XI. Professional Responsibility

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A. Introduction

This past survey period was an active one for the Indiana Supreme Court and its Disciplinary Commission concerning the law of lawyering. The reported cases are instructive for counsel desirous of fulfilling their professional responsibilities. It is regrettable that there continues to be a litany of decisions dealing with an attorney's neglect of his client's legal matters.[1] The dominant focus of this Article, however, will be the changes in the Indiana Code of Professional Responsibility concerning attorney advertising and solicitation, pitfalls confronting the fiduciary relationship of attorney and client, circumstances allowing permissive withdrawal from employment, and the standard of proof required in a disciplinary proceeding.

B. Publicity, Advertising, and Solicitation

The 1977 decision of the United States Supreme Court in *Bates v. State Bar of Arizona*[2] ended the states' absolute restraint on attorney advertising. The following year, Indiana revised its Code of Professional Responsibility to bring it into conformity with the *Bates* decision, but stopped short of allowing the scope of advertising permitted under the amendment adopted by the American Bar Association.[3] Further inroads were made on the states' ability to regulate attorney advertising with the 1982 Supreme Court's decision in *In re R.M.J.*[4] Indiana responded to that

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[1] *See In re* Stivers, 450 N.E.2d 531 (Ind. 1983) (After accepting employment to file a petition for postconviction relief in one client's case and to perfect an appeal for another client, respondent failed to take the necessary action and misrepresented the status of the cases to them.). *In re* Roemer, 455 N.E.2d 1123 (Ind. 1983) (Respondent was retained and paid to file a joint petition in bankruptcy yet failed to take action for approximately 10 months and failed to return clients' calls. In another case, respondent neglected to close an estate for four years and failed to forward executrix's money orders to discharge the estate's inheritance tax liability, all of which resulted in substantial interest penalties being assessed.). *In re* Jones, 455 N.E.2d 903 (Ind. 1983) (An agreed discipline of public reprimand resulted from respondent's failure to pursue an appeal as court-appointed counsel, while maintaining that an appeal had been filed.). *In re* Holloway, 452 N.E.2d 934 (Ind. 1983) (An agreed discipline of 45 days suspension resulted from several incidents in which respondent neglected to protect his clients' interest and misrepresented the status of cases.).

[2] 433 U.S. 350 (1977).

[3] Model of Professional Responsibility (amended 1977).

[4] 455 U.S. 191 (1982).

decision in January, 1984 when its supreme court adopted, virtually verbatim, a major revision of the Disciplinary Rules in Canon 2 of the Code that had been submitted by the State Bar Association's Committee on Lawyer Advertising.[5]

1. Advertising.—The thrust of the change in Disciplinary Rule 2-101[6] is to expand the range of public media that can be utilized by attorneys in advertising their legal services. Additionally, rather than limiting the specific categories of information that an attorney can disseminate to the public, the new rule merely restates such categories and describes them as illustrative of the permissible areas of information that could be included in the public communication.[7] Further, Disciplinary Rule 2-101(B) expressly forbids an attorney's use of a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim" in any public communication.[8] This is consistent with the Supreme Court's view that such statements contained in commercial speech are not entitled to first amendment protection and, of course, are subject to state regulation.[9] Indeed, such use would conflict with the premise that the major justification for attorney advertising is to "facilitate the process of informed selection of a lawyer by potential consumers of legal service."[10] The test of whether or not a statement in a public communication is false, fraudulent, misleading, deceptive, self-laudatory or unfair is set forth in Disciplinary Rule 2-101(C).[11] Likewise, public communications that contain statements or data that tout "past performance" or "future success," endorsements or testimonials, photographs of any one other than the attorney, representations as to the "quality of legal services," and "appeals to a layperson's emotions" are similarly proscribed.[12] Finally, unless it is apparent

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[5]IND. CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (amended by the Supreme Court of Indiana, January 14, 1984).

[6]IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1984). No longer prohibited is the attorney's use of television or telephone to advertise legal services, and the geographic limitation contained in the former rule has been deleted in the revision.

[7]*Id.* DR 2-101(B)(1)-(19).

[8]*Id.* DR 2-101(B).

[9]*See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, & n.24 (1976).

