

XIII. Professional Responsibility

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A. Community Standards and Code Standards:

Is the Boat Starting to Rock?

What wisdom is available to lawyers who believe that a custom of local practice conflicts with the Indiana Code of Professional Responsibility?¹ In some counties, "Don't rock the boat" may be the conventional answer. A quiet boat may carry along questionable but convenient habits that do not give rise to complaints by clients, adverse publicity, or uneasy feelings among practitioners.

Although some time-honored local customs are now obviously improper,² there may yet be a stillness over troubled waters concerning questions to which the Code does not provide clear an-

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¹The Indiana Code of Professional Responsibility [hereinafter referred to as the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA Code]. The House of Delegates of the American Bar Association adopted the ABA Code on August 12, 1969, to become effective on January 1, 1970. The ABA Code was amended on February 24, 1970. Indiana adopted this version of the ABA Code in 1971.

The Code contains Ethical Considerations and Disciplinary Rules, which are defined as follows:

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being the subject to disciplinary action.

INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

²For example, with respect to dividing fees without regard to the proportion of services and the responsibility assumed, the Code in Disciplinary Rule 2-107(A) provides that:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

swers. The unrocked boat leaves lawyers drifting uneasily toward their personal solutions. For example does an advocate ever have a duty to permit perjury by the defendant?³ This question surely has arisen in Indiana practice hundreds of times; yet, the record remains barren of discussion, let alone answers. Another example of a common ethical problem left unresolved at the community level is how does a lawyer interview responsibly without suggesting useful but untrue answers?⁴ Also, if cross-examination would destroy the testimony of an adverse but truthful witness, must the lawyer go forward with that cross-examination?⁵

By adopting the Code of Professional Responsibility in 1970 and enervating the Disciplinary Commission in 1971,⁶ the Indiana Supreme Court decided that the ethics boat should be rocked in Indiana.⁷ The commission now provides a ready ear for complaints

³The Code in Disciplinary Rule 7-102(A) (4) provides that a lawyer must not "[k]nowingly use perjured testimony or false evidence." However, the Code contains no practical guidance for resolving the resulting dilemma. To properly prepare, the attorney must hear all relevant facts known to the accused, using assurances of confidentiality if necessary. A problem which then arises is whether the client must be warned against an admission of guilt or incriminating information that might later impair the client's constitutional right to zealous representation by a competent lawyer. Dean Monroe H. Freedman concludes that the attorney in a criminal case has the duty to "examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant." M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 40-41 (1975). In a civil case, Dean Freedman suggests, the attorney is required to divulge the client's perjury only when the attorney has participated in the perjury. Some lawyers, perhaps evasively, resolve the problem by saying that the lawyer never really "knows" that the client is guilty or lying, for those matters are entrusted to the jury.

⁴The Code provides that a lawyer shall not "[p]articipate in the creation" of evidence when the lawyer "knows or it is obvious that the evidence is false." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A) (6). However, the Code does not suggest how the attorney can test the thoroughness of a client's recall by explaining the legal relevance and importance of various aspects of a situation without incurring the risk that it may tend to induce the client, in some circumstances, to commit perjury.

⁵Dean Freedman suggests that the lawyer must press forward and that the viable alternatives are law reform or declining to accept cases where one's personal views are so strong that they might interfere with effective advocacy. FREEDMAN, *supra* note 3, at 49. See also INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-101(A); *id.* Ethical Consideration 5-1, 5-2.

⁶IND. R. ADMISS. & DISCP. 23(6) (composition of the commission).

