

Discipline of Attorneys for Personal Misconduct

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I. INTRODUCTION

During this past year's Survey period, the Indiana Supreme Court again decided a large number and wide variety of attorney discipline cases.¹ Many of these cases address instances of attorney neglect, conflicts of interest and misappropriation of funds, which involve violations of the Code of Professional Responsibility obvious to most practicing lawyers.² These cases do not need elaboration and will not be addressed by this article. This Article will discuss the large number of a alcohol and substance abuse cases decided by the court and the possible changes in the court's approach that could result if the new Model Rules of Professional Conduct are adopted.³ In addition, the Article will highlight some less familiar issues of first impression decided by the court during the Survey period.

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¹1984-1985 IND. SUP. CT. DISCIPLINARY COMM'N ANN. REP. at 5, 6.

²In addition to the disbarment cases covered by this Article, the court also awarded disbarment in *In re Burge*, 474 N.E.2d 991 (Ind. 1985) (neglect, failure to account for his client's funds, deceit, misrepresentation); *In re Brault*, 471 N.E.2d 1124 (Ind. 1984) (conversion and misuse of client's funds, misrepresentation, neglect); *In re Deloney*, 470 N.E.2d 65 (Ind. 1984) (forgery, misuse of funds); *In re Aungst*, 467 N.E.2d 698 (Ind. 1984) (failure to preserve testamentary trust, bad checks). The court ordered suspensions of varying length in *In re Budnick*, 466 N.E.2d 36 (Ind. 1984) (contempt of court); *In re Frey*, 475 N.E.2d 688 (Ind. 1985) (sharing fees with non-lawyer who recommends lawyer's services); *In re Miller*, 462 N.E.2d 76 (Ind. 1984) (neglect, failure to identify client funds, use of misleading trade name); *In re Strain*, 477 N.E.2d 85 (Ind. 1985) (misrepresentation to client concerning untimely appeal); *In re Vickery*, 468 N.E.2d 849 (Ind. 1984) (obstruction of justice); *In re Wilcox*, 467 N.E.2d 1182 (Ind. 1984) (neglect, failure to return funds); *In re Hailey*, 473 N.E.2d 616 (Ind. 1985) (neglect); *In re Lewis*, 474 N.E.2d 962 (Ind. 1985) (misrepresentation and neglect); *In re Jackson*, 474 N.E.2d 994 (Ind. 1985) (failure to perform agreed services, retention of fee).

³The Model Rules of Professional Conduct will be considered at this year's meeting of the Indiana State Bar Association's House of Delegates. See Rakestraw, *Rule 1.6, Saga of Misunderstanding, Conflicting Purposes, Juggled Priorities*, 29 RES. GESTAE 119 (Editor's Note) (1985).

II. ALCOHOL AND SUBSTANCE ABUSE

A. *Discipline for Personal Misconduct—Standards*

Of the nine attorney disbarments ordered by the Indiana Supreme Court during the Survey period, three involved alcohol or substance abuse.⁴ Several other substance abuse cases resulted in suspensions.⁵ These cases are instructive because they indicate our supreme court's approach to an issue that has received widely varied treatment in other jurisdictions⁶ and which has received different treatment by the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.⁷

Several sections of the Model Code of Professional Responsibility, adopted in Indiana on March 8, 1971, and amended through 1985,⁸ are relevant to an attorney's non-law-related conduct. Disciplinary Rule 1-102(A)(3) charges that "[a] lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude."⁹ Disciplinary Rule 1-102(A)(6) forbids an attorney to engage in any conduct that "adversely reflects on his fitness to practice law,"¹⁰ and Canon 9 instructs that a lawyer must avoid "even the appearance of professional impropriety."¹¹ These Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."¹² The Disciplinary Rules are supplemented by Ethical Considerations, aspirational in nature,¹³ that

⁴*In re Hayes*, 467 N.E.2d 20 (Ind. 1984); *In re McCarthy*, 466 N.E.2d 442 (Ind. 1984); *In re Ewers*, 467 N.E.2d 1184 (Ind. 1984).

⁵*In re Thomas*, 472 N.E.2d 609 (Ind. 1985); *In re Jones*, 464 N.E.2d 1281 (Ind. 1984).

