XI. Professional Responsibility

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A. Disciplinary Actions

1. Nature of Disciplinary Proceedings.—Pursuant to the Indiana Constitution, the Indiana Supreme Court has exclusive jurisdiction to discipline attorneys.[1] The court has broad discretion in conducting disciplinary hearings and in imposing sanctions for misconduct. During the survey period the supreme court discussed the nature and constitutional requirements of such proceedings.

In *In re Lewis*,[2] the court reiterated that the standard for judging an attorney's conduct in a disciplinary proceeding is the *Code of Professional Responsibility for Attorneys at Law* and "that such standard exists independently of issues in civil or criminal litigation out of which an allegation of impropriety may develop."[3] Thus, although the trial court had found that Lewis did not render effective assistance of counsel, that determination was not controlling against Lewis in the disciplinary action. Rather, in order for the supreme court to impose sanctions for such misconduct, the Disciplinary Commission must introduce sufficient independent evidence from which the court can conclude that the attorney violated the *Code*.[4] In *Lewis*, no such evidence was presented on the charge of ineffective assistance.[5]

The supreme court analyzed the constitutional requirement of procedural due process within the unique framework of a disciplinary proceeding in *In re Roberts*.[6] In that case, the hearing officer[7] found that

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[1] Ind. Const. art. VII, § 4, provides in part:

> The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

[2] 445 N.E.2d 987 (Ind. 1983).

[3] *Id.* at 989.

[4] *Id.*

[5] *Id.* Lewis was, however, disbarred on the basis of other counts. *Id.* at 990.

[6] 442 N.E.2d 986 (Ind. 1983).

[7] A hearing officer is appointed, pursuant to Indiana Admission and Discipline Rule 23, to hear disciplinary matters and submit findings of fact and recommendations to the supreme court. Ind. R. Admiss. & Discp. 23, § 13. Admission and Discipline rules are reproduced in the Indiana Rules of Court (1983). The hearing officer's findings are not controlling upon the supreme court. *In re* Crumpacker, 269 Ind. 630, 383 N.E.2d 36 (1978), *cert. denied*, 444 U.S. 979 (1979).

Roberts had filed a frivolous grievance against a trial judge in violation of Disciplinary Rule 8-102(B),[8] even though the Disciplinary Commission did not specifically or generally allege such misconduct in the complaint.[9] Roberts asserted that this finding violated his right of due process. The Disciplinary Commission countered "that this issue was tried by the express or implied consent of the parties and that under Trial Rule 15(B) the complaint should be so amended."[10]

The supreme court determined that the constitutional issue of due process must be resolved with recognition of the unique character of disciplinary proceedings.[11] The court stated that neither the rules appropriate in civil cases[12] nor the constitutional standards necessary in criminal cases apply to disciplinary proceedings.[13] However, the court found that procedural due process does require that an attorney be notified of the charges and be given an opportunity to be heard in a disciplinary proceeding.[14] Furthermore, the court cited a United States Supreme Court decision holding that charges against an attorney cannot be amended after the attorney has testified.[15] Therefore, the court held that the complaint could not be impliedly amended under Trial Rule 15(B) and that procedural due process would not allow a finding of misconduct because Roberts was not aware that he was confronting a possible violation of Disciplinary Rule 8-102(B) until after he testified.[16]

2. Sanctions Imposed for Miconduct.—During the survey period, six attorneys resigned from the Bar of the State of Indiana.[17] Disciplinary

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[8]MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B) (1971) provides that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." The Code is reproduced in the INDIANA RULES OF COURT (1983).

[9]442 N.E.2d at 987.

[10]*Id.*

[11]*Id.* at 988.

[12]Admission and Discipline Rule 23, § 14(a) specifically provides that "[t]he rules of pleading and practice in civil cases shall not apply."

[13]442 N.E.2d at 988 (citing *In re* Kesler, 272 Ind. 161, 397 N.E.2d 574 (1979)).

[14]442 N.E.2d at 988 (citing *In re* Wireman, 270 Ind. 344, 367 N.E.2d 1368 (1977), *cert. denied*, 436 U.S. 904 (1977); *In re* Murray, 266 Ind. 221, 362 N.E.2d 128 (1977), *appeal dismissed*, 434 U.S. 1029 (1978)).

[15]442 N.E.2d at 988 (citing *In re* Ruffalo, 390 U.S. 544 (1968)).

[16]442 N.E.2d at 988. Roberts was suspended for six months for other misconduct. In determining the appropriate sanction, the court considered the entire course of Robert's conduct, "*including* any uncharged misconduct which is supported by the evidence in the record and relates to the finding of misconduct." *Id.* (emphasis added).

[17]*In re* Randall, 446 N.E.2d 1305 (Ind. 1983); *In re* Tyler, 445 N.E.2d 91 (Ind. 1983); *In re* Edwards, 435 N.E.2d 995 (Ind. 1982); *In re* Boyle, 435 N.E.2d 21 (Ind. 1982); *In re* Zenos, 433 N.E.2d 763 (Ind. 1982); *In re* Virgil, 432 N.E.2d 403 (Ind. 1982). Under Admission and Discipline Rule 23, § 17, an attorney confronted with allegations of misconduct may resign by delivering the required affidavit to the supreme court.

proceedings resulted in four disbarments,[18] seven suspensions,[19] and nine puplic reprimands.[20]

a. Conduct warranting disbarment.—In the only proceeding involving an attorney who commingled funds, the supreme court, consistent with its customary sanction for such misconduct, ordered disbarment.[21]

In *In re Schaumann*,[22] an attorney was disbarred primarily for his actions subsequent to writing a bad check. Respondent wrote a check for five thousand dollars as partial payment for equipment he had ordered. The bank returned the check due to insufficient funds. Then, respondent told the company that the failure to clear was due to bank error; however, the redeposited check again failed to clear. Moreover, when the company tried to repossess the equipment, respondent had already disposed of it. Thereafter, respondent failed to appear in court, causing the court to issue a bench warrant.