⁷The supreme court has the exclusive jurisdiction to admit attorneys to the practice of law. IND. CODE § 33-2-3-1 (Burns 1975). This authority carries with it the right to suspend or disbar attorneys as the court may, in its judicial discretion, find reasonable under the circumstances. *In re Harrison*, 231 Ind. 665, 109 N.E.2d 722 (1953).

about lawyers' shortcomings or misconduct, whether the complaints are filed by clients or by lawyers. Disciplinary Rule 1-103 (A) imposes a duty on lawyers to report unprivileged knowledge of a Code violation. The supreme court's decision to increase the annual registration fee for practicing attorneys from \$15 to \$35⁹ should enhance the commission's capacity to investigate. The court's decision to publicly reprimand a lawyer for misconduct⁹ indicates its willingness to increase the flexibility of sanctions. All these developments should result in thorough and responsible investigations into the Code's application to local customs and special circumstances.

The supreme court, by circulating or otherwise providing for the dissemination of information on proposed Code changes, could obtain any feedback necessary to improve the Code. The use of a mechanism through which the court can receive carefully considered and publicly discussed recommendations for Code amendments remains an important step to be taken. The court could effectuate such a mechanism by requesting that a study of Code amendments be undertaken by the Disciplinary Commission, the Indiana State Bar Association, or an advisory committee.¹⁰ A committee might find it easier than the court to gather data and viewpoints, to hold hearings, and to publish tentative proposals regarding amendments to the Code. These procedures would facilitate the incorporation of diverse perspectives based on a wide range of experiences. A committee could consider whether the Indiana Bar should have disciplinary rules or other objectives that differ from those of the American Bar Association. There is a precedent for this from another jurisdiction.¹¹ Hopefully, the court will make such an assignment in the near future or will create a new committee expressly charged with this responsibility.

⁹IND. R. ADMISS. & DISCP. 23(21)(a) (effective October 1, 1975). A discussion of the change is set forth in 19 RES GESTAE 284 (1975).

⁹*In re Ackerman*, 330 N.E.2d 322 (Ind. 1975).

¹⁰An existing committee has the potential to undertake this task. Trial Rule 80 created an Advisory Committee on Revision of Rules of Procedure and Practice, which has authority to study proposed rule changes and make recommendations to the supreme court. This rule is applicable to the Admission and Discipline Rules. As a result, it would appear that Rule 80 also applies to the Code of Professional Responsibility which is incorporated into the Admission and Discipline Rules through Admission and Discipline Rule 23(2). In the past, the committee's expertise has concerned procedural matters almost exclusively. Thus, it is questionable whether this committee's responsibility should be extended to encompass the Code. For a discussion of Trial Rule 80 see 19 RES GESTAE 276, 285 (1975).

¹¹The District of Columbia Court of Appeals amended Disciplinary Rule 7-102(B) (1) as follows:

A lawyer who receives information clearly establishing that:

Changes already approved by the American Bar Association

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refused or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

DISTRICT OF COLUMBIA COURT OF APPEALS CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B) (1) (amended April 1972) (underlined phrase deleted by the amendment). For the wording of the ABA rule see note 14 *infra*.

This amendment had previously been adopted in 1970 by the Bar Association of the District of Columbia, pursuant to a 74 percent affirmative vote of those responding on a mail ballot. FREEDMAN, *supra* note 3, at 257. That such a procedure can contribute to useful discussion of professional responsibility problems seems clear from considering the well drafted arguments which were set forth on the ballot for and against the amendment. The argument for the amendment was:

The effect of the Code provision can be illustrated by a divorce case. At the husband's deposition, he produces his tax return and testifies that it is complete and accurate. Through confidential communications from his client, the husband's attorney learns that the husband has additional unreported income. The attorney urges him to correct his false testimony, and he refused to do so. The proposed DR subjects the attorney to discipline if he does not reveal the unreported income to the wife and her attorney, to the court, and to the IRS. Thus the DR would turn the lawyer into his client's judge and prosecutor instead of his advocate, and make clients fearful of confiding relevant information fully and freely to their attorneys. It would require an abridgement of the long-established confidentiality of the lawyer-client relationship. There is sufficient protection against the lawyer being made a participant in the client's fraud in the permissible withdrawal provisions of DR 2-110(C).

