

After obtaining the emergency order, the lawyer called opposing counsel and informed him of the order.[39] This was the first time that opposing counsel had any knowledge that the emergency petition was in play.[40] The lawyer's misconduct begs the question, why didn't he call opposing counsel before the filing or before securing the order? This 2000 opinion is written in a strong, corrective tone. It does not dwell on the permissive nature of ex parte communication that is prescribed by Trial Rule 65(B). Instead, the court focuses on the undermining of a fair and impartial adversary system of justice.[41] The opinion suggests that the

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28. *Id.*
29. *Id.* at 1187-90.
30. *Id.*
31. *Id.* at 1189.
32. *Id.* at 1190.
33. 729 N.E.2d 566, 567 (Ind. 2000).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *See id.* at 569.

court is bemused at the lawyer's failing to notify opposing counsel in advance of the ex parte filing, but then calling opposing counsel immediately after the ex parte order is secured.[42]

Juxtapose the 2000 *In re Anonymous* opinion with both the 2003 and 2015 *In re Anonymous* opinions, and one can see that the court speaks in much more permissive tones in the latter two decisions.[43] In the 2003 opinion, the court goes out of its way to acknowledge that marriage dissolution is contentious and many times volatile.[44] It further acknowledges that there has to be a mechanism in that arena for permissible ex parte communication.[45] The 2003 opinion reminds all practitioners of their duty to comply with all the requirements of Trial Rule 65(B).[46] Likewise, the 2015 opinion specifically states, "We do not wish to discourage attorneys from seeking, or judges from issuing, such relief where appropriate. Nevertheless, when such relief is sought, the basic safeguards provided by Trial Rule 65(B) are essential to due process and must be followed."[47]

The supreme court has addressed the issue of improper ex parte communication in other opinions where sanctions greater than a private reprimand were imposed. In *In re Cotton*, ex parte alteration of a domestic violence protective order to a marriage dissolution temporary restraining order, which prevented the husband from removing his personal property from the marital residence, resulted in a thirty-day law license suspension and restitution of husband's attorney fees to defend against the ex parte order.[48] In *In re Ettl*, merely alleging that the husband was "at large in the community" was not a certification of either efforts to give notice or the reasons notice should not be required in a child emergency custody petition.[49] The attorney's actions resulted in a public reprimand.[50] In *In re Bash*, a lawyer who called the judge after the issuance of an order unfavorable to his client and told the judge that his client would not comply with the order, made an unauthorized ex parte communication resulting in a public reprimand.[51] In *In re Marek*, a lawyer "submitted her proposed findings of fact [to the judge] to which she attached a handwritten note" discussing facts outside of the record; the lawyer did it without notifying opposing counsel.[52] The lawyer's action was held to be an improper ex parte

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42. *Id.* at 568-69.

43. *Compare id.*, *with In re* Anonymous, 786 N.E.2d 1185, 1189-90 (Ind. 2003), *and In re* Anonymous, 43 N.E.3d 568, 570 (Ind. 2015).

44. *See In re Anonymous*, 786 N.E.2d. at 1189-90.

45. *Id.*

46. *Id.* at 1189.

47. *In re Anonymous*, 43 N.E.3d at 570.

48. 939 N.E.2d 619, 620-24 (Ind. 2010).

49. 851 N.E.2d 1258, 1260 (Ind. 2006).

50. *Id.* at 1261.

51. 813 N.E.2d 777, 777-78 (Ind. 2004).

52. 609 N.E.2d 419, 419 (Ind. 1993).

communication resulting in a public reprimand.[53]

Additionally, another ex parte communication matter resulted in a published Order of Discipline rather than a per curiam opinion where an attorney filed an ex parte motion to award custody of a five-year-old child to the maternal grandparents a few days after the child's mother died.[54] The grandparents were going to take the child to their native country of Kenya after the Indiana funeral concluded.[55] Two days after the motion was filed, a hearing occurred at respondent's request.[56] No notice was given to the child's father who lived out-of-state.[57] The lawyer did not make any of the notice certifications required by Trial Rule 65(B).[58] Custody was awarded to the grandparents and the child was taken to Kenya.[59] Upon learning of these proceedings, the father filed a motion to correct error.[60] The grandparents returned from Kenya with the child for the hearing.[61] After the probate court granted the father's motion and held the father should have custody, the parties entered into an agreement.[62] The agreement allowed the father to relinquish custody, and the child returned to Kenya with the grandparents.[63]

The supreme court found the respondent's failure to comply with Trial Rule 65(B) resulted in an improper ex parte communication with a judge, violating Indiana Rule of Professional Conduct 3.5(b).[64] This omission also ensnared the judge into a judicial conduct violation for being a party to the ex parte communication.[65] The improper ex parte communication was found to be a violation of Indiana Rule of Professional Conduct 8.4(f) because the respondent assisted the judge in violating a rule of judicial conduct.[66]

The facts surrounding repeat travel to and from Kenya are astounding. One could imagine the likelihood of getting the child back on U.S. soil was extremely slim at best. However, the grandparents commendably returned and participated in the U.S. legal proceedings.[67] It is also reasonable to assume that the financial burden of travel was taxing. This burden could have been avoided if Trial Rule

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53. *Id.*

54. *In re* Drendall, 53 N.E.3d 404, 404-05 (Ind. 2015).

55. *Id.* at 404-05.

56. *Id.* at 405.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Indiana Judicial Qualifications Commission, *Public Admonition of Magistrate Barbara Johnston, St. Joseph Probate Court* (July 5, 2012), https://www.in.gov/judiciary/jud-qual/files/jud-qual-admon-johnston-2012-07-05.pdf [https://perma.cc/G9G9-WGKX].

66. *In re Drendall*, 53 N.E.3d at 405.

