Developments in Professional Responsibility

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I. Introduction

There were several significant developments during the survey period in the area of professional responsibility. Most notable, of course, was Indiana's adoption of the Model Rules of Professional Conduct.[1] This article, however, focuses on the case law developments in this area, and, in this regard, the Indiana Supreme Court decided several disciplinary cases involving many types of attorney misconduct.[2] Although a number of these disciplinary cases, as well as several non-disciplinary cases involving professional conduct, are quite interesting and should be noted,[3] this article discusses three particularly comment-worthy cases that address novel issues in Indiana law. The analysis of each case is devoted to providing a better understanding of a lawyer's duties under the Code of Professional Responsibility, and, where appropriate, the discussion explains the impact of the new rules on the particular case being discussed.

II. The Ethical Requirements Applicable to Fees Paid in Advance of the Performance of Legal Services

A. The Current Rule in Indiana

The Indiana Supreme Court, in *In re Stanton*[4] (*Stanton II*), delivered the first opinion squarely addressing whether a flat fee paid to an

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[1]The Rules of Professional Conduct became effective in Indiana on January 1, 1987. Indiana Rules of Professional Conduct (1987) [hereinafter Rules].

[2]*See* 1986-87 Indiana Sup. Ct. Disciplinary Comm'n Annual Report.

[3]Among these are: *In re* Alexander, 504 N.E.2d 584 (Ind. 1987) (attorney committed misconduct by representing clients in dissolution actions while acting as county prosecutor); *In re* Morton, 504 N.E.2d 279 (Ind. 1987) (attorney committed misconduct by commingling client and attorney funds, by failing to account for client funds, and by failing to pay the funds over to the client); Midland-Guardian Co. v. United Consumer Club, Inc., 499 N.E.2d 792 (Ind. Ct. App. 1986) (attorney's testimony did not violate the witness-advocate rule where it was limited to the nature and value of his services and the right to attorneys' fees was not a contested issue); *In re* Tew, 498 N.E.2d (Ind. 1986) (attorney committed misconduct by entering into business transaction with client and making personal loans to himself from client funds on note containing forgiveness clauses).

[4]504 N.E.2d 1 (Ind. 1987).

attorney by a client at the beginning of the attorney's representation must be maintained in a separate bank account and accounted for pursuant to the requirements of the Code of Professional Responsibility. These segregation and accounting requirements were in Disciplinary Rule 9-102, which has been superseded by Indiana's version of the Model Rules of Professional Conduct.[5] The *Stanton II* court stated that the segregation and accounting requirements of Disciplinary Rule 9-102(A) "are not applicable to attorney fees charged in advance for the performance of legal services."[6] Thus, Indiana attorneys may commingle funds received from a client to the extent those funds can be characterized as advance fees.

The court addressed this issue after granting a petition to rehear *Stanton I*,[7] but limited the rehearing to clarifying the ethical requirements where the client pays the fee before the attorney performs the legal services.[8] The issues presented in *Stanton I*, however, required the court to decide a number of other issues relating to attorney misconduct. In *Stanton I*, the respondent was charged with eleven counts of ethical violations,[9] and the court found that the respondent had committed misconduct under six of the eleven counts.[10] Under counts VI, VII, and VIII, the court found that the respondent had received advance fees for legal services and that the respondent failed to account for the fees, failed to keep records of the fees, and failed to refund the fees after the attorney-client relationship had terminated and the fees had not been earned.[11] Also, the respondent was charged under count X with engaging in a "pattern of conduct" in violation of Disciplinary Rule 1-102(A)(4), (5) and (6). Apparently, the Disciplinary Commission's theory under count X was that because the respondent, among other things, failed to segregate his clients' advance fees from his personal funds pursuant to the segregation and accounting dictates of Disciplinary Rule 9-102, the respondent had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, engaged in conduct prejudicial to the administration of justice, and engaged in conduct adversely affecting his fitness to practice law.[12]

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[5]Rules, *supra* note 1, Rule 1.15.

[6]504 N.E.2d at 1.

[7]*In re* Stanton, 492 N.E.2d 1056 (Ind. 1986).

[8]504 N.E.2d at 1.

[9]The respondent was charged with violations of the following disciplinary rules: DR 1-102(A)(4), (5) and (6); DR 2-110(A); DR 2-105(A); DR 2-106; DR 2-109(A)(3); DR 6-101(A)(3); DR 7-101(A)(2)(3); DR 9-102(A)(2); DR 9-102(B)(4).

[10]492 N.E.2d at 1063.

[11]*Id.* at 1060-62.