⁶*See, e.g., In re Chase*, 299 Or. 391, 702 P.2d 1082 (1985) (attempted possession of cocaine is not misdemeanor involving moral turpitude; while sale and trafficking offenses constitute moral turpitude, possessory offenses do not); *Disciplinary Counsel v. Gross*, 11 Ohio St. 3d 48, 463 N.E.2d 382 (1984) (possession of marijuana and methaqualone, and driving under the influence adversely reflect on attorney's fitness to practice law and warrant indefinite suspension); *Committee on Professional Ethics and Misconduct v. Shumin-sky*, 359 N.W.2d 442 (Iowa 1984) (possession of marijuana and four amphetamine tablets violates DR 1-102(A)(6) and EC 1-5 and 9-6 warranting indefinite suspension); *In re Willis*, 371 N.W.2d 794 (S.D. 1985) (respondent's testimony before grand jury on immunity that he had used cocaine on "several occasions" resulted in 180-day suspension from law practice for failing to maintain integrity of the profession and for moral turpitude).

⁷*Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (amended 1979) *with* MODEL RULES OF PROFESSIONAL CONDUCT (1983).

⁸*See* IND. CODE OF PROFESSIONAL RESPONSIBILITY Table of Contents (amended 1984).

⁹IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(3) (1984).

¹⁰*Id.*, DR 1-102(A)(6).

¹¹*Id.*, Canon 9.

¹²*Id.*, Preamble and Preliminary Statement.

¹³*Id.*

caution a lawyer to be temperate, dignified, and to promote public confidence in the legal profession.¹⁴

The specific conduct constituting moral turpitude, impropriety, or intemperance is left undefined by the Code. This lack of definition has caused the split in interpretation among jurisdictions¹⁵ reflected in the Code's own footnotes. Essentially, the split is between jurisdictions which hold that offenses or convictions which do not affect an attorney's fitness to practice his profession are not grounds for discipline and jurisdictions which hold that the power to discipline may be exercised where an attorney's misconduct outside the scope of his profession includes offenses which are contrary to "justice, honesty, modesty or good morals."¹⁶

The new ABA Model Rules of Professional Conduct, adopted by the ABA House of Delegates in August, 1983,¹⁷ omits the "moral turpitude" language of the Code's Disciplinary Rule 1-102. Rule 8.4 of the Model Rules, which most closely resembles the Model Code's Disciplinary Rule 1-102, provides:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

¹⁴*Id.*, EC 1-5, 9-1, and 9-6. These Ethical Considerations state:

EC 1-5: A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 9-1: Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-6: Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect of the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

¹⁵The split among the jurisdictions is reflected in the Code's own footnotes. *Id.*, DR 1-102 nn.13, 14.

¹⁶*Id.*, n.14 (quoting *In re Wilson*, 391 S.W.2d 914, 917 (Mo. 1965)).

¹⁷ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT (BNA) ¶ 01:101 (1984).

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.¹⁸

The Comment to Rule 8.4, also adopted by the ABA,¹⁹ clearly indicates that the omission of moral turpitude language was deliberate and that Rule 8.4 is not intended to be a basis for discipline for a lawyer's acts not relevant to his practice of law.²⁰

As the following cases indicate, Indiana can be numbered among the jurisdictions interpreting the Code of Professional Responsibility as directing discipline for a lawyer's personal misconduct outside the practice of law. Within the next year, the new Model Rules of Professional Conduct will be considered by the House of Delegates of the Indiana State Bar Association and recommendations will be made regarding the

¹⁸MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1983).

¹⁹*Id.*, Rule 8.4 comment.

²⁰*Id.* That comment includes the following observation:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to the fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

* * *

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust, such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization. *Id.*

Model Rules' adoption in Indiana.²¹ Should Model Rule 8.4 be adopted as written, it may markedly change the court's current approach to personal misconduct cases as reflected in the following cases decided during the Survey period.

B. Substance Abuse - Cocaine and Marijuana

In *In re Turner*,²² respondent Turner's car was stopped by a police officer. The officer searched Turner's car and found "a quantity" of marijuana. Turner was arrested and charged with possessing marijuana in violation of Indiana Code section 35-48-4-11(1).²³ Turner pleaded guilty to a Class A misdemeanor and served six days of a sixty-day sentence before being placed on probation.²⁴

After initiation of disciplinary proceedings, Turner entered into a Conditional Agreement for discipline with the Indiana Supreme Court Disciplinary Commission, which charged Turner with violations of Disciplinary Rules 1-102(A)(1), (3), and (6) of the Code of Professional Responsibility. By way of mitigation, the parties acknowledged "that at the time of his arrest, the respondent was not using marijuana, nor was he violating any traffic law, nor was he endangering the public in any way."²⁵

Citing Canon 1 of the Code of Professional Responsibility charging attorneys with maintaining the integrity of the profession, and Ethical Consideration 1-5, the court found that Turner had been involved with an illegal substance, a crime in Indiana, and had engaged in misconduct which reflected adversely on his profession.²⁶ The court made no comment on whether it considered Turner's possession of marijuana a violation of the Disciplinary Rules as charged by the Disciplinary Commission and, therefore, did not specifically decide whether possession of marijuana

²¹See *supra* note 3.