FREEDMAN, *supra* note 3, at 258. The argument against the amendment was:

The lawyer is first and foremost an officer of the court and as such participates in a search for truth. The false tax return and testimony in the illustration are perjurious and are a fraud on the client's wife, the court, and the IRS. A lawyer who knows that his client is committing perjury and fails to reveal it is betraying the law itself, to which he owes his highest allegiance. A confidential communication from a client does not privilege the client to bind the lawyer to become a partner and participant in a fraudulent and illegal course of conduct. By definition, information concerning the perpetration of a fraud "in the course of the representation" is unprivileged and not entitled to confidence. Nor is it sufficient simply to permit the lawyer to withdraw from the case and remain silent. The proposed DR is necessary to put the bar and the public on notice that the lawyer's devotion to integrity precludes participation in a client's "dirty work."

Id.

In addition, the National Council of the Federal Bar Association adopted supplemental Ethical Considerations on November 17, 1973. These amendments deal with the problem that arises when a lawyer employed by the government receives incriminating information from a fellow employee. They create a duty to reveal the information to supervisors and a duty to warn that such information is not privileged and will be disclosed.

probably should be adopted by the Indiana Supreme Court.¹² The supreme court has responded to the ABA's concern about making group legal service plans available by proposing Admission and Discipline Rule 26.¹³ This rule defines requirements for such plans, calls for annual reporting, and requires lawyers to comply with the Code. Also, it seems quite likely that Indiana lawyers would support the 1974 ABA amendment to Disciplinary Rule 7-102(B). The amended rule now requires that lawyers reveal a fraud perpetrated by their clients only when the information regarding the fraud is not a privileged communication.¹⁴

A variety of additional clarifications or changes in the present Code might well be considered. For example, although the Code requires honesty by condemning a lawyer's knowingly false statement of law or fact in representing a client,¹⁵ it does not contain clear guidelines on whether an advocate may be disciplined for breaking his or her own word to another lawyer. The conventional wisdom on this matter for neophytes says that "only a few lawyers in this county don't keep their word." The young lawyer is

¹²ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-33 (added February 1975) (encouraging attorneys to cooperate with qualified legal assistance organizations providing prepaid legal services); *id.* Disciplinary Rules 2-101(B), 2-103(B), (C), (D), 2-104(A) (amended February 1975) (creating standards for legal assistance organizations and especially approving open-panel plans); *id.* Disciplinary Rule 5-105(A), (B) (amended March 1974) (declining employment if it would be likely to involve the lawyer in representing different interests); *id.* Disciplinary Rule 5-105(D) (amended March 1974) (extending employment disqualification to partners, associates, and affiliates); *id.* Ethical Consideration 7-34, Disciplinary Rule 7-110(A) (amended March 1974) (allowing campaign fund contributions to candidates for judicial office pursuant to B(2) under Canon 7 of the Code of Judicial Conduct); *id.* Disciplinary Rule 8-103(A) (added March 1974) (requiring lawyer candidates for judicial office to comply with applicable provisions of Canon 7 of the Code of Judicial Conduct); *id.* Definition (7) (amended February 1975) (bar association); *id.* Definition (8) (added February 1975) (qualified legal assistance organization). See FREEDMAN, *supra* note 3, at 249.

¹³See 19 RES GESTAE 284 (1975).

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A Lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to affected person or tribunal, except when the information is protected as a privileged communication.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(B) (1) (amended March 1974) (amendment underlined).

¹⁵INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A) (5).

advised that he or she will learn "in practice" who cannot be trusted. Apparently the legal profession does not regard the conduct of those dishonest few, even where beset with broken promises and unreliable assurances, as in violation of the Code. At least, this kind of violation is not regarded as one for which the boat should be rocked.