[12]*Id.* at 1062. Count X, therefore, was brought under DR 1-102(A)(4), (5) and (6)

The court noted that because the respondent was not charged specifically with violations of Disciplinary Rule 9-102 and because Disciplinary Rule 2-109(A)(3), which required the refund of all unearned fees, was the only disciplinary rule applicable to the fees, count X was repetitious.[13] This ruling set the stage for *Stanton II* in which the court reheard count X in order to clarify "the relationship of Disciplinary Rule 9-102(A)(2) and 9-102(B)(3) in comparison with Disciplinary Rule 2-109(A)(3)."[14]

The *Stanton II* court noted that Disciplinary Rule 9-102 ordinarily applied to funds in the nature of settlements or other properties received on behalf of a client. The court summarily held that Disciplinary Rule 9-102 did not apply to advance fees and that advance fees could be used or commingled at the will of the attorney, although the attorney would be required to refund any of the advance fee not earned.[15]

The court's reasoning in *Stanton II* is questionable, and the decision is inconsistent with a prior Indiana ethics opinion. The court did not even mention a 1977 Indiana State Bar Association legal ethics opinion that stated, "With respect to client advances which specifically represent 'retainer advances' against an attorney's anticipated legal fees, said advances must be deposited in one or more identifiable bank accounts in accordance with Disciplinary Rule 9-102(A) and Disciplinary Rule 9-102(A)(2); said advances may not be deposited in a firm name account or otherwise commingled with the funds of the attorney or his law firm."[16] Also, the court did not refer to or attempt to distinguish *In re Yussman*,[17] which arguably applies to the facts in *Stanton II*.[18] Thus, the court in *Stanton II* disregarded the view that "some advance fee payments, and perhaps even retainer fees, must be deposited into a trust account and withdrawn only as the lawyer earns the fees" so as to comply with Disciplinary Rule 9-102.[19] The Indiana State Bar Association Legal Ethics Committee has adopted this view, and so have

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and not DR 9-102. The same theory was asserted in *In re* Yussmann, 487 N.E.2d 161 (Ind. 1986), where an attorney had commingled and used client funds that were labeled as a "retainer" contrary to an employment agreement which required such funds to be deposited in his firm's escrow account. In *Yussmann*, the attorney was charged with violations of DR 1-102(A)(4)(5) and (6) and 9 DR 9-102(A)(2). The court found that the attorney had committed misconduct by "his depositing and using the funds in question contrary to his agreement and to professional guidelines. . . ." *Id.* at 162.

[13]492 N.E.2d at 1062.

[14]*Stanton*, 504 N.E.2d at 1.

[15]*Stanton*, 504 N.E.2d 1.

[16]Indiana State Bar Ass'n, Op. 4 (1977).

[17]487 N.E.2d 161 (Ind. 1980).

[18]*See supra* note 12.

[19]C.W. WOLFRAM, MODERN LEGAL ETHICS § 4.8 at 178 (1986).

a majority of the states that have published legal ethics opinions on the subject.[20] The *Stanton II* court did not even discuss this view.

It is possible that the court simply bowed to the practical realities regarding fee collection facing the bar, particularly the criminal defense and domestic relations bar. Without doubt a ruling that advance fees must be segregated would have disconcerted many members of the Indiana Bar who have established, and rely on, the practice of collecting advance fees. These practical considerations are outweighed, however, by the sound policy that should have governed the interpretation of Disciplinary Rule 9-102. This disciplinary rule was intended to prevent commingling of attorney and client funds for two reasons: (1) to protect a client's funds from misappropriation, and (2) to avoid the appearance of impropriety.[21] These reasons apply to advance fee payments.

Moreover another disciplinary rule, Disciplinary Rule 2-110(A)(3), required an attorney to "refund promptly any part of the fee paid in advance that has not been earned."[22] Clearly this rule indicated that the client retained an interest in advance fees. If a client has an interest in the funds received by the attorney, it surely follows that the dangers of commingling and misappropriation are just as prevalent as they are when an attorney receives client funds for any other purpose. It seems contradictory that the court in *Stanton I* would find that the advance fees were client funds to the extent they had to be refunded pursuant to Disciplinary Rule 2-110(A)(3), but that the funds in question were not client funds that needed to be segregated pursuant to Disciplinary Rule 9-102(A)(2). The court's decision, then, creates a curious paradox: If a client is afforded the protection to have its unearned advance fee returned because the attorney did not earn the fee, how is the client afforded the protection that the unearned fee has not already been used, or that the lawyer is unable to refund what is owed to the client?

In order to better understand the court's decision in *Stanton II*, it is important to understand the ambiguity that existed in Disciplinary Rule 9-102, the confusing difference between advance fees and retainers, and the majority view that advance fees are best considered client funds for the purposes of the separation and accounting requirements of Disciplinary Rule 9-102.

B. Analysis of Disciplinary Rule 9-102 and the Prevailing View with Regard to Advance Fees

Disciplinary Rule 9-102(A), which has been superseded by Rule 1.15(a), required all client funds received by an attorney to be held

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[20]*See infra* note 32 and accompanying text.