²²463 N.E.2d 477 (Ind. 1984).

²³IND. CODE § 35-48-4-11(i) (Supp. 1985) provides:

A person who:

- (1) Knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, or hashish;
- (2) Knowingly or intentionally grows or cultivates marijuana; or
- (3) Knowing that marijuana is growing on his premises, fails to destroy the marijuana plants;

commits possession of marijuana, hash oil, or hashish, a class A misdemeanor. However, the offense is a class D felony (i) if the amount involved is more than thirty (30) grams of marijuana or two (2) grams of hash oil or hashish, or (ii) if the person has a prior conviction of an offense involving marijuana, hash oil, or hashish.

²⁴463 N.E.2d at 477-78.

²⁵*Id.* at 478.

²⁶*Id.*

constituted moral turpitude or whether such possession reflected adversely on Turner's fitness to practice law.

Indiana case law holds that violation of an Ethical Consideration alone will not support discipline.²⁷ It is unclear, therefore, from the *Turner* decision, that absent a Conditional Agreement, the court would have held marijuana possession to be a proper subject for attorney discipline.

Approximately three weeks after the *Turner* decision, the court handed down the decision of *In re Jones*.²⁸ In *Jones*, the respondent, a candidate for Morgan County Prosecutor, was arrested for driving under the influence of intoxicating liquor and for possession of marijuana and hashish. Jones pleaded guilty to driving while intoxicated and possession of marijuana and, pursuant to a plea agreement, was fined, received a suspended sentence, and was ordered to perform community service and attend a drug abuse program.²⁹ Pursuant to Indiana Code section 35-48-4-12, the marijuana possession charge was subsequently dropped.³⁰

After his disciplinary hearing on the same facts, respondent Jones petitioned the supreme court for a review of the hearing officer's recommendation for discipline, contending that his conduct was not such that it adversely reflected upon his fitness to practice law, nor were his offenses crimes of moral turpitude as charged by the Disciplinary Commission.³¹ The Commission argued that the court's earlier decision in *In re Moore*³² was controlling.

In *Moore*, the respondent, a Deputy Prosecutor of Jennings County, was disbarred for failing to destroy marijuana plants which he knew to be growing on his premises, in violation of public trust and Disciplinary Rules 1-102(A)(1), (3) and (6).³³ The court noted that while the *Moore* case involved charges of professional misconduct similar to those in *Jones*, "the underlying factual [bases were] unique and distinct."³⁴ The court pointedly stated that "[t]he fact that marijuana was involved in both disciplinary actions does not mean that all issues in such cases are forever decided."³⁵ Citing *In re Gorman*,³⁶ the court emphasized that

²⁷See *Kizer v. Davis*, 174 Ind. App. 559, 369 N.E.2d 439 (1977).

²⁸464 N.E.2d 1281 (Ind. 1984).

²⁹*Id.*

³⁰*Id.*

³¹464 N.E.2d at 1281.

³²453 N.E.2d 971 (Ind. 1983).

³³*Id.* at 974.

³⁴464 N.E.2d at 1281.

³⁵*Id.* at 1282.

³⁶269 Ind. 236, 379 N.E.2d 970 (1978). In *Gorman*, the respondent was charged with moral turpitude based in part upon a criminal conviction for possession with intent

the issue for determination was not the "nature of the drug involved," but rather the "measure of Respondent's conduct viewed in toto, against his moral fitness to continue in the practice of law."³⁷

The court found that Jones, while seeking public office, had engaged in illegal conduct by possessing marijuana and hashish and driving under the influence of alcohol, thereby placing himself above the law and demonstrating a "total disregard for societal judgments relating to the possession of controlled substances."³⁸ The court also noted that Jones had endangered the public by driving while intoxicated.³⁹ Based upon this, the court held that "in its totality" Jones' conduct established that he was morally unfit to practice law and suspended him from practice for three years, foregoing disbarment in consideration of Jones' youth, inexperience, and his support from the Morgan County bench and bar.⁴⁰

In *Jones*, the court focused on the respondent's public position and the sum total of his conduct. Like *Turner*, the decision leaves unanswered the question of whether any one of the respondent's offenses standing alone would support discipline.