A pervasive problem is how a lawyer should respond when a client wants the lawyer's aid in doing something which is legal, but which is unjust in the lawyer's opinion. In such a circumstance, the Code allows the attorney to withdraw in nonlitigation matters.¹⁶ But the Code does not provide explicit guidelines indicating whether the attorney may assist the client without violating the spirit of the Code. Explicit guidelines would protect the attorney in two ways: (1) The attorney would know when he could assist the client without being disciplined, and (2) the attorney, in explaining his position to the client, would be backed up by the Code. Thus, consideration should be given as to whether the Code should provide explicit guidelines regarding this issue, as it does regarding requests by clients that lawyers express their personal views on the merits of litigation.¹⁷

B. Recent Indiana Decisions on Attorney Discipline

1. Flexibility of Sanctions

During the spring of 1975, the Indiana Supreme Court created waves by ordering the public reprimand of an Indianapolis lawyer.¹⁸ The lawyer had accepted \$140 from a client toward a \$200 fee. However, he had failed to act upon the client's request

¹⁶"In the event that the client in a non-adjudicated matter insists upon a course of conduct that is contrary to the judgment and advise of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." *Id.* Ethical Consideration 7-8.

¹⁷*Id.* Disciplinary Rule 7-106(C) states:

In appearing in his professional capacity before a tribunal, a lawyer shall not:

- (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
- (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

¹⁸*In re Ackerman*, 330 N.E.2d 322 (Ind. 1975). Sanctions are likely to become more flexible as of January 1, 1976, under proposed Admission and Discipline Rule 23(3)(c), which adds probation to the current list of disbarment, suspension, and public or private reprimand. See 19 RES GESTAE 277 (1975).

that a bankruptcy petition be filed, even when it appeared that the client's wages were about to be garnished. The court majority, composed of Justices Prentice, Givan, and DeBruler, thought that the client was morally entitled to the return of his money; yet they declined to order restitution. Instead, they recommended that the client file a civil action for restitution. Justice Arterburn dissented in an opinion with which Justice Hunter concurred. The dissenting justices supported the hearing officer's recommendation that restitution be ordered by the court.¹⁹

Despite the unwillingness of the majority to order restitution in this case, it appears that a much wider range of sanctions is now available. The reprimand by the court indicates that it will order discipline commensurate with the nature of the misconduct rather than applying only the sanctions of disbarment or suspension. This development may cause the Disciplinary Commission to expand the number of cases it carries forward to hearings. In addition, this case may help remove some of the inhibitions attorneys feel about triggering commission inquiry into local practices which violate the Code.

Of course, some attorneys deserve severe sanctions. By supervising discipline, the supreme court protects the public against both incompetent and unscrupulous professionals. For example, the court disbarred an attorney who violated the trust of his client (the Federal Government) by forging transportation requests.²⁰ The hearing officer had recommended a 4-year suspension, stressing that the attorney had been severely disadvantaged as a youth. The court unanimously replied that the attorney was not only well employed but that he was under no extraordinary stresses at the time of the misconduct. In arriving at its decision, the court applied three factors to determine whether the sanction for misconduct should be disbarment or only suspension. These factors were: (1) The attorney's guilt, (2) the risk to the public if the attorney's practice continues, and (3) the particular circumstances bearing on the likelihood of future transgressions.²¹ The court also disbarred an attorney who borrowed \$4,625 from an estate he was representing, telling the administrator that this was proper, and who later gave the administrator a bad check for \$4,100 as repayment.²²

¹⁹330 N.E.2d at 324 (Arterburn, J., dissenting).

²⁰*In re Lee*, 317 N.E.2d 444 (Ind. 1974).

²¹*Id.*

²²*In re Broadfield*, 315 N.E.2d 357 (Ind. 1974). *Cf. In re Wyttenbach*, 324 N.E.2d 481 (Ind. 1975) (attorney disbarred who had been convicted of theft).