In disbarring Schaumann, the court emphasized that this was not simply a case of an attorney writing a bad check.[23] The court stated that, by knowingly misrepresenting that sufficient funds existed in his account, disposing of the equipment, and failing to appear in court, "[t]he Respondent has acted in blatant disregard of his ethical obligations and the laws which he has sworn to uphold. . . . His actions appear to be those of a common fugitive from the law."[24]

Disbarment was also ordered in two proceedings where the findings established repeated misconduct. In *In re Lewis*,[25] the attorney faced a complaint containing several counts. One count involved a case from which

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[18]*In re* Schaumann, 446 N.E.2d 1304 (Ind. 1983); *In re* Lewis, 445 N.E.2d 987 (Ind. 1983); *In re* Levinson, 444 N.E.2d 1175 (Ind. 1983); *In re* Lytal, 444 N.E.2d 853 (Ind. 1983).

[19]*In re* Roberts, 442 N.E.2d 986 (Ind. 1983) (six months); *In re* Callahan, 442 N.E.2d 1092 (Ind. 1982) (two years); *In re* Hirschauer, 441 N.E.2d 480 (Ind. 1982) (thirty days); *In re* Morris, 440 N.E.2d 675 (Ind. 1982) (ninety days); *In re* Leibowitz, 437 N.E.2d 973 (Ind. 1982) (two years); *In re* Brooks, 437 N.E.2d 47 (Ind. 1982) (ninety days); *In re* LeMaster, 433 N.E.2d 787 (Ind. 1982) (two years).

[20]*In re* Roache, 446 N.E.2d 1302 (Ind. 1983); *In re* Keithley, 445 N.E.2d 997 (Ind. 1983); *In re* Gibson, 444 N.E.2d 852 (Ind. 1983); *In re* Cissna, 444 N.E.2d 851 (Ind. 1983); *In re* Fasig, 444 N.E.2d 849 (Ind. 1983); *In re* Lantz, 442 N.E.2d 989 (Ind. 1982); *In re* Frank, 440 N.E.2d 676 (Ind. 1982); *In re* O'Brien, 437 N.E.2d 972 (Ind. 1982); *In re* Mahoney, 437 N.E.2d 49 (Ind. 1982).

[21]*In re* Lytal, 444 N.E.2d 853 (Ind. 1983). In one case, the respondent had refused to distribute settlement funds; and in another, the respondent had kept a retainer fee while failing even to file suit for his client. Respondent also had urged his client not to accept an offered settlement, claiming that he could obtain a larger amount. Thereafter, he failed to appear at a scheduled pre-trial conference and at hearing on the defendant's motion to dismiss which was then granted.

[22]446 N.E.2d 1304 (Ind. 1983).

[23]*Id.* at 1305.

[24]*Id.* Respondent also was not an Indiana Bar Association member in good standing for failure to pay his annual registration fees since 1976. *Id.* at 1304.

[25]445 N.E.2d 987 (Ind. 1983).

Lewis had requested leave to withdraw. Although he told the court that he had been paid less than one hundred dollars, the Disciplinary Committee showed that he was paid more. Another count involved his campaign for Jackson County Prosecutor, during which he suggested special consideration for his friends if elected. A third count concerned an occasion on which Lewis threatened a witness with litigation unless he retracted his affidavit. On another occasion, Lewis failed to advise a client who was filing bankruptcy against transferring title to mortgaged property. Afterward, the client was charged with a criminal offense involving fraud upon creditors, and Lewis demanded additional attorney fees for this representation. The supreme court found that these actions constituted a "pattern of repeated misconduct"[26] which required the strongest sanction available. The court also noted its duty to protect the public from future acts by the respondent.

In re Levinson[27] also addressed a multiple count complaint. The court found that Levinson had engaged in illegal conduct involving moral turpitude by committing acts of public indecency.[28] In his professional relationships, Levinson was found to have neglected legal matters entrusted to him, damaged the interests of his clients, engaged in misrepresentation, and prejudiced the administration of justice.[29]

In deciding the appropriate sanction, the court properly looked at the gravity of the respondent's misconduct and the harm caused to his clients. Therefore, noting that Levinson's conduct was not that of a rational, educated person, the court found that its duty was to protect the public from the effect of his problem rather than to look for its root.[30]

b. Conduct warranting suspension.—Two proceedings involving attorney neglect of legal matters resulted in ninety-day suspensions for the attorney. In *In re Morris*,[31] the court emphasized that, although the neglect complained of was probably minimal, it occurred immediately after the attorney had been privately reprimanded for similar neglect.[32] The court

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[26]*Id.* at 990. Lewis was also charged with ineffective assistance of counsel. *See supra* text accompanying notes 2-5.

[27]444 N.E.2d 1175 (Ind. 1983).

[28]*Id.* at 1176. Police observed Levinson standing at a window of his residence, nude, masturbating, and waving to attract attention. The court found that this conduct "is of such nature as to establish the requisite baseness or depravity of social duty to constitute an act of moral turpitude." *Id.*

[29]*Id.* at 1176-77. For example, Levinson failed to enter an appearance and file a counterclaim resulting in a default judgment which he was unable to have set aside. He also failed to file for increased child support, yet kept the retainer, and he failed to appear and instructed his client not to appear at a final dissolution hearing even though his motion for continuance was denied.

[30]*Id.* at 1177.

[31]440 N.E.2d 675 (Ind. 1982).