In another marijuana possession case based upon facts similar to *Jones*, the court ordered the identical sanction of three years suspension.

to distribute and distribution and conspiracy to distribute cocaine. Gorman admitted commission of "an illegal act (*malum prohibitum*), but denie[d] that he [had] done wrong (*malum in se*), arguing that the use of cocaine is neither addictive nor injurious to health" and, therefore, contended he did not commit moral turpitude. *Id.* at 237-38, 379 N.E.2d at 971. The court, citing *Baker v. Miller*, 236 Ind. 20, 24, 138 N.E.2d 145, 147 (1955), discussed the definition of moral turpitude at length, stating:

In proceedings of this character moral turpitude has always been a controlling factor in the disciplinary action to be taken by the court where there has been a charge of misconduct by a member of the bar. The problem of defining moral turpitude is not without difficulty. There is certain conduct involving fraud, perjury, theft, embezzlement, and bribery where there is no question but that moral turpitude is involved. On the other hand, because the law does not always coincide exactly with principles of morality there are cases that are crimes that would not necessarily involve moral turpitude. Acts which normally at common law were not considered wrong, do not by reason of statutory enactment making them a crime, add any element of moral turpitude. For example, willfully running a stop light or exceeding the speed limit does not necessarily involve moral turpitude.

Webster's International Dictionary (2d Edition) defines "turpitude" as: "Inherent baseness or vileness of principle, words, or actions; depravity."

Black's Law Dictionary (4th Edition) defines "moral turpitude" as: "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

³⁷464 N.E.2d at 1282 (quoting *In re Gorman*, 269 Ind. at 238, 379 N.E.2d at 971).

³⁸464 N.E.2d at 1282.

³⁹*Id.*

⁴⁰*Id.*

In *In re Thomas*,⁴¹ the respondent, a Deputy Prosecutor in Jackson County, Indiana, was stopped by a state police trooper for failing to make a complete stop at an intersection. The arresting officer subsequently found marijuana and hydrocodone, a Schedule II controlled substance, in the respondent's possession. Thomas was charged for these offenses, although the charges for possession of a controlled substance were eventually dropped. The respondent pleaded guilty to possession of marijuana and to the traffic offense.⁴²

In assessing discipline, the court, as in *Jones*, examined Thomas' conduct in its entirety, keying on the respondent's duty as prosecutor and the illegality of his conduct. The court determined that the conduct constituted moral turpitude and adversely reflected on the respondent's fitness to practice law.⁴³ Commenting on the sanction imposed for respondent's misconduct, the court stated:

In our assessment of an appropriate sanction, we observe that the Respondent violated the very laws he was obligated to enforce in his professional capacity as a Deputy Prosecutor. This, however, does not mean that the Respondent is being disciplined solely because he served as a public official. The use and possession of marijuana and controlled substances are illegal in this state and one need not be a Deputy Prosecutor to understand this illegality. . . . Obedience to the law exemplifies respect for law. . . . As lawyers, the members of the bar have a particular responsibility to demonstrate these principles.⁴⁴

This statement indicates that although possession and use of a controlled substance is viewed in the context of an attorney's total misconduct for purposes of determining whether he has engaged in moral turpitude, once that determination is made, the acts of misconduct will be viewed separately to determine a proper sanction. Thus, in *Thomas*, while a combination of misconduct including a traffic offense and possession of controlled substance by a deputy prosecutor were held to constitute moral turpitude, the illegality of respondent's act of possession was evaluated independently as a basis for his suspension.

The court had occasion to discuss cocaine addiction and its effect on an attorney's practice in *In re McCarthy*.⁴⁵ In *McCarthy*, the respondent attorney spent an average of \$2,000 a week to support his

⁴¹472 N.E.2d 609 (Ind. 1985).

⁴²*Id.*

⁴³*Id.* at 610.