[21]INDIANA CODE OF PROFESSIONAL RESPONSIBILITY , EC 9-5 (1981) [hereinafter CODE].

[22]Code, *supra* note 21, DR 2-110(A)(3).

in a bank account separate from funds belonging to the attorney or the attorney's firm.[23] Funds can be received from a client in a variety of ways including settlement funds from lawsuits, estate distributions, deposits held in escrow, and advances for costs and expenses.[24] The requirements of Disciplinary Rule 9-102(A) are explicit and, thus, violations of this rule should be obvious to most practitioners.[25] There is, however, an aspect of Disciplinary Rule 9-102(A)(2) that is ambiguous.

Disciplinary Rule 9-102(A)(2) provided an exception to the rule requiring separation of client funds in cases where an attorney received funds which "presently or potentially" belonged to the attorney or the

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[23]Code, *supra* note 21, DR 9-102(A). DR 9-102 states:

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
  (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
  (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:
  (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
  (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safety as soon as practicable.
  (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
  (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive.

[24]*See* Note, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415 (1977) [hereinafter *Attorney Misappropriation*].

[25]For example, there can be no doubt that DR 9-102 would be violated if an attorney settled a lawsuit on behalf of his client, received the settlement proceeds, cashed the check, and never paid the funds over to the client. *See In re* DeWitt, 268 Ind. 160, 374 N.E.2d 514 (1978). As another example, it is clear that where an attorney receives on behalf of a client partial distributions from an estate, fails to deposit those funds in a separate account and commingles the distribution with his own funds, that attorney has committed misconduct under DR 9-102. *See In re* Kesler, 272 Ind. 161, 397 N.E.2d 574 (1979), *cert. denied sub nom.* Kesler v. Indiana Supreme Court Disciplinary Comm'n, 449 U.S. 829 (1980).

attorney's firm.[26] These funds still must have been deposited in a separate account, but that portion of the funds that belonged to the attorney or the firm could have been withdrawn when due, unless the client disputed the portion in question.[27]

The ambiguity existed in cases where an attorney received advance fees from a client at the beginning of the attorney-client relationship.[28] Obviously these types of funds "presently or potentially" belonged to the attorney or the attorney's firm. Thus, these funds could have been the client's funds and should have been held separately. It is also possible to argue that because the funds were transferred to the attorney in anticipation of his legal fees, the funds lost their identity as client funds and were subject to Disciplinary Rule 9-102. The often confusing difference between funds received at the beginning of an attorney's representation that were considered as a fee advance and those that were characterized as a retainer compounds the ambiguity.[29]

Funds received from a client that are intended as an advance payment of legal fees are, in essence, a deposit for the payment of future services and a lawyer's protection against a client's refusal or inability to pay.[30] These funds can be confused with a retainer,[31] which has traditionally been defined as a nonrefundable amount that is paid solely to secure an attorney's, or firm's, general availability for particular matters and to prevent the attorney from representing a client's adversaries.[32] Although the confusion in terminology may seem a mere exercise in semantics, it should have been a critical issue for the purposes of Disciplinary Rule 9-102(A). The distinction between the character

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[26]CODE, *supra* note 21, DR 9-102(A)(2).

[27]*Id.*

[28]*See, e.g.*, *Attorney Misappropriation*, *supra* note 24, at 415 n.2 (noting the ambiguity "as to whether prepaid legal fees for specified services . . . must be treated as client's money prior to performance of the legal services").

[29]One court faced with the question of whether an advance fee or retainer is subject to the DR 9-102 separation requirement balked at deciding the question because of the confusion in terminology. *In re* Zedric, 92 Wash. 2d 777, 782, 600 P.2d 1297, 1302 (1979) ("We note the apparent confusion about the status of retainer fees . . . . Until the bar association clarifies its position regarding retainer fees which have not been earned in full, we will not consider the issues . . . .").

[30]*See, e.g.*, New York State Bar Ass'n Op., 570 (1985).

[31]While defining retainer as a payment intended to secure the general availability of an attorney and preventing that attorney from representing the client's adversary, some authorities note that the term retainer can also "mean solely the [advance] compensation for services to be performed in a specific case." BLACKS LAW DICTIONARY, 1183 (5th ed. 1979). *See also* Illinois State Bar Ass'n Op. (BNA) 703 (1980).