[32]*Id.* at 676.

determined that, because its prior leniency was apparently misunderstood by Morris, a stronger sanction was needed.[33]

Repeated neglect by an attorney resulted in only a ninety-day suspension in *In re Brooks*[34] pursuant to the court's approval of an agreement for discipline by the parties. In contrast to *In re Lewis*[35] and *In re Levinson*,[36] where repeated misconduct resulted in disbarment, the agreed upon sanction in *Brooks* seems very lenient. Apparently significant was the finding that the parties recognized "mitigating circumstances which explain Respondent's conduct in the foregoing matters."[37] Unfortunately the mitigating circumstances the court seems to have relied upon were not enumerated, thus leaving any further distinction impossible.

Suspension was ordered for two years in *In re Callahan*[38] as a result of an extortion scheme. In 1969, respondent and his law partner were members of an association interested in public construction in East Chicago. At this same time, the Board of Sanitary Commissioners proposed the construction of a water pollution abatement project which respondent's association vigorously opposed. Later that year, respondent, his law partner, and the president of the association met with the superintendent of the Board and threatened to stop the project unless they were paid.[39] Although respondent did not actively participate, his partner coerced the superintendent to persuade the general contractor of the project to retain their law firm "ostensibly as legal counsel."[40] Over time, respondent's firm received $55,000 as "attorneys fees for legal work" rendered for the contractor.[41] In determining the appropriate sanction, the court stated that it would consider "the specific acts of misconduct, this Court's responsibility to preserve the integrity of the Bar and the risk, if any, to which we will subject the public by permitting the Respondent to continue in the profession or be reinstated at some future date."[42]

Under these guidelines, the court found that, although Callahan did not orchestrate the extortion scheme, he acquiesced in the plan and participated in the spoils. The court noted that the temptation and availability of "easy money," which may always be present in the professional

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[33] *Id.*

[34] 437 N.E.2d 47 (Ind. 1982).

[35] 445 N.E.2d 987 (Ind. 1983).

[36] 444 N.E.2d 1175 (Ind. 1983).

[37] 437 N.E.2d at 49.

[38] 442 N.E.2d 1092 (Ind. 1982).

[39] *Id.* at 1093.

[40] *Id.* at 1093-94.

[41] *Id.* at 1094. Respondent and his partner received approximately $2,500 each month which they divided into three equal parts. The president of the association received one part, supposedly for consultant services. Respondent and his partner never performed any significant legal work.

[42] *Id.*

life of an attorney, "is the very reason for the existence of our professional rules of ethics."[43] The court discussed the mitigating circumstances present in *Callahan*. It noted that the extortion had occurred over twelve years ago with no evidence of other misconduct in the interim period. Callahan also voluntarily resigned as judge of the East Chicago City Court during these proceedings.[44] The court found, however, that neither inexperience nor naivete could justify even acquiescing in an extortion scheme.[45] The court did seem to consider inexperience and naivete in opting for a two year suspension over disbarment. Taking into account all these considerations, the court concluded that suspension was necessary to preserve the integrity of the Bar, but that "[Callahan] does not present such a risk as to preclude the possibility of reinstatement at a later date."[46]

In re Roberts[47] addressed an attorney's failure to promptly disclose his knowledge of the improper conduct of a juror. In a jury questionnaire, under penalty of perjury, the juror incorrectly identified his wife's employer. The juror's wife was actually employed as a secretary in the respondent's law firm. During voir dire, respondent did not question the juror about his wife's employment although he knew of the questionnaire, nor did he reveal the connection when counsel for the other side questioned the juror about his relationship with the respondent. Only after the jury had begun deliberations did the respondent disclose the relationship.[48] Roberts was suspended for six months.[49]

In *In re Leibowitz*,[50] the attorney was suspended for two years for, among other violations, entering into a prohibited business relationship with a client and neglecting legal matters.[51] After Leibowitz represented a client in a dissolution of marriage action in which the client received a substantial property settlement, the attorney borrowed $25,000 from the client. In finding this constituted an improper business relationship, the court emphasized that a client should "be shielded from self-serving con-

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[43] *Id.* at 1095.

[44] *Id.* The court often applauds voluntary withdrawal from the judiciary as indicative of genuine remorse and a mitigating circumstance when determining the appropriate sanction. *See, e.g., In re* Littell, 260 Ind. 187, 294 N.E.2d 126 (1973); *cf. In re* LeMaster, 433 N.E.2d 787 (Ind. 1982) (court considered an attorney's voluntary withdrawal from practice in determining the effective date of a disciplinary sanction).

[45] 442 N.E.2d at 1095.

[46] *Id.*

[47] 442 N.E.2d 986 (Ind. 1983).

[48] *Id.* at 987. The court found that "[b]y his continued silence, [Roberts] violated a most fundamental precept of our judicial system, the impartiality and integrity of the jury." *Id.* at 988. The court did not consider Robert's disclosure to be a mitigating factor. *Id.* at 989. When the trial judge approached Roberts in order to resolve the matter of nondisclosure, Roberts retaliated by filing a frivolous grievance against him. *Id.* at 987. For discussion of this issue, see *supra* notes 6-16 and accompanying text.

[49] 442 N.E.2d at 989.

[50] 437 N.E.2d 973 (Ind. 1982).

