

XIII. Professional Responsibility

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A. Lawyer Advertising

The Code of Professional Responsibility was adopted by the Indiana Supreme Court in 1971.¹ The Code's Canon 2 provides that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." Nevertheless, the profession's traditional bar on advertising was retained in DR 2-101, which provided that a lawyer was not to publicize himself or his firm through newspaper or magazine advertisements, radio or television announcements, display of advertisements in city or telephone directories, or other means of commercial publicity.

On June 27, 1977, DR 2-101 became obsolete. On that date, the United States Supreme Court decided in *Bates & O'Steen v. State Bar*² that the first amendment does not allow states to prevent certain kinds of lawyer advertising. Specifically, the Court approved the publication of a truthful newspaper advertisement by an attorney concerning the availability and terms of routine legal services, such as uncontested divorces, simple adoptions, uncontested personal bankruptcies, changes of name, and the like. Mr. Justice Blackmun, who wrote for the Court, stated that the traditional barrier against lawyer advertising "likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable."³ He conceded that "advertising does not provide a complete foundation on which to select an attorney," but added that "it seems peculiar to deny the consumer . . . at least some of

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¹The Indiana Code of Professional Responsibility [hereinafter referred to as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA Code].

The Code contains Ethical Considerations, which represent the objectives toward which every member of the profession should strive, and Disciplinary Rules [hereinafter referred to as DRs], which are mandatory in character and state the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action.

²97 S. Ct. 2691 (1977) (5-4 decision).

³*Id.* at 2705.

the relevant information needed to reach an informed decision."⁴

Mr. Justice Powell, who dissented, was concerned that allowing lawyers to advertise fees would be misleading to the public. He explained:

Some lawyers may gain temporary advantages; others will suffer from the economic power of stronger lawyers, or by the subtle deceit of less scrupulous lawyers. Some members of the public may benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services "almost infinite [in] variety and nature"⁵

The Court's opinion made no mention of broadcast advertising. However, Mr. Justice Powell noted:

No distinction can be drawn between newspapers and a rather broad spectrum of other means, for example, magazines, signs in buses and subways, posters, handbills, and mail circulations. But questions remain open as to time, place, and manner restrictions affecting other media, such as radio and television.⁶

The American Bar Association's House of Delegates, reacting to *Bates*, approved an amendment to Canon 2 of the ABA Code (Proposal "A") and distributed that amendment to the states along with an alternative approach (Proposal "B"). The American Bar Association also authorized its Board of Governors to create (1) a commission on advertising to monitor developments at the local level and within other professions and to make appropriate recommendations and (2) a special committee to study and make recommendations on the feasibility of a nationwide institutional advertising program to educate consumers regarding the utility, cost, and availability of legal services.

Proposal "A" adopts a regulatory approach. It first prohibits false, fraudulent, misleading, deceptive, and self-laudatory or unfair statements or claims. Then it specifically authorizes certain information to be disseminated by print media or radio broadcast in the geographical area in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides. Per-

⁴*Id.* at 2704. Although holding that advertising by attorneys could not be subjected to "blanket suppression," Justice Blackmun also stated that limitations on advertisements were not foreclosed for false, deceptive, or misleading advertisements (which might include advertisements relative to quality of service or in-person solicitation). *Id.* at 2708.

⁵*Id.* at 2719 (Powell, J., dissenting) (footnote omitted).

⁶*Id.* at 2718 n.12 (Powell, J., dissenting).

mitted information includes the lawyer's name, education, memberships, fields of law in which he practices, fee for initial consultation, contingent fee rates, hourly rate, ranges of fees for services, and fixed fees for special legal services.