[10]IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1984).

[11]*Id.* DR 2-101(C). This section defines a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim" to include (1) a material misrepresentation of fact; (2) omission of any material fact necessary to make the statement not misleading; (3) statements intended or likely to create an unjustified expectation; (4) statements or implications that the attorney is a specialist, other than as permitted by Disciplinary Rule 2-104; (5) statements conveying the impression that the attorney is in a position to influence improperly any tribunal, or other public body or official; (6) a representation, express or implied, that is likely to cause a layperson to misunderstand or be deceived, or omits necessary disclaimers that would make the representation not deceptive. *Id.* DR 2-101(C).

[12]*Id.* DR 2-101(D)(1)-(7).

that the communication is an advertisement, it must be so identified, and a copy approved by the attorney must be retained for six years after its dissemination.[13]

2. Use of Firm Names.—Another important change in Canon 2 announces a standard by which an attorney can determine the permissible choice of names under which he may engage in the practice of law. Disciplinary Rule 2-102(B) provides that an attorney shall not use a name that misleads the public as to the "identity, responsibility or status" of the attorney in the firm.[14] Additionally, the rule states that it is inherently misleading for an attorney engaged in the private practice to use a "trade name."[15] Unfortunately, the term "trade name" is not defined for purposes of Disciplinary Rule 2-102(B). Thus, attorneys using nontraditional names do so at some risk that the name will be found to be misleading. For example, "Indianapolis Legal Clinic" was deemed to be a prohibited trade name.[16] Moreover, "The People's Law Firm" was held to be misleading because of the possible inference that "the firm is controlled by the public, receives public funds for its existence, provides free legal services or is a nonprofit legal service."[17]

3. Solicitation.—The revision of Disciplinary Rule 2-103 is a studied effort to bring the rule into conformity with several decisions that have addressed the limits of permissible attorney solicitation.[18] Disciplinary Rule 2-103(A) provides:

> A lawyer shall not seek or recommend, by in-person contact (either in the physical presence of, or by telephone), the employment, as a private practitioner, of himself, his partner, or

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[13] *Id.* DR 2-101(E).

[14] *Id.* DR 2-102(B).

[15] *Id.*

[16] *In re* Sekerez, 458 N.E.2d 229 (Ind. 1984). Respondent was disbarred for violations of the Code, including practicing under a "trade name." *Id.* at 242. The court concluded that since an attorney cannot practice under a trade name, he is prohibited from advertising such a trade name. *Id.* at 244.

[17] *In re* Shepard, 92 A.D.2d 978, 979, 459 N.Y.S.2d 632, 633 (1983).

[18] *See, e.g., In re* R.M.J., 455 U.S. 191 (1982) (Supreme Court reversed the state court's finding that respondent had violated its rules pertaining to attorney advertising and solicitation by a general mailing of announcement cards to persons other than those listed in the rules.); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding the state's right to prohibit in-person solicitation of accident victims); *In re* Perrello, 271 Ind. 560, 394 N.E.2d 127 (1979), *cert. denied*, 414 U.S. 878 (1973) (respondent disbarred for soliciting clients outside the courtroom). *See also* Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981) (New York's highest court refused to discipline attorneys for mailing letters soliciting real estate work from 7500 property owners). *But cf. In re* Frank, 440 N.E.2d 676 (Ind. 1982) (respondent agreed to a public reprimand for mailing solicitation letters to 20 persons that court records indicated were unrepresented defendants).

> associate, to a non-lawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing.[19]

The foregoing section recognizes, implicitly, that an attorney may utilize nonsolicited mailings to *prospective* clients, although even that usage is not limitless. Disciplinary Rule 2-103(D) lists those circumstances in which an attorney shall not contact or send a written communication for the purpose of obtaining professional employment,[20] the most noteworthy being where "[t]he contact or written communication is based upon the happening of a specific event. . . ."[21] Thus, an attorney would be prohibited from communicating with a prospective client after learning that the client may sustain financial loss as a result of a third party's filing of a petition in bankruptcy. If success in asserting rights for a current client in litigation is dependent upon the joinder of others, however, the attorney may solicit and accept employment "from those he is permitted under applicable law to contact for the purpose of obtaining their joinder."[22]