[51] *Id.* at 974-75.

duct of his attorney."[52] Finally, in *In re LeMaster*,[53] the court suspended an attorney for two years for violations of Regulation 10B-5 under the Securities Act of 1933. As an officer and director of LaPan Corporation, the attorney had made misrepresentations of fact and omitted material information in the sale of stock to investors.

c. Conduct warranting public reprimand.—During the survey period, the court addressed a wide variety of misconduct which warranted admonishment. In one proceeding, the court reprimanded an attorney appointed as appellate counsel in two criminal cases for failing to timely file both appeals.[54] In another criminal case, the attorney suggested that his friendship with the judge would help in reducing the bond of his client and later made his fee contingent upon the client's receipt of a lesser criminal penalty.[55] The survey period also saw an attorney reprimanded for communicating with a person he knew to be represented by an attorney on the subject matter of the representation[56] and another admonished for soliciting clients.[57]

The most common misconduct warranting a reprimand during the survey period was accepting employment with one client which was likely to affect adversely the attorney's independent judgment on behalf of another client.[58] In *In re Cissna*,[59] the court found that the attorney's

> representation of a husband in a prior non-related matter, his representation of the family corporation and his subsequent representation of the wife in a marriage dissolution matter where the corporate assets became the subject of the property settlement agreement, portray the sort of division of loyalties that is prohibited by the rules of ethics.[60]

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[52]*Id.* at 974. The court focused on the fact that Leibowitz used knowledge gained during a professional relationship for his own benefit. *Id.* at 974-75.

[53]433 N.E.2d 787 (Ind. 1982).

[54]*In re* Gibson, 444 N.E.2d 852 (Ind. 1983). The court indicated that this neglect was based in part upon the client's financial status. The court concluded that Gibson betrayed the trust not only of his clients but also of the appointing court. *Id.* at 853.

[55]*In re* Fasig, 444 N.E.2d 849 (Ind. 1983). Such conduct constitutes a violation of both DR 9-101(c) and DR 2-106(c) (an arrangement for a contingent fee in a criminal case).

[56]*In re* Mahoney, 437 N.E.2d 49 (Ind. 1982).

[57]*In re* Frank, 440 N.E.2d 676 (Ind. 1982). Frank sent letters to unrepresented persons who had been charged with driving under the influence of alcohol, advising them of his success in plea bargaining such cases. The court found this solicitation went beyond the information limitation. *Id.* at 677. Justice Prentice, however, doubted that sanctions for solicitation had much effect and would have directed the Supreme Court Disciplinary Commission to submit a brief on the subject or to dismiss the case. *Id.* (Prentice, J., separate opinion). *Cf.* Order Amending Code of Professional Responsibility (Ind. Jan. 17, 1984).

[58]MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A), (B) (1971).

[59]444 N.E.2d 851 (Ind. 1983).

[60]*Id.* at 852. At the time of the property settlement agreement, Cissna tendered to the parties a release of him and his firm from any liability in this matter. The court found that this attempt to exonerate himself "aggravated his misconduct." *Id.*

In *In re Keithley*,[61] the attorney represented the wife in a dissolution for marriage action. Before that proceeding was concluded, the client informed Keithley that she wished to obtain custody of her child from a prior marriage after the dissolution was final. Several months later, the father retained respondent to enforce the custody order, and respondent prepared a petition for contempt citation for him. When the wife arrived at respondent's office for her appointment, respondent served her with the contempt petition. The court concluded that respondent's conduct was "not merely inadvertent . . . dual representation of conflicting interests. The Respondent not only changed sides in a sensitive issue of child custody . . . but he did so in a particularly callous and reprehensible manner."[62]

Two cases addressed the related problem of the conflicts between an attorney's public and private duties. *In re O'Brien*[63] addressed a blatantly improper representation by an attorney serving in a judicial capacity. O'Brien was reprimanded for failing to disqualify himself as judge pro tempore of the Martin Circuit Court and entering a dissolution decree and property settlement in a case in which he represented the husband.[64] Although O'Brien acted in accordance with the parties' wishes, the court stated that "it is inherently improper to act as an advocate for one party in a controversy and then serve as a decision-making authority to resolve the conflict."[65] The court found the defendant's action to be an "obvious violation of a very basic principle of professional ethics."[66] In *In re Lantz*,[67] the court reviewed a case in which the attorney represented a person in a civil case while simultaneously representing the State in the prosecution of the same person. The court reiterated that "[t]he mere possibility of an adverse effect upon the exercise of his free judgment prevents a lawyer from representing clients with opposing interests."[68] The significance of these cases is the court's obvious insistence that attorneys keep their public legal roles absolutely free from conflict with their private practices.[69]

Another case resulting in a reprimand addressed an attorney's use of a client confidence to the disadvantage of the client and the advantage of himself. In *In re Roache*,[70] the respondent was retained to represent his client in the purchase of a business. After receiving the first counteroffer, the client insisted on dealing with the vendors directly. Shortly thereafter, the client called Roache for further consultation. The respondent

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[61] 445 N.E.2d 997 (Ind. 1983).

[62] *Id.* at 998.

[63] 437 N.E.2d 972 (Ind. 1982).

[64] *Id.* at 973. The wife was not represented by counsel. *Id.* at 972.

[65] *Id.* at 973.

[66] *Id.*

[67] 442 N.E.2d 989 (Ind. 1982).

[68] *Id.* at 990.

[69] *See infra* notes 97-125 and accompanying text.

[70] 446 N.E.2d 1302 (Ind. 1983).

informed the client that he could no longer represent him because he was now representing Roache's brother in the purchase of the same business.

The client then told the vendors that, because respondent no longer represented him, he could not commit himself to the closing. That same day, the respondent informed the vendors that the client was no longer interested. Roache then signed an offer to purchase the business. Several days later, after learning from the client's new attorney that the client was still interested, the respondent offered to assign his own interest in the business to the client. That offer was declined. Respondent later rescinded his offer to purchase the business, and the client eventually was able to buy it.

The court found that Roache's actions caused the client unnecessary delay and inconvenience in buying the business.[71] The court concluded that Roache had violated the Code of Professional Responsibility by using his position to his client's disadvantage and to his own advantage and by withdrawing "from employment without having taken reasonable steps to avoid foreseeable prejudice to the rights of his client."[72]

B. Non-Disciplinary Actions

1. The Unauthorized Practice of Law.—During the survey period, the Indiana Supreme Court was twice called upon to restrain the unauthorized practice of law.