Proposal "B" adopts a directive or guidelines approach. It first bars the use of any false, fraudulent, misleading, or deceptive statement or claim and then indicates ways in which a statement of claim may be improper under that guideline. The list includes making a material misrepresentation of fact, creating an unjustified expectation, publishing statistical data or other information based on past performance, or predicting future success. Proposal "B" limits fee disclosure to the same kind of information permitted under Proposal "A" and prohibits advertising over television until the agency having jurisdiction under state law determines that the use of such media is necessary and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

The first round of lawyer advertising has been mostly newspaper advertisements limited to statements of fees for particular kinds of services. Such advertising by lawyers should prove beneficial to the public and to the profession. It probably will encourage many people to obtain legal service for problems they otherwise would simply have endured or not met because of fear about excessive costs or ignorance about the availability of a lawyer who wished to handle their kind of problem. Thus, the cost of advertising may be offset by expanded opportunities to serve and a better distribution of legal business. That should be beneficial to new lawyers, particularly to new solo practitioners and to small firms who wish to develop a particular kind of practice.

It seems unlikely that there will be widespread abuse of the new constitutional right by the publication of advertisements that are false or misleading. Lawyers have almost always been restrained in their public utterances. Unlike office conferences regarding fees, an advertisement is beamed out to the general public, which includes other lawyers and disciplinary authorities. Fee disputes, the most common kind of lawyer-client disagreement, might be easier to deal with if the lawyer had stated his or her terms to the public in advance.

Advertising may have some effect to help insure fair fees. Michael Pildes, a Chicago attorney, contends that "his firm's advertised uncontested divorce fee of \$300 plus court costs is a real service to the community because most people don't know what a divorce should cost and therefore end up paying an average of \$750 in the Chicago area."⁷ Evidence that some fees are being reduced as

⁷Wall St. J., Sept. 9, 1977, at 12, col. 3.

the result of advertisements has been cited by Steve Silvern of the Silvern Legal Clinic in Denver. The prevailing fee for handling an individual bankruptcy in Denver, according to Mr. Silvern, has declined to approximately \$200 from \$300 or more since the Silvern clinic began advertising its \$200 bankruptcy rate.⁸

Perhaps we should not make too much of this new freedom. The Yellow Pages will surely contain classifications of lawyers and perhaps some fee information. However, most lawyers probably will not advertise. Their clientele is generated in a manner that does not call for media dissemination of information.

Though much of the discussion of lawyer advertising has been cast in terms of possible fee wars or abuses, it seems likely that the basic underlying argument is a strongly held feeling that advertising is demeaning to the profession and that advertising is lacking in dignity. However, in a consumer oriented age, it surely is not demeaning to inform the public of the services one proposes to provide and the prices one charges for those services when it is done in a factual manner that is not false or misleading. Of course, in tandem with individual advertising, the bar associations could provide a public service if they were to undertake campaigns to educate potential clients about legal fees and services and about how one should go about selecting a lawyer and evaluating the service provided.

A committee of the Indiana State Bar Association has the entire matter of lawyer advertising under consideration, and it is likely that at least a modified version of one of the American Bar Association's proposals, probably Proposal "A," will be recommended to the Indiana Supreme Court. In the past, the court has moved very deliberately in considering amendments to the Code. It is possible, therefore, that guidelines for advertising by Indiana lawyers will not be promulgated and made effective for some months to come.⁹

⁸*Id.* at col. 2.

⁹Mr. John L. Carroll has predicted that the Indiana Supreme Court will promulgate new advertising rules in January of 1978. Carroll, *Supreme Court Hands Down Decision Concerning Lawyer Advertising*, 21 RES GESTAE 352 (1977). State Bar Association President John L. Carey has stated that perhaps the most significant aspect of *Bates* is its holding that restraints on advertising required by a state agency are not subject to attack under the Sherman Act. Carey, *The President's Message*, 21 RES GESTAE 329 (1977). Judge Robert H. Staton of the Indiana Court of Appeals has been exploring the related issue of regulating and allowing public announcement of lawyer specialization. He has discussed the English analogy and has carefully distinguished between the state regulated system of California and the self-designation systems of several other states. Staton, *Lawyer Specialization—Is It Suitable for Indiana?*, 21 RES GESTAE 144, 197, 246, 294, 380 (1977). Judge Staton has stated that the sixth and final installment in his published series on these subjects will appear in March 1978. It will include the results of a questionnaire on specialization distributed