2. *Inadequate Representation*

A lawyer's professional misconduct may have consequences for the client or the lawyer irrespective of whether the lawyer is disciplined. One frequently litigated example of nondisciplinary consequences to the client involves defendants who were inadequately represented in a criminal proceeding. These defendants may be entitled to a reversal. While counsel is presumed competent, this presumption may be overcome by a strong and convincing showing that the attorney's actions made a mockery of the trial which shocks the conscience of the court.²³ The fact that the attorney could have conducted the defense differently is not sufficient to require a reversal.²⁴ Nor do isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience necessarily imply that counsel is ineffective, unless, taken as a whole, the trial is a mockery of justice.²⁵

Four recent attempts by defendants to overcome the presumption of competent representation came to naught. A defendant, convicted of second degree murder, contended in *Brown v. State*²⁶ that his attorney had coerced him to plead guilty to a crime which he did not commit. However, the court of appeals did not find that the guilty plea had been entered involuntarily. As a result, the defendant failed to overcome the presumption of counsel's competence.

In *Greer v. State*²⁷ defendant sought relief from a conviction for robbery and infliction of injuries on the ground of insufficiency of the evidence. This issue had been waived on appeal by the defendant's attorney. The defendant was, in essence, claiming that the attorney's failure to pursue this issue amounted to incompetent representation as a matter of law. The supreme court held that the appellate attorney did not make a mockery of the appeal by waiving this issue as a matter of strategy. The reviewing court will not second guess counsel's tactics or strategy.

A defendant was convicted of second degree murder in *Robertson v. State*.²⁸ He appealed, alleging that counsel's inadequacy was shown by the following three things: (1) Failure to object to the cross-examination of the defendant which elicited information regarding a previous theft conviction, (2) failure to object to admission of pictures and testimony which demonstrated that defendant had long hair and a moustache at the time of the inci-

²³Greer v. State, 321 N.E.2d 842 (Ind. 1975).

²⁴Blackburn v. State, 260 Ind. 5, 22, 291 N.E.2d 686, 696 (1973).

²⁵*Id.*

²⁶322 N.E.2d 98 (Ind. Ct. App. 1975).

²⁷321 N.E.2d 842 (Ind. 1975).

²⁸319 N.E.2d 833 (Ind. 1974).

dent but not at the time of the trial, and (3) the failure to poll the jury as allowed by statute. The court's holding on each of these issues was adverse to the defendant. Because there was a question regarding the defendant's character, the evidence of the prior theft was not improper. Nor was the use of the pictures improper, because evidence of the defendant's changed appearance was relevant. Finally, the failure to poll the jury was not in itself proof of incompetence without further proof of harm to the defendant.

In *Maxwell v. State*²⁹ the defendant sought to have a homicide conviction vacated. The defendant alleged at the post-conviction hearing that his counsel had been incompetent at the trial. This allegation was based on the counsel's failure to present evidence favorable to a plea of self-defense and a defense of insanity. The attorney had not called any witnesses on behalf of the defendant despite the fact that defendant was under guardianship at the time of the homicide, that he had twice before been in mental institutions, and that three persons could have testified that he was not the aggressor. Counsel testified at the post-conviction hearing that he had advised a plea bargain rather than call witnesses at the trial because the state had incriminating evidence and he did not believe that the defendant was insane. After defendant's motion to vacate his conviction was denied by the criminal court, he appealed to the supreme court. The supreme court stated that in a post-conviction proceeding, the trial judge, as the trier of fact, is the sole judge of the weight and credibility of the witnesses. By hearing the attorney, the trial court could best determine whether the attorney's testimony defeated the defendant's claim. Therefore, the supreme court affirmed the lower court's decision in favor of the attorney.

In civil, as well as in criminal cases, inadequate representation may have important consequences. The lawyer may be liable to the client for damages caused by the lawyer's negligence or misconduct. For example, any persons owed adequate representation under an insurance policy may recover for damages caused by inadequate representation. Thus, in *Simpson v. Motorists Mutual Insurance Co.*,³⁰ the insurance company was ordered to pay the full \$210,000 judgment, even though the policy limit was \$10,000, where the company had rejected an offer to settle for the policy limit without consulting the protected party.

²⁹319 N.E.2d 121 (Ind. 1974).

³⁰494 F.2d 850 (7th Cir. 1974). See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 316 N.E.2d 381 (Ind. Ct. App. 1974).