Former Disciplinary Rule 2-104 contained exceptions to the general prohibition that an attorney shall not accept employment arising out of unsolicited advice to a layperson that he should obtain counsel to take legal action. Thus, an attorney would be permitted to "accept employment by a close friend, relative, former client . . . , or one whom the lawyer reasonably believe[d] to be a client," even though the attorney had given unsolicited advice to such person to take legal action.[23] Likewise, an attorney could "accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems . . . if such activities are conducted or sponsored by a qualified legal assistance organization."[24] Unfortunately, none of these exceptions were incorporated into the revision of the rule and it would seem that a technical amendment to correct this omission would be appropriate.

C. Sixth Amendment Guarantee of Assistance of Counsel

It often appears that the scorn a convicted defendant has for the quality of legal services afforded him by his court-appointed lawyer is exceeded only by the disfavor the courts attach to the defendant's claim that he has been denied his sixth amendment guarantee of effective assistance of counsel. This past survey period produced several noteworthy decisions that addressed the question of adequacy of counsel;[25] they are

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[19]IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1984).
[20]*Id.* DR 2-103(D)(1)-(4).
[21]*Id.* DR 2-103(D)(1).
[22]*Id.* DR 2-103(B).
[23]IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1983) (amended 1984).
[24]*Id.* DR 2-104(A)(2).
[25]*See* Burton v. State, 455 N.E.2d 938 (Ind. 1983); Metcalf v. State, 451 N.E.2d 321

noteworthy in that they underscored the exceedingly difficult task a defendant has in persuading a court that he should be given a new trial because of the ineffective representation afforded him by his attorney.[26] With one exception,[27] the courts rejected every allegation that an attorney's acts of omission or commission evidenced incompetence.[28] When presented the question of adequacy of the representation, the court looks to the facts in each case and applies the standard of whether the representation was a "mockery of justice,"[29] as modified by the requirement of "adequate legal representation."[30] In addition, this standard is implemented by a presumption that the defense counsel was competent; the burden then rests with the defendant to rebut this presumption by strong and convincing evidence.[31]

The exception, referred to above, is *Burton v. State*,[32] wherein the court held that the constitutional guarantee of assistance of counsel extends to an indigent who is denied a meritorious appeal because his appellate counsel is ineffective. After Burton's conviction, his trial counsel preserved significant issues in his motion to correct errors, which was denied by the trial court.[33] Thereafter, a new attorney was appointed to pursue Burton's original appeal. The court of appeals affirmed the trial court.[34] At Burton's request, his appellate counsel withdrew her appearance, and his original counsel reentered the case and filed a petition to transfer, accompanied by an affidavit.[35] The defendant stated that he had had no contact or communication with his appellate counsel and that he had not been asked, nor had he consented, to waive any of the issues set forth in his motion to correct errors.[36] The supreme court held that the defendant was denied his due process right to effective representation because of the total inadequacy of the appellate counsel's attempted appeal.[37] The

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(Ind. 1983); Boone v. State, 449 N.E.2d 1077 (Ind. 1983); Jones v. State, 449 N.E.2d 1060 (Ind. 1983); Priest v. State, 449 N.E.2d 602 (Ind. 1983); Ward v. State, 447 N.E.2d 1169 (Ind. Ct. App. 1983).

[26]*See, e.g.*, Leaver v. State, 414 N.E.2d 959 (Ind. 1981) (noting that there is a strong presumption that an attorney has fulfilled his duties to his client, and strong and convincing proof is required to overcome such a presumption; to prevail on a claim of incompetent counsel, it must be shown that what attorney did or did not do made the proceeding a mockery of justice shocking to the conscience of the court).

[27]Burton v. State, 455 N.E.2d 938 (Ind. 1983).

[28]*See supra* note 25.

[29]Williams v. State, 445 N.E.2d 101, 102 (Ind. 1983).

[30]*See* Crips v. State, 271 Ind. 534, 394 N.E.2d 115 (1979).

[31]*See* Rinard v. State, 271 Ind. 588, 394 N.E.2d 160 (1979); Issac v. State, 257 Ind. 319, 274 N.E.2d 231 (1971).