B. Enforcement of the Code

1. *Sanctions for Misconduct.*—In a disciplinary proceeding, when the Indiana Supreme Court adopts findings of fact and concludes as a matter of law that those findings constitute the violation of a DR, the court then has the duty to impose an appropriate disciplinary sanction.¹⁰ The court has used a standard that involves the consideration of various factors, and it is most frequently articulated as follows:

[I]n determining the appropriate discipline to be imposed, consideration is given the nature of the ethical violation; the specific acts of the respondent; this Court's responsibility to preserve the integrity of the Bar of this State; the risk, if any, to which we will subject the public by permitting the respondent to continue in the profession or to be reinstated at some future date; and the deterrent effect the imposition of discipline has on the Bar in general.¹¹

Some idea of what this standard means in action can be inferred by studying the pattern of sanctions meted out in the survey year. In *In re Althaus*,¹² a ninety-day suspension was ordered where

by the court. A special seminar on specialization was held on October 13, 1977. *Id.* at 383.

¹⁰The Indiana Supreme Court explained in *In re Murray*, 362 N.E.2d 128 (Ind. 1977), that it is the function of the Disciplinary Commission to review grievances, dismiss those which are baseless, and then form a complaint that places the alleged misconduct within the structure of the Code. A disciplinary proceeding is an original action in the supreme court for which the court sits as a trial court to determine issues of fact as well as how the Code applies. The findings of a hearing officer appointed by the court are reviewed and considered by the court but are not controlling. It considers the entire record.

The report of the Disciplinary Commission for the period commencing October 1, 1975, and ending September 30, 1976, appears in INDIANA STATE BAR ASSOCIATION, INDIANA SUPREME COURT DISCIPLINARY COMMISSION ANNUAL REPORT, reprinted in 21 RES GESTAE 28 (1977). The report notes the investigation of 260 complaints in 1973-1974; 431 in 1974-1975; and 310 in 1975-1976. It also contains statistics on complaints by kind of misconduct alleged and the subject matter of each case. Torts, domestic relations, and criminal cases gave rise to the largest volume of complaints. Neglect was the largest category of complaint.

In his State of the Judiciary Annual Address, Chief Justice Richard M. Givan noted that from October 1975 to October 1976, the court had administered 3 private reprimands, 5 public reprimands, had ordered 6 suspensions for periods of 30 to 180 days, had decreed 1 disbarment, and had allowed 3 reinstatements. State of the Judiciary Annual Address by Chief Justice Givan, reprinted in 21 RES GESTAE 49,51 (1977).

¹¹*In re Merritt*, 363 N.E.2d 961, 971 (Ind. 1977).

¹²348 N.E.2d 407 (Ind. 1976). A 90-day suspension was also handed down in *In re Case*, 354 N.E.2d 198 (Ind. 1976), where an attorney was convicted for failing to file a federal income tax return several years before the Code had been promulgated by the

money collected for a client was commingled in the lawyer's own account for a year, and he did not file a divorce for which he had collected a retainer, which was not returned even though he initially had said that it would be returned. A more severe sanction was imposed in *In re Noel*,¹³ where the lawyer commingled funds, neglected legal matters, and failed to make an appropriate record or accounting of client funds. The hearing officer had recommended a public reprimand, but the court imposed a 180-day suspension, commenting:

The fiduciary relationship of a lawyer to this client involves trust. There is no surer way to undermine this trust than to become involved in questionable and unethical conduct in dealing with funds that belong exclusively to a client. This type of misconduct reflects adversely upon a lawyer's fitness to continue the practice as well as brings severe discredit to the legal profession.¹⁴

Finally, in *In re Wood*,¹⁵ a one-year suspension was given a lawyer who offered his legal services in exchange for sexual favors—posing for nude photographs. The court said that “it does not, cannot, and will not attempt to establish guidelines for the sexual activities of the members of the bench and bar.”¹⁶ However, the court stated the following:

The sexual activities of the respondent in this cause were not personal and unrelated to his practice of law. He attempted to exchange legal services for sexual favors. . . . It is this improper combining of professional and personal interests which establishes his unfitness to practice law and constitutes a violation of Disciplinary Rule 1-102(A)(6).¹⁷