67. *Id.*

65(B) had been followed. The prejudice to both the father and the grandparents was great and supported a violation of Indiana Rule of Professional Conduct 8.4(d) for prejudicial conduct toward the administration of justice.[68]

II. PERSONAL MISCONDUCT PER CURIAM OPINIONS

Per curiam opinions were issued in several cases involving personal misconduct by lawyers. Charles P. White was a former councilman for the Town of Fishers, Indiana, and later became the Indiana Secretary of State.[69] He was convicted of several counts of felony crimes of dishonesty arising from his election candidacy and service on the town council.[70] The crimes were based upon falsifying his residential address for public office candidacy, falsifying his residential address for a bank loan, and receiving pay for a public office that he was ineligible to hold.[71] After appeal, some, but not all, of the counts were dismissed.[72] After exhausting all of his appellate remedies, White remained convicted of one count each of perjury, voting outside a precinct of residence, and theft.[73]

White's misconduct did not occur in the course of practicing law. Nevertheless, the supreme court noted that attorneys who hold public office are held to a high standard.[74] The court stated that White's misconduct "strikes at the very heart of public trust in our institution of government and the legal profession."[75] The court imposed a two-year law license suspension without automatic reinstatement for violations of Indiana Rule of Professional Conduct 8.4(b) and (c).[76] These rules prohibit a lawyer from engaging in a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, as well as prohibit a lawyer from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation.[77]

Similarly, Harold E. Bean was the elected Clerk-Treasurer of the Town of Warren Park.[78] He was convicted of theft and official misconduct for stealing $20,800 from the Town in his official capacity.[79] He alluded to having a gambling

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68. *Id.*

69. White v. State, 25 N.E.3d 107, 113 (Ind. Ct. App. 2014), *reh'g denied*, (Mar. 12, 2015), *trans. denied*, 34 N.E.3d 685 (Ind. 2015), *cert. denied*, 136 S. Ct. 595 (2015).

70. *Id.* at 118.

71. *Id.* at 116.

72. *Id.* at 112.

73. *Id.* at 141.

74. *In re* White, 54 N.E.3d 993, 994 (Ind. 2016).

75. *Id.*

76. *Id.*

77. *See* IND. PROF'L CONDUCT R. 8.4 (2016).

78. *In re* Bean, 60 N.E.3d 1021, 1021 (Ind. 2016).

79. *Id.*

addiction.[80] The sanction for Bean was harsher than White's.[81] Bean was disbarred for life.[82] The fact that he had two prior misconduct adjudications aggravated his sanction.[83]

Timothy Durham was not a public official, but he was in the public limelight. Durham was the CEO of Fair Holdings, Inc., a holding company that owned Fair Finance Company, as well as the CEO of National Lampoon, Inc.[84] Fair Finance Company operated as an investment Ponzi scheme.[85] Following appeal, he stood convicted in federal court of eight counts of wire fraud, one count of securities fraud, and one count of conspiracy to commit wire and securities fraud.[86] Durham's scheme defrauded thousands of investors of over $200 million.[87]

The court stated that Durham's actions suggested "a level of greed which knew no bounds and displayed a total lack of concern for the thousands of customers [Durham] financially ruined."[88] The court found violations of Indiana Rule of Professional Conduct 8.4(b) and (c) and disbarred Durham for life.[89]

III. DISHONEST BEHAVIOR PER CURIAM OPINIONS

Dishonest behavior in multiple forms was the downfall of attorney David J. Steele in the fifth per curiam discipline opinion.[90] He admitted to a host of material facts alleged in the verified complaint and consented to discipline from the supreme court without a trial.[91] The most serious of his misconduct was the conversion of approximately $150,000 of client funds from his lawyer trust account.[92] In addition to using the pilfered funds for his own use, he admitted that he would "peel off a few hundred dollars" as a "spot bonus" to his employees.[93]

Steele engaged a non-refundable clause in many of his advance fee agreements with clients.[94] Although non-refundable clauses are not per se prohibited, they are subject to careful wording and scrutiny by the Disciplinary

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80. *Id.* at 1022.

81. *See id.*; *see also In re* White, 54 N.E.3d 993, 994 (2016).

82. *In re Bean*, 60 N.E.3d at 1022.

83. *See In re* Bean, 756 N.E.2d 964 (Ind. 2001) (involving a public reprimand for violation of Indiana Rules of Professional Conduct 1.2(a), 1.3, and 1.4(a)); *see also In re* Bean, 529 N.E.2d 836 (Ind. 1988) (involving a public reprimand for improper ex parte communication as a judge).

84. United States v. Durham, 766 F.3d 672, 675-76 (7th Cir. 2014).

85. *Id.*

86. *Id.*

87. *In re* Durham, 55 N.E.3d 302, 303 (Ind. 2016).

88. *Id.*

89. *Id.* at 304.

90. *In re* Steele, 45 N.E.3d 777, 777-79 (Ind. 2015).

91. *Id.* at 777.

92. *Id.*

93. *Id.*

94. *Id.* at 778.

Commission.[95] Steele sometimes vigorously enforced his non-refundable clause outside the boundaries of permissibility.[96] He especially did so when a client requested a refund or complained about his services.[97] He would often falsely inflate his bill as retaliation against complaining clients and would direct his employees to intentionally falsify itemized invoices.[98] A memorialized email that Steele sent to his office manager was illustrative of his common practice to inflate a bill:

> I simply cannot tell you how tired [I] am of these people. How tired [I] am of hearing about the stupid f***ing transcripts she ordered on her own and [ ] expects me to split with her. . . . You added a line to her January bill right? A line that said, "emails and phone calls to and from client, prepare for hearing," right? How much time did we put down for that? I think [I] only told you like 4.5 hours right? Well f*** that. If she wants me to split the cost of those f***ing transcripts [I] told her not to get, add another 1.5 hours to that line ok?[99]

When Steele was in the mood to issue a refund, he would do so from the funds paid in trust by new clients.[100] The office manager questioned the propriety of this practice.[101] Steele retaliated by threatening to fire the office manager and then eventually did so.[102] As the Commission's investigation delved deeper into Steele's misconduct, he was caught in numerous lies made to the Commission's investigators.[103] In his admission to the court, Steele stated that his lies were "virtually pathological in frequency and scope."[104] Among the more fantastical lies was his claim that his former office manager was not credible and was fired for having sex with a male client in Steele's office.[105] When the office manager was fired, Steele intimidated the employee by brandishing a handgun.[106] He then lied about this incident to the Commission and also instructed another employee to lie about the job termination episode.[107] Steele also frequently lied to courts, opposing counsel, and clients to avoid obligations.[108] He enlisted his employees

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95. *See In re* Canada, 986 N.E.2d 254 (Ind. 2013); *In re* Hammerle, 952 N.E.2d 751 (Ind. 2011); *In re* O'Farrell, 942 N.E.2d 799 (Ind. 2011).