[32]ABA LAWYERS MANUAL ON PROFESSIONAL CONDUCT (BNA), 45:104 (1985) [hereinafter LAWYERS MANUAL]. *See also* Wisconsin State Bar Op. E-86-9 (1986); Hawaii Supreme Court Disciplinary Bd. Op. 29 (1985).

of the payment as either a fee advance or a retainer should have had an effect on a court's interpretation of the ambiguity in Disciplinary Rule 9-102(A)(2) as to whether funds received at the beginning of representation were client funds or were considered earned.[33]

Although there is almost no case law on the issue,[34] several state bar associations have considered whether advance fees were subject to the separation requirement of Disciplinary Rule 9-102. Most of state bar associations that have considered the issue have determined that fee advances belong to the client until earned and, thus, should be kept in an account separate from the attorney's account and identifiable as client funds.[35] Further, it is generally accepted that a true retainer, which is a fee paid to the attorney solely for the attorney's availability, becomes the attorney's property as soon as he receives it and need not be kept in a separate account.[36]

A few state bar associations do not view advance fees as client funds and do not require that they be separated from the attorney's funds.[37] Arguments that have been made against characterizing advance fees as client funds are compelling, but not persuasive. For example, some argue that because the term "fee" did not appear in Disciplinary Rule 9-102, the rule did not govern advance fees.[38] Also, various other

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[33]*See, e.g.*, *In re* Stern, 92 N.J. 611, 619, 458 A.2d 1279, 1983-84 (1983) (pending a clarification of the 1983 Model Rules, we "hold that absent an explicit understanding that the retainer fee be separately maintained, a general retainer fee need not be deposited in an attorney's trust account."). *But see In re* Aronson, 352 N.W.2d 17, 18 (Minn. 1984) (holding that an attorney's deposit of a "retainer fee" into a personal account violates DR 9-102(A)(2)).

[34]In *Stanton II*, 504 N.E.2d 1 (Ind. 1987), the focus of this discussion, is the only case to squarely decide the issue of whether advance fees are subject to the separation requirements of DR 9-102.

[35]LAWYERS MANUAL, *supra* note 32, at 45:103-4 (citing Indiana State Bar Ass'n Op. 4 (1977); Massachusetts Op. 78-11 (1978); Oregon State Bar Op. 205 (1972); Oregon State Bar Op. 251 (1973); San Francisco Bar Ass'n Op. 1973-14 (1973)); Texas State Bar Op. 391 (1978); Virginia State Bar Op. 360 (N.D.). *See also* Hawaii Supreme Court Disciplinary Board Op. 29 (1985); Missouri Bar Admin. Op. 116 (1981); Oregon State Bar Ass'n Op. 454 (1980); San Francisco Bar Ass'n Op. 1980-1 (1980); Washington State Bar Ass'n Op. 173 (1980); Wisconsin State Bar Op. E-86-9 (1986).

[36]LAWYERS MANUAL, *supra* note 32, at 45:104 ("retainers that secure a lawyer's general availability to a client, and are not related to the fee for a particular representation, belong to the lawyer and need not be segregated in client trust accounts."). *See also* Hawaii Supreme Court Disciplinary Bd. Op. 29 (1985); Missouri Bar Admin. Op. 116 (1981); Washington State Bar Ass'n Op. 173 (1980); Wisconsin State Bar Op. E-86-9 (1986).

[37]LAWYERS MANUAL, *supra* note 32, at 45:104 (citing D.C. Op. 113 (1982); Florida Bar Op. 76-27 (1976); Maryland State Bar Ass'n Op. 83-62 (1983); New York State Bar Ass'n Op. 570 (1985)).

[38]*Legal Ethics Committee Proposed Opinion for Comment: Fees Advanced by Clients*,

provisions of the Model Code of Professional Responsibility specifically refered to the term "fee."[39] Thus, the argument continues, if the drafters inserted the word "fee" in parts of the Code yet failed to mention "fees" in Disciplinary Rule 9-102, then Disciplinary Rule 9-102 must not have been intended to govern advance fees.[40]

Another argument against requiring advance fees to be separately maintained focuses on the practical considerations, from an attorney's point of view, that surround fee arrangements. Attorneys often request fee advances in order to avoid problems with clients who do not pay for legal services after the services have been performed.[41] The New York State Bar Association has noted that this purpose would be defeated if fee advances were subject to Disciplinary Rule 9-102 and held in trust until the client dispute is resolved.[42]

An even more tenuous argument, which also ignores the interests of the client, focuses on the needs and practical realities of the practice of law by emphasizing the "unnecessarily disruptive" effect that the Disciplinary Rule 9-102 separation requirement would have on attorneys who commonly request advance fees.[43] It is possible that many bar associations, courts, and practitioners consider this argument the most compelling one. After all, requiring an attorney to completely overhaul his or her business in order to accommodate the rule "is likely to cause mischief."[44] It would be unfortunate, however, if avoiding such "mischief" became an underlying principle of an ethical code for lawyers.