During the survey year, five attorneys were disbarred. Disbarment is a sanction not frequently imposed. It appears that it will be used in only very extreme cases. In *In re Wallace*,¹⁸ the attorney had commingled funds, neglected to carry out his duties, failed to promptly make good on personal checks returned for insufficient funds, and even forged a judge's name on an alleged decree. In *In re Conner*,¹⁹ an attorney was disbarred for having neglected to process

court. Retroactive application of the Code was approved several years ago. *In re Mullin*, 261 Ind. 444, 305 N.E.2d 779 (1974).

¹³350 N.E.2d 623 (Ind. 1976).

¹⁴*Id.* at 627-28.

¹⁵358 N.E.2d 128 (Ind. 1976).

¹⁶*Id.* at 133.

¹⁷*Id.*

¹⁸354 N.E.2d 213 (Ind. 1976).

¹⁹358 N.E.2d 120 (Ind. 1976).

with dispatch legal matters entrusted to him by several clients, for having failed to keep commitments to make restitution of unearned fees paid in advance, and for having failed to live up to commitments to the Disciplinary Commission with respect to taking care of his obligations to creditors and with respect to dealing with his drinking problem. The court noted that personal hardships and misfortunes, compounded by the disease of alcoholism, had led to the destruction of the respondent's personal career. However, the court added: "It is this Court's responsibility to safeguard the public from attorneys who, for whatever reason, are no longer fit to honor the trust that forms the basis of the attorney-client relationship."²⁰ In *In re Tabak*,²¹ the attorney was disbarred because while serving as a judge pro tempore in criminal court, he sought out the tickets of several of his clients, found the clients guilty (without their knowledge), and then suspended the sentences. The court said: "This conduct ignores any concept of trust and responsibility and demonstrates a total disregard to the ethical requirements of all attorneys and judges."²² Disbarment was also mandated in *In re Merritt*,²³ where eight different counts were established against the respondent (who was living in Alabama). They encompassed the following acts: closing his law office without making arrangements for having court notices picked up on cases pending; arranging through deceit to have a real estate agent visit one of his clients while the client was in prison; failing to pay over to clients money that was due to them; failing to appear in court to defend clients at scheduled hearings; terminating employment because of the nonpayment of a fee and not making arrangements to protect the client's rights; withdrawing money from a client's trust account, using it for personal purposes, and not replacing it; and leaving the jurisdiction without notifying clients that he would be unable to appear at a scheduled trial date. Finally, in *In re Murray*,²⁴ an attorney was disbarred after having committed twenty-nine different violations of the Code including:

using perjured testimony, making false statements of fact and law, participating in the creation of false evidence, failing to reveal to the trial tribunal the existence of fraud perpetrated by clients and witnesses, allowing a third person to direct and regulate professional judgment, engaging in conduct prejudicial to the administration of justice, and ac-

²⁰*Id.* at 123.

²¹362 N.E.2d 475 (Ind. 1977).

²²*Id.* at 477.

²³363 N.E.2d 961 (Ind. 1977).

²⁴362 N.E.2d 128 (Ind. 1977).

quiescing in the payment of witnesses for favored testimony.²⁵

In addition to disbaring five lawyers, the court accepted the resignation of two lawyers who admitted that charges against them were true and that they could not defend against them.²⁶ One of the attorneys was barred from seeking reinstatement for five years,²⁷ the other for two.²⁸ Partially offsetting these departures, two attorneys were reinstated.²⁹

The Indiana Supreme Court did not amend Indiana's version of the Code during the survey year, nor was the court called upon to make an interpretation of the Code (other than the interpretations implicit in applying the Code to fairly typical disciplinary situations.)³⁰ In none of the reported cases did the court reject the findings of a hearing officer that the respondent had been guilty of misconduct. This is some evidence that the Disciplinary Commission is engaged in a selective enforcement policy; it brings formal proceedings in only the most blatant cases. Although disputes over fees constitute a substantial percentage of the complaints, no attorney was sanctioned by the court for charging an unreasonable fee. Perhaps part of the explanation is that in cases where the fee might have been unreasonable the attorney may also have been guilty of a more easily provable violation, such as neglect.

