

SURVEY OF INDIANA LAW OF PROFESSIONAL RESPONSIBILITY (2021-2022)

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INTRODUCTION

From August 1, 2021 through September 30, 2022, the Indiana Supreme Court handed down five per curiam decisions imposing sanctions for attorney misconduct. During this period, the Court also issued two significant disciplinary Orders for misconduct resulting from attorney unethical behavior during pretrial proceedings. While these matters covered a variety of topics and ethical violations, a continuing theme emerged from the Court, as it repeatedly remarked about uncivil behavior, drawing attention to the importance of and need for civility, both in trial and disciplinary proceedings.

During the relevant period, the Indiana Supreme Court Disciplinary Commission published three formal advisory opinions to provide further guidance to Indiana lawyers about the application of the Rules of Professional Conduct to common ethical dilemmas.

I. THE CIVILITY FRAMEWORK

Although scholars, judges, and prominent practitioners have long called for greater civility in the legal profession,¹ no professional conduct rule, either in the

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1. See Erika Harold, *The True Cost of Incivility in the Profession*, 2CIVILITY (Sept. 21, 2022), <https://www.2civility.org/the-true-cost-of-incivility-in-the-legal-profession> [<https://perma.cc/7YGS-BKSM>] (referencing New York Supreme Court Justice Andrea Masley’s remarks and decision in *Hindlin v. Prescription Songs LLC*, New York Supreme Court, New York County; Cal. No. 2022L-01547, in which Justice Masley imposed steep penalties for discovery violations, writing her specific rejection of the notion that incivility is mere vigorous advocacy and instead reinforcing that civility is the first principle of the legal profession); see also David A. Grenardo, *Making Civility Mandatory: Moving From Aspired to Required*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 239 (2013); James Podgers, *From Many Voices, a Call for Public Civility*, 97-SEP A.B.A. J. 58, 58 (2011) (quoting ABA President Stephen N. Zack who decried the legal profession’s “continuing slide into the gutter of incivility.”).

Model Rules of Professional Conduct or the Indiana Rules of Professional Conduct, specifically requires lawyers to be civil to one another.² However, proponents are not defenseless in their quest for greater civility. As the Indiana Supreme Court has noted in various attorney discipline decisions, all attorneys bear the responsibility of adhering to the Oath of Attorneys.³ The Oath thus serves as a prominent guide of the requirements for all Indiana attorneys:

I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with a crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God.⁴

In select egregious cases, the Court has found a respondent lawyer in violation of the Oath in conjunction with violations of other professional conduct rules.⁵

The Indiana Supreme Court also has demonstrated its interest in promoting civility within the legal profession through its 2000 amendments to the Indiana Rules of Professional Conduct.⁶ One such amendment was to add language to the

2. See generally MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023); IND. RULES OF PRO. CONDUCT (2023).

3. See, e.g., *In re Burns*, 657 N.E.2d 738, 740 (Ind. 1995); *In re Keaton*, 29 N.E.3d 103, 110 (Ind. 2015).

4. IND. ADMIS. DISC. R. 22 (2023).

5. See, e.g., *In re Robertson*, 78 N.E.3d 1090 (Ind. 2016) (lawyer violated the Oath when he drove intoxicated to a local courthouse and then made repeated physical sexual advances on the court's receptionist); *In re Halpin*, 53 N.E.3d 405 (Ind. 2015) (lawyer violated the Oath by making various invective attacks on opposing counsel, the opposing party, and the judge); *In re May*, 992 N.E.2d 684 (Ind. 2013) (lawyer violated Oath when, after a hearing, he grabbed his client by the arms and pushed the client against a rail in the courtroom in such a manner that caused the client to be bent backward over the rail).

6. See Donald R. Lundberg & Charles M. Kidd, *Survey of the Law of Professional Responsibility You Say You Want an Evolution?: An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 IND. L. REV. 1255, 1257-58 (2005).

Preamble advising attorneys that: “[w]hether or not engaging in the practice of law, lawyers should conduct themselves honorably.”⁷ Additionally, in contrast to the Model Rules of Professional Conduct, the Court removed the term “zealous”⁸ from paragraph 8 of the Preamble so that an Indiana lawyer now is required to be an “effective advocate on behalf of a client”⁹ rather than a zealous advocate.¹⁰

During the past survey period, the Court furthered showed its commitment to civility in the profession through its analysis and application of specific professional conduct rules aimed at promoting fairness in proceedings and curbing unreasonable zealousness. In particular, three Indiana Professional Conduct Rules are prominent: Rule 4.1 (which prohibits attorneys from bypassing opposing counsel to speak with an opposing party); Rule 4.4(a) (which prohibits lawyers from using means that have no substantial purpose other than to embarrass, delay, or burden a third person); and Rule 8.2(a) (which prohibits lawyers from making statements that are false or with reckless disregard as to its truth or falsity about the qualifications or integrity of a judge).

II. CIVILITY IN DISCOVERY AND PRETRIAL MATTERS

Misconduct during discovery and pretrial matters was a recurring theme in this year’s survey of attorney discipline decisions. There were several cases in which a respondent lawyer’s uncivil behavior was the heart of the disciplinary charges.¹¹

Advocacy is one of the critical skills for lawyers to master, and such advocacy is not limited to courtrooms and hearing rooms. More and more, cases are resolved in discovery and pretrial proceedings, which requires attorneys to hone their advocacy skills in those arenas. However, in the interest of fairness and decorum, the Indiana Supreme Court places limits on this advocacy, particularly in pretrial and discovery matters.¹²

During the relevant period, the Indiana Supreme Court again emphasized the importance of civility, issuing a per curiam opinion and two disciplinary orders sanctioning misconduct during pretrial proceedings that strained the limits of appropriate advocacy.¹³

A. *In re Allen R. Stout*¹⁴

In *In re Stout*, the Indiana Supreme Court imposed a 90-day suspension with

7. IND. PROF. COND. R. pmbl., para. 1 (2005).

8. IND. PROF. COND. R. pmbl., para. 8 (1987).

9. IND. PROF. COND. R. pmbl., para. 8 (2005).

10. Compare IND. PROF. COND. R. pmbl., para. 8 (2005), with IND. PROF. COND. R. pmbl., para. 8 (1987).

11. See *In re Davis*, 176 N.E.3d 457 (Ind. 2021); *In re Stout*, 179 N.E.3d 465 (Ind. 2022); *In re Smith*, 181 N.E.3d 970 (Ind. 2022); *In re Kyres*, 183 N.E.3d 299 (Ind. 2022).