[32]455 N.E.2d 938 (Ind. 1983).

[33]*Id.* at 938-39.

[34]*Id.* at 939.

[35]*Id.*

[36]*Id.* at 940.

[37]*Id.* at 939.

original appellate counsel's brief to the court "neither raised the issues [that were properly preserved in the motion to correct errors] nor brought up all of the Record necessary to show that they were properly presented before the trial court."[38] Further, the issues that were raised on appeal "were so inadequately presented that they could hardly be discerned, let alone decided."[39]

In *Metcalf v. State*,[40] the supreme court rejected a defendant's claim of ineffective representation where the attorney's tactical or strategic decision may, in retrospect, have proven detrimental. The questioned tactics included a waived opening statement, the counsel's decision not to call a defense witness, and an alleged refusal by the attorney to allow his client to take the stand. The court noted that decisions concerning whether to call a witness to testify and whether to make an opening statement are strategy calls that reside with the attorney.[41] The court stated, "Deliberate choices by attorneys for some tactical or strategic reason do not establish ineffective representation even though such choices may be subject to criticism or the choices ultimately prove detrimental to the defendant."[42] At a postconviction relief hearing, the conflicting testimony concerning whether the attorney had denied the petitioner the right to testify in his own behalf or, rather, had accepted his counsel's advice that taking the stand would be unwise was resolved by the trial court in favor of the attorney.[43]

Because the issue of inadequacy of counsel is raised most frequently in petitions for postconviction relief, it is imperative for the petitioner to make a record at the postconviction relief hearing that establishes the specific deficiencies in his counsel's representation that resulted in the alleged denial of his constitutional rights. The petitioner bears the burden of establishing his grounds for relief by a preponderance of the evidence.[44] Because the trial judge is the sole judge of the weight of the evidence, it is only where "the evidence is without conflict and leads solely to a result different from that reached by the trial court" that the decision will be set aside.[45]

In *Priest v. State*,[46] the petitioner contended that his attorney's failure

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[38] *Id.*

[39] *Id.* at 938-39.

[40] 451 N.E.2d 321 (Ind. 1983).

[41] *Id.* at 321.

[42] *Id.* at 324 (citing Cobbs v. State, 434 N.E.2d 883 (Ind. 1982)).

[43] 451 N.E.2d at 324. Appellant's contentions were in direct conflict with other testimony and were resolved on credibility. The court noted that "[t]he trial judge did this and we leave it to his judgment." *Id.*

[44] *Id.* at 323 (citing Cobbs v. State, 434 N.E.2d 883 (Ind. 1982)).

[45] 451 N.E.2d at 323 (citing Tessely v. State, 432 N.E.2d 1374 (Ind. 1982)).

[46] 449 N.E.2d 602 (Ind. 1983).

to timely file a notice of alibi and present an alibi witness demonstrated the attorney's incompetency. On appeal, the supreme court affirmed the trial court's findings: (1) that the attorney had attempted to locate the allegedly favorable witness and (2) that the failure of the witness to appear for scheduled meetings or to attend the trial was more likely attributable to her decision not to perjure herself.[47] The court cited *Williams v. State*[48] which contains the following quote: "It is a rare occasion when a single omission or commission by counsel will be so grievous as to deny the defendant a fair trial."[49]

Similarly, in *Boone v. State*,[50] the trial counsel's failure to request that the voir dire examination be recorded was held not to constitute ineffective assistance of counsel. On appeal from the denial of a petition for postconviction relief, the court rejected the petitioner's argument that the jurors were potentially biased against him because they had previously served on a jury that had convicted another defendant on a similar charge. The only evidence in the record that the jurors were biased was the petitioner's unsubstantiated opinion which, the court noted, the trial court was not obligated to credit.[51] The cases demonstrate that when the record discloses that the defense counsel adequately cross-examined witnesses and made appropriate objections and motions on the defendant's behalf, the court is indisposed to find that the level of representation was perfunctory or a "mockery of justice."[52]

D. Conflicts of Interest

Ethical Consideration 5-1 of the Code of Professional Responsibility states the principle: "The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties."[53] Five recent disciplinary proceedings illustrate the relative ease that an attorney's violation of that principle can result in a finding of misconduct.