The argument that advance fees need not be separately maintained is not persuasive and, as previously noted, most state bar associations have not accepted it.[45] Any response to the minority view should begin with the language of Disciplinary Rule 9-102(A) that states that all "client funds" paid to an attorney, except "advances for costs and expenses," shall be separately maintained.[46] The general, categorical

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DIST. LAW., July-Aug. 1981 at 47, 53 [hereinafter *Proposed Opinion*] (arguing that "[b]asic logic compels the conclusion that the absence of any reference to 'fees' here [in DR 9-102] means that this DR is not intended to regulate fees.") (dissenting opinion).

[39]The term "fee" is used in the following code sections: (1) DR 2-106 "Fees for Legal Services;" (2) DR 2-107 "Division of Fees Among Lawyers;" and (3) DR 3-102 "Dividing Legal Fees with a Non-Lawyer."

[40]*Proposed Opinion*, *supra* note 38, at 53.

[41]19 New York State Bar Ass'n Op. 570 (1985).

[42]*Id.*

[43]*Proposed Opinion*, *supra* note 38, at 52. (This argument was advanced in a dissenting opinion. The proposed draft opinion favored the application of DR 9-102 to advanced fees.)

[44]*Id.* at 56.

[45]*See supra* note 35 and accompanying text.

[46]CODE, *supra* note 21, DR 9-102(A).

reference to *all* client funds followed by the limited and specific exclusion indicates that the rule governs even advance fees.[47]

Having reviewed this seemingly academic debate (because the Code no longer applies in Indiana), it is logical to discuss what impact the new Rules of Professional Conduct will have on this issue. Although *Stanton II* was decided under Disciplinary Rule 9-102, the counterpart to this provision in the new Rules should not change the law, and, in fact, probably supports the holding that advance fee payments need not be maintained in a separate account. The new rule governing this issue is entitled "Safekeeping Property,"[48] and although the drafters of the new rules may have intended to broaden the scope of the former rule regarding client funds, there is a very good argument that Rule 1.15 is not broad enough to cover advance fees.

The rule provides, "A lawyer shall hold *property of clients* . . . that is in a lawyer's possession in connection with the representation separate from the lawyer's own property."[49] This rule also requires that "funds" be held in a separate account and "other property" be appropriately safeguarded.[50] Clearly, then, the phrase "property of clients" in the first part of the rule is intended to cover client funds. This seems to place Rule 1.15 on equal footing with Disciplinary Rule 9-102 in that client funds must be maintained separately. The debate over whether an advanced fee is client funds could begin here; but, because of *Stanton II*, it should now be clear in Indiana that advance fee payments do not constitute client funds. Additionally, the new rules distinguish between "property of clients" and an advanced fee payment.[51]

Under Rule 1.16(d), a lawyer must, at the end of his representation of the client, "take steps reasonably practicable to protect a client's interest, such as . . . surrendering papers and *property* to which the client is entitled and *refunding any advance payment of fee* that has not been earned."[52] Thus, even if one could argue that the all encompassing term "property," as used in Rule 1.15, covers advance fee payments, the drafters have effectively preempted that argument because the term "property" in Rule 1.16 does not include "advance payment

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[47]*See Proposed Opinion*, *supra* note 38, at 48 ("We do not think that the drafters of the Code would have used such an all-inclusive term if in fact they had intended to reach only limited categories . . . of funds including client funds to be delivered to a third party or delivered to the client from a third party.")

[48]RULES, *supra* note 1, Rule 1.15.

[49]*Id.* (emphasis added).

[50]*Id.*

[51]*Id.* Rule 1.16.

[52]*Id.* (emphasis added).

of fees." Apparently, then, the debate over advanced fees has ended, whether based on the decision in *Stanton II* or the language of the new rules. Thus, lawyers in Indiana need not maintain attorney fees paid in advance in a separate trust account.

III. Denial of a Fair Trial Based on an Advocate's Ethical Violation in a Civil Case

Another important case that was decided during the survey period is *Jackson v. Russell*.[53] This lawsuit originated when two businessmen, who were attempting to agree on the terms of a joint-venture, reached an impasse while negotiating the financing terms.[54] Although *Jackson* is a civil case for damages, the court discusses important ethical questions relating to the witness-advocate rule.[55]

The plaintiff in *Jackson* was the president and chief operating officer of Como Plastic Corp. a wholly-owned subsidiary of PPG Industries, Inc. The plaintiff and defendant together made plans to form a joint venture, with the defendant providing the financing, to purchase Como from PPG. The attorneys for both parties met to negotiate the terms of the transaction; however, throughout the negotiations the plaintiff consistently rejected a buy-sell agreement offered by the defendant. On the scheduled closing date, the parties reached an impasse on this issue and the defendant refused to go forward. Soon after the deal failed, the defendant approached PPG and offered to buy Como himself. Although the plaintiff threatened to sue, the defendant and PPG reached an agreement that was almost identical to the original sale agreement, and PPG sold Como to the defendant.