12. See, e.g., IND. PROF. COND. R. 3.1, 3.3, 4.1, 4.2, 4.3, 4.4.

13. See *In re Stout*, 179 N.E.3d 465; *In re Smith*, 181 N.E.3d 970; *In re Kyres*, 183 N.E.3d 299.

14. *In re Stout*, 179 N.E.3d 465.

automatic reinstatement for an attorney's violations of Indiana Professional Conduct Rules 4.1(a), 8.4(c), and 8.4(d) for the lawyer's ethical misconduct during a deposition in a protective order case.¹⁵

This disciplinary matter involved two counts. Count one charged Respondent Stout with alleged misconduct during his representation of a wife in a dissolution case by behaving inappropriately toward the husband during a deposition and following a hearing.¹⁶ After an evidentiary hearing, the hearing officer determined that Stout's conduct was unprofessional but did not rise to the level of rule violations.¹⁷ The Court agreed.¹⁸

Count two involved the deposition of an unrepresented petitioner in a protective order case.¹⁹ Attendees included the court reporter and others in Respondent Stout's firm.²⁰ During the deposition, he confronted the petitioner with several 8x10 intimate photos she had sent to his client prior to the events that gave rise to the protective order.²¹ Displaying the photos face up on the table for all in attendance to see, Stout asked the petitioner, "why do women who seek the aid of the court send these kinds of pictures to men?"²² Then, he asked the petitioner if she still intended to pursue a protective order or whether there would be a "better way" to handle things than for her to be "drug through" and "exposed in" court.²³ The petitioner indicated that she just wanted the defendant to stop harassing her.²⁴ Respondent Stout ended the deposition and told the petitioner:

[T]he court reporter will transcribe this to final form, submit it to the court, it then becomes a public record. There's a way to stop that, but otherwise with the matter still pending we'll have to submit it to the court and attend a hearing, which will be a very public hearing as well.²⁵

This statement was misleading, incomplete, and false, which Stout knew as an experienced practitioner.²⁶ After hearing Respondent Stout's comments, the petitioner indicated that "she wanted to dismiss the case," so he "instructed the court reporter to go off the record" and informed "the petitioner how to file for a dismissal," which she later did.²⁷ Stout "later bragged to an associate about having secured a dismissal by threatening to have the photographs become part

15. *Id.* at 466.

16. *Id.* at 465; *see also* Hearing Officer's Report at 3-12, 23-26, *In re Stout*, 179 N.E.3d 465.

17. *In re Stout*, 179 N.E.3d at 465.

18. *Id.* at 466.

19. *Id.* at 465.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

of the record.”²⁸

The Disciplinary Commission charged Respondent Stout with violating Indiana Professional Conduct Rules 4.1(a), 4.4(a), 8.4(b), 8.4(c), and 8.4(d).²⁹ In his defense, Stout argued that his objective in deposing the petitioner was to explore and develop a record of inconsistent messages sent by the petitioner to his client and to explore the petitioner’s motive in filing for the protective order.³⁰ The hearing officer found in Respondent Stout’s favor on the Rule 4.4(a) and 8.4(b) allegations, but he found in the Commission’s favor on Rules 4.1(a), 8.4(c) and 8.4(d).³¹ Rule 4.4(a) provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”³² Rule 8.4(b) provides that “[i]t is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”³³

While critical of Respondent Stout’s conduct, the hearing officer found that he did not violate Rule 4.4(a) because the photos had some evidentiary purpose other than to embarrass or burden.³⁴ Rule 4.1(a) provides that “[i]n the course of representing a client a lawyer shall not knowingly: . . . make a false statement of material fact or law to a third person.”³⁵ Rules 8.4(c) and 8.4(d) provide that “[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [and] (d) engage in conduct that is prejudicial to the administration of justice.”³⁶

Respondent Stout asserted that he always files deposition transcripts with the trial court.³⁷ However, the Court accepted the hearing officer’s finding that Stout removed his own agency in the matter and implied the filing of a deposition transcript was a routine and automatic procedure that could only be stopped by dismissal of the case.³⁸ This led to the hearing officer’s conclusion that Stout had made a knowing false statement to the petitioner in violation of Rule 4.1(a).³⁹

As to potential sanction, Stout relied upon *In re Broderick*⁴⁰ in urging the

28. *Id.*

29. *Id.*

30. Hearing Officer’s Report at 30-31, *In re Stout*, 179 N.E.3d 465.; *see also* Respondent’s Tender of Proposed Findings, *In re Stout*, 179 N.E.3d 465.

31. Hearing Officer’s Report at 27-31, *In re Stout*, 179 N.E.3d 465.

32. IND. PROF. COND. R. 4.4(a).

33. *Id.* 8.4(b).

34. *See* Hearing Officer’s Report at 30-31, *In re Stout*, 179 N.E.3d 465.

35. IND. PROF. COND. R. 4.1(a).

36. *Id.* 8.4(c), (d).

37. *See* Hearing Officer’s Report at 29, *In re Stout*, 179 N.E.3d 465; *see also* Respondent’s Tender of Proposed Findings, *In re Stout*, 179 N.E.3d 465.

38. *In re Stout*, 179 N.E.3d 465; *see also* Hearing Officer’s Report at 29-30, *In re Stout*, 179 N.E.3d 465.

39. Hearing Officer’s Report at 20, 29-30, *In re Stout*, 179 N.E.3d 465.

40. *In re Broderick*, 929 N.E.2d 199 (Ind. 2010).

Supreme Court to impose a public reprimand for any misconduct found.⁴¹ The Court disagreed, noting that while both cases involved similar misconduct, Respondent Stout's "actions were qualitatively worse by several degrees. In *Broderick*, the attorney's false statement in a prosecution deferral agreement . . . was the product of willful ignorance."⁴² In contrast, Respondent Stout's statements did not result from ignorance. In rejecting Stout's argument that the matters were similar, the Court distinguished his misconduct, noting that, "Respondent's deception . . . was part of an intentional and purposeful plan he devised to coerce and bully the petitioner into dismissing her case under threat of having her intimate photos exposed."⁴³ The Court suspended him from the practice of law for ninety (90) days with automatic reinstatement.⁴⁴

*B. In re Andreas T. Kyres*⁴⁵

The Indiana Supreme Court addressed another Rule 4.4(a) violation in *In re Kyres*, with different results from *Stout*.⁴⁶ An opposing party, who was represented by counsel, sought a protective order against Respondent Kyres' client and another individual.⁴⁷ During a hearing on the protective order case, Kyres sought a motion to continue and alleged in open court "that he had evidence showing that Opposing Counsel had a sexual relationship with the police sergeant who had handled [the petitioner's] report and the subsequent investigation" of that report.⁴⁸ A few days later, at the continuation of the hearing, Respondent Kyres asserted that "he 'had a source' for his allegation."⁴⁹

The Disciplinary Commission charged Respondent Kyres with violating Rule 3.3(a)(1), which provides that: "A lawyer shall not knowingly: . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."⁵⁰ In the disciplinary complaint, the Commission alleged that Respondent Kyres had no basis for the allegation he made about opposing counsel, and further, he had not substantiated the information from his "source."⁵¹ The Commission also charged Kyres with violating Rule 4.4(a).⁵² In a Conditional Agreement for Discipline, the parties agreed Respondent Kyres violated Rule 4.4(a) and proposed a public reprimand

41. *In re Stout*, 179 N.E.3d at 466.

42. *Id.*

43. *Id.*

44. *Id.*

45. *In re Kyres*, 183 N.E.3d 299 (Ind. 2022).

46. *Id.* at 299.