2. *Disqualification.*—The Code's Canon 9 provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The courts occasionally enforce this Canon by granting a motion to disqualify a lawyer, and sometimes his firm, from a particular case. Useful guidelines for Indiana attorneys were set forth by the Seventh Circuit Court of Appeals in *Schloetter v. Railoc of Indiana, Inc.*³¹ The court of appeals affirmed the district court's disqualification of defendant's counsel because a lawyer associated with that firm had previously represented the plaintiff on a subject matter closely related to the present litigation. Specifically, an attorney

²⁵*Id.* at 137.

²⁶See IND. R. ADMISS. & DISCP. 23(17).

²⁷State v. Barger, 352 N.E.2d 487 (Ind. 1976).

²⁸*In re Laib*, 357 N.E.2d 895 (Ind. 1976).

²⁹*In re Noel*, 359 N.E.2d 920 (Ind. 1977); *In re Perrello*, 360 N.E.2d 588 (Ind. 1977).

³⁰Two opinions were issued by the state bar association. 21 RES GESTAE 126 (1977). Opinion number 1 ruled that a lawyer may not allow his name to be used in a referral list not distributed, sponsored, or approved by a local bar association. *Id.* Opinion number 2 ruled that an attorney may write newspaper articles and appear on local television concerning general legal topics for the education of the public. However, it would be improper, the opinion said, for the lawyer to use those forums to solicit professional employment. *Id.* The *Bates* case obviously makes some inroad on this ruling.

³¹546 F.2d 706 (7th Cir. 1976).

who continued to maintain a substantial relationship with the law firm that represented defendant had represented the plaintiff in procuring the patent whose validity was placed in issue by the defendant in this litigation. The court said that it was mindful of the need to preserve a balance between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. However, the court stated the following:

The basic policies underlying any judicially-compelled withdrawal of counsel because of a potential conflict of interest can be found in Canons 4 and 9 of the ABA Code of Professional Responsibility. Canon 4 provides that "a Lawyer Should Preserve the Confidences and Secrets of a Client," and Canon 9 provides that "a Lawyer Should Avoid Even the Appearance of Professional Impropriety." Read together, the two canons indicate that an attorney *may* be required to withdraw from a case where there exists even an appearance of a conflict of interest.³²

In the case at bar, the court said the subject matter of the present litigation was substantially related to the prior representation. In this type of situation, the court will presume that confidential information relating to the matter passed to the attorney during the former representation. There had been no evidentiary showing to dispel that presumption. However, the court said that even if the defendant's attorneys had not been exposed to confidential information disclosed during the course of Mr. Jeffery's former representation of the plaintiff, the district court was well within the bounds of its discretion in disqualifying the defendant's firm because of the *appearance* of impropriety. "The rationale underlying Canon 4 is the principle that a client should be encouraged to reveal to his attorney all possibly pertinent information. . . . *A client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one.*"³³

The court of appeals distinguished two decisions relied upon by the defendant³⁴ on the grounds that in both cases a young associate left the employ of a large law firm now representing the plaintiff to join another firm now representing the defendant, but the associate had not been exposed to any matter substantially related to the sub-

³²*Id.* at 709.

³³*Id.* at 711 (quoting *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1384, (3rd Cir. 1972) (emphasis in original)).