⁴⁴*Id.*

⁴⁵466 N.E.2d 442 (Ind. 1984).

cocaine addiction. To finance his habit, McCarthy engaged in various acts of misconduct, including withdrawing money from an estate without authorization.⁴⁶ In addition, he wrote bad checks, failed to return a client's funds promptly, and was guilty of neglect.⁴⁷

Based upon these acts, the supreme court ordered McCarthy disbarred for violations of Canons 1, 6, 7, and 9.⁴⁸ Commenting on the respondent's cocaine addiction, the court stated:

It is indeed unfortunate when a person trained to be a professional loses grasp of priorities and subjugates professional responsibilities to the demands of an addiction. Apparently, Respondent has suffered this personal tragedy. But this is only a part of the total misfortune generated by this addiction. The results are equally calamitous to the client who is disserved by a person thought to be trusted.

The public must have confidence that when they place their trust in an attorney they will receive faithful, professional assistance. If an attorney cannot so respond, he is unfit to continue in the profession.⁴⁹

The respondent's addiction was not considered in mitigation of his offenses.⁵⁰

One month after its *McCarthy* decision, the court addressed another cocaine-related case in *In re Ewers*.⁵¹ In *Ewers*, the respondent placed an advertisement in a local newspaper seeking to hire " 'a recent female high school graduate desirous in working with horses.' " ⁵² Two female police department employees responded to the advertisement. They later met with respondent at which time all three used the respondent's cocaine. During a second meeting in which cocaine was also used, the respondent was arrested and charged with possession of cocaine⁵³ and possession

⁴⁶*Id.* at 443-44.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.* at 444.

⁵⁰*Id.*

⁵¹467 N.E.2d 1184 (Ind. 1984).

⁵²*Id.* at 1185.

⁵³IND. CODE § 35-48-4-6 (Supp. 1985), relating to possession of cocaine, provides: A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses cocaine (pure or adulterated) or a narcotic drug (pure or adulterated) classified in schedule I or II commits possession of cocaine or a narcotic drug, a class D felony. However, the offense is a class C felony if the amount of the drug involved (pure or adulterated) weighs three (3) grams or more.

of Schedule VI⁵⁴ and Schedule II⁵⁵ controlled substances. Ewers entered a guilty plea and received a suspended sentence.

After Ewers' disciplinary hearing, he petitioned the supreme court for review of the hearing officer's finding of misconduct, arguing that his conduct failed to constitute "moral turpitude." The court, again applying its conduct in toto test, disagreed, noting that Ewers' acts of possessing cocaine and soliciting female high school graduates were not "the acts of experimenting youth," but were acts done with full knowledge that he was placing himself above the law.⁵⁶ The court found the acts to be "evidence of a baseness, vileness, and depravity in the social and private duties which an attorney owes to his fellowman."⁵⁷

Respondent further argued that even if he was guilty of misconduct, his conduct was not of the type that warranted disbarment. In response, the court repeated previously-established factors which may prompt court sanctions:

the nature of the violation, the specific acts of the Respondent, [the] Court's responsibility to preserve the integrity of the Bar, and the risk, if any, to which [the court] will subject the public by permitting the Respondent to continue in the profession or be reinstated at some future date.⁵⁸

The court also noted that in assessing the nature of the sanction to be invoked, it will look to the entire course of conduct involved, including uncharged misconduct.⁵⁹ The court then noted that in the case before

⁵⁴IND. CODE § 35-48-4-7 (Supp. 1985) (amended by P.L. 327-1985, § 4), relating to possession of Schedule I through V controlled substances, provides:

A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance (pure or adulterated) classified in schedule I, II, III, IV, or V, except marijuana or hashish, commits possession of a controlled substance, a class D felony.

⁵⁵*Id.*

⁵⁶467 N.E.2d at 1185.

⁵⁷*Id.*

⁵⁸*Id.* at 1186.

⁵⁹*Id.* (citing *In re Roberts*, 442 N.E.2d 986 (Ind 1983)). In *Roberts*, the respondent was charged by the Disciplinary Commission with failure to report the improper conduct of a venireman. At hearing, evidence revealed that the respondent had also filed a frivolous grievance against a trial judge. The hearing officer found both the charged and uncharged acts of the respondent to constitute misconduct. The respondent contended that the hearing officer committed error in considering the uncharged conduct and the court agreed. The court noted that an attorney is entitled to know the charges against him in advance of hearing. Disregarding the uncharged conduct, the court nonetheless found that the respondent had engaged in misconduct as charged in the complaint.