96. *In re Steele*, 45 N.E.3d at 778.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 779.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

to perpetuate these lies and bragged about the success of the lies.[109]

Steele's dishonesty had no bounds. He maintained a profile on the legal website Avvo.com, and monetarily rewarded clients who posted positive reviews on Avvo.[110] This resulted in an inflated rating on the law marketing website.[111] Negative reviewers were attacked by Steele.[112] His attacks included disclosure of confidential client information and "outing" the identity of clients. In one instance he was mistaken on the identity of the reviewing client.[113]

Steele was impressed with his own hubris. He secretly recorded many client conversations, and would later share these recordings with staff and family to revel on the success of his lying trait.[114] He would often mock his clients for falling for his lies and did so while meeting with Disciplinary Commission investigators.[115]

The actions and behavior of Steele violated a host of professional conduct rules. They included Indiana Rules of Professional Conduct:

- 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.
- 1.5(b): Failing to communicate the basis or rate of the fee for which a client will be responsible before or within a reasonable time after commencing the representation.
- 1.6(a): Revealing information relating to representation of a client without the client's informed consent.
- 1.9(c)(2): Revealing information relating to the representation of a former client except as rules permit or require.
- 1.15(a): Failing to safeguard property of clients; treating client funds as his own; failing to maintain and preserve complete records of client trust account funds.
- 1.15(c): Disbursing funds from a trust account for the attorney's personal use.
- 1.15(f): Failing to hold client funds in an IOLTA account.
- 1.16(d): Failing to refund an unearned fee promptly upon termination

109. *Id.*
110. *Id.*
111. *Id.* at 780.
112. *Id.* at 779.
113. *Id.*
114. *Id.*
115. *Id.*

of representation.

- 1.18(b): Using or revealing information learned in consultation with prospective client, except as permitted by rule.
- 4.1(a): Knowingly making a false statement of material fact to a third person in the course of representing a client.
- 7.1: Making a false or misleading communication about the lawyer or the lawyer's services, including the improper use of statistical data or other information based on past performance and the improper use of statements or opinions as to the quality of services.
- 8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter.
- 8.1(b): Failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in a disciplinary matter.
- 8.4(b): Committing criminal acts (theft, conversion, deception) that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.
- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- 8.4(d): Engaging in conduct prejudicial to the administration of justice.[116]

The court was direct in addressing the impudence of the misconduct and the severity of the sanction: "These considerations point in a single direction here. The seriousness, scope, and sheer brazenness of Respondent's misconduct is outrageous."[117] The court's imposition of a sanction was blunt:

> Respondent's actions amount to a pattern of systemic and wide-ranging misconduct, and rather than express any regret or remorse for his actions or the harm they have caused, Respondent has proudly trumpeted his repugnant behavior as the *raison d'etre* of his practice. There can be no doubt in these circumstances that disbarment is warranted and that Respondent's privilege to practice law should be permanently revoked.[118]

116. *Id.* at 779-80.
117. *Id.* at 780.
118. *Id.*

Another per curiam opinion of disbarment is *In re Elton Johnson*.[119] Johnson's minimal participation in his own discipline investigation and subsequent trial was indicative of his practice style which led to his six counts of misconduct; the matter was essentially a default judgment against Johnson.[120] In the very first footnote of the opinion, the court calls out Johnson for his flawed punctuality:

> Respondent eventually filed a belated answer, which the hearing officer declined to accept. Given Respondent's refusal to cooperate with the Commission's investigation, his failure to comply with the deadlines imposed under the Admission and Discipline Rules, and his failure to file a petition for review or brief on sanction, we likewise decline to give Respondent's belated answer any effect.[121]

The first two counts of misconduct arose from Johnson's relationship with a California law office known as the Terani Law Firm.[122] Terani took in clients through a national marketing scheme and then farmed the work out to lawyers in the jurisdictional states.[123] Terani would collect the entire fee up front from the client and then pay a negotiated portion to the local lawyer, but clients were not informed of the fee split.[124]

In the first count of misconduct, the client sought to avoid registration as a sex offender.[125] For $10,000 Johnson had a law clerk draft a four-and-one-half page memorandum that had virtually no chance of providing relief to the client and could expose the client to retrial of criminal charges and a more severe prison sentence.[126] For another $32,800, the client hired Johnson to perform according to the unsound plan.[127] Johnson performed no work on the case and was fired by the client.[128] He never refunded any of the $32,800, nor did he give an accounting to the client when requested.[129] He billed the client at attorney rates for clerical work, and at a rate higher than what was negotiated in his fee agreement.[130] Johnson also billed the client for work allegedly performed after being fired, and for his time answering the discipline grievance filed against him.[131] Johnson falsely claimed to Commission investigators that he had worked 425 hours on the

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119. 53 N.E.3d 1177 (Ind. 2015).
120. *Id.* at 1178-80.
121. *Id.* at 1178 n.1.
122. *Id.* at 1178-79.
123. *Id.*
124. *Id.*
125. *Id.* at 1178.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

client's matter.[132]

In Count 2, Johnson was hired to file a habeas petition.[133] Johnson was paid $5500 to do the work, but did not file the petition or even confer with the client about doing so.[134] Johnson missed the filing deadline for the petition but merely advised the client that there were no grounds to file the habeas petition.[135]

Johnson's third count of misconduct arose from his mismanagement of a client's retainer deposit.[136] Johnson agreed to not make any withdrawals from his trust account without prior approval of the client.[137] The client paid a total of $28,210 to Johnson, of which $5000 was never deposited into the trust account.[138] Johnson withdrew funds from the trust account without the approval of the client and without any monthly billing statements.[139] Eventually, Johnson was fired.[140] He gave the client a refund of $4445 and no work product.[141]

The client in the fourth count of misconduct suffered greatly from Johnson's neglect of the client's litigation.[142] Johnson failed to file an answer, failed to seek vacation of a default judgment, failed to forward requests for admissions to the client, failed to respond to a summary judgment motion, and failed to keep the client informed of the adverse proceedings.[143] The client ended up on the wrong end of a $430,000 summary judgment.[144] Johnson received a $2500 non-refundable retainer fee from the client.[145] He had not refunded any of the retainer after being fired.[146]

Counts 5 and 6 arose from Johnson's botched office management practices. He failed to maintain and retain contemporaneous accounting ledgers for each client whose money he held in trust.[147] He made at least nine trust account checks payable to cash.[148] He transferred approximately $9000 of client money to his personal account for payment of personal and business expenses.[149] He also fired a paralegal because she refused to deposit client money into his business