The plaintiff, having agreed not to sue PPG, brought suit against the defendant alleging, among other things, tortious interference with contractual relations. The defendant filed a third party claim against PPG for breach of warranty, and PPG moved to dismiss the defendant's lead counsel when it appeared that members of the lead counsel's firm, which had represented the defendant during the joint venture negotiations, would be called to testify at the trial. The court denied PPG's motion because the defendant's lawyers assured the trial court that members of the firm would not be called as witnesses. Nevertheless, after one week of trial, the trial court was forced to disqualify the

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[53]498 N.E.2d 22 (Ind. Ct. App. 1986).

[54]*Id.* at 26.

[55]The witness-advocate rule was embodied in DR 5-101(B) and DR 5-101(A). The rule prohibited an attorney from acting as an advocate in a trial in which the attorney ought to be called as a witness, and where the rule applies, the attorney and his firm must withdraw from the case. Code, *supra* note 21, DR 5-102(B).

law firm because it became clear that members of the firm would appear as witnesses. In what appears to be a compromise, the trial court accepted the law firm's plan under which the defendant's local counsel, who was not a member of the firm, would act as lead counsel, and the lawyers from the firm would be permitted only to assist silently at the counsel table. The trial resumed and the jury found the defendant guilty of tortious interference, constructive fraud, breach of fiduciary duty, and criminal mischief. The jury awarded the plaintiff damages of two million dollars.[56]

On appeal the defendant argued, among other things, that his right to a fair trial had been impaired because the trial court did not declare a mistrial after the defendant's lead counsel was disqualified. To support this argument, the defendant claimed that the trial court's failure to declare a mistrial forced him to proceed after one week of trial with new lead counsel who was not as familiar with his case as were the disqualified attorneys. Further, the defendant argued that the sudden appearance, in a jury trial, of new lead counsel with the disqualified attorney sitting silently at the counsel table prejudiced his case. Finally, the defendant asserted that not only did his lawyers fail to inform him of the potential ethical problem and its consequences, but the opposing counsel and the trial court also failed to raise the questions early enough in the course of the litigation. The court of appeals grouped these arguments together under the broad claim that the trial court erred in not declaring a mistrial and first discussed "the ethical considerations present when an attorney serves both as advocate and witness in a case."[57]

The witness-advocate rule provides that when a trial lawyer learns "or it is obvious" that the lawyer or a member of his firm "ought to be called as a witness on behalf of his client," the lawyer must withdraw from representing the client so that the lawyer can testify.[58] Although violation of this, or any, disciplinary rule could result in attorney discipline, this rule is frequently invoked in the course of litigation, because courts generally accept a violation of the rule as a basis for a motion to disqualify the would-be testifying attorney from continuing as an advocate in the case.[59]

In *Jackson*, the court of appeals held that trial court properly disqualified the defendant's lawyers[60] and relied on the policy argument often cited as the basis for the witness-advocate rule—the protection

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[56]498 N.E.2d at 28.

[57]*Id.* at 29.

[58]CODE, *supra* note 21, DR 5-102(A).

[59]C.W. WOLFRAM, MODERN LEGAL ETHICS § 7.5.1 at 375 (1986).

[60]498 N.E.2d 22, 30.

of the interests of the client, the opposing party, and the reputation of the bar in general.[61] The court stated that it matters little whether the lawyer-witness actually testifies at trial. Rather, the proper test in determining whether an attorney should be disqualified under Disciplinary Rule 5-102 is "whether the attorney's testimony could be significantly useful to the client; if so, he or she ought to be called."[62] Further, as the rule indicates, the attorney is unable to choose whether to be an advocate or a witness. If the test is met, an attorney must withdraw in favor of testifying on behalf of the client.[63]

The court also considered the hardship exception to Disciplinary Rule 5-102. Under the proper circumstances, a lawyer may continue to represent a client even if the lawyer or a lawyer from the lawyer's firm ought to be called as a witness, if the withdrawal "would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel on a particular case."[64] The court stated that this exception should apply only in the most extraordinary cases, and that it was not appropriate in a case where, as in *Jackson*, a possible disqualification was apparent from the beginning of the litigation and the issue did not appear suddenly and unexpectedly.[65]

Having determined that the trial court properly disqualified the defendant's attorneys, the court then considered whether a party in a civil case has been denied his right to a fair trial if his lead counsel has been disqualified. In a criminal case, ineffective counsel can deny a defendant his right to a fair trial under the sixth and fourteenth amendments;[66] however, ineffective counsel is not ordinarily grounds for reversal in a civil case.[67] Nevertheless, the court of appeals in *Jackson* said, "[A] violation of the CPR that prevents a fair trial would constitute reversible error. . . ."[68] Having said this, the court then had to determine a most difficult and controversial question—whether this particular violation was reversible error.