In determining the appropriate sanction based on such conduct, the court then looked to the entire course of the respondent's behavior, including the uncharged conduct omitted, in its assessment of violation of the Disciplinary Rules.

it respondent had made uncharged material misrepresentations in his criminal case pre-sentence report and in his answer to the Disciplinary Commission's complaint, thereby demonstrating "a complete disregard for professional obligations."⁶⁰ Because all of his acts, charged and uncharged, were "acts of a man not worthy of the respect of the legal profession," the court ordered disbarment.⁶¹

C. Alcohol Abuse

The Indiana Supreme Court's general posture regarding an attorney's abuse of alcohol was set forth in a 1978 case, *In re Erbecker*,⁶² in which the court stated:

This Court is not unmindful of the reality that many professional people drink intoxicating beverages, in varying degrees. It should be obvious that this Court cannot, and will not, impose discipline simply because an attorney drank an intoxicating beverage. The disciplinary rules of this Court do not require supererogatory conduct; these rules are based in reality. On the other hand, this Court cannot ignore its responsibility to impose discipline when the activities of an attorney demonstrate misconduct.⁶³

The court's statement clearly warns that there is a point beyond which alcohol use will not be tolerated. In the past, Indiana attorneys have been disciplined for appearing in court intoxicated,⁶⁴ for neglect while under the influence of alcohol,⁶⁵ and for alcohol-related misuse of a client's funds.⁶⁶ During this survey period, one alcohol-related disciplinary action resulted in disbarment.⁶⁷ Another case contained a pointed warning for attorneys who drive while intoxicated.⁶⁸

In *In re Hayes*,⁶⁹ the court ordered disbarment for an attorney found to have committed several disciplinary code violations under a two-count

⁶⁰*Id.* Respondent attributed his misrepresentations to alcohol and stress.

⁶¹*Id.*

⁶²268 Ind. 345, 375 N.E.2d 214 (1978). Erbecker was found to have missed two scheduled court hearings, neglected his obligations to his clients, and appeared in court in an intoxicated condition. He was publicly reprimanded by the court. *Id. Cf. In re Seely*, 427 N.E.2d 879 (Ind. 1981), in which the respondent was found to have appeared in court one hour late and intoxicated, staggered before the jury, and fallen asleep in court. Seely was suspended from practice for 90 days.

⁶³268 Ind. at 348, 375 N.E.2d at 215.

⁶⁴See cases cited in *supra* note 62.

⁶⁵See, e.g., *In re Vincent*, 268 Ind. 101, 374 N.E.2d 40 (1978).

⁶⁶See *id.*; see also *In re Althaus*, 264 Ind. 660, 348 N.E.2d 407 (1976).

⁶⁷*In re Hayes*, 467 N.E.2d 20 (Ind. 1984).

⁶⁸*In re Jones*, 464 N.E.2d 1281 (Ind. 1984).

⁶⁹467 N.E.2d 20 (Ind. 1984).

complaint. The respondent, a diagnosed alcoholic, was given money by his client to pay a tax liability assessed by the Internal Revenue Service. The client's funds were deposited in the respondent's trust account but later withdrawn by the respondent, who failed to make the tax payment. The client learned that the IRS had assessed additional interest against him and confronted the attorney who wrote two checks to the IRS on behalf of his client which were both returned for insufficient funds. Under a separate count, the respondent was found to have issued other bad checks.⁷⁰ The court found that he had engaged in misconduct through commingling, misrepresentation, moral turpitude, and conduct which was prejudicial to the administration of justice.⁷¹

In arriving at the sanction of disbarment based upon this conduct, the court took occasion to comment on its hearing officer's assessment that respondent's "moral and professional judgment were adversely affected" by his alcoholism. The court stated:

It is unfortunate that any person, whatever occupation or profession, suffer the personal tragedy generally associated with abuse of alcohol; this, however, does not vitiate the effects of professional misconduct. In this regard, the disease of alcoholism is not a valid basis of excuse. . . . Our responsibility is to safeguard the public from unfit lawyers, whatever the cause of unfitness may be.⁷²

The court noted that the respondent had sought treatment for his "disease" and had made restitution of all funds. Despite this, however, the court determined that his conduct posed a potential of harm to unsuspecting clients and demeaned the legal profession, thereby warranting the "strongest sanction available."⁷³

The *Hayes* decision is consistent with other disciplinary actions in which the respondent has pleaded his alcoholism as a mitigating factor.⁷⁴ In response to such pleading, the court has repeatedly stated that it will weigh any mitigating factors against its "duty to maintain a competent Bar and protect the public from . . . unethical conduct."⁷⁵ However,

⁷⁰*Id.*

⁷¹*Id.* at 21.