47. *Id.*

48. *Id.*

49. *Id.*

50. IND. PROF. COND. R. 3.3(a)(1).

51. Disciplinary Complaint at 3, *In re Kyres*, 183 N.E.3d 299.

52. *In re Kyres*, 183 N.E.3d at 299-300.

for his misconduct.⁵³ The Court approved the Conditional Agreement and imposed a public reprimand.⁵⁴

*C. Clarifying the Disciplinary Procedural Rules – In re Davis*⁵⁵

In *In re Davis*, the respondent lawyer's discipline case was the consolidation of two matters.⁵⁶ Trust account mismanagement and inadequate supervision of an employee were at the core of respondent's misconduct in the first cause.⁵⁷

Respondent Davis was a solo practitioner with a paralegal as his only employee.⁵⁸ He commingled his own funds with client funds, mostly by failing to withdraw earned fees from his trust account.⁵⁹ Through his paralegal, he made several cash withdrawals and non-client disbursements from the trust account, but there was no evidence that he knowingly misappropriated or misapplied funds.⁶⁰ Davis was charged with, and admitted to, violating Indiana Professional Conduct Rules 1.15(a) (commingling client and attorney funds) and 5.3(c) (ordering or ratifying the misconduct of a nonlawyer assistant) as well some procedural rules for trust account management.⁶¹

Respondent Davis contested a disciplinary charge that he had knowingly failed to timely respond to a Commission demand for information under Indiana Professional Conduct Rule 8.1(b).⁶² A hearing officer found that the Commission proved this charge.⁶³ Although no petition to review this determination was filed, the Indiana Supreme Court employed its *de novo* review⁶⁴ and decided, without elaboration, that the Commission failed to meet its burden on the charge.⁶⁵

The second disciplinary matter involved eight disciplinary rule violations committed by Respondent Davis during two client representations:

- 1.1: Failing to provide competent representation.
- 1.3: Failing to act with reasonable diligence and promptness.

53. *Id.*

54. *Id.*

55. *In re Davis*, 176 N.E.3d 457 (Ind. 2021).

56. *Id.* at 458.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 462.

62. *Id.*; see IND. PROF. COND. R. 8.1(b).

63. *In re Davis*, 176 N.E.3d at 458.

64. See IND. CONST. art. VII, § 4 (providing that the Indiana Supreme Court has original jurisdiction over the “discipline or disbarment of those admitted” to the practice of law in the State). In exercising its jurisdiction, the Court applies *de novo* review to evaluate whether the Commission has met its burden of proof, even in the absence of the filing of a petition for review by either party. See also *In re Levy*, 726 N.E.2d 1257, 1258 (Ind. 2000); *In re Gallo*, 619 N.E.2d 921, 922 (Ind. 1993); *In re Steele*, 181 N.E.3d 976, 978 (Ind. 2022).

65. *In re Davis*, 176 N.E.3d at 462.

- 1.7: Representing a client when the representation involves a concurrent conflict of interest.
- 3.1: Asserting a position for which there is no non-frivolous basis in law or fact.
- 3.2: Failing to expedite litigation consistent with the interests of a client.
- 4.2: Improperly communicating with a person the lawyer knows to be represented by another lawyer in the matter.
- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- 8.4(d): Engaging in conduct prejudicial to the administration of justice.⁶⁶

The first matter involved Respondent Davis's filing of a lawsuit not for the purpose of obtaining a judgment, but instead to increase costs and to drive the other party out of business.⁶⁷ Davis filed a lawsuit on behalf of a limited liability corporation and its principals against a would-be franchisee when the defendant would-be franchisee pulled out of an agreement because one of the principals unilaterally changed the terms to grant himself an ownership interest in the franchisee.⁶⁸ One defendant countersued, filing an abuse of process claim based on an admission by one of the principals that the suit had been filed merely to cause the defendants to incur costs that would force them out of business.⁶⁹

During the lawsuit, Respondent Davis also engaged in dilatory and oppressive tactics that drove up the cost and duration of the proceedings, including making accusations that one of the defendants had given former girlfriends a sexually transmitted disease and then issuing subpoenas to those women, despite the fact that none of the women were involved with the defendant at the time the franchise agreement was being negotiated or fell apart.⁷⁰ After Davis's clients lost on summary judgment and at trial, he pursued three appeals before the United States Court of Appeals for the Seventh Circuit, raising groundless arguments and misrepresenting precedent.⁷¹ During the litigation, Respondent Davis also assisted his clients' attempts to transfer ownership of trademarks and other intellectual property to a different limited liability corporation with the same principals in an attempt to avoid payment of the judgment.⁷²

The second client representation also involved a legal dispute with a limited liability company.⁷³ The LLC owned and operated a pizza restaurant; two of the LLC's members sought to sell the company to a buyer, but a third member

66. *Id.*

67. *Id.* at 460.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Wine & Canvas Dev., LLC v. Muelle*, 868 F.3d 534 (7th Cir. 2017).

72. *In re Davis*, 176 N.E.3d at 460.

73. *Id.* at 461.

objected to the sale.⁷⁴ During negotiations, Respondent Davis initially represented the buyer but later began representing the two LLC members who wanted the sale.⁷⁵ Also, in the midst of negotiations, Respondent Davis presented the third member with a fake operating agreement bearing the member's forged signature, which purported to permit a sale of the company if approved by a majority of the members.⁷⁶ The sale was completed, and, during the process, Respondent Davis contacted the third member directly multiple times, despite the member being represented by counsel.⁷⁷

The third member filed suit against the other two members, the buyer, and others.⁷⁸ Respondent Davis filed an appearance for all defendants, except the LLC; he then proceeded to commit extensive discovery misconduct and made multiple false representations in motions for extensions of time.⁷⁹ Ultimately, his conduct resulted in the trial court entering a default judgment against all defendants as a sanction for the defendants' and their attorney's misconduct.⁸⁰

A damages hearing was set in the matter and the third member filed a motion to compel discovery because the defendants withheld information needed to determine damages.⁸¹ After the trial court granted the motion to compel, Davis failed to comply, resulting in the trial court barring defendants from presenting witnesses or evidence at the damages hearing.⁸²

Appeals were initiated by the defendants, the LLC, and the third member, which were consolidated by the Court of Appeals of Indiana.⁸³ Respondent Davis filed several motions for extensions, some of which were belated and did not comply with the Appellate Rules of Procedure, contained false factual assertions, and asserted personal attacks on opposing counsel.⁸⁴ Through successor counsel, the defendants notified the appellate court they had fired Davis and requested leave to supplement their briefing.⁸⁵ After a re-briefing and additional delays, the Court of Appeals reversed the trial court and remanded for an award of damages and attorney fees.⁸⁶

The Disciplinary Commission filed its initial complaint on the second case in February 2021 and was granted leave to amend the complaint in April 2021.⁸⁷

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* However, at the damages hearing, the trial court did grant the defendants' motion for involuntary dismissal on the grounds that the third member could not prove damages. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 458.

Respondent Davis did not timely file an answer to the complaint, so the Commission filed a motion for judgment on the pleadings, which the hearing officer granted.⁸⁸

Indiana Admission and Discipline Rule 23(14)(b) requires a respondent lawyer to file an answer to a disciplinary complaint or a written motion for an extension to respond within thirty days of the filing of the complaint.⁸⁹ In a petition for review, Respondent Davis alleged that the hearing officer improperly had disregarded his belatedly-filed answer and granted judgment on the pleadings because: 1) the hearing officer at a pretrial conference orally had granted him an extension to answer the amended complaint, and 2) even if he was mistaken about the hearing officer granting him an extension, “any neglect on his part was excusable.”⁹⁰

The Supreme Court disagreed, noting that the transcript reflected the hearing officer had indicated he was *inclined* to grant an extension *if* one was filed.⁹¹ The Court further reasoned that Respondent Davis’s “professed confusion about whether Rule 23(14)(b) requires an extension request to be in writing” was not warranted, as the plain language in the Rule specifies that such requests must be written.⁹²

Of more significant note were the Court’s comments about Respondent Davis’s lack of civility during his litigation of the two client representations in the second case and during the disciplinary case. In a footnote, the Court referenced his failure to adhere to the substantive requirements of Admission and Discipline Rule 23(14)(b)(4) in his late answer.⁹³ Specifically, the Court commented about the inappropriateness of Davis’s repeated use of the following boilerplate denials—“**DENY AS THE DOCUMENT(S), RECORD, AND/OR OTHER ITEM(S) REFERENCED SPEAKS FOR THEMSELVES. THIS IS NOT WHAT WAS SAID**”—when averments in the complaint did not even reference any documents.⁹⁴

The Court also pointed to the pattern of misconduct in the second case.⁹⁵ Although Respondent Davis had no prior disciplinary history, the Court imposed

88. *Id.* at 459.