3. Authorization for Attorney's Actions

While the attorney rather than the client controls the litigation process, the attorney may not totally disregard the desires of the client. In *Bramblett v. Lee*³¹ the defendant sought relief from a stipulation of paternity. The defendant's attorney had forgotten to note the trial date on his calendar, and he was not prepared to litigate the matter. As a result, he called the judge to inform him of the situation. During the conversation, the attorney entered a stipulation of paternity, leaving the support issue to be settled later. Subsequently, after support had been set, the defendant had a new attorney file a motion to correct errors on the basis that the prior attorney was not authorized to enter the stipulation. The First District Court of Appeals stated that by reason of employment, the attorney was impliedly authorized to enter a binding stipulation. However, the court also added that if the stipulation was contrary to the directions of the defendant, the defendant must look elsewhere for redress, namely to the attorney.

In *Hendrixon v. State*³² the defendant's attorney failed to raise a particular issue in a motion to correct errors because he felt it was frivolous. The client had continuously expressed his desire to present this particular issue to the court. The Third District Court of Appeals held that the defendant was entitled to file a belated supplemental motion to correct errors. In this case, the court leaned toward the client in resolving the tension between a client's right to decide on legally available methods³³ and the lawyer's duty not to assert a frivolous position.³⁴ A general principle regarding authorization appears to be that a client is always bound by authorized acts of his attorney but that he may not be bound by unauthorized acts, depending on the circumstances of the case.

C. Discipline of Judges

The Indiana Code of Judicial Conduct, by order of the Indiana Supreme Court, became effective on January 1, 1975. It replaces the Indiana Code of Judicial Conduct and Ethics which had been adopted by the Indiana Supreme Court in 1971. The Code of Judicial Conduct includes provisions relating to judicial, quasi-judicial and extra-judicial activity, political constraints, and income reporting.³⁵ A section following the Canons describes the extent

³¹320 N.E.2d 778 (Ind. Ct. App. 1974).

³²316 N.E.2d 451 (Ind. Ct. App. 1974).

³³See INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-8.

³⁴See *id.* Ethical Consideration 7-4; Disciplinary Rule 7-102(A).

³⁵Indiana also has a statute which requires that judges make financial reports. IND. CODE § 33-2.1-8-3 (Burns Supp. 1975).

to which part-time, pro tempore, and retired judges must comply.

A commission on judicial qualifications of judges has been created pursuant to article 7, section 9 of the Indiana Constitution.³⁶ This commission is composed of seven members.³⁷ Three members are attorneys elected by other members of the bar. Three members are laymen appointed by the Governor. The remaining member, who serves as chairman, is the Chief Justice of the Indiana Supreme Court or another justice appointed by the Chief Justice. This commission has jurisdiction to hold disciplinary hearings regarding the alleged misconduct of judges of superior, probate, juvenile, and criminal courts³⁸ and to make recommendations to the supreme court. Any citizen of Indiana may file with the commission a complaint regarding a judge,³⁹ and the commission can make inquiry on its own motion.⁴⁰

Two recent cases have dealt with the power of the supreme court to discipline judges. In a 1974 case, *In re Evrard*,⁴¹ a prosecuting attorney sought to have a judge removed for alleged violations of criminal laws. The supreme court stated that disciplinary powers over judges include suspension, with or without pay, retirement and removal, and all the other disciplinary sanctions available against lawyers.⁴² The supreme court appointed a new hearing officer to conduct further inquiry into the case.

In a 1975 case, *In re Terry*,⁴³ the Disciplinary Commission initiated a proceeding against a circuit court judge as a judicial officer and as a member of the bar. It was alleged that the judge violated the Code of Judicial Conduct and Ethics, the Code of Professional Responsibility, the Oath of Attorneys, and the Judicial Oath of the Ripley County Circuit Court.⁴⁴

³⁶*Id.* §§ 33-2.1-6-1 to -30 (Burns 1975).

³⁷*Id.* §§ 33-2.1-4-1, -4-2, -4-8.