³⁴*Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

ject matter of the pending action during his tenure at the firm now representing the plaintiff. "[I]f there existed any appearance of impropriety, it was *de minimis*,"³⁵ according to the court. To have disqualified the plaintiff's law firm under those circumstances "would have meant depriving the client of the right to counsel of his own choosing without, at the same time, materially fostering high ethical standards of professional responsibility of public confidence in the legal profession."³⁶

C. *Conduct and Powers of the Prosecutor*

The prosecutor cannot pursue a case with quite the same kind of zeal that is the duty of other advocates. DR 7-103 requires that the prosecutor in criminal litigation make timely disclosure to counsel for the defendant of the existence of evidence that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Still, the prosecutor is not deprived of all power to act as an advocate. This point was emphasized in *Ortiz v. State*.³⁷ In his closing argument, counsel for defendant said: "The person who took the life of Gregory Hill is still walking free waiting to take the life of someone else."³⁸ In rebuttal, the prosecutor stated: "[L]adies and gentlemen, the killers of Mr. Ortiz and Mr. Williams are not endangering the lives of Gary and running around the street. They are here in court today."³⁹ When defense counsel objected, the prosecutor apologized to the jury for injecting personal opinion and urged them to look solely to the evidence.

On appeal, the defendant argued that the prosecutor's statement violated DR 7-106(C)(4) because it was an assertion of personal opinion as to the guilt of the accused. The court said: "The evil to be avoided by this rule is that the jury will infer that counsel has superior or inside knowledge of the case, and will therefore give his opinion evidentiary effect."⁴⁰ Testing the incident by this standard, the court concluded that while it is always preferable that counsel cast conclusions in forms that clearly indicate that the remarks are based upon counsel's interpretation of the evidence, the prosecutor's statement was not impermissible. The court explained:

The prosecutor's remark implies no personal knowledge, notwithstanding the absence of explicit reference to the

³⁵546 F.2d at 712.

³⁶*Id.*

³⁷356 N.E.2d 1188 (Ind. 1976).

³⁸*Id.* at 1196.

³⁹*Id.*

⁴⁰*Id.*

evidence, but was made to rebut the rhetorical effect of Ortiz's attorney's assertion that the guilty parties were still at large. Retaliatory responses of this sort are not to be encouraged. However, when kept within reasonable bounds, they are to be judicially tolerated if the values of spirited advocacy are not to be lost altogether.⁴¹

In *In re Daley*,⁴² a case arising in Illinois, the Seventh Circuit Court of Appeals held that a federal prosecutor's power to grant immunity is limited to future criminal proceedings and does not extend to state bar disciplinary proceedings growing out of the witness' compelled testimony. The witness, under a grant of immunity explicitly including both United States criminal statutes and state bar disciplinary proceedings, had admitted before a grand jury that he had bribed a public official in order to assure the granting of zoning variances favorable to his developer clients. The court said that the legislative history of the federal statute authorizing prosecutors to grant immunity showed an intent to restrict the statute's scope of immunity to that which is constitutionally required. The fifth amendment, in turn, prohibits compelled testimony from being given only in criminal proceedings. However, the court held that bar disciplinary proceedings are not criminal in nature; they seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice. Accordingly, the state bar disciplinary proceedings could continue, and the compelled testimony could be used.

D. *Claims of Incompetent Counsel in Criminal Cases*

The Indiana appellate courts reviewed a number of appeals from denial of petitions for post-conviction relief which alleged that the defendant had not received effective assistance of counsel. The courts used a standard unlike that applied to determine misconduct under the Code.⁴³ Hence, in *Kerns v. State*,⁴⁴ the court said: "[A]bsent a glaring and critical omission or succession of omissions evidencing in their totality a mockery of justice, this Court will not attribute a criminal conviction of affirmation to ineffective representation."⁴⁵

⁴¹*Id.* at 1196-97.

⁴²549 F.2d 469 (7th Cir. 1977).

⁴³IND. R. ADMISS. & DISCP. 23(2)(a) provides: "Any conduct that violates the Code of Professional Responsibility or the Code of Judicial Conduct and Ethics heretofore adopted or as hereafter modified by this Court or any standards or rules of legal and judicial ethics or professional responsibility hereafter adopted by this Court shall constitute grounds for discipline."

⁴⁴349 N.E.2d 701 (Ind. 1976).

⁴⁵*Id.* at 703.