89. Ind. Admis. Disc. R. 23(14)(b).

90. *In re Davis*, 176 N.E.3d at 459.

91. *Id.*

92. *Id.*

93. *Id.* at 459 n.1 (referencing the requirements of Admission and Discipline Rule 23(14)(b)(4)); *see generally* Ind. Admis. Disc. R. 23(14)(b)(4) (Procedural rule mandating that a respondent lawyer’s answer: “[S]hall admit or controvert the averments set forth in the Disciplinary Complaint by specifically denying designated averments or paragraphs or generally denying all averments except the designated averments or paragraphs as the respondent expressly admits. All denials shall fairly meet the substance of the averments denied. If in good faith the respondent intends to deny only a part of an averment, he or she shall specify so much of it as is true and material and deny the remainder.”).

94. *Id.* (Court noted bold and capitalization were in the respondent’s original answer).

95. *Id.* at 463.

a suspension from the practice of law for not less than one year without automatic reinstatement.⁹⁶ The Court reasoned that Respondent Davis's conduct merited a severe sanction because of his repeated misconduct in the charged counts that spanned nearly a decade, involving "pervasive fraud, dishonesty, bad faith, obstreperousness, repetitive and frivolous filings, and gross incompetence."⁹⁷ The Court noted that these activities "are endemic to Respondent's practice and not isolated lapses in judgment."⁹⁸

III. NEGOTIATING ETHICALLY – THE *STEELE* DECISIONS⁹⁹

Two of the per curiam decisions released this period involved the same lawyer and presented novel legal issues for the Court's consideration. In *Steele I*, the question before the Court was whether a lawyer engages in conduct prejudicial to the administration of justice (a violation of Indiana Professional Conduct Rule 8.4(d)) by demanding that a disciplinary grievance, filed by an opposing party in a civil matter, be withdrawn as a condition of settlement if the grievance is meritless.¹⁰⁰

Respondent Steele had a contentious breakup that resulted in his ex-girlfriend initiating criminal and protective order proceedings against Steele; Steele filing a defamation suit against his ex-girlfriend; and the ex-girlfriend and her sister filing disciplinary grievances against Steele.¹⁰¹ After the grievances were filed, Respondent Steele emailed the opposing counsel in the defamation case, demanding that the grievances be withdrawn before he would consider discussing settlement of the defamation suit.¹⁰²

The criminal and protective order proceedings eventually were dismissed.¹⁰³ Steele's ex-girlfriend did not accede to his demand and was able to obtain a dismissal of some counts in the defamation suit and summary judgment on the remaining counts.¹⁰⁴ The original disciplinary grievances also were dismissed, but the Commission discovered during the investigation of those grievances Respondent Steele's transmission of the email demand.¹⁰⁵ The Commission then pursued a disciplinary complaint alleging that Steele violated Rule 8.4(d) by attempting to interfere with the disciplinary process.¹⁰⁶ Respondent Steele contended that his settlement demand could not be "prejudicial to the

96. *Id.*

97. *Id.*

98. *Id.*

99. *In re Steele (Steele I)*, 171 N.E.3d 998 (Ind. 2021); *In re Steele (Steele II)*, 181 N.E.3d 976 (Ind. 2022).

100. *Steele I*, 171 N.E.3d at 1000-01.

101. *Id.* at 1000.

102. *Id.*

103. *Id.*

104. *Id.* at 1001.

105. *Id.* at 1000.

106. *Id.*

administration of justice” if the underlying grievance had no merit in the first place.¹⁰⁷

The Supreme Court rejected Respondent Steele’s argument, first pointing out that precedent establishes that coercive threats to file a grievance with the Commission unless settlement is accepted, or alternatively, quid pro quo demands that someone withdraw a grievance as a condition precedent to settlement, violate Rule 8.4(d).¹⁰⁸ The Court next examined the policy considerations underlying this precedent—such actions have the potential to frustrate the disciplinary process by possibly interfering with the Commission’s ability to obtain evidence and cooperation from the grievant.¹⁰⁹ Specifically comparing *Steele I* to *In re Ramirez*,¹¹⁰ the Court pointed out that Steele’s action, like those of Ramirez, had not actually prejudiced the outcome of the underlying litigation or the Commission’s investigation.¹¹¹

However, the Court noted that prejudice under Rule 8.4(d) is measured objectively by the potential to thwart the “administration of justice” rather than the actual outcome to the parties.¹¹² The Court then reasoned:

At the time Respondent made his demand, the Commission had objectively good cause for its investigation, as Respondent was facing criminal charges and was the subject of a temporary protective order in connection with his alleged conduct toward his ex-girlfriend. That much of this eventually was resolved in Respondent’s favor does nothing to alter the need for the Commission to investigate the allegations made in the grievances, and for that process to occur free from any attempts to undermine it.¹¹³

Although the Court recognized Respondent Steele’s frustration in having to deal with meritless grievances, it concluded that his action violated Rule 8.4(d), as the disciplinary system must be able to determine the viability of grievances without interference.¹¹⁴

In *Steele II*, the Court was asked to determine whether a lawyer representing himself in a matter can violate Indiana Professional Conduct Rule 4.2 by directly contacting an opposing party who is represented by counsel.¹¹⁵ Steele had a legal dispute with a long-time friend over repayment of educational expenses.¹¹⁶ He

107. *Id.* at 1000-01 (quoting IND. PROF. COND. R. 8.4(d)).

108. *Id.* at 1001 (referencing *In re Ramirez*, 853 N.E.2d 121, 121 (Ind. 2006), which held that an attorney even suggesting to a client to withdraw a grievance violates Rule 8.4(d)).

109. *Id.*

110. *In re Ramirez*, 853 N.E.2d 121.

111. *Steel I*, 171 N.E.3d at 1001.

112. *Id.* at 1002.

113. *Id.*

114. *Id.*

115. *In re Steele (Steele II)*, 181 N.E.3d 976, 978 (Ind. 2022).