1. Business Relationships.—In *In re Pitschke*,[54] the respondent undertook to represent the husband in a child custody dispute. During the representation, the respondent had business dealings with her client. These dealings consisted of providing him an apartment, lending him money, and consigning valuable books for possible sale in his business.

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[47]*Id.* at 604.

[48]445 N.E.2d 101 (Ind. 1983).

[49]*Id.* at 102 (quoting Bowen v. State, 263 Ind. 558, 556, 334 N.E.2d 691, 696 (1975)).

[50]449 N.E.2d 1077 (Ind. 1983).

[51]*Id.* at 1079.

[52]*See, e.g.*, Metcalf v. State, 451 N.E.2d 321 (Ind. 1983); Jones v. State, 449 N.E.2d 1060 (Ind. 1983).

[53]IND. CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1984).

[54]455 N.E.2d 943 (Ind. 1983).

Pursuant to an agreement between the husband and his former wife, the husband was to return their child at a prearranged time. The preceding day, however, the husband delivered the child to his aunt who was to care for the child until he returned home from a trip out of the city. After several attempts to reach the husband to see if he had sold the books, the respondent called the aunt and learned the child was with her, and that she had not heard from the child's father. The respondent then advised the aunt of her business dealings with the husband and expressed concern that perhaps he might be considering taking the books, kidnapping the child, and disappearing.[55] The respondent spoke with her client the day the child was to be returned to the ex-wife, but she was still suspicious. The respondent again called the aunt, and told her to deliver the child to her office that afternoon. It was not until the Indianapolis Police Department intervened in the matter that the respondent released the child to the child's mother.[56] A fair reading of the opinion suggests that the respondent was using the child as a pawn to secure her investment in the client's business.

Although the court concluded the respondent had engaged in misconduct, it unfortunately did not cite to a specific Disciplinary Rule that had been violated.[57] The court merely held that the respondent had allowed her personal financial interests to interfere with her professional obligations. This case, however, may be the first Indiana decision in which the court announces sub silentio that a clear violation of an Ethical Consideration can constitute professional misconduct.

An attorney who enters into a business relationship with a client must pay close heed to the admonishment of Disciplinary Rule 5-104.[58] The possibility that the business will fail requires an attorney to disclose fully the potential for differing interests with his joint venturer. Further, where the client expects the attorney to exercise professional judgment in the business for the client's protection, the client's consent must be obtained before undertaking the representation.[59]

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[55] *Id.* at 944.

[56] *Id.*

[57] *Id.*

[58] IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104 (1984).

[59] *See id.* EC 5-2 ("A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."). Moreover, Ethical Consideration 5-3 provides, in part:

> Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure.

Id. EC 5-3.

In *In re Aspinall*,[60] the court accepted the client's perception that the role the attorney would play in the business was to perform legal services and act in a fiduciary capacity for his client. The attorney viewed his contribution of professional legal services to the business as the quid pro quo of his client's investment of capital.[61] The attorney failed to set forth the nature of his own interests which were different from those of his client. This fact, coupled with evidence establishing that the attorney failed to prepare and maintain corporate records and resolutions, and failed to disclose the financial plight of the business in a prompt fashion, supported the court's finding that the attorney had engaged in professional misconduct that warranted the agreed discipline of public reprimand.[62]

2. Dual Representation: Client-Adverse Witness.—In 1942, the Supreme Court of the United States, in *Glasser v. United States*,[63] overturned a criminal conviction on the ground that a lawyer's dual representation of codefendants with conflicting interests is a denial of a defendant's sixth amendment right to effective assistance of counsel.[64] While the dual representation in *Glasser* involved codefendants charged with the same crime and tried together, the petitioner in *Ward v. State*[65] argued on direct appeal that the same result should occur where his court-appointed counsel was also attorney of record for one of the state's witnesses. The court of appeals acknowledged, "Although the concurrent representation of an adverse witness and a defendant, without the defendant's knowledge and consent, violates the constitutional right to effective counsel, mere dual representation does not create such a violation."[66] When Ward's attorney learned that one of his current clients in an unrelated case would testify for the state, he had no further contact with him. At the hearing for postconviction relief, the petitioner testified that

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[60]455 N.E.2d 942 (Ind. 1983).