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132. *Id.*
133. *Id.* at 1179.
134. *Id.* at 1178-79.
135. *Id.* at 1179.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *See id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

account.[150] He also failed to accept delivery of mailings from the Disciplinary Commission regarding the investigation and failed to timely respond to the Commission's demands for information.[151] Eventually, Johnson's law license was administratively suspended for his lack of cooperation with discipline authorities.[152]

In support of disbarment, the per curiam opinion found multiple violations of the substantive Indiana Rules of Professional Conduct and the administrative Admission and Discipline Rules but did not identify which rule violations applied to which counts.[153] The Verified Complaint filed by the Disciplinary Commission identified the violations as follows:

> [Count 1, Indiana Professional Conduct Rules:]
>
> - 1.1: Failure to provide competent representation.
>
> . . . .
>
> - 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.
>
> - 1.5(e): Failure to obtain a client's approval of a fee division between lawyers who are not in the same firm.
>
> - 1.15(a): Failure to deposit legal fees paid in advance into a client trust account.
>
> - 1.15(d): Failure to render promptly a full accounting regarding a client's property upon request by the client.
>
> - 1.16(d): Failure to refund an unearned fee upon termination of representation.

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150. *Id.*

151. *Id.* at 1179-80.

152. *Id.* at 1180; *see* IND. R. ADMIS. B. & DISC. ATT'Y Rule 23 § 10.1(a) and (b) (2016):

> (a) *Duty to cooperate.* It shall be the duty of every attorney to cooperate with an investigation by the Disciplinary Commission, accept service, and comply with the provisions of this Rule.
>
> (b) *Failure to cooperate.* The failure to: (1) respond to a grievance under this Rule; (2) comply with any written demand from the Executive Director under this Rule; (3) accept certified mail from the Disciplinary Commission that is sent to the attorney's official address of record with the Clerk and that requires a written response under this Rule; (4) comply with a subpoena issued pursuant to this Rule; or (5) unexcused failure to appear at any hearing on the matter under investigation shall be deemed failure to cooperate with an investigation by the Disciplinary Commission.

153. *See In re Johnson*, 53 N.E.3d 1177.

- 8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter.[154]

[Count 2, Professional Conduct Rules:]

- 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions.

. . . .

- 1.5(e): Failure to obtain a client's approval of a fee division between lawyers who are not in the same firm.[155]

[Count 3, Professional Conduct Rules:]

- 1.4(a): Failure to keep a client reasonably informed about the status of a matter.

- 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions.

- 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.

. . . .

- 1.16(d): Failure to refund an unearned fee upon termination of representation.

. . . .

- 8.4(b): Committing a criminal act (conversion) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[156]

[Count 4, Professional Conduct Rules:]

- 1.3: Failure to act with reasonable diligence and promptness.

- 1.4(a): Failure to keep a client reasonably informed about the status of a matter.

- 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions.

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154. *Id.* at 1180.
155. *Id.*
156. *Id.*

- 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.

. . . .

- 1.16(d): Failure to refund an unearned fee upon termination of representation.[157]

[Count 5, Professional Conduct Rules:]

- [ADR] 23(29)(a)(2): Failure to create, maintain, or retain appropriate trust account records.

- [ADR] 23(29)(a)(3) and (4): Failure to create, maintain, or retain accurate trust account records and client ledgers.

- [ADR] 23(29)(a)(5): Making withdrawals from a trust account by checks payable to "cash."[158]

- 8.4(b): Committing a criminal act (conversion) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[159]

[Count 6, Professional Conduct Rule:]

- 8.1(b): Failure to respond in a timely manner to the Commission's demands for information.[160]

The final per curiam discipline opinion involves lawyer Joseph Lehman, who was actually the subject of two independent discipline actions within the reporting time frame of this Article.[161] In October 2015, the supreme court found Lehman in contempt for practicing law while under a discipline order of suspension.[162] In July 2016, Lehman was before the court again for another contempt for the same type of misconduct.[163]

Lehman was originally suspended from the practice of law for a period of two

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See In re* Lehman, 53 N.E.3d 403 (Ind. 2015); *see also In re* Lehman, 55 N.E.3d 821 (Ind. 2016).

162. *In re Lehman*, 53 N.E.3d 403.

163. *In re Lehman*, 55 N.E.3d 821.

years beginning on April 3, 2014.[164] That suspension arose from multiple misconduct incidents that included: 1) Failing to appear at multiple court hearings, which eventually led to a contempt finding by the trial court, and filing a defective notice of appeal in the matter; 2) Failing to protect the confidentiality of client files by placing the unredacted files next to a public trash bin; 3) Incompetence and neglect in representing multiple bankruptcy clients; 4) A string of failures to appear in multiple trial courts over a span of six years that resulted in multiple contempt findings, some of which resulted in jail sentences; 5) Multiple instances of filing deficiencies such as failing to provide correct information, providing incomplete information and failing to follow court rules; and 6) trust account overdrafts.[165] At the misconduct trial, multiple judges testified that Lehman's legal abilities were far below the average level of performance of local attorneys, and that attempts by the local judiciary to help him improve his deficiencies were ignored.[166] One judge went so far as to testify that Lehman showed "a complete lack of respect for diligence and represent [sic] clients, professionalism and . . . an utter disregard of court orders."[167]

The October 2015 contempt order from the supreme court arose from Lehman's unauthorized practice of law during his suspension period. He entered his appearance as counsel for the mother in a paternity action and later submitted a minute entry to the trial court under the guise of being the mother's "translator."[168] The latter was done after the trial court had stricken Lehman's entry of appearance due to his license suspension.[169] Lehman was fined $500 for his contempt of the supreme court.[170]

The finding of contempt by the supreme court, as well as his prior contempt findings by the local trial courts, did not deter Lehman. In July 2016, the supreme court again addressed a contempt citation for a subsequent act of practicing law in violation of his license suspension, when Lehman was found to have provided legal consultation to two paying clients.[171] Also, he was found to have not paid his fine from the previous contempt order.[172] The court appeared to be exasperated with Lehman's defiance to its authority over his license:

> Respondent's repeated contemptuous acts over the years have resulted in fines, imprisonment, and the suspension of his law license. None of the sanctions previously imposed has deterred Respondent from continuing to engage in the practice of law in defiance of his suspension order, and Respondent's repeated violations of that order have exposed the public

164. *In re* Lehman, 3 N.E.3d 536, 538 (Ind. 2014).
165. *Id.* at 536-37.
166. *Id.* at 537.
167. *Id.*
168. *In re Lehman*, 53 N.E.3d at 403.
169. *Id.*
170. *Id.*
171. *In re* Lehman, 55 N.E.3d 821, 822 (Ind. 2016).
172. *Id.*