116. *Id.* at 977.

sent a demand letter by email to the friend and the friend's attorney.¹¹⁷ Opposing counsel replied, directing Steele to cease all communication with the friend *and* to send all correspondence to counsel.¹¹⁸ After a series of emails back and forth between counsel that ultimately were not productive, Respondent Steele filed suit.¹¹⁹ One week later, he sent a profanity-laced email to his former friend threatening to visit him in person and demanding that the friend bypass his attorney and discuss the dispute with Steele directly.¹²⁰

The Commission then filed a disciplinary complaint against Steele for an alleged violation of Indiana Professional Conduct Rule 4.2, which provides: “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.”¹²¹ Respondent Steele argued that he was ethically permitted to send the email to his former friend because he was not “representing a client,” a predicate to application of Rule 4.2, but instead was representing himself.¹²² Accordingly, he contended that he should be seen in the role of “party” rather than “attorney.”¹²³ Steele then pointed to commentary to Rule 4.2 that recognizes parties generally are permitted to communicate with each other.¹²⁴

A majority of the Supreme Court rejected Respondent Steele's arguments, noting that the Court has found violations of other ethical rules with similar prefatory language to Rule 4.2 for attorneys' professional misconduct during pro se litigation.¹²⁵ Further, the majority reasoned that the policy considerations supporting Rule 4.2—preservation of the integrity of the attorney-client relationship and prevention of an attorney from unfairly pressuring an opposing party to settle on less favorable terms by bypassing opposing counsel—equally

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 977-78.

121. IND. PROF. COND. R. 4.2(a).

122. *Steele II*, 181 N.E.3d at 978.

123. *Id.*

124. *Id.* To support his position, the Respondent pointed to a clause in Comment 4 to Rule 4.2 which notes that there are situations when “[p]arties to a matter may communicate directly with each other . . .” IND. PROF. COND. R. 4.2 cmt 4.

125. *Steele II*, 181 N.E.3d at 979 (“we found violations of Rule 4.4(a)—which provides that ‘in representing a client’ an attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person—for conduct committed by the respondent attorneys as pro se litigants” (citing *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013); *In re Richardson*, 792 N.E.2d 871 (Ind. 2003))). The court also noted a violation of Indiana Professional Conduct Rule 3.3(a)(1) for an attorney's “dishonesty in bankruptcy filings by a pro se attorney, even though the commentary to [Rule 3.3] indicates it covers conduct of an attorney ‘who is representing a client.’” *Id.* (citing *In re Thomas*, 30 N.E.3d 704 (Ind. 2015)).

apply with the pro se lawyer.¹²⁶

The majority also opined that the commentary cited by Respondent Steele does not change the analysis, as Steele pointed to one clause without considering all comments in context.¹²⁷ The majority noted that, although Comment 4 to Rule 4.2 recognizes that parties may directly communicate with one another, it “is not intended to insulate from scrutiny situations where a party communicates with another at the insistence of or in the presence of the party’s counsel and while the adverse party’s counsel is absent and unaware of the contact.”¹²⁸ Ultimately, the majority reasoned that Rule 4.2 applies to the conduct of a self-represented lawyer because an attorney “who proceeds pro se in a matter functionally occupies the roles of both an attorney and client.”¹²⁹

Justice Slaughter dissented.¹³⁰ Although he agreed that the policy grounds cited by the majority are important, he maintained that the plain meaning of the prefatory language of Rule 4.2 does not support application to lawyers engaged in self representation.¹³¹ His position was that the majority’s interpretation of the self-represented lawyer as simultaneously occupying the roles of attorney and client twists the understanding of the attorney-client relationship under the Indiana Rules of Professional Conduct.¹³² He further believed that the majority’s analysis may lead to counterintuitive results with its new definition of “client” when applying other professional conduct rules.¹³³ His suggestion was to rewrite the Rule with language specifically including self-representation.¹³⁴

Beyond the Court’s analysis resolving two novel legal issues in ethics, *Steele*

126. *Id.*

127. *Id.* at 979-80.

128. *Id.* at 980 (quoting *In re Anonymous*, 819 N.E.2d 376, 379 n.1 (Ind. 2004)); see also IND. PROF. COND. R. 4.2 cmt. 4 (2022). The relevant sentences in Comment 4 to Rule 4.2 read fully as follows: “This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.” IND. PROF. COND. R. 4.2, cmt 4 (2022).

129. *Steele II*, 181 N.E.3d at 979.

130. See *id.* at 981-82 (Slaughter, J., dissenting).

131. *Id.* at 981.

132. *Id.*

133. *Id.*

134. *Id.*; see also ABA Comm. on Ethics & Pro. Resp., Formal Op. 502 (2022) (showing the divergence of opinions on the application of Rule 4.2 to lawyers engaged in self-representation through its discussion on communication with a represented person by a pro se lawyer).

I and *II* are important to review for the Court's remarks regarding civility (or lack thereof) and its impact on disciplinary proceedings. In *Steele I*, the Court noted that the respondent's misconduct typically would warrant a public reprimand since he had no prior disciplinary history.¹³⁵ However, the Court felt that it could not ignore his conduct during the disciplinary proceedings:

Here, we simply cannot turn a blind eye to Respondent's abusive conduct during these proceedings against the Commission's staff, the hearing officer, the judge in his defamation case, and even members of this Court. . . . While we will not repeat here the full range of epithets and *ad hominem* attacks Respondent has directed toward others, he repeatedly attacked the Commission for incompetence and corruption Respondent has also accused the judge in his defamation case of having "betrayed and shamed his oath and his office," he has accused the hearing officer of being a "puppet," and he has repeatedly accused members of this Court of having improperly attempted to influence the hearing officer in this matter.¹³⁶

The Court noted that attorneys have the right to defend their professional reputations, even vigorously, but they do not have the right "to merely hurl senseless invective and baseless allegations toward opposing counsel, judicial officers, and everyone else with a connection to the matter. Such vituperative and unfounded conduct unnecessarily undermines the legitimacy of proceedings and 'has no place within the contemporary practice of law.'"¹³⁷ The Court reasoned that Respondent Steele's behavior during the proceedings warranted a suspension of thirty days from the practice of law with automatic reinstatement.¹³⁸

Although the Court's majority imposed a public reprimand for Steele's professional misconduct in *Steele II*, the Court expressed, in a footnote, similar concerns with the respondent's behavior during the proceedings.¹³⁹ The Court pointed out:

We hasten to add, though, that Respondent continues to be his own worst enemy when it comes to his electronic communications. He has been disciplined twice now for inappropriate emails; and during our consideration of this case he has sent numerous extrajudicial emails about his disciplinary matters to the membership and staff of this Court, prompting the Commission to file an "Objection to Respondent's Email Communications and Verified Request for Order Prohibiting Further Submissions." We decline at this time to issue an order of prohibition enforceable through contempt, this matter essentially having come to its substantive end with this opinion. But our declination should not be

135. *In re Steele (Steele I)*, 171 N.E.3d 998, 1003 (Ind. 2021).

136. *Id.*

137. *Id.* (citing *In re Crumpacker*, 383 N.E.2d 36, 52 (Ind. 1978)).

138. *Id.* at 1004.

139. *Steele II*, 181 N.E.3d at 880 n.4.

viewed by Respondent as license to engage in inappropriate communications.¹⁴⁰

Steele I and *II* serve as cautionary tales to other practitioners to maintain civility during disciplinary and underlying proceedings, as repeated caustic and unfounded attacks will be considered an aggravator when determining an appropriate sanction.

IV. CRITICAL SPEECH OF JUDGES – *IN RE JASON M. SMITH*¹⁴¹

In another per curiam decision, the Court took the opportunity to evaluate the propriety of other lawyer communications, addressing, once again,¹⁴² in the case of *In re Smith*, the issue of whether a lawyer violates Indiana Rule of Professional Conduct 8.2(a) when the lawyer criticizes a judge in pleadings.¹⁴³ Rule 8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.¹⁴⁴

In *In re Smith*, Respondent Smith represented a former bank employee in a suit brought by the bank against the former employee.¹⁴⁵ The trial court granted preliminary and permanent injunctions in favor of the bank.¹⁴⁶ The trial court further found the former employee in contempt for violating the preliminary injunction and awarded attorney fees to the bank.¹⁴⁷ The former employee appealed.¹⁴⁸ In his brief filed on behalf of the former employee, Respondent Smith made several intemperate and unfounded attacks on the integrity of the trial court judge.¹⁴⁹ These statements included the following:

- “[Judge] demonstrated extreme bias and prejudice against [former employee] by . . . intentionally orchestrating hearings so as to deprive [former employee] of opportunities to be heard[.]”