³⁸*Id.* § 33-2.1-6-3. Under a proposed rule, the commission would investigate complaints against all justices and judges of the state. Proposed Ind. R. Admiss. & Discl. 25. For the text of the proposed rule see 19 RES GESTAE 276 (1975).

³⁹IND. CODE § 33-2.1-6-8 (Burns 1975).

⁴⁰*Id.* § 33-2.1-6-9.

⁴¹317 N.E.2d 841 (Ind. 1974).

⁴²Under a proposed amendment to the disciplinary rules, judges would be included within the definition of the term "attorney" and would thus be subject to the same sanctions. Proposed Ind. R. Admiss. & Discl. 23(1). It is also proposed that discipline for attorneys include probation, permanent disbarment subject to reinstatement, suspension for a definite or indefinite period subject to reinstatement, suspension not to exceed six month with automatic reinstatement, public reprimand, or private reprimand. Proposed Ind. R. Admiss. & Discl. 23(3). For a complete text of the proposed rules see 19 RES GESTAE 276, 277 (1975).

⁴³323 N.E.2d 192 (Ind. 1975).

⁴⁴*Id.* at 193.

Based on the findings of a hearing officer, the supreme court suspended the judge without pay. On appeal, a majority of the supreme court affirmed its previous action.⁴⁵ The judge raised three issues on his appeal to the supreme court. The first issue was whether the supreme court had jurisdiction to discipline the judge except as provided by article 7, section 13 of the Indiana Constitution.⁴⁶ The majority held that the court had jurisdiction. Secondly, respondent claimed that the Disciplinary Commission was without authority to bring an action against a circuit court judge. The supreme court held that the commission did have such authority. Finally, the judge maintained that the evidence was insufficient to support the findings of the hearing officer.

In reviewing the evidence, the supreme court only considered the alleged violations of the Code of Judicial Conduct and Ethics. At issue were alleged violations of Rules 1, 2, 3, 8, and 10. Rule 1 calls for the avoidance of impropriety. The majority found this rule violated by numerous actions of the judge. Most of these actions involved his illegal removal of a welfare board member. Rule 2 provides that a judge is to organize the court with a view to prompt and convenient dispatch of its business. The majority found that the judge had deliberately organized the court to delay the business of attorneys who had signed the disciplinary grievance against him. The majority noted that far-reaching consequences to a client resulted from the judge's actions. Rule 3 requires courtesy to counsel, and Rule 8 forbids intervention in the conduct of the trial. The majority found that the judge violated these rules by his undue and unnecessary questioning of various counsel during trial. Lastly, the majority found that the judge violated Rule 10 by allowing his own personal idiosyncrasies to guide the administration of justice.

Justices DeBruler and Prentice, in separate opinions, concurred in part and dissented in part.⁴⁷ Justice DeBruler agreed with the majority that the supreme court has jurisdiction and that the Disciplinary Commission has authority to bring such an action. However, he disagreed regarding the sufficiency of the evidence. Justice DeBruler felt that Rules 1, 3, and 10 were too vague for a judge to know what behavior was expected. Furthermore, he felt that the evidence did not allow the inference that the judge was either

⁴⁵The majority opinion was written by Justice Hunter and concurred in by Justices Givan and Arterburn.

⁴⁶This section provides that the supreme court may remove any circuit court judge who has been convicted of corruption or other high crime. The court stated that the basis for discipline was actually under article 7, section 4 of the Indiana Constitution which gives the supreme court original jurisdiction regarding discipline of judges.

⁴⁷323 N.E.2d at 202.

neglectful or incompetent or that he had disrupted the orderly process of the court. Thus, Justice DeBruler would have entered judgment for the respondent.

Justice Prentice differed from the majority in his preference for a trial de novo rather than a mere review of the findings of the hearing officer. While Justice Prentice did find that the judge was not temperamentally suited to the office and that the judge did commit acts of indiscretion which disrupted the judicial process, he did not find the evidence convincing to the extent the majority did. Justice Prentice would have ordered a less severe sanction, such as reprimand or brief suspension, rather than suspension until further notice.