[61]*Id.* at 943. Client, respondent, and another went into business in which the "[r]espondent was to provide legal services in organizing the business and handling automobile title transactions, provide office and telephone facilities, keep the books for the business, and generally assist in operating the business." *Id.* at 942.

[62]*Id.* at 943. (notwithstanding respondent's loss of $12,000 which respondent had invested in the corporation).

[63]315 U.S. 60 (1942).

[64]*Id.* at 76. *See also* U.S. CONST. amend. VI. This amendment states:

> Rights of the accused.
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> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for this defence.

U.S. CONST. amend. VI.

[65]447 N.E.2d 1169 (Ind. 1983).

[66]*Id.* at 1170 (citing Cowell v. Duckworth, 512 F. Supp. 371, 373 (N.D. Ind. 1981)).

he was aware of the dual representation, yet he wanted his attorney to continue to represent him.[67] The court found that the record supported the determination that the petitioner was not forced to go to trial represented by an attorney with possible conflicts of interest; therefore, to prevail on the question, he would have to show that an actual conflict existed that affected the attorney's performance.[68] The court's studied review of the record revealed that the attorney had vigorously cross-examined the state's witness, and had elicited information from the witness regarding the charges pending against him, his hopes for a reduced sentence in return for his work as an informant, and the payments made to him by the state for his expenses.[69] Additionally, the court noted, "There is no indication that [the attorney] had obtained any confidential information relevant to cross-examination from his representation of [the witness] which he was reluctant to use because of his ethical obligations to maintain client confidences."[70] The court held that the record supported the trial court's determination that the attorney's duty to represent the petitioner with independence and zeal was not compromised or impaired by his concurrent representation of the state's witness.[71]

3. Public Official.—An attorney serving as prosecutor while maintaining his private practice is especially vulnerable to criticism and charges of conflicts of interest. In *In re Thrush*,[72] an attorney who opted to continue his private practice, after being elected prosecuting attorney, was retained by a husband to initiate a dissolution of marriage proceeding. The following day, the wife went to the office of the respondent's deputy to complain that her husband had committed a battery against her. An affidavit of probable cause was filed by the deputy prosecutor, and a warrant was issued for the husband's arrest. The next day the wife's attorney filed a petition for dissolution of marriage on her behalf. Without knowledge of either of the foregoing events, the respondent filed a similar petition on behalf of the husband. When informed that the wife had already filed her petition, the respondent designated the husband's petition a counter-petition. Thereafter, the respondent learned of the criminal charges against his client and that the wife objected to his continuing to represent her husband because of his position as prosecutor. Notwithstanding the dictates of Disciplinary Rule 2-109(B)(2),[73] requiring his

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[67]447 N.E.2d at 1171.

[68]*Id.* The court recognized that unconstitutional multiple representation is never harmless error; thus, prejudice need not be established. *Id.* (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)). The court concluded the appellant would have first to show that an actual conflict impaired his attorney's performance to demonstrate an unconstitutional multiple representation. 447 N.E.2d at 1171.

[69]447 N.E.2d at 1171.

[70]*Id.*

[71]*Id.* at 1171-72.

[72]448 N.E.2d 1088 (Ind. 1983).

[73]IND. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(B)(2) (1984).

mandatory withdrawal, the respondent requested that the wife's attorney sign a waiver of objections. When apprised that a complaint might be filed with the Disciplinary Commission, the respondent stated that he would withdraw his appearance in the civil matter but would also dismiss the criminal charges pending against his client. Nine days after the wife filed a grievance, the respondent withdrew his appearance.[74]

By that time, the misconduct had occurred. The court held that the dual representation compromised the respondent's independent professional judgment owed to his clients. Additionally, the threatened use of the power of his public office in order to gain an advantage in a civil case constituted a betrayal of the interests of his client, the state, and was prejudicial to the administration of justice.[75]