140. *Id.*

141. *In re Smith*, 181 N.E.3d 970 (Ind. 2022).

142. The Indiana Supreme Court has a history of disciplinary cases that involved critical speech about judges. See *In re Terry*, 394 N.E.2d 94 (Ind. 1979); *In re Atanga*, 636 N.E.2d 1253 (Ind. 1994); *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002), *reh’g granted in part and denied in part*, 782 N.E.2d 985 (Ind. 2003); *In re Dixon*, 994 N.E.2d 1129 (Ind. 2013).

143. *In re Smith*, 181 N.E.3d 970.

144. IND. PROF. COND. R. 8.2(a).

145. *In re Smith*, 181 N.E.3d at 971.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 971-72.

- “[Judge’s] . . . almost submissive interactions with [bank’s] counsel, followed by the granting [of] ex parte orders in [bank’s] favor, and various other methods of disregarding [former employee’s] efforts to defend himself, tell a story of extreme partiality.”
- “[Judge’s] quick entry of ex parte orders, at [bank’s] request, creates the appearance that he is doing the bidding of [bank] dutifully and without question.”
- “Judge . . . appeared to go beyond the mere summary granting of [bank’s] motions, to the point of proactively assisting in the elimination of [former employee’s] due process.”
- “At worst, [Judge] . . . intentionally misled [former employee’s] counsel[.]”
- “[Judge’s] . . . bias or prejudice seemed to become an open and obvious weapon designed to convince [former employee] that his search for impartial review was hopeless.”
- “[Judge] . . . cemented his subservience to [bank] when he submitted a memorandum in his own court . . . authorizing [bank’s counsel] to ‘decide’ the findings of fact and conclusions of law on both the Final Injunction Order and the Contempt Order.”¹⁵⁰

In its opinion, the Court of Appeals chastised the respondent in a footnote and directed the Clerk to forward the case materials to the Disciplinary Commission.¹⁵¹

The Disciplinary Commission filed a disciplinary complaint against Respondent Smith, charging him with violating Rule 8.2(a).¹⁵² Relying on *In re Dixon*, Smith argued in his defense that the Commission failed to show he made the statements in his brief “with knowing or reckless falsity.”¹⁵³

In *In re Dixon*, the Court was called upon to determine the proper standard to apply under Rule 8.2(a) when evaluating whether an attorney knowingly made false statements about a judicial officer.¹⁵⁴ The case arose after Respondent Dixon made critical statements in a motion for change of judge in a criminal misdemeanor case occurring at the University of Notre Dame.¹⁵⁵ Dixon asserted in the motion that the trial judge was biased because of her husband’s relationship

150. *Id.* at 972 n.1.

151. *Id.* at 972.

152. *Id.*

153. *Id.*

154. *In re Dixon*, 994 N.E.2d 1129 (Ind. 2013).

155. *Id.* at 1131-32.

with the University and his writings and advocacy reflecting a pro-life stance.¹⁵⁶

Respondent Dixon represented eighty-five pro-life protesters who were arrested by Notre Dame police officers for actions occurring during a protest of President Barack Obama's visit to the University.¹⁵⁷ Dixon "planned to present a novel defense for his clients—that they had a contractual right to pray on the Notre Dame campus originating in Catholic canon law."¹⁵⁸ The trial court judge assigned to hear the case was married to a Notre Dame professor who previously advocated in favor of the pro-choice cause.¹⁵⁹ Respondent Dixon sought the judge's recusal in the trespass case, arguing that:

[B]ased on her husband's alleged advocacy in favor of pro-choice causes and academic freedom for Notre Dame, along with [the judge's] failure to disclose this alleged advocacy. Respondent argued that his clients were arrested because they had acted on beliefs about abortion and academic freedom for Notre Dame that were directly contrary to the beliefs allegedly advocated by [the judge's husband] during his career. [The judge] also made statements that Respondent believed were inaccurate about her husband's writings at the hearing on the Motion for Change of Judge. In addition, Respondent cited [the judge's] allegedly erroneous rulings . . . as a basis for recusal.¹⁶⁰

In the motion for change of judge, Respondent Dixon made the followings statements:

- "Such large scale litigation, and the results therefrom, could adversely impact Notre Dame's bottom line, which in turn could have a negative impact on Notre Dame's current and future employees. It is in [the judge's husband's] interest to see that this does not occur. In short, [the judge] and her husband are simply too intertwined with, and invested in, the University of Notre Dame and its mission to be allowed to preside over these cases."¹⁶¹
- "[The judge's] inability to admit the intellectual and political (in the sense of policy setting) consanguinity between her husband's career mission and Notre Dame's current mission, calls into profound question her ability to navigate the waters of defendants' legal defenses related to their contractual rights to be where they were when they were arrested."¹⁶²

156. *Id.* at 1132.

157. *Id.* at 1131.

158. *Id.*

159. *Id.* at 1132.

160. *Id.*

161. *Id.*

162. *Id.* at 1132-33.

- “[The judge’s] ruling applying the injunction to Mrs. Kendall can be explained in only one of two ways: either [the judge] did not understand the privity requirement of Trial Rule 65, or she did not feel duty bound to apply the rule because she was biased in favor of the abortuary.”¹⁶³
- “[The judge’s] refusal to allow Marsh into the case, when she knew Mrs. Kendall wanted out of the case, demonstrates to me that she was willing to ignore the applicable legal standards in order to move the case in a direction that negatively affected Marsh’s legal rights without giving him the ability, as required by Trial Rule 24, to have a voice in the process or defend the same.”¹⁶⁴

The judge filed a grievance with the Disciplinary Commission, and the Commission charged attorney Dixon with violating Rule 8.2(a) for making the above statements attacking the judge’s integrity in his Motion for Change of Judge.¹⁶⁵ The Supreme Court adopted an objective test for determining whether an attorney’s statements criticizing a judge violate Rule 8.2(a).¹⁶⁶ The Court explained that the following question and considerations are relevant to this analysis:

Did the attorney lack any objectively reasonable basis for making the statement at issue, considering its nature and the context in which the statement was made? The extent to which the attorney discloses accurate facts to support the statement is relevant to the determination of whether the attorney acted in reckless disregard as to its truth or falsity.¹⁶⁷

Applying this standard, the Court determined that Respondent Dixon did not violate Rule 8.2(a) because “Respondent’s statements were made not just within, but as material allegations of, a judicial proceeding seeking a change of judge on three grounds, each of which *affirmatively requires* alleging personal bias or prejudice on the part of the judge.”¹⁶⁸

The Court noted that in order to further his legal argument for recusal, Respondent Dixon alleged that the trial court judge was both biased and appeared to be biased.¹⁶⁹ Because a moving party must assert actual bias in support of a motion for a change of judge in a criminal case, the Court found that Respondent Dixon’s statements were in furtherance of his legal argument and did not violate Rule 8.2(a), even though the disciplinary rule holds attorneys to a higher standard than is required in defamation cases under the *New York Times Co. v. Sullivan*

163. *Id.* at 1133.