The *Jackson* court asserted several reasons to support its conclusion that the defendant was not entitled to a new trial because of the trial court's disqualification procedure. First, the court rejected the defendant's contention that his own lawyers prejudiced his case by forcing him into a rash decision regarding the substitution of counsel.[69] The

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[61] *Id.* at 29.
[62] *Id.* at 30.
[63] *Id.*
[64] CODE, *supra* note 21, DR 5-101(B)(4).
[65] 498 N.E.2d at 30.
[66] *See, e.g.*, Johnson v. Rutoskey, 472 N.E.2d 620, 623 (Ind. Ct. App. 1984).
[67] *Id.*
[68] *Jackson*, 498 N.E.2d at 31.
[69] *Id.*

court found that the defendant was fully informed of the possible ethical problems and was also aware of the consequences.[70] Also, the court noted that given the defendant's business acumen and his prior experience with legal matters it was unlikely the defendant was forced into an uninformed decision. Alternately, the court said that the defendant waived any right to a mistrial.[71] Testimony from the disqualification discussion revealed that the defendant was aware of and acquiesced in the disqualification plan.[72] In concluding that the defendant had waived any right to a mistrial, the court stated, "Clearly, [defendant] was aware of what had transpired and acquiesced in the procedure employed by the court."[73]

Finally, even if the defendant had not waived the right to a mistrial, the court concluded that the defendant failed to show any prejudice in the trial court's disqualification procedure. The court rejected the defendant's argument that he was prejudiced when the trial resumed the second week with a change in the lead counsel. Noting that the defendant's new lead counsel had been at the counsel table from the beginning of the trial, and that the disqualified attorneys were allowed to remain silently at the counsel table, the court considered this argument speculative.[74] Also, the court refused to hold that the new lead counsel's unfamiliarity with the case prejudiced the defendant. Because the disqualified lawyers were still allowed to assist the new lead counsel, and because the defendant failed to show any specific examples of error committed by the lead counsel, the defendant failed to prove any grounds for reversal.[75]

The Model Rules of Professional Conduct, eliminate the problem that confronted the defendant in *Jackson*. The counterpart to Disciplinary Rule 5-102(A), Rule 3.7, is substantially similar to the old rule except that Rule 3.7(b) provides, even if the witness-advocate rule would otherwise apply, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a

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[70]The court quoted portions of the testimony from the disqualification discussions which indicated that the defendant understood the proceedings. For example, in response to a question by an attorney from the firm as to whether withdrawal of the firm would work a hardship, the defendant answered, "I have been advised where we are on this and have felt comfortable with it . . . ." *Id.*

[71]*Id.*

[72]The testimony revealed repeated questions from the defendant's new lead counsel to the defendant asking whether he understood and agreed with the disqualification plan. In response to each question, the defendant unequivocally affirmed his understanding and acquiescence. *Id.* at 31-32.

[73]*Id.* at 32.

[74]*Id.* at 33.

[75]*Id.*

witness unless precluded from doing so by [the general conflict of interest and prohibited transaction rules]."[76] Clearly, then, the original trial counsel for the defendant in *Jackson* could have continued to represent the defendant even though lawyers from the same firm were likely to be called as witnesses. Perhaps the *Jackson* court anticipated the rule change. The court stated that the trial court's plan resolved the disqualification problem "in a manner feasible and fair to all those involved."[77]

Although a fair reading of Disciplinary Rule 5-102(A) would appear to have required the firm to be disqualified from even silently assisting the lead counsel, the plan, which disqualified the law firm only to the extent that its lawyers were not permitted to speak on behalf of the defendant in court, appears to have merged the old and new rules. Nevertheless, the situation presented in *Jackson* is no longer a problem, and lawyers who represent clients in transactional or business matters need not worry that lawyers in their firm would be disqualified from representing these clients if the same matters were to ultimately end in litigation.

IV. Part-Time Deputy Prosecutors: Avoiding Conflicts of Interests with Private Clients

Many communities rely on part-time government lawyers who concurrently maintain a private practice, possibly with a law firm.[78] For example, a majority of prosecutors in the United States are not full-time government lawyers.[79] Attorneys who maintain a private practice while also acting as part-time prosecutors are keenly aware of the potential conflicts that arise as a result of this type of multiple representation. Formerly, this conflict surfaced when a part-time prosecutor represented clients in private practice in dissolution matters. The conflict existed because of the requirement that the prosecutor appear in uncontested dissolution proceedings and because traditionally prosecutors defended against those proceedings.[80] This role was defined by statutes, which have since been repealed,[81] and by a very old line of Indiana

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[76]Rules, *supra* note 1, Rule 3.7(b).