In *State v. Gould*,[73] the court held that a labor representative employed by the Indiana State Employees Association was not engaged in the practice of law when appearing before the State Employees' Appeals Commission on behalf of state employees.[74] Rejecting the findings of fact and conclusions of its appointed commissioner, the court found that the administrative nature of the hearing permitted representation by non-lawyers.

Pursuant to the State Personnel Act,[75] a state employee with an unsatisfactorily resolved complaint arising out of employment "may seek an appeal to the commission, which is charged with the duty of conducting a public hearing 'with the right to be represented and to present evidence.' "[76] Eli W. Gould, the respondent, appeared on behalf of a state employee before the Commission. Gould requested the issuance of subpoenas, made arguments, presented evidence, and examined and cross-examined witnesses.

The court treated these facts as a case of first impression in Indiana,

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[71] *Id.* at 1303.

[72] *Id.* at 1303-04.

[73] 437 N.E.2d 41 (Ind. 1982).

[74] *Id.* at 43-44.

[75] IND. CODE § 4-15-2-1 (1982).

[76] 437 N.E.2d at 42 (citing IND. CODE § 4-15-2-35 (1982)).

distinguishing it from previous unauthorized practice of law decisions[77] on the basis of Gould's representation before an administrative hearing. Despite arguments by the State that the Commission followed a judicial model and therefore required a skilled lawyer, the court determined that use of a judicial model was not dispositive.[78] Rather, the court looked to the confined nature of the hearing, "the character of the tribunal, the interests at stake, and the potential for ineptness in the representation to create a hazard for the public" in determining that the representation of a "complaining employee" before the Commission did not represent the practice of law.[79]

In *Gould*, the court provided some guidelines for determining if appearances before a state administrative agency constitute the practice of law. The court looked first to the potential for detriment to the person being represented. The court noted that members of the state Commission were not required to have legal training and concluded that "legal techniques and legal concepts would have a diminished impact"[80] before the Commission. Recognizing that the complaining employee had considerable interest in the hearing in terms of money and future employment, the court nonetheless found that because the possibility of appeal from the Commission's decision existed, the employee's interests would not suffer irrevocable harm. The court looked next to the "potential for detriment to the public from inept representation" and found such a potential "speculative" in that the hearing was part of a process taking place under "one roof" and limited to state employees.[81]

The unauthorized practice of law has long been a gray area of case law.[82] The *Gould* opinion is helpful in revealing countervailing factors for approving a practice which otherwise could be construed as unauthorized practice.

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[77] *See generally* Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982) (negotiating a disputed claim settlement between an insured and his insurance company constitutes the practice of law); State *ex rel.* Indiana State Bar Ass'n v. Osborne, 241 Ind. 375, 172 N.E.2d 434 (1961) (preparing and drafting a will or giving advice as to its legal effect is the practice of law); Fink v. Pedan, 214 Ind. 584, 17 N.E.2d 95 (1938) (giving legal advice to clients and transacting business connected with the law constitutes the practice of law); Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 (1893) (preparing legal instruments which secure legal rights is the practice of law).

[78] 437 N.E.2d at 43.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See* State v. Indiana Real Estate Ass'n, 244 Ind. 214, 191 N.E.2d 711 (1963).

> There is a twilight zone between the area of activity which is clearly permitted to the layman, and that which is denied him.
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> Thus, the question which this court must determine is where, within this "twilight zone" it is proper to draw the line between those acts which are and are not permissible to persons who are not lawyers.

Id. at 220-21, 191 N.E.2d at 714-15.

In *Professional Adjusters, Inc. v. Tandon*,[83] the supreme court declared unconstitutional an Indiana statute[84] which provided for the licensing of certified public insurance adjusters.[85] The court found that statute to be a violation of the sections of the Indiana Constitution which place exclusive control over the practice of law in the Indiana Supreme Court.[86]

Professional Adjusters filed suit against the Tandons whom it had represented in settling an insurance claim for a fire loss to the defendant's mobile home. The Tandons had agreed to pay a percentage of the insurance settlement in exchange for Professional Adjusters' assistance in adjusting their claim. This agreement was signed only by the Tandons who moved to dismiss, alleging that the contract was based upon an unconstitutional statute and was therefore unenforceable. The trial court granted the motion, agreeing that the Indiana statute which provided for licensing of certified public adjusters was unconstitutional.[87]

The supreme court held that Professional Adjusters' representation of the Tandons amounted to the unauthorized practice of law in that the plaintiff had formulated and submitted a claim for negotiation.[88] Even though a bargaining process of offer and counteroffer had not begun, the court held that Professional Adjusters had engaged in negotiation "by submitting a figure which [the Tandons] would deem acceptable for their loss and contemplating in return a response from the insurance carrier that would effect the settlement."[89] The court stated that negotiation of settlement under an insurance contract requires the interpretation of the terms of that contract and held that the statute which authorized such negotiation without admission to the bar was unconstitutional.[90]

Justice Hunter dissented.[91] He first argued that, because the contract

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[83]433 N.E.2d 779 (Ind. 1982).

[84]IND. CODE §§ 27-1-24-1 to -9 (1982). This statute provided in part:

> (a) The term "Public adjuster" shall include every person or corporation who, or which, for compensation or reward, acts on behalf of, or aids in any manner, an assured, in negotiating for, or effecting, the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property . . . .

Id. § 27-1-24-1(a).

The Indiana Public Adjusters statute was amended in 1983. Act of Apr. 4, 1983, Pub. L. No. 257-1983, § 1, 1983 Ind. Acts. 1657, 1657-64 (codified at IND. CODE §§ 27-1-27-1 to -11 (Supp. 1983)) (repealing IND. CODE §§ 27-1-24-1 to -9 (1982)). For further discussion of this statute, see Arthur, *Insurance, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 240 (1984).

[85]433 N.E.2d at 783.