4. Loyalty to Former Client.—Since the adoption of the Code, decisions and opinions indicate that its drafters intended to include the former client within the purview of Disciplinary Rule 5-105,[76] at least with respect to matters that arise out of or are closely related to the subject matter of the former representation.[77] There appear to be two rationales for the prohibition contained in Disciplinary Rule 5-105: (1) the duty of loyalty to a former client survives the termination of the attorney-client relationship,[78] and (2) the possibility that through the former representation the attorney acquired information amounting to a client confidence.[79] Few believe that a lawyer who represents a client is disqualified for the rest of his life from accepting employment by a person having an interest which may conflict with that of the prior client.[80] Yet, where the subsequent matter is "substantially" related to that involved in the previous representation, the attorney must be disqualified. The test of "substantially" related is met, and disqualification must occur, where it is shown that the controversy involved in the pending case is substantially related to a matter in which the attorney previously represented another client.[81] "This test must be applied to the facts of each case to determine whether

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[74]448 N.E.2d at 1089.

[75]*Id.*

[76]*See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394 n.63 (S.D. Tex. 1969).

[77]*See In re* Evans, 113 Ariz. 458, 461, 556 P.2d 792, 795 (1976) (forbidding attorneys to prepare an agreement for one party and subsequently to sue on behalf of another party attacking the validity of the same agreement).

[78]*See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1322 (1975); *id.*, Informal Op. 1349 (1975) (former counsel for corporation and its board of directors may not subsequently initiate or participate in a minority shareholder's suit against a board member and a majority shareholder).

[79]*See* Walker v. State, 401 N.E.2d 795 (Ind. Ct. App. 1980); Branan v. State, 161 Ind. App. 443, 316 N.E.2d 406 (1974).

[80]*See* Thomas v. State, 512 S.W.2d 116 (Mo. 1974); Kerr v. State, 584 S.W.2d 626 (Mo. Ct. App. 1979).

[81]*See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1322 (1975).

the issues in the prior and present cases are essentially the same or closely interwoven therewith."[82]

In *In re Zinman*,[83] two years after he had represented a woman in a dissolution of marriage in which she was awarded custody of a minor child, the respondent accepted employment by the former husband and his mother to modify the dissolution of marriage decree as to visitation for the minor child's grandmother. The court concluded that the respondent's second representation was substantially related to the initial controversy and resulted in a violation of the Code of Professional Responsibility.[84]

E. Withdrawal from Employment

After accepting employment, one of the cardinal principles guiding every attorney is the duty to carry out the representation in complete loyalty to the best of his abilities.[85] Yet, the Code anticipates that situations may arise that will allow or require an attorney to withdraw his appearance.[86] A decision by the attorney to withdraw, however, should

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[82]*In re* Zinman, 450 N.E.2d 1000, 1002 (Ind. 1983) (quoting State *ex rel.* Meyers v. Tippecanoe County Court, 432 N.E.2d 1377, 1378 (Ind. 1982)).

[83]450 N.E.2d 1000 (Ind. 1983).

[84]*Id.* at 1002.

[85]IND. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-31, DR 7-101(A)(1)-(3) (1984).

[86]*Id.* DR 2-109(A), (B), (C). These sections state, in pertinent part:

Withdrawal from Employment.

(A) In General.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

. . . .

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to

be made only on the basis of "compelling circumstances."[87] Further, Ethical Consideration 2-32 alerts the attorney of the obligation to comply with a tribunal's rule regarding withdrawal.[88]

In *Hawblitzel v. Hawblitzel*,[89] a dissolution of marriage case, the court of appeals held that the trial judge did not abuse his discretion in allowing the attorney for the wife to withdraw his representation on the day of trial, notwithstanding the court's own rule which provided that a motion to withdraw would not be granted unless ten days notice had been given.[90] The evidence disclosed that the wife had been subpoenaed to attend a deposition scheduled for the day before the trial. When her attorney advised her of the consequences of her failure to appear at the deposition, she accused him of the theft of some of her property. In turn, she was informed of the attorney's intent to withdraw and of her need immediately to obtain substitute counsel to represent her both at the deposition and at the trial. The following morning, the court granted the attorney's oral motion for leave to withdraw.[91] That afternoon, the court proceeded with the scheduled trial without an appearance being made on behalf of the wife. At no point in the proceedings did the wife appear and request a continuance or otherwise seek relief from the court.[92]

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withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

. . . .