> to the danger of misconduct by an attorney who has yet to prove his remorse, rehabilitation, and fitness to practice law through the reinstatement process. Under these circumstances, the Court concludes that disbarment is warranted.[173]

Outside the discussion of Lehman's ethics issue with the Disciplinary Commission is a criminal prosecution against him in Elkhart County, Indiana for the crime of practicing law by a non-attorney.[174] The Commission did not rely on this conviction to pursue the second contempt against Lehman.[175] On October 15, 2015, he was found guilty of three counts of that offense.[176] He received a suspended jail sentence and probation.[177] The conviction was upheld by the court of appeals on May 31, 2016, and the supreme court denied transfer on August 11, 2016.[178]

IV. DISCIPLINE ORDERS OF SUSPENSION

Most discipline dispositions occur by way of a short Order of Discipline rather than a full per curiam opinion. These Orders are generally one or two pages in length. It is difficult to glean much academic discussion from an Order. In these instances, one must look to the public record of the proceedings in order to learn about the details of a discipline case.

The case of Dejuan Bouvean is a simple two-page order of discipline arising from mismanagement of the attorney trust account.[179] A quick read of the order might not impart instructional value to the reader. Bouvean's trouble began when he overdrew his trust account.[180] An audit of the account showed that he commingled personal funds with client funds and made dozens of disbursements and ATM withdrawals for cash from the trust account.[181] None of these transactions were associated with any client.[182] He also failed to maintain individual ledgers for each client whose money was held in trust.[183] Once he began maintaining individual ledgers, his record keeping was insufficient.[184]

A key fact missing from this case was any evidence of theft or conversion of client funds.[185] Bouvean was found to have violated Indiana Rule of Professional

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173. *Id.*

174. *See* Lehman v. State, 55 N.E.3d 863 (Ind. Ct. App.), *trans. denied*, Lehman v. State, 57 N.E.3d 817 (Ind. 2016).

175. *See In re Lehman*, 55 N.E.3d 821.

176. *See id.* at 866.

177. *Id.* at 866.

178. *See id.*

179. *In re* Bouvean, 53 N.E.3d 407 (Ind. 2015).

180. *Id.* at 407.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

Conduct 1.15(a) for commingling client and attorney funds, and for failing to maintain proper records of the trust account.[186] He was also found to have violated subsections (2) through (5) of the trust account procedural rules located in Indiana Rule for Admission to the Bar and the Discipline of Attorneys 23(29)(a).[187]

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186. *See id.*; *see also* IND. PROF'L CONDUCT R. 1.15(a):

Safekeeping property.

(a) 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. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

187. IND. R. ADMIS. B. & DISC. ATT'Y Rule 23 § 29(a):

Trust Account Funds.

(a) *Required trust account records.* An attorney who is licensed in Indiana shall maintain current financial records as provided for in this Rule and required by Rule 1.15 of the Indiana Rules of Professional Conduct. An attorney shall keep records sufficient to determine, at any time, the amount held for each client or other beneficiary in relation to the total amount held in the trust account as a pooled whole. For each trust or other fiduciary account, attorneys shall create and retain the following records for a period of five (5) years after the conclusion of each matter:

(1) Deposit and disbursement journals containing a record of deposits to and withdrawals from each trust account, specifically identifying the date, source of funds, description, amount, and client or beneficiary of each item deposited; the date, payee, purpose, amount, and client or beneficiary of each item disbursed; and a running total of the balance of the trust account as a pooled whole (an example of a deposit and disbursement journal is appended to this Section as Exhibit A);

(2) Ledgers for all trust accounts showing, for each separate trust client or beneficiary, the amount of funds disbursed or deposited, the date of disbursement or deposit, the source of funds deposited, the payee of funds disbursed, and a running total of the amounts held in trust for each separate client or beneficiary (examples of client ledgers are appended to this Section as Exhibit B);

(3) A ledger detailing the nominal amount of attorney funds held in the account, showing the amount of attorney funds disbursed or deposited, the date of their disbursement or deposit, and a running balance of the amount of attorney funds held in the trust account (an example of a ledger of attorney owned funds is appended to this Section as Exhibit C);

(4) Relevant fee agreements;

(5) All checkbook registers, bank statements, records of deposit, and cancelled checks;

(6) Records of all electronic disbursements from trust accounts, including the name of the person authorizing the disbursement, the date of the disbursement, the name

What makes this case particularly interesting is the two-year license suspension imposed by the court. Past cases of poor record keeping and commingling of funds without an element of conversion have generally resulted in a suspension of six months or less with the actual execution of the license suspension stayed and the lawyer placed on probation with monitoring by a CPA.[188] Another similar trust account case with aggravating factors resulted in a six-month suspension without automatic reinstatement and without the benefit of stayed execution or probation.[189]

The Disciplinary Commission recommended to the Hearing Officer a six-month suspension all executed without the benefit of probation and without automatic reinstatement because of evidence that Bouvean was not a candidate for rehabilitation.[190] The Hearing Officer followed that recommendation.[191] However, the court imposed the more harsh sanction of a two-year license suspension without automatic reinstatement.[192] The court found in aggravation that Bouvean had: 1) demonstrated a pattern of misconduct; (2) engaged in multiple disciplinary violations; and (3) was the subject of multiple show cause proceedings.[193]

One can only wait and see if Bouvean is a new, more severe standard in trust account mismanagement cases that lack the element of conversion.

A case of personal misconduct addressed in another Order of Discipline is worthy of discussion because of (1) its odd nature; (2) the fact that the Board of Law Examiners pursued the license sanction rather than the Disciplinary Commission; and (3) the published Order Revoking Conditional License to Practice Law is only four paragraphs in length.[194] Indiana Rule for Admission to the Bar and the Discipline of Attorneys 12(6)(c) grants the Board of Law Examiners authority to admit a license applicant on a conditional basis if the Board has special concerns about an applicant's moral character and fitness based upon evidence of drug, alcohol, psychological or behavioral problems.[195] The

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of the recipient, the purpose of the disbursement, and the client or beneficiary for whom the disbursement was made; and

(7) All periodic reconciliation reports for each trust account.

188. *See, e.g.*, *In re* Carmouche, 23 N.E.3d 661 (Ind. 2014); *In re* Hogan, 5 N.E.3d 1161 (Ind. 2014); *In re* Aguilar, 984 N.E.2d 1235 (Ind. 2013) (involving thirty-day suspension); *In re* Suarez, 984 N.E.2d 1233 (Ind. 2013) (involving sixty-day suspension).