[86]IND. CONST. art. VII, § 4, art. III, § 1.

[87]433 N.E.2d at 780.

[88]*Id.* at 782. Although the court recognized that the issue was not before it, it indicated that no contract between Professional Adjusters and the Tandons may have occurred. *Id.* at 781. Because no representative of the plaintiff had signed the agreement, the court suggested that the writing was merely an assignment without consideration. *Id.*

[89]*Id.* at 782.

[90]*Id.* at 783.

[91]*Id.* at 784 (Hunter, J., dissenting).

was unenforceable without Professional Adjusters' signature, the court did not have to address the statute's constitutionality. Further, Justice Hunter stated that Professional Adjusters' acts did not constitute the practice of law.[92] He argued that if the reasoning of the majority was valid, then adjusters working for insurance companies also engage in the practice of law. Justice Hunter stated that "no valid distinction" exists between the services performed by a public adjuster and an insurance administrator or claims representative who negotiates settlements for insurance companies under the authority of other Indiana statutes.[93] Therefore, Justice Hunter concluded that public adjusters and insurance company adjusters negotiate the same contractual rights which the majority held necessitated a licensed attorney's involvement.[94]

In *Professional Adjusters*, the court indicated that acts performed by agents in negotiating insurance settlements constitute the practice of law if the agent represents the public but do not constitute the practice of law if he represents a corporation. Therefore, although the court clearly based its determination on the act of contract interpretation, representation of the general public actually controls. As Justice Hunter points out in his dissent, the majority did not consider the protection of public interest built into the certified public adjuster statute by the Indiana Legislature.[95] This protection, coupled with the expediency of using competent, trained settlement experts, Justice Hunter argued, should prevent the public from being "deprived of the same nonlegal assistance in the matter of out-of-court settlements which insurers enjoy."[96]

2. Conflicts of Interest.—Two cases during the survey period dealt with prior representation and the "substantial relationship" test.[97]

In *Simmon's, Inc. v. Pinkerton's, Inc.*,[98] the defendant, Pinkerton's, moved to disqualify plaintiff's counsel, who were members of a firm which had represented Pinkerton's in a previous action. The magistrate denied

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[92]*Id.*

[93]*Id. See* IND. CODE §§ 27-1-25-1, 27-8-4-10 (1982).

[94]433 N.E.2d at 784 (Hunter, J., dissenting).

[95]*Id.* at 786. For example, Indiana Code sections 27-1-24-1 to -9 provided for the regulation of public adjusters by the Commissioner of Insurance; the licensing of public adjusters only after passing a written examination; sanctions such as probation, suspension, or revocation of an adjuster's license; and prohibitions against counseling clients to refrain from seeking legal advice.

[96]433 N.E.2d at 787 (Hunter, J., dissenting). Justice Hunter noted that "public adjusters" are commonplace in the United States. He stated that in no other jurisdiction has a public adjuster statute been held unconstitutional. *Id.*

[97]The substantial relationship test was formulated in *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). The test is used to determine whether a prior representation of a client by a particular law firm has revealed such confidences and secrets of that client that present representation of a third party by that same firm against that client violates Canons 4 and 9 of the Model Code of Professional Responsibility. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982).

[98]555 F. Supp. 300 (N.D. Ind. 1983).

the disqualification motion, concluding that no substantial relationship existed between the two representations. The United States District Court for the Northern District of Indiana reviewed de novo.[99]

In *Simmon's*, plaintiff's attorneys were members of the firm of Robins, Zelle, Larson & Kaplan which had in an earlier case, *Guardsmark v. WCCO-TV*,[100] represented Pinkerton's. The firm at the time of the *Guardsmark* representation had different members and used the name of Robins, Davis & Lyons. Pinkerton's alleged that the attorneys who continued from the predecessor to the present firm had gained confidential information during the *Guardsmark* representation, which was presumed to be within the knowedge of all attorneys in the current Robins firm, requiring the firm's disqualification.[101]

The district court, in its de novo review, followed closely the analysis used by the Seventh Circuit Court of Appeals in *Freeman v. Chicago Medical Instrument Co.*[102] That decision reflected a careful balancing of ethical and practical considerations. The court in *Freeman* termed disqualification "a drastic measure which courts should hesitate to impose except when absolutely necessary."[103] The *Freeman* court urged caution in granting disqualification motions because they terminate an existing attorney-client relationship of the client's choosing and because they present the potential for harassment.[104] The *Freeman* court noted that strictly applied disqualification rules " 'might seriously jeopardize [young lawyers'] careers by temporary affiliation with large law firms.' "[105] The court also noted that clients might suffer an adverse effect because disqualification rules could cause " 'difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporally remote connections with attorneys for the other side.' "[106]

As in *Freeman*, the *Simmon's* court employed a two-step analysis in determining whether disqualification was warranted. The court asked: "(1) Is there a 'substantial relationship' between the *Guardsmark* representation . . . and the instant litigation . . . that will raise a rebuttable presumption that confidential information is possessed . . .? (2) If the presumption has arisen, . . . [has it been rebutted]?"[107]

To determine if a "substantial relationship" existed under the first inquiry, the court must follow three steps. First, it must " 'make a fac-

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[99]*Id.* at 302.

[100]*Guardsmark* was settled prior to trial. *Id.* at 303.

[101]*Id.* at 302.

[102]689 F.2d 715 (7th Cir. 1982).

[103]*Id.* at 721.

[104]*Id.* at 721-22.

[105]*Id.* at 723 n.11 (quoting Laskey Bros. of W. Va. v. Warner Bros. Pictures, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)).

[106]689 F.2d at 723 n. 11 (quoting Laskey Bros. of W. Va. v. Warner Bros. Pictures, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)).