⁷²*Id.* at 22.

⁷³*Id.*

⁷⁴*See, e.g., In re Carmany*, 466 N.E.2d 16 (Ind. 1984); *In re Seely*, 427 N.E.2d 879 (Ind. 1981).

⁷⁵*See, e.g., In re Carmany*, 466 N.E.2d at 23. In *Carmany*, the respondent urged that the court consider his mental illness, marital, financial, and personal problems, including substance abuse, in mitigation of his misconduct. While the court apparently made such a consideration, it found no evidence to indicate the respondent had solved his problems. The court held that it was its duty to safeguard the public "from unfit lawyers whatever the cause of unfitness may be." *Id.* (citations omitted).

the court has noted in the past that it finds "little merit in any argument that an attorney should somehow be excused of misconduct by reason of the disease of alcoholism."⁷⁶

The second alcohol-related case decided during this period does not address alcoholism as a mitigating factor, but rather considers an attorney's alcohol-related personal misconduct. In *In re Jones*,⁷⁷ discussed previously in the context of substance abuse, one of the elements of total misconduct constituting moral turpitude charged against the respondent was his arrest for driving while intoxicated.⁷⁸ The court's hearing officer, after reviewing the facts of the respondent's case, had concluded that driving while intoxicated did not rise to the level of misconduct requiring disciplinary action. The court disagreed, finding the hearing officer's conclusion to be at odds with its policy of evaluating moral turpitude on totality of conduct.⁷⁹ Noting that driving under the influence endangers "every occupant of the highways," the court included respondent's arrest for this offense in assessing his total misconduct as moral turpitude.⁸⁰

Jones leaves unanswered the question of whether driving while intoxicated absent other misconduct will be considered moral turpitude subject to discipline. Nonetheless, it joins the court's *Turner*, *Ewers*, and *Thomas* decisions in clearly indicating that Indiana is among those jurisdictions which assess discipline for an attorney's personal misconduct aside from his practice of law. While these cases are wholly consistent with the current Code of Professional Responsibility, only the *Thomas* facts would command the same result under the new Model Rules of Professional Conduct under Rule 8.4 and its Comment.⁸¹ The court's *Turner*, *Ewers*, and *Jones* decisions would not appear to warrant discipline under the Model Rules given the Comment's instruction that a lawyer should be "professionally answerable" only for offenses "involving violence, dishonesty, or breach of trust or serious interference with the administration of justice," — offenses which "indicate lack of those characteristics relevant to law practice."⁸² Based upon this language, a reconciliation

⁷⁶*In re Vincent*, 268 Ind. 101, 111, 374 N.E.2d 40, 45 (1978). *But cf. In re Althaus*, 264 Ind. 660, 348 N.E.2d 407 (1976). In *Althaus*, the court specifically noted that the respondent's sanction would have been more severe if the court had not considered, in mitigation, respondent's alcoholic, domestic, and financial problems. *Id.*

⁷⁷464 N.E.2d 1281.

⁷⁸*Id.* at 1282.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹The Comment to Rule 8.4 states, "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney."

⁸²MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 and comment (1983).

of current Indiana case law and the new Model Rules, if adopted as written, may be difficult.

III. MISCELLANEOUS DECISIONS

During the Survey period, the court addressed several other disciplinary issues of first impression and unusual interest. In *Matter of McDaniel*,⁸³ the supreme court discussed a procedural issue of first impression involving the disciplinary process. The issue the case addressed was whether constitutional prohibitions against double jeopardy prohibit the filing of disciplinary charges based upon criminal charges for which an attorney has been acquitted in a criminal jury trial. The respondent was indicated and tried on charges of perjury and filing false police reports. A disciplinary action was also filed based upon the indictments. The respondent was acquitted in the criminal case, but the disciplinary action was not dismissed.