189. *See In re* Munson, 39 N.E.3d 373 (Ind. 2015).

190. Tender of Proposed Hearing Officer's Report ¶ 41, *In re Bouvean*, 53 N.E.3d at 407.

191. *Id.* ¶ 35.

192. *In re Bouvean*, 53 N.E.3d at 407..

193. *Id.*

194. *See In re* Speraw, 51 N.E.3d 136, 136 (Ind. 2016).

195. IND. R. ADMIS. B. & DISC. ATT'Y Rule 12 § (6)(c) (2016):

The Board of Law Examiners shall make a finding regarding each applicant:

. . . .

(c)That the Board has special concerns about the proof of applicant's moral character and fitness based upon evidence of drug, alcohol, psychological or behavioral problems,

Board retains jurisdiction to initiate an action to revoke a conditional admission if the applicant later violates any of the conditions to the admission within the prescribed time of the conditional admission.[196]

On October 19, 2010, the State Board of Law Examiners conditionally admitted Adam Speraw to the Indiana Bar.[197] It was a condition of admission that he refrain from having any alcohol-related incidents and that he report to the Board of Law Examiners every quarter on his compliance with the conditions.[198] On July 4, 2012, Speraw drove a vehicle while intoxicated and crashed.[199] He also failed to report the incident to the Board.[200]

The supreme court revoked Speraw's license to practice law.[201] Had this been a case brought under the jurisdiction of the Disciplinary Commission, his law license would have been subject to suspension or disbarment. Revocation of the license is not a listed sanction in the lawyer discipline tool box.[202] However, this case was disposed through the admission process of the Board of Law Examiners and revocation is a sanction within their tool box.[203] The harsh reality of revocation by the Board is that one must re-apply for admission and re-take the

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but in lieu of denying admission to the bar finds that the applicant has satisfied the Board as to his or her character and fitness, and has also satisfied the general qualifications, sufficiently to be eligible for conditional admission upon such terms and conditions as specified by the Board, said conditional admission to be administered by the Board over a period of time not to exceed five (5) years. The conditional admission shall be governed by Internal Rules and Policies adopted by the Board. The fact that the admission is conditional shall be confidential[.]

196. *Id.* § 10:

If, after following the hearing procedures in Section 5, 8 & 9 of this Rule, the Board determines that a conditional admittee has violated any of the conditions of the admission, or if the Board determines that any applicant admitted under these rules falsified or failed to fully inform the Board of facts bearing upon the applicant's character and fitness and general qualifications to practice law prior to admission, the Board may impose additional conditions, including without limitation, an additional term of conditional admission for up to five (5) years, or the Board may certify such findings to the Supreme Court of Indiana with the recommendation that the Court revoke such admission, along with a recommended period of time before the conditional admittee can submit a new application for admission. A conditional admittee whose conditional admission has been revoked by the Supreme Court shall not be readmitted, except upon a new application and examination, after the expiration of the revocation period set by order of the Supreme Court.

197. *In re Speraw*, 51 N.E.3d at 136.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. IND. R. ADMIS. B. & DISC. ATT'Y Rule 23 § 3 (2016).

203. *See generally id.* Rule 23.

bar exam if one seeks to be re-admitted after revocation.[204] In this instance, the court determined Speraw would not be eligible for re-admission for eighteen months after the revocation order was entered.[205]

Another matter of personal behavior in the bar admission process is the discipline of Michael Bratcher.[206] While the Speraw case was based upon a failure to comply with conditions of the admission process,[207] the foundation of the Bratcher case is dishonesty in the bar admission process.[208]

While an undergraduate student, Bratcher attended a cheerleading mascot camp in Milwaukee.[209] While dressed in his college's mascot costume, he committed an act of shoplifting from the host campus' dormitory convenience store.[210] He was cited for, and convicted of retail theft, for which he paid a fine.[211]

Upon graduation from college, Bratcher applied to the University of South Carolina Law School.[212] He disclosed the retail theft incident on his application but was not honest about the facts surrounding the episode nor in the legal disposition of the matter.[213] The false nature of the statement of facts was not exposed and he was admitted to the law school.[214]

Bratcher later applied to transfer to the Indiana University Robert H. McKinney School of Law and repeated the same false description of the retail theft incident and again was successful in not being exposed.[215] Upon graduation, Bratcher applied to be admitted to practice law in Indiana.[216] He again repeated the false description of the retail theft incident and was successful in gaining admittance to the Indiana bar.[217] Approximately one year later, Bratcher applied for admission to the Illinois bar.[218] For the fourth time, he falsely described the details of his retail theft incident, but this time his dishonesty was exposed and

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204. *Id.* Rule 12 § 10.

205. *In re Speraw*, 51 N.E.3d at 136; *see also In re* Vondersaar, 967 N.E.2d 507 (Ind. 2012) (involving an example of interplay between the Board of Law Examiners conditional admission process and the Disciplinary Commission's jurisdiction over a violation of a conditional admission); *In re* Conditional Admission of Bar Applicant No. E03070, 974 N.E.2d 1018 (Ind. 2012) (involving contempt of the supreme court).

206. *See In re* Bratcher, 53 N.E.3d 416 (Ind. 2016).

207. *See In re Speraw*, 51 N.E.3d at 136.

208. *See In re Bratcher*, 53 N.E.3d 416.

209. Verified Complaint ¶ 6, *In re Bratcher*, 53 N.E.3d 416.

210. *Id.* ¶ 7.

211. *Id.* ¶ 9, 11.

212. *Id.* ¶ 12.

213. *Id.*

214. *Id.* ¶ 13-17.

215. *Id.* ¶ 15.

216. *See id.* ¶ 18.

217. *Id.* ¶ 21.

218. *See id.* ¶ 21-23 (showing the time elapsed between when Bratcher was admitted in Indiana and when he was interviewed in Illinois).

he was denied permission to sit for the Illinois bar exam.[219]

Three of the four dishonest statements occurred before Bratcher became a lawyer, while the Illinois incident occurred while he held an Indiana law license.[220] The Disciplinary Commission exercised jurisdiction over all of the episodes of dishonesty. Indiana Rule of Professional Conduct 8.1 applies to false statements in the bar application process.[221] It is logical that enforcement of this rule falls upon the Disciplinary Commission if the lawyer is able to successfully dupe one's way to a law license. If the false statement was detected at the application stage, the Board of Law Examiners could have exercised its jurisdiction and denied the application just as the Illinois bar examiners did.