In *Kerns*, the defendant had been convicted of first degree murder. Among the specific allegations made by Kern to support his contention of ineffective counsel were that his counsel's investigation of the case was inadequate, that counsel called no witnesses on defendant's behalf, and that counsel failed to file a plea of insanity. The supreme court, in rejecting Kerns' claim, stated that an attorney is strongly presumed to be competent and that mere "allegations of incompetence, even if unrefuted, are not alone sufficient to rebut the presumption of competence."⁴⁶ Hence, since the defendant failed to show which witnesses the trial counsel had failed to interview or what exculpatory evidence counsel had failed to discuss, the court was unable to find anything in the record to warrant a charge of ineffective counsel. Additionally, the court stated that the defense of insanity, which counsel did not raise, was not susceptible to review, since such omission whether detrimental or beneficial was speculative where unsupported by the record.⁴⁷

Another consideration not discussed in *Kerns*, but used in other cases, is that not only must counsel cause a situation amounting to a mockery of justice that is shocking to the conscience of the reviewing court, but, more importantly, the defendant must be able to prove some specific harm caused by counsel's alleged inattention.⁴⁸

In *Cade v. State*,⁴⁹ the defendant was convicted of first-degree murder and homicide while in the perpetration of a burglary. On appeal, the defendant alleged, among other things, that he was denied the right to effective assistance of counsel, since during the course of the proceeding he was represented by three different attorneys. Interestingly, the incompetence of counsel was not alleged to be a contributing factor to defendant's unfavorable verdict.⁵⁰ Instead, the issue raised on appeal was "whether or not someone, as in the case of this Appellant, can receive effective assistance of counsel where three or more attorneys representing the accused at various and critical states of the proceedings operating on separate theories and varying degrees of zealotry can ultimately result in effective representation."⁵¹ The Indiana Supreme Court held that although a defendant is entitled to consult with counsel in every stage of the proceedings against him⁵² and although counsel should have an ade-

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Smith v. State*, 353 N.E.2d 470, 472 (Ind. Ct. App. 1976).

⁴⁹348 N.E.2d 394 (Ind. 1976).

⁵⁰*Id.* at 397.

⁵¹*Id.*

⁵²*Id.* at 398.

quate opportunity to prepare for a "zealous and active defense,"⁵³ the defendant failed to present facts to show that he was not "afforded this right."⁵⁴

It should be noted that some federal courts have used a different standard with respect to issues raised on appeal concerning inadequate representation of counsel. In *United States ex rel. Ortiz v. Sielaff*,⁵⁵ the test was whether counsel's performance met "a minimum standard of professional representation."⁵⁶ The court stated: "Much depends on the nature of the charge, of the evidence known to be available to the prosecution, of the evidence susceptible of being produced at once or later by the defense, and of the experience and capacity of defense counsel."⁵⁷ The facts in *Sielaff* revealed that counsel spent approximately three minutes immediately before trial interviewing alibi witnesses. Also, counsel failed to move for suppression of defendant's incriminating statement and identification. The court held that defendant was not denied the right to effective counsel, noting the charge (robbery), the straightforward case made by the prosecution and known to defense counsel, the strong witness identification, the limited use of an otherwise suppressible statement, and the trial counsel's past experience. Moreover, defendant did not at any time show how his attorney's alleged inadequate representation prejudiced his defense.

Similarly, in a number of other post-conviction proceedings the defendant failed to show that there had been a denial of effective counsel.⁵⁸

⁵³*Id.*

⁵⁴*Id.*

⁵⁵542 F.2d 377 (7th Cir. 1976).

⁵⁶*Id.* at 379.

⁵⁷*Id.* at 380.

⁵⁸*Parsley v. State*, 354 N.E.2d 185 (Ind. 1976) (counsel's failure to interpose insanity plea did not constitute ineffective representation); *Loman v. State*, 354 N.E.2d 205 (Ind. 1976) (defendant was not deprived of effective assistance of counsel by virtue of his attorney's failure to subpoena his sole alibi witness, in light of fact the defense counsel had previously interviewed prospective witness and found that his testimony would not establish alibi); *Dunn v. State*, 355 N.E.2d 870 (Ind. Ct. App. 1976) (that counsel only briefly on three occasions consulted with defendant was insufficient to overcome presumption that defendant was effectively represented by counsel).