164. *Id.*

165. *Id.* at 1132-33.

166. *Id.* at 1137.

167. *Id.* (citation omitted).

168. *Id.*

169. *Id.* at 1138.

standard.¹⁷⁰ The Court further explained in *Dixon*:

[W]e also recognize that attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients—particularly on issues, as here, that *require* criticism of a judge or a judge’s ruling. And as discussed above, in seeking a change of judge under Criminal Procedure Rule 12(B), a party must allege personal bias or prejudice on the part of the judge—and an attorney must therefore be allowed to assist the client in doing what the rule requires. A motion for a change of judge due to personal bias is inherently sensitive, but it implicates the client’s fundamental due process right to a neutral decision maker. Counsel’s advocacy on such matters must not be chilled by an overly restrictive interpretation of Rule 8.2(a).¹⁷¹

In his defense, Respondent Smith referred to the language in *Dixon* that “attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients” and asserted that his actions merely were effective advocacy on behalf of his client.¹⁷² However, Respondent Smith failed to recognize the distinction between his conduct and that of attorney Dixon, as Smith failed to act in good faith when he criticized the judge, and he had no legal basis for making his recklessly false claims about the judge’s integrity. By contrast, in *Dixon*, the respondent lawyer was legally required to make the critical allegations against the judge to carry out his legal purpose of seeking a change of judge for his clients. Moreover, attorney Dixon acted in good faith when he made his statements about the judge in his motion to disqualify the judge. As the Court elaborated in *In re Smith*:

Respondent counters by citing our recognition in *Matter of Dixon*, that “attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients.” But that “wide latitude” is not a blank check. *Dixon* also provides that “good faith professional advocacy” is a predicate for application of this “least restrictive” standard.¹⁷³

In short, the Court was not persuaded that Smith was acting in good faith when he questioned the integrity of the judge, nor did the Court find that Smith was able to support his criticisms of the judge with any reliable evidence.¹⁷⁴ As a result, the Court found attorney Smith violated Rule 8.2(a) and suspended him from the practice of law for thirty days with automatic reinstatement.¹⁷⁵

For practitioners, the lasting impact of *In re Smith* is that the decision

170. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

171. *Id.*

172. *In re Smith*, 181 N.E.3d 970, 973 (Ind. 2022).

173. *Id.* (citing *In re Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003) (“Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge’s integrity”).

174. *Id.*

175. *Id.* at 973-74.

provides further guidance as to when a lawyer's statements about a judge cross the line of permissible conduct. By elucidating the requirement that lawyers must have a good faith professional advocacy purpose for making statements criticizing a judge's integrity, the Court struck the appropriate balance between civilized discourse in pleadings and the need for effective, vigorous advocacy.

V. DISBARMENT—*IN RE THOMAS*¹⁷⁶

The Court considers a number of factors when fashioning the appropriate remedy in attorney misconduct cases; however, time and time again, the Court has viewed deception as one factor that always warrants a severe sanction.¹⁷⁷ The case of *In re Thomas* is illustrative of this point and ended up in the most severe sanction available to the Court—disbarment.¹⁷⁸

Respondent Thomas's disciplinary situation began with trust account mismanagement, which led to a criminal conviction for check deception for a check kiting scheme that left his trust account overdrawn.¹⁷⁹ The Disciplinary Commission filed a disciplinary complaint against Thomas due to that conviction.¹⁸⁰

The parties agreed that while that matter was pending, the Commission was investigating other misconduct allegations.¹⁸¹ The Court noted: "In connection with one of these investigations, Respondent admits he fraudulently created a document purporting to be an order granting a sentence modification to a client and forged the presiding judge's signature on that document. The parties indicate that other pending investigations also involve allegations of fraudulent documents."¹⁸²

The parties agreed that Respondent Thomas's misconduct warranted disbarment and further agreed that he had committed the following rule violations:

1.15(a): Failing to safeguard property of clients and to hold property of clients separate from the lawyer's own property.

8.4(b): Committing criminal acts that reflect adversely on the lawyer's honesty.

8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

8.4(d): Engaging in conduct that is prejudicial to the administration of

176. 184 N.E.3d 1157 (IND. 2022).

177. See, e.g., *In re Cooper*, 161 N.E.3d 362 (Ind. 2021); *In re Fulk*, 146 N.E.3d 919 (Ind. 2020); *In re Lennox*, 144 N.E.3d 181 (Ind. 2020); *In re Gupta*, 140 N.E.3d 287 (Ind. 2020); *In re Fraley*, 138 N.E.3d 262 (Ind. 2020).

178. *In re Thomas*, 184 N.E.3d at 1158.

179. *Id.* at 1157.

180. *Id.*

181. *Id.*

182. *Id.*

justice.¹⁸³

In deciding whether the proposed sanction submitted in the parties' Conditional Agreement was appropriate, the Court pointed out that, when deciding on appropriate discipline, the Court looks at the following factors: the nature of the misconduct, the duties violated by the respondent, any resulting or potential harm, the respondent's state of mind, the Court's duty to preserve the integrity of the profession, the risk to the public if the Court were to allow the respondent to continue to practice law, and matters in mitigation and aggravation.¹⁸⁴

The Court noted that it has imposed sanctions "in prior cases involving crimes of dishonesty, misappropriation of client funds, creation of fraudulent documents, or forging of signatures."¹⁸⁵ Balancing the relevant discipline factors, the Court remarked that the consideration of factors "point in a single direction here."¹⁸⁶ The Court then voiced: "[h]ere, Respondent admits having done all of these things. These acts demonstrate Respondent's unfitness to practice law, now or ever. We agree with the parties that permanent disbarment is warranted."¹⁸⁷

Although *In re Thomas* is a short opinion, the Court's decision to issue a per curiam opinion, as opposed to an Order Approving Conditional Agreement, suggests the Court viewed the matter as significant enough to reaffirm its commitment to the preservation of the integrity of the profession. This opinion also reinforces how important the Court values honesty in the practice of law. In essence, lying is the ultimate act of incivility.

VI. THE FORMAL ADVISORY OPINIONS

Aside from investigating and prosecuting professional attorney misconduct, the Disciplinary Commission issued three formal advisory opinions providing guidance on common ethical pitfalls arising in the practice: (1) 1-21 – Lawyers' Responsibility for their Nonlawyer Assistants' Notarial Acts; (2) 1-22 – Lawyers' Public Comments on Pending Matters; (3) 2-22 – Detecting and Navigating Conflicts of Interest.

A. Lawyers' Responsibility for Their Nonlawyer Assistants' Notarial Acts

In Advisory Opinion 1-21, the Commission emphasized the importance of attorneys properly using, as well as supervising the use by others of, the notary process.¹⁸⁸ Indiana Professional Conduct Rule 5.3 and Guideline 9.1 govern attorneys' responsibilities over nonlawyer assistants, which includes notarial

183. *Id.*

184. *Id.* at 1158.