In response to respondent's claim of double jeopardy, the court held that disciplinary actions are not criminal proceedings and, therefore, "the application of constitutional standards generally afforded criminal defendants is not appropriate in all particulars."⁸⁴ The court further stated that the discipline of a member of the bar is independently determined from any other proceedings, including a criminal case.⁸⁵ Having found no constitutional prohibition to the disciplinary action, the court disbarred the attorney based upon a hearing officer's finding that the respondent had in fact committed perjury and submitted a false police report.⁸⁶

In *Matter of Allen*,⁸⁷ the court dealt with an alleged violation of Disciplinary Rule 9-101(C), which provides that an attorney "shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."⁸⁸ In *Allen*, the respondent-attorney recommended that his client employ co-counsel for an upcoming criminal drug case. The reason given by the attorney for the hiring recommendation was that co-counsel had a relationship with the judge, had dinner with the judge, played golf with the judge, and discussed the outcome of his cases with the judge.⁸⁹ Respondent represented that if the other attorney were employed as co-counsel he could affect the outcome of the case in the defendant's favor.⁹⁰ The court found that this

⁸³470 N.E.2d 1327 (Ind. 1984).

⁸⁴*Id.* at 1328.

⁸⁵*Id.*

⁸⁶*Id.* at 1332.

⁸⁷470 N.E.2d 1312 (Ind. 1984).

⁸⁸IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-101(c) (1984).

⁸⁹470 N.E.2d at 1313.

⁹⁰*Id.*

type of representation to the client offended the Code of Professional Responsibility and suspended respondent from the practice of law for one year.⁹¹ The court's rationale for imposing such a sanction is perhaps best stated in its own words:

[W]e are convinced that the recommendation to hire this attorney was made by the Respondent not because of superior skills or knowledge in criminal defense work, but because of an alleged personal relationship with the judge. The implication is not that of simply good professional rapport or mutual respect between lawyer and judge; it is an implication of a special standing in which the proposed co-counsel routinely speaks to the judge about cases, outside the courtroom, and by which method the proposed co-counsel could achieve special treatment for the defendant, an outcome which could not be achieved through regular channels. . . . A client, as in this case, finding himself in the precarious position of being face to face with a serious felony conviction and a lengthy incarceration, becomes the perfect subject for the sort of subtle persuasion present in the Respondent's representations. Swayed by the enticement of an "in" with the judge, the client agreed to hire a co-counsel who was paid \$5,000.00 as a fee. When the anticipated outcome did not transpire, the Respondent blamed the co-counsel and the co-counsel's representations as to influence with the court. The unwitting client, already in a difficult situation, is ready to believe in and is happy to pay for what he perceives to be the easy way out of his predicament. This sort of practice cannot be allowed to persist. It is damaging to the client and prejudices his legitimate interests. The aspersions cast on the judiciary of this state, upon our system of justice, upon the entire legal profession, serve to destroy the public's confidence in our institutions.⁹²

In a third case, *Matter of Berning*,⁹³ the court addressed the extent to which attorneys may make contact with jurors. In *Berning*, a prosecuting attorney sent a letter to jurors who had recently completed deliberations in a criminal case. The jury had acquitted a defendant who had been charged with assault and battery arising out of a domestic dispute. The respondent's letter to the jurors expressed shock and displeasure with the verdict and read in part:

Needless to say, everyone involved in the prosecution of the case was terribly upset and shocked at the verdict of not guilty. Marilyn

⁹¹*Id.* at 1316.

⁹²*Id.* at 1314-16.

⁹³468 N.E.2d 843 (Ind. 1984).

Martin had the difficult task of trying to explain to her children why Mr. Martin was able to get away with such an act without being punished for it. The victim was in tears because the finding of not guilty meant to her that the jury felt that she was a liar. The mother of the victim was in tears for the same reason. Even Steve Mullins was visibly upset by the finding of not guilty, and he is, in my opinion, not the type to let adverse decisions affect him emotionally. However, my purpose in writing is not to "cry over spilled milk" because we lost the decision.⁹⁴

The letter then advised the jurors to contact the prosecutor so that he would re-evaluate his office's policy concerning the handling of instances of domestic violence.⁹⁵

During respondent's disciplinary hearing, the jurors testified that they were embarrassed and displeased by receipt of the letter.⁹⁶ Some jurors testified that receipt of the letter might influence them in future deliberations.⁹⁷

The court found a clear violation of Disciplinary Rule 7-108(D),⁹⁸ which provides that an attorney may not ask questions of or make comments to a member of the jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.⁹⁹ Respondent was publicly reprimanded.¹⁰⁰

⁹⁴*Id.* at 844.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.* at 845.

⁹⁹IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-108(D) (1984).

¹⁰⁰468 N.E.2d at 845.