D. Academic Developments

One may turn from the courts to academia for additional developments which portend changes in practice. In 1973, the American Bar Association revised its standards for the approval of law schools to require that every student take a course in professional responsibility.⁴⁸ This instruction must include the ABA Code and the history and traditions of the profession. Although many schools have long had required courses in professional responsibility, one effect of the ABA requirement may be to bring more scholars into this field.

One sociological study⁴⁹ points to the nature of a law practice as a factor making it difficult and sometimes impossible to conform to ethical standards. In efforts to obtain business, and in dealing with clients or public officials, the attorney is often exposed to pressures to engage in practices contrary to official norms. The most important ongoing research on this problem is that being undertaken by a team at the University of Michigan Law School under the direction of Dr. Andrew Watson.⁵⁰ The team is attempting to discover the nature of the psychological pressures generated in attorneys by ethical conflicts arising out of practice and to discover ways to teach attorneys to cope with these pressures. The results of the Watson research could have far-reaching implications for teaching professional responsibility to law students as well as providing assistance to practicing attorneys.

⁴⁸ABA APPROVAL OF LAW SCHOOLS STANDARDS AND RULES OF PROCEDURE 302(a) (iii), at 7 (1973).

⁴⁹J. CARLIN, *LAWYERS ON THEIR OWN* 209 (1962).

⁵⁰Pepe, *Is There a Doctor in the House? Opening Reflections on The Involvement of Psychiatrists in Michigan's Legal Clinic*, VII COUNCIL ON LEGAL EDUCATIONAL FOR PROFESSIONAL RESPONSIBILITY, INC. No. 12, December 1974. For this research, students are videotaped while interviewing and counseling clients. Two psychiatrists assist with the evaluation of inner tensions and emotional reactions which are stirred up in the lawyers as well as in the client.

The most important scholarly publication of 1975 in the area of professional responsibility is *Lawyers' Ethics in an Adversary System* by Dean Monroe H. Freedman.⁵¹ Dean Freedman analyzes a number of ethical problems, making vigorous arguments on behalf of the adversary system as the fairest and most efficient way of determining the truth. Further, he inveighs against the present Code restrictions on advertising, which he views as an interference with the duty of the profession to make legal counsel available, particularly to persons who may otherwise be ignorant of their rights.

The most important impact of this book will be to point the way for analysis of professional responsibility in terms of the functions of institutions and roles assigned to persons in those institutions. Freedman disagrees with the traditional approach to professional responsibility. He feels that the traditional approach has two characteristics: (1) It is committed in general terms to all that is good and true, and (2) it answers specific questions by uncritically relying on legalistic norms, regardless of the context in which the attorney acts or of the motives and consequences of the act.⁵² In contrast, Freedman views ethics as part of a functional sociopolitical system concerned with the administration of justice in a free society.⁵³ Thus, his system attempts to deal with ethical problems in context, giving due regard to both the motives of the individual lawyer and the consequences of the lawyer's actions to society as a whole.

XIV. Property*

The Indiana courts decided two significant property cases during this survey period. In *Barnes v. Macbrown & Co.*,¹ the First District Court of Appeals refused to extend to subsequent vendees the implied warranty of habitability for purchasers of residential dwellings from the builder-vendor. This case is discussed in the section on contracts and commercial law.²

In *In re Estate of Fanning*,³ the Third District Court of Appeals dealt with the ownership of certificates of deposit made out

⁵¹FREEDMAN, note 3 *supra*.

⁵²*Id.* at 45.

⁵³*Id.* at 46.

*Bruce A. Hewetson

¹323 N.E.2d 671 (Ind. Ct. App. 1975).

²See pp. 141-42 *supra*.

³315 N.E.2d 718 (Ind. Ct. App. 1974). In a recent decision the Indiana Supreme Court unanimously affirmed the holding of the Third District Court