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

. . . .

(6) He believes in good faith, in a proceeding pending before a tribunal that the tribunal will find the existence of other good cause for withdrawal.

Id. (footnotes omitted).

[87] *Id.* EC 2-32. This section states:

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

Id. (footnotes omitted).

[88] *Id.*

[89] 447 N.E.2d 1156 (Ind. Ct. App. 1983).

[90] *Id.* at 1158-59 & n.1.

[91] *Id.* at 1157-58.

[92] *Id.* at 1158.

In view of the wife's generally recalcitrant behavior throughout the entire proceedings and her accusations of theft, in particular, the court of appeals is to be commended for its conclusion that "counsel . . . was pursuing a course of action that was reasonable under the circumstances."[93] In a concurring opinion, Judge Staton viewed the trial court's refusal to apply its own rule requiring ten days notice in motions to withdraw as an abuse of discretion, but, reluctantly, agreed that the issue had been waived in this appeal.[94]

F. Standard of Proof in Attorney Misconduct Proceedings

A disciplinary proceeding is neither civil nor criminal—the proceeding is *sui generis*.[95] Although the hearing officer conducts a hearing and submits his findings, which may include a proposed sanction, the ultimate fact finder in an attorney disciplinary proceeding in Indiana is the supreme court.[96] In *In re Moore*,[97] the respondent challenged the "preponderance of the evidence" standard found in the court's disciplinary rules.[98] He argued that procedural due process requires the issue of attorney misconduct involving unlawful behavior to be determined at no less than the "clear and convincing" standard of proof.[99] The court concluded that the United States Constitution does not mandate a rigidly defined standard of proof in such proceedings in view of the panoply of other rights afforded an attorney charged with professional misconduct.[100] Even though

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[93]*Id.*

[94]*Id.* at 1165 (Staton, J., concurring).

[95]*See In re* Mills, 539 S.W.2d 447, 450 (Mo. 1976) ("A disciplinary proceeding is not a 'criminal prosecution'; it is a proceeding '*sui generis*,' in the nature of an inquiry by the court into the conduct of its officer for the protection of the public, the courts and the profession.") (citations omitted).

[96]*In re* Callahan, 442 N.E.2d 1092 (Ind. 1982); *In re* Murray, 266 Ind. 221, 362 N.E.2d 128 (1977), *appeal dismissed*, 434 U.S. 1029 (1978).

[97]453 N.E.2d 971 (Ind. 1983).

[98]IND. R. ADMISS. & DISCP. 23 § 14(f). The section provides, in part: "Within thirty (30) days after the conclusion of the hearing, the hearing officers shall determine whether misconduct has been proven by a *preponderance of evidence and shall submit to the Supreme Court written findings of fact.*" *Id.* (emphasis added).

[99]453 N.E.2d at 972. The respondent cited Santosky v. Kramer, 455 U.S. 745 (1982), wherein the Court noted that an intermediate standard of proof is mandated where "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" 455 U.S. at 756 (citation omitted). The intermediate standard was also found "necessary to preserve fundamental fairness in . . . . government-initiated proceedings that threaten the individual . . . with 'a significant deprivation of liberty' or 'stigma.'" *Id.* (citations omitted).

[100]453 N.E.2d 972-73. The court stated, "The interests at stake in the present proceeding are those associated with the judicial license to practice law in this jurisdiction." *Id.* They are clearly distinguishable from those liberty interests incidental to family life, civil commitment, deportation, or denaturalization. *Id.*

an intermediate standard of proof may not be required, however, the court reasoned "that such standard is an appropriate description of the level of confidence the fact finder should have in the correctness of his conclusions."[101] Thus, attorney misconduct will be established only upon "clear and convincing" evidence, and Indiana joins the majority of states utilizing that standard of proof,[102] although there has been no formal amendment to Rule 23.

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[101] *Id.* at 973. "Clear and convincing" has been described as proof which should leave no doubt in the mind of the trier of fact concerning the truth of the matters in issue. *In re* Jones, 34 Ill. App. 3d 603, 608, 340 N.E.2d 269, 273 (1975).

[101] *See In re* Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979), and cases cited therein.