[77]*Jackson*, 498 N.E.2d at 33.

[78]C.W. Wolfram, Modern Legal Ethics § 8.9.4 at 454 (1986).

[79]*Id.* at 455 (citing U.S. Dept. of Justice (LEAA), State and Local Prosecution and Civil Attorney Systems 4 (1978); Comment, *The Part-time State's Attorney in South Dakota: The Conflict Between Fealty to Private Client and Service to the Public*, 227 S.D.L. Rev. 24, 28 (1981)).

[80]*See In re* Reed, 500 N.E.2d 1189 (Ind. 1986).

[81]*See, e.g.*, Ind. Code § 31-1-12-20 (1971), *repealed by* Act of April 1, 1971, § 1, 1971 Ind. Acts 1956; Ind. Code § 31-1-21-1 to -3 (1971), *repealed by* Act of April 8, 1971, § 1, 1971 Ind. Acts 1956.

cases that established "the duty of prosecuting attorneys, whenever any petition for divorce remains undefended, to appear and resist the petition."[82] The duty referred to in those cases was derived purely from the state interest in maintaining the family relation and in preventing collusive dissolution of the marital relation.[83]

Although the duty to defend against uncontested dissolutions has been repealed by statute, and the case law on this issue is somewhat outdated, there is still good reason to believe that a part-time prosecutor has some duty on behalf of the State to intervene in dissolution-related matters.[84] If a duty can be established, there can be no doubt that it would be a conflict of interest for a part-time prosecutor to engage in the representation of clients in dissolution-related matters. This creates a serious dilemma for a part-time prosecutor who must decline all dissolution-related cases in private practice or risk violating the rules.

The Indiana Supreme Court resolved, at least partially, this dilemma in *In re Reed*.[85] *Reed* involved a disciplinary proceeding against a duly appointed deputy prosecuting attorney who had accepted and continued private employment in matters involving child support and custody.[86] The court recognized the prior duty of prosecutors to defend against dissolution proceedings and the current duty of prosecutors to act in "various matters relating to dissolution and support. . . ."[87] Rather than focusing on whether a real conflict results because of such a duty, the court, recognizing that part-time deputy prosecuting positions can best be filled with experienced local attorneys only by allowing those attorneys to continue in their private practice, reached a compromise that avoids conflicts of the nature involved in *Reed*. The court held, "Where the employment of such part-time deputy prosecutors is predicated upon a prior, express written limitation of responsibility to exclude dissolution-related matters, we can find no reasonable purpose for perpetuating the prohibition against involvement in dissolution cases

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[82]*See* State v. Brinneman, 120 Ind. 357, 358, 22 N.E. 332, 333 (1889). *See also* Scott v. Scott, 17 Ind. 309 (1861); Yeager v. Yeager, 43 Ind. App. 313, 87 N.E. 144 (1908).

[83]*Brinneman*, 120 Ind. at 358, 22 N.E. at 333.

[84]The most obvious basis for such a duty can be derived from an Indiana statute requiring prosecuting attorneys to prosecute the enforcement of support agreements. *See* IND. CODE § 31-2-1-12 (1982).

[85]500 N.E.2d 1189 (1986).

[86]*Id.* at 1190. The court did not explain under which disciplinary rules respondent was charged; however, it is most likely that he was charged under DR 5-102 relating to conflicts of interest. The counterpart to this provision in the new Rules is Rule 1.7. RULES, *supra* note 1, Rule 1.7.

[87]*Reed*, 500 N.E.2d at 1190.

in their private law practice."[88] Based on this holding, and on the unavailability of any evidence that the respondent's duties in *Reed* expressly excluded dissolution-related matters, the court refused to approve the parties' joint statement of circumstances and conditional agreements.[89] The court's apparent compromise removes the disincentive that may have prevented qualified, and otherwise eager, local attorneys from accepting part-time deputy prosecutor positions solely because their acceptance would curtail the family law aspect of their private practice.

The *Reed* court also noted that its rationale "would apply also to the professional standards embodied in the [Rules of Professional Conduct]."[90]

The then Chief Justice Given agreed with the majority but "dis-agree[d] with the practice of using an opinion to change the rules . . . ."[91] He added, "[A]ttorneys should be entitled to turn to the rule book and get a succinct statement as to what the rule of procedure is in a given instance."[92] Apparently, the court has done what the former Chief Justice suggested.[93]

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[88]*Id.*

[89]*Id.*

[90]*Id.* at 1190, n.1.

[91]*Id.* at 1191 (Given, C.J, concurring).

[92]*Id.*

[93]Effective September 4, 1987, the Indiana Supreme Court promulgated Rule 1.8(k) which states:

> (k) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.

RULES, *supra* note 1, Rule 1.8(k).