[107]555 F. Supp. at 303.

tual reconstruction of the scope of the prior legal representation.' ''[108] Second, the court must determine '' 'whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters.' ''[109] Finally, the court must determine whether '' 'the information is relevant to the issues raised in the litigation pending against the former client.' ''[110]

Finding no previous case law on the movant's burden of proof, the *Simmon's* court accepted ''any logical factual reconstruction'' which can support the movant's contention as to the scope of prior representation.[111] However, the court concluded that the limited scope of the *Guardsmark* representation did not support the inference, required in the second step, that during the prior representation confidential information was transmitted.[112] Thus, the court held that no ''substantial relationship'' existed.[113]

The court stated that, even if a substantial relationship had been established, the presumption of shared confidences would have been rebutted by the contents of uncontroverted affidavits filed by plaintiff's counsel. In these affidavits, Simmon's counsel denied having access to the *Guardsmark* files and denied having any discussions with other firm attorneys on the subject of *Guardsmark*. These affidavits revealed that the Robins firm had taken special care in isolating the Simmon's attorneys from the *Guardmark* files.[114] The court found that these uncontroverted affidavits, taken together, were sufficient to rebut the presumption of revealed confidences.[115]

The *Simmon's* decision reveals the substantial barriers erected by the courts to successful motions for disqualification of counsel. Movants who first satisfy strict criteria to establish a substantial relationship between prior and present representation hold only a rebuttable presumption that the confidences have been revealed. This presumption, once attained, is at best tenuous. The *Simmon's* decision indicates that the standards for rebuttal will not be high.

Several months before the district court's decision in *Simmon's*, the Indiana Supreme Court had occasion to discuss the substantial relationship test in a case of first impression in Indiana, *State v. Tippecanoe*

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[108]*Id.* at 302 (quoting *Freeman*, 689 F.2d at 722 n.10 (quoting T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953))).

[109]555 F. Supp. at 302 (quoting *Freeman*, 689 F.2d at 722 n.10 (quoting T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953))).

[110]555 F. Supp. at 302 (quoting *Freeman*, 689 F.2d at 722 n.10 (quoting T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953))).

[111]555 F. Supp. at 303.

[112]*Id.* at 304.

[113]*Id.*

[114]The *Guardsmark* files were reduced to microfilm and all attorneys involved in actions relating to Pinkerton's were denied access. *Id.* at 305.

[115]*Id.*

County Court.[116] In *Tippecanoe*, the court was called upon to decide "whether the entire office of the prosecuting attorney in one county should be disqualified because the elected prosecuting attorney was previously a defense attorney for the accused in two prior cases."[117] Under the facts, John Meyers, Tippecanoe County Prosecutor, charged the defendant (Smith) with theft and with being an habitual offender. Meyers had previously defended Smith on two charges while serving as a public defender.

First, the court in *Tippecanoe* used a substantial relationship test in determining whether Meyers should have been disqualified. The court determined that Smith's earlier representations by Meyers had no relation to the present theft case.[118] The court, however, found that the habitual offender charge was based upon the two prior offenses and, therefore, that a substantial relationship existed.[119] The court held that, because it could not "say without speculation that the prosecutor's knowledge of those prior cases [would] not actually result in prejudice to [the] defendant," Meyers must be disqualified.[120]

After disqualifying Meyers, the court then turned to the question of disqualification of Meyers' entire staff. The court noted that, while disqualification of an entire firm when one member is disqualified is strictly enforced in civil actions, it is not as strictly applied against government agencies. This distinction is based upon the absence of a common financial interest among members of the government agency.[121] Citing *State ex rel. Goldsmith v. Superior Court*,[122] the court stated that, because of this distinction, disqualification of a *deputy* prosecutor does not always require a "recusation of the entire staff of the prosecutor."[123] However, the court found that, because the prosecutor had administrative control over his staff, when the prosecutor himself was disqualified, " 'his entire staff

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[116]432 N.E.2d 1377 (Ind. 1982).

[117]*Id.* at 1378.

[118]*Id.* at 1379.

[119]*Id.*

[120]*Id.* The court found that "public trust in the integrity of the judicial process" required it "to resolve any serious doubt in favor of disqualification." *Id.*

[121]*Id.* The court quoted from State *ex rel.* Goldsmith v. Superior Court, 270 Ind. 487, 386 N.E.2d 942 (1979), as follows:

> The relationship between the prosecuting attorney and his sole client, the citizens of the circuit in which he serves, is fundamentally and decisively different from a lawyer and the ordinary attorney-client relationship. The lawyers in a law firm have a common financial interest in the case whereas the deputies in a prosecutor's office have an independent duty by law to represent the State of Indiana in criminal matters. Their relationship to each other, rather than pecuniary, is no more than sharing the same statutory duties; and the interest of one deputy which requires him to testify will ordinarily have no financial or personal impact on the other deputies in the office. Thus, there is no reason to recuse the entire staff of deputies of the prosecuting attorney when one deputy becomes a witness in a case handled by the office.

432 N.E.2d at 1379 (quoting *Goldsmith*, 270 Ind. at 490, 386 N.E.2d at 945).

[122]270 Ind. 487, 386 N.E.2d 942 (1979).

[123]432 N.E.2d at 1379.

of deputies must be recused in order to maintain the integrity of the process of criminal justice.' ''[124]

Appointment of a special prosecutor is a costly proposition for Indiana county governments. The *Tippecanoe* decision deters the election of experienced attorneys within the county because past representations will probably prevent them and their entire staff from performing their elected duties. The decision is likely to prove particularly detrimental in the smaller Indiana counties which have part-time prosecutors. The possibility of conflicts is even stronger where the prosecutor concurrently conducts a part-time private practice. Recent decisions such as *Tippecanoe*[125] have made it increasingly difficult for prosecutors to practice outside their elected offices. In counties where prosecutor's salaries are small, this inability to obtain additional income from private practice may well dissuade qualified attorneys from seeking office.