Additionally, Bratcher was found to have violated Indiana Rule of Professional Conduct 8.4(c) for engaging in dishonest conduct.[222] It can be argued that the false statements on the two law school applications are outside the jurisdiction of this discipline action. However, those facts do carry weight in determining whether a sanction should be aggravated. The Indiana Supreme Court cited those incidents in its opinion and also cited a pattern of dishonest or selfish motive as facts in aggravation of the sanction.[223] Nevertheless, Bratcher repeated the false account of the Wisconsin incident at least once in an official capacity as a licensed Indiana lawyer and this alone served as the basis for the violation of Indiana Rule of Professional Conduct 8.4(c).[224] For his misconduct, the court imposed an eighteen-month suspension of Bratcher's law license without provision for automatic reinstatement.[225] In a dissenting opinion, Justice Brent Dickson would have imposed disbarment.[226]

Another small, but curious case involved a website and a Yellow Pages ad by

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219. *Id.* ¶ 35.

220. *Id.* ¶¶ 12, 15, 18, 38.

221. IND. PROF'L CONDUCT R. 8.1 (2016):

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
>
> (a) knowingly make a false statement of material fact; or
>
> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

222. *In re* Bratcher, 53 N.E.3d 416, 416 (Ind. 2016). Indiana Rule of Professional Conduct 8.4(c) states: "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

223. *Id.* Author's Comment: Being truthful about an immature college stunt would not necessarily have been the death knell to his law school application and legal career. It might have caused more scrutiny of his character and fitness, but it is more likely than not that it would not have been a per se bar to his law school admission or bar admission.

224. Verified Complaint ¶ 38, *In re Bratcher*, 53 N.E.3d 416.

225. *Id.*

226. *Id.* at 417 (Dickson, J., dissenting).

attorney Brent Welke.[227] The ad concerned debtor bankruptcy and contained the following statements: (1) "Screwing Banks Since 1992"; (2) "Keep your property"; (3) "Stop wage garnishments"; (4) "Stop home foreclosure"; and (5) "Stop vehicle repossession."[228]

The ad violated Indiana Rule of Professional Conduct 7.1, which prohibits lawyer advertising from being false or misleading.[229] The court found the ad contained a material misrepresentation of fact or law, or omitted a fact necessary to make the statement considered as a whole not materially misleading.[230]

Advertising violations have traditionally resulted in a public reprimand.[231] But, in this instance, the court imposed a thirty-day license suspension with automatic reinstatement.[232] The court cited Welke's prior discipline history as an aggravating factor in imposing the suspension.[233]

Short suspensions from the practice of law generally tend to allow for automatic reinstatement of the license at the end of the suspension period. The final two matters to be reported run contrary to that maxim. Both cases resulted in short suspensions, but without automatic reinstatement.[234]

Darcie Campanella secured a default judgment for a client in small claims court.[235] The damages sought were $1833.15 arising from property damages in a traffic crash.[236] Campanella prepared the judgment order and inserted $6000 as the judgment amount .[237] The judgment was eventually set aside and a trial was conducted.[238] The trial court entered a judgment for about $1833.15.[239] Campanella knew that the evidence would not support a claim of $6000.[240] Campanella tried to claim that the increased amount included attorney's fees,

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227. *In re* Welke, 53 N.E.3d 408 (Ind. 2016).

228. *Id.* at 409.

229. IND. PROF'L CONDUCT R. 7.1 (2016) ("Communications Concerning a Lawyer's Services: A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").

230. *In re Welke*, 53 N.E.3d at 409.

231. *See, e.g.*, *In re* Whitten, 952 N.E.2d 744 (Ind. 2011); *In re* Keller, 792 N.E.2d 865 (Ind. 2003); *In re* Wamsley, 725 N.E.2d 75 (Ind. 2000).

232. *In re Welke*, 53 N.E.3d at 409.

233. *See id.*; *see also In re* Welke, 772 N.E.2d 992 (Ind. 2002).

234. *See In re* Campanella, 56 N.E.3d 631 (Ind. 2016); *In re* Halpin, 53 N.E.3d 405 (Ind. 2015).

235. *In re Campanella*, 56 N.E.3d at 632.

236. *Id.*

237. *Id.; see also* IND. CODE § 33-31-2-3 (2016) (describing $6000 is the jurisdictional limit of small claims court).

238. *In re Campanella*, 56 N.E.3d at 632.

239. *Id.*

240. *Id.*

though she was not entitled to them in this case.[241]

In the second count of misconduct, Campanella represented the plaintiff in a lawsuit arising from a trade-in of a used, 2008 Pontiac Solstice automobile.[242] During pre-trial proceedings, Campanella was sanctioned for failure to comply with discovery requests.[243] Summary judgments were granted to the defendants.[244] Campanella appealed the adverse decision for her client.[245] While the appeal was pending, she sent a settlement demand letter to opposing counsel, demanding $200,000,000 and threatening to file a disciplinary grievance against opposing counsel if the demand was not met.[246]

Campanella was found to have violated Indiana Rule of Professional Conduct 8.4(d) in both counts of misconduct.[247] Her actions were prejudicial to the administration of justice.[248] In Count 1, she created unnecessary litigation by inserting a judgment amount that was unsupported by the evidence and then later tried to justify the amount under an inapplicable legal remedy.[249] In Count 2, she compromised the administration of justice by trying to use the lawyer discipline process as a bargaining chip to force a settlement of a legal matter.[250] This legal maneuver is unethical for two reasons. First, she was asking opposing counsel to consider their personal interests being at stake if the settlement demands were not met, which is a clear conflict of interest under Indiana Rules of Professional Conduct.[251] Second, if there was misconduct occurring, she had a duty under the Indiana Rules of Professional Conduct to report the misconduct.[252] Compromising

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241. *Id.*

242. Proposed Preliminary Proceedings, Findings of Fact, Conclusions of Law, and Recommended Sanctions ¶ 129, *In re Campanella*, 56 N.E.3d 631.

243. *In re Campanella*, 56 N.E.3d at 632.

244. *Id.*

245. *Id.*

246. *Id.* at 632-33.

247. *Id.* at 633.

248. *Id.*

249. *See id.* at 632.