185. *Id.*

186. *Id.*

187. *Id.*

188. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 1-21 (2021), available at <https://www.in.gov/courts/discipline/files/dc-opn-1-21.pdf> [<https://perma.cc/Z3KM-QA55>].

activities.¹⁸⁹

Indiana Professional Conduct Rules implicated by an attorney's failure to supervise the proper use of a notary include: (1) Rule 5.3(c)(1), (2) – Failure to supervise; (2) Rule 3.3(a)(1) – Lack of candor toward tribunal; (3) Rule 8.4(a) – Assisting or inducing a violation of the Rules of Professional Conduct; (4) Rule 8.4(c) – Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and (5) Rule 8.4(d) – Engaging in conduct prejudicial to the administration of justice.¹⁹⁰ To maintain compliance with ethics rules, it is imperative that lawyers carefully review these rules and ensure proper training for and supervision over nonlawyer assistants acting as notaries.

B. Lawyers' Public Comments on Pending Matters

In Advisory Opinion 1-22, the Commission emphasized the care attorneys should take when making extrajudicial statements on traditional media and social media platforms about legal matters they have participated in or are actively participating in.¹⁹¹ Whether a lawyer may comment on legal matters depends both on whether the lawyer has obtained the client's consent (implicating Indiana Professional Conduct Rule 1.6) and the nature of the statements, including what the impact of any statement could have on the client and the legal system generally.¹⁹²

In offering guidance to practitioners regarding extrajudicial statements, the Commission described Indiana Professional Conduct Rule 3.6 (also known as the "Trial Publicity" Rule)¹⁹³ as an attempt to strike a balance between attorneys' rights to engage in free speech and the rights of those involved in litigation to a fair trial free of prejudice.¹⁹⁴

Generally, attorneys should not comment on any items that could prejudicially impact pending litigation, such as the credibility of witnesses or the existence of inadmissible evidence.¹⁹⁵ Further, the Commission recommended that attorneys should refrain from commenting on matters outside the public record that an ordinary citizen would not be able to access. This includes not commenting on internal investigative reports or information that only "insiders"

189. *Id.* at 1.

190. *Id.* at 2.

191. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 1-22 (2022), available at <https://www.in.gov/courts/discipline/files/dc-opn-1-22.pdf> [<https://perma.cc/4V4V-QFVL>].

192. *Id.* at 1.

193. Rule 3.6 is broken down into four parts. Section (a) sets forth the general rule. Section (d) provides a non-exhaustive list of subjects that are rebuttably presumed to be materially prejudicial. Section (b) offers a limited list of "safe harbor" subjects that a lawyer is ethically permitted to comment upon. Then section (c) recognizes a limited exception for responses to negative publicity created by the client. IND. PROF. COND. R. 3.6.

194. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 1-22, *supra* note 191, at 5.

195. *Id.* at 3.

would be able to obtain.¹⁹⁶ The Advisory Opinion also sets forth that attorneys should refrain from public statements or written posts that are reactive in nature and could reveal a client's identity, even though the client's name is not specifically mentioned in the statement or post.¹⁹⁷

As detailed in the Opinion, another applicable Rule to consider when making extrajudicial statements is Indiana Professional Conduct Rule 3.8. This Rule applies particularly to prosecutors and outlines the responsibilities of prosecutors to ensure faith in the justice system.¹⁹⁸ The Commission noted that prosecutors should limit their public comments to statements necessary to inform the public on the extent of the charges and the prosecutor's actions that serve as a legitimate law enforcement purpose.¹⁹⁹ Additionally, all public statements made by prosecutors should be accompanied by a verbal or written acknowledgment that all charges are merely allegations and that the accused is presumed innocent until proven guilty.²⁰⁰

C. Detecting and Navigating Conflicts of Interest

In Advisory Opinion 2-22, the Commission addressed the issue of detecting and navigating conflicts between current, potential, and former clients.²⁰¹ The Commission noted that, under Indiana Professional Conduct Rules 1.7, 1.9, and 1.18, attorneys "should decline to represent a client, or withdraw from a current matter, when their advocacy is or will be materially limited by duties owed to another."²⁰² Under Rules 1.7 (a)(2) and 1.8, attorneys also should avoid representation when their ability to advocate for a client is compromised by their personal interests.²⁰³ The Commission explained that, with certain exceptions, the fiduciary duties of loyalty that lawyers owe to their clients prohibit them from using information gained during representation to the disadvantage of current and former clients.²⁰⁴ The Commission used several hypotheticals to help elucidate how the conflict of interest rules work.

In Hypothetical 1, for example, when a potential client reveals material and potentially harmful confidential information to the lawyer during consultation, the lawyer would be prohibited from representing a future client in a similar matter when the information the prospective client revealed could be used to the future client's disadvantage, regardless of whether the prospective client ever

196. *Id.*

197. *Id.* at 5.

198. IND. PROF. COND. R. 3.8.

199. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 1-22, *supra* note 191, at 4.

200. *Id.*

201. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 2-22 (2022), *available at* <https://www.in.gov/courts/discipline/files/dc-opn-2-22.pdf> [<https://perma.cc/5KE5-N448>].

202. *Id.* at 1; *see also* IND. PROF. COND. R. 1.7, 1.9, 1.18.

203. *Id.* at 2.

204. *Id.*

hired the lawyer.²⁰⁵

In Hypothetical 2, the Commission demonstrated that if lawyers can provide reasonably competent and diligent representation despite a conflict, an informed written consent still must be obtained from all affected clients unless the type of conflict in question is not waivable.²⁰⁶ The Commission warned, however, that before gaining a waiver, the lawyer should consider whether the interests of the clients in joint representation are truly aligned such that the lawyer can provide aggressive and competent representation to each.²⁰⁷ The lawyer also should consider whether each client in a joint representation can and does understand the potential issues that could arise between the clients and that counsel will have to withdraw from representing all parties if conflict between joint clients comes to pass.²⁰⁸

Hypothetical 3 involves lawyers who engage in business transactions with their clients outside of providing legal services.²⁰⁹ Although it is not encouraged, lawyers who engage in personal business deals with clients must take steps to avoid personal conflicts of interests, such as when a lawyer offers to provide legal services to a client's business in exchange for shares of ownership in the business.²¹⁰ Under such circumstances, lawyers must ensure that the terms are fair to the client, advise the client in writing to seek the advice of another independent lawyer (and actually give the client the opportunity to do so), and obtain the client's informed written consent per Rule 1.8.²¹¹

As the Opinion detailed, it is imperative that attorneys have strong conflict check procedures in place to avoid running afoul of the Rules, to protect current and former clients, and to limit the necessity of having to decline or withdraw from a matter.²¹² The opinion's hypotheticals represent only a few examples of conflicts that can arise but also demonstrate that each situation is fact specific. Therefore, it is important that attorneys' intake procedures properly identify potentially affected actors and the interest at stake. Moreover, the Commission emphasized that the relevant Indiana Rules of Professional Conduct and Comments that correspond to each Rule are extremely valuable for avoiding potential ethics violations by practitioners.

CONCLUSION

Although the Court only issued five per curiam disciplinary opinions during this Survey period, the Court addressed several important areas of ethical interest. Cases revealed the need for strict adherence to the procedural rules governing

205. *Id.*

206. *Id.* at 3.

207. *Id.*

208. *Id.*

209. *Id.* at 4.

210. *Id.*

211. *Id.* (citing *In re Davis*, 740 N.E.2d 855 (Ind. 2001)).

212. *Id.*

attorney discipline matters, recognized that a self-represented lawyer remains bound by the ethical rules, provided further guidance on when lawyer statements criticizing a judge's integrity cross ethical bounds, and generally re-emphasized the Court's commitment to civility in the practice.