Although the *Simmon's* decision held that the presumption of shared confidences is rebuttable and does not absolutely require disqualification in civil actions, it is unlikely that the *Simmon's* decision will prevent disqualification of prosecutors' staffs. The *Simmon's* court allowed the presumption to be rebuttable in the interest of a client's right to choose an attorney. That choice being absent, the courts will probably avoid any appearance of conflict in order to uphold the public's trust in the integrity of the criminal justice system.

3. Attorney-Client Contracts.—In *Whitehouse v. Quinn*,[126] the Second District Court of Appeals concluded that a twenty-year statute of limitations should apply to legal malpractice actions based on certain types of contracts.[127]

Appellant, David Whitehouse, entered into a written contingent fee contract with appellee, Thomas Quinn, Jr. for Quinn's representation of Whitehouse on a personal injury claim. In this contract, Quinn agreed " 'to represent and prosecute [Whitehouse's personal injury] claim to final settlement or judgment . . . against several defendants, including Russell A. Toothman, Michael Vaccarello, Kathie K. Christy *and others*.' ''[128] Quinn recovered from Toothman and from Vaccarello. As part of the Vaccarello recovery, Whitehouse executed a release which discharged anyone associated with Whitehouse's injury from further liability. Approximately three years later, Whitehouse filed an action against Quinn based on one count of negligence and one count of breach of the contingent fee contract, claiming Quinn had failed " 'to secure all of the remedies

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[124]*Id.* (quoting *Goldsmith*, 270 Ind. at 491, 386 N.E.2d at 945).

[125]*See, e.g., In re* Lantz, 442 N.E.2d 989 (Ind. 1982), discussed *supra* text accompanying notes 67-68.

[126]443 N.E.2d 332 (Ind. Ct. App. 1982).

[127]*Id.* at 337.

[128]*Id.* at 334 (quoting from the contingent fee contract).

available.' "[129] The trial court granted Quinn's motion for summary judgment, holding Whitehouse's complaint to be governed and barred by the two-year statute of limitations period of Indiana Code section 34-1-2-2.[130]

On appeal, the court addressed the narrow issue of whether "an action against an attorney based upon that attorney's professional services was exclusively an action for legal malpractice based upon negligence."[131] The court relied on the nineteenth century decision, *Foulks v. Fall*,[132] and stated that "a claim predicated upon the nonperformance of an *express* promise contained in a written attorney-client contract . . . is governed by the statute of limitation applicable to written contracts."[133] The court indicated that the statute of limitations for written contracts will attach whenever the "attorney-client contract . . . bears more than a remote or indirect connection with [the plaintiff's] claim, and the contract is more than a mere link in the chain of evidence needed to state the claim."[134]

The court reasoned that its conclusion was consistent with the Indiana Supreme Court's holding in *Shideler v. Dwyer*.[135] *Shideler* established that the applicable statute of limitation is determined by "the nature or substance of the cause of action" and not by "pleading technicalities."[136] In *Shideler*, the court found the plaintiff's negligence claim against an attorney to be governed by the two-year statute of limitations applicable to loss of interest in personal property.[137] The *Whitehouse* court distinguished *Shideler*, noting that the plaintiff in *Shideler* was neither the attorney's client nor a party to an express contract.[138]

Although the court of appeals held that Whitehouse's action in contract was not barred by the applicable limitations period, it determined that the two-year statute of limitations barred his negligence claim based upon Quinn's failure to disclose the effect of the release.[139] Relying on a medical malpractice decision, *Guy v. Shuldt*,[140] the court found that

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[129] *Id.* (quoting for Count I of the Complaint).

[130] The court cited to IND. CODE ANN. § 34-1-2-2 (Burns 1973) (current version at IND. CODE § 34-1-2-2(1) (1982)).

[131] 443 N.E.2d at 336.

[132] 91 Ind. 315 (1883).

[133] 443 N.E.2d at 337 (citing *Foulks*, 91 Ind. at 321) (emphasis added).

[134] 443 N.E.2d at 337.

[135] 417 N.E.2d 281 (Ind. 1981).

[136] *Id.* at 285-86.

[137] *Id.* at 288. For comment on the *Shideler* decision, see MacGill, *Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 297 (1981).

[138] 443 N.E.2d at 338.

[139] *Id.* at 339.

[140] 236 Ind. 101, 138 N.E.2d 891 (1956). The *Whitehouse* court reasoned that the supreme court had "declared constructive or passive fraud operates to toll the statute where a fiduciary relationship exists and the fiduciary fails to disclose material information to his charge." 443 N.E.2d at 339 (citing *Guy*, 236 Ind. at 109, 138 N.E.2d at 895). The *Whitehouse* court quoted from *Guy* as follows:

the statute had begun to run when the attorney-client relationship had ended and the client could no longer rely on the attorney's duty to inform.[141]

The *Whitehouse* decision clarifies the uncertainty that has long existed as to the effects of fraudulent concealment upon the accrual of a cause of action for legal malpractice. It can now be concluded that the two-year statute of limitations based upon a negligence claim for legal malpractice can be avoided if a client alleges fraudulent concealment and the attorney-client relationship has not terminated.

> "[W]here the duty to inform exists by reason of a confidential relationship, when that relationship is terminated the duty to inform is also terminated; concealment then ceases to exist. *After the relationship of physician and patient is terminated the patient has full opportunity for discovery and no longer is there a reliance by the patient nor a corresponding duty of the physician to advise or inform. The statute of limitations is no longer tolled by any fraudulent concealment and begins to run.*"

443 N.E.2d at 339 (quoting *Guy*, 236 Ind. at 109, 138 N.E.2d at 895) (emphasis added by *Whitehouse* court).

[141] 443 N.E.2d at 339.