250. *Id.* at 633. The Commission also relied on the facts of these two counts to support charging Campanella with violations of Indiana Rules of Professional Conduct 3.1 (Meritorious Claims and Contentions); 3.3(a)(1) (Candor Toward the Tribunal); and 3.4(d) (Fairness to Opposing Party and Counsel). *Id.* at 632. The hearing officer found the Commission failed to prove these violations by clear and convincing evidence. *Id.* at 633. The supreme court adopted those findings in its Order of Discipline. *Id.*

251. IND. PROF'L CONDUCT R. 1.7(a) (2016) ("Conflict of Interest: Current Clients (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

252. IND. PROF'L CONDUCT R. 8.3(a) (2016) ("Reporting Professional Misconduct (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional

her ethical duty to gain a strategic advantage for her client is contrary to the interests of justice.[253]

Campanella's misconduct garnered her a thirty-day suspension of her law license.[254] However, the court ordered that her suspension was without automatic reinstatement despite no prior history of misconduct.[255] The court was not explicit in its Order as to why she cannot have automatic reinstatement.[256] But the court's reference to the hearing officer's observations and judgment on credibility suggests that Campanella's behavior during the discipline proceedings warranted the necessity for her to participate in the reinstatement process to insure that she has the character and fitness to resume the practice of law.[257] In particular, the hearing officer noted that Campanella failed to express any remorse for her misconduct and continued to maintain that the proceedings against her were a "witch hunt," that corruption was afoot in the proceedings, that the Commission was "protecting" the opposing counsel in the Pontiac case, that the truth has been "manipulated" by the Pontiac trial court, and that there was a "pay off" in the Pontiac case.[258]

The last case for discussion also has overtones of incivility similar to the Campanella matter. Shortly after the parties entered an agreed order in a paternity, custody, and visitation matter in Tippecanoe County, Michael Halpin entered his appearance for the mother in an attempt to modify the agreement and change venue to Lake County.[259] Because the mother was pro se at the time of the agreement, Halpin accused opposing counsel of fraud, deceit, and trickery in arranging the venue in Tippecanoe County.[260] The trial court denied the motion to change venue.[261] He also accused opposing counsel of intentionally violating mother's rights as a disabled person and in engaging in unethical conduct.[262] Similar to Campanella, Halpin threatened opposing counsel with a disciplinary complaint, and with filing criminal theft charges against the father unless counsel would accede to the venue transfer.[263]

Halpin did not reserve his ad hominem attacks to opposing counsel. He also accused the father of being "possibly homophobic, racist, sexist," and that he was furthering "that agenda."[264] And he accused the trial judge who denied the change

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Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

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

254. *In re Campanella*, 56 N.E.3d at 633.

255. *Id.*

256. *See id.*

257. Hearing Officer's Report at 32-33, *In re Campanella*, 56 N.E.3d 631.

258. *Id.*

259. *In re* Halpin, 53 N.E.3d 405, 406 (Ind. 2015).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

of venue motion of having a "stubbornly injudicious attitude" and of "taking off on detours and frolics that ignore the fact that there are laws in Indiana that the court is supposed to follow and uphold" even though the venue issue was correctly decided by the judge.[265]

The Commission charged Halpin with violating Indiana Rule of Professional Conduct 8.4(d), engaging in conduct prejudicial to the administration of justice.[266] In a rare move, the Commission also charged Halpin with violating the Oath of Attorneys in which all lawyers swear or affirm to "abstain from offensive personality."[267] The supreme court followed the findings of the hearing officer and determined that both of these rules were violated.[268]

The court cited Halpin's lack of remorse as an aggravating factor for sanction.[269] Despite having no prior discipline history, the court imposed a short suspension of sixty days and denied the lenience of an automatic reinstatement.[270] In order to re-enter the practice of law, Halpin must petition for license reinstatement, which includes clear and convincing proof that the lawyer's "attitude towards the misconduct for which he or she was disciplined is one of genuine remorse."[271]

Subsequent to the court's discipline order, Halpin filed a motion to vacate (December 10, 2015), a renewed motion to vacate and motion for the Chief Justice to recuse from the matter (March 16, 2016), and finally, a third motion to vacate and enter a competent order (April 27, 2016).[272] Each of these post-judgment petitions were summarily denied by the court.[273] The ABA Journal Daily News published an article on this case in its November 16, 2015, online edition, where Halpin is quoted as stating, "As far as I'm concerned I'm suspended for the rest of my life because I'm not going to have genuine remorse."[274] These post-judgment filings and public quotation lend validation to the findings for lack of remorse as well as offensive personality.

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265. *Id.*

266. *Id.*

267. *Id.*; IND. R. ADMIS. B. & DISC. ATT'Y Rule 22 (2016).

268. *In re Halpin*, 53 N.E.3d at 406.

269. *Id.*

270. *Id.*

271. IND. R. ADMIS. B. & DISC. ATT'Y Rule 23 § 18(b)(3)(iv) (2016).

272. *See* Chronological Case Summary, *In re Halpin*, 53 N.E.3d 405 (No. 45S00-1408-DI-00559), https://publicaccess.courts.in.gov/docket/Search/Detail?casenumber=45S00-1408-DI-00559 [https://perma.cc/HV5T-N6DQ].

273. *See id.*

274. Debra Cassens Weiss, *Lawyer Who Criticized Judge's 'Stubbornly Injudicious Attitude' Is Suspended*, ABA J. DAILY NEWS (Nov. 16, 2015, 5:45 AM), http://www.abajournal.com/news/article/lawyer_who_criticized_judges_stubbornly_injudicious_attitude_is_suspended [https://perma.cc/9U92-BNLL].

CONCLUSION

Lawyers should be extremely careful when having conversations with judges. The line between an acceptable ex parte communication and an ethical one can be crossed easily if a lawyer fails to follow the rules as listed in the Indiana Rules of Trial Procedure. Attorneys have to understand that these rules are in place to protect the fairness of the system. If the grandparent in the case of *In re Drendall* would have never traveled back from Kenya, the father of the child would have had to spend a significant amount of resources in an effort to get his child back after being taken abroad.[275]

Overall, the decisions by the court during the time period this Article covers have shown there is not a formula for the length of a suspension, especially when it comes to aggravating facts or automatic reinstatement. The court wants to make sure attorneys understand there is no room for misconduct and after being suspended, one must prove he or she will be an appreciable asset to the community.

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275. *In re* Drendall, 53 N.E.3d 404, 404 (Ind. 2015). The father, in fact, had to spend a significant amount of resources that could have been avoided had the ex parte communication never happened.