Professional Responsibility

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I. INTRODUCTION

During the survey period,[1] the state and federal appellate courts decided a number of cases in the areas of Professional Responsibility and Professional Liability. This Article will discuss in detail several of the cases which significantly affect the Indiana practitioner, some of which address issues of first impression in Indiana. In the analysis of the cases selected for comment, particular attention will be given to the effect of the newly adopted Rules of Professional Conduct[2] upon the case whenever appropriate.

II. ATTORNEY ADVERTISING

A. *Targeted Direct-Mail Solicitations:* Shapero v. Kentucky Bar Association

The United States Supreme Court's decision in *Bates v. State Bar of Arizona*[3] and its progeny,[4] has fueled a great interest among the members of the practicing bar as to the extent of First Amendment protection afforded various forms of attorney advertising. In a long awaited decision, the United States Supreme Court in *Shapero V. Kentucky Bar Association*[5] concluded, in a 6-3 decision authored by Justice Brennan, that a state may not prohibit targeted, direct-mail solicitation absent a "particularized finding that the solicitation is false or misleading."[6]

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1. This Article will report on all Indiana Supreme Court disciplinary cases decided during the survey period. Cases which do not raise significant issues or reflect changes in Indiana law will receive brief report in the final section of this Article.

2. Model Rules of Professional Conduct, adopted November 25, 1986, and effective January 1, 1987.

3. 433 U.S. 350 (1977).

4. *In re* R.M.J., 455 U.S. 191 (1982) (held unconstitutional a Missouri Supreme Court rule which prohibited a lawyer from listing areas of practice in an advertisement); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upheld Ohio's ban on in-person solicitation); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (held unconstitutional an Ohio rule which forbade attorney's advertisements containing information or legal advice regarding a specific legal problem).

5. 108 S. Ct. 1916 (1988).

6. *Id.* at 1920.

The petitioner in *Shapero* was a Kentucky lawyer who sought approval from the appropriate agency of the Kentucky Bar Association[7] before sending the following letter to defendants in mortgage foreclosure actions:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them. You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember, it is FREE, there is NO charge for calling.[8]

After winding its way through the Kentucky Bar Association's lawyer advertising approval process,[9] the issue ultimately reached the Kentucky Supreme Court. The Kentucky Supreme Court, upon review of the bar association opinion concerning the letter, deleted its own rule which imposed a blanket prohibition upon the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee . . . as distinct from the general public."[10] However, the Kentucky Supreme Court replaced this Rule with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct which also prohibits targeted, direct-mail solicitation by lawyers.[11]

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7. Kentucky has a unified bar whereby all attorneys are required to belong to the Kentucky Bar Association as a condition of practice in the Commonwealth. The Kentucky Bar Association, in addition to the social and professional activities for attorneys, performs the function of lawyer discipline. It also staffs the Attorneys Advertising Committee which rules upon attorney advertising. Indiana has no system of prior approval of attorney advertising.

8. 108 S. Ct. at 1919.

9. The Kentucky Attorneys Advertising Commission did not find the letter false or misleading but found that the letter violated an existing Kentucky Supreme Court Rule. However, the commission also believed the rule violated the First Amendment and suggested the Kentucky Supreme Court amend its rules. Shapero then petitioned the Legal Ethics Committee of the Kentucky Bar Association for an advisory opinion as to the validity of the rule. The ethics committee agreed that the letter was not false or misleading but found that the Rule was consistent with Rule 7.3 of the American Bar Association's (ABA) Model Rules of Professional Conduct (1984). The Kentucky Supreme Court reviewed the decision of the Ethics Committee.

10. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916, 1920 n.2 (1988).

11. The Supreme Court indicated its puzzlement with the Kentucky Supreme Court's action by noting that the Kentucky court "did not specify either the precise infirmity in (its Rule) . . . or how Rule 7.3 cured it." 108 S. Ct. at 1920. It should be noted that Indiana's Rule 7.3(d) of the Rules of Professional Conduct also bans targeted, direct-mail solicitation although the language in the prohibition is more similar to the Kentucky rule replaced by Rule 7.3 than ABA Model Rule 7.

The Supreme Court, in reliance upon the rationale set forth in the line of lawyer advertising cases beginning with *Bates*, but primarily upon *Zauderer v. Office of Disciplinary Counsel*,[12] held that targeted, direct-mail solicitation, absent a showing that the mailing is false or misleading, is constitutionally protected commercial speech under the First and Fourteenth Amendments.[13] While the Court was careful to emphasize that states do have the right to prohibit false and misleading lawyer advertisements, they may not ban targeted, direct-mailing merely because of the potential for abuse in such practices.[14] In distinguishing between face-to-face solicitation, which states may categorically ban, and targeted direct-mailing, the Court noted "the mode of communication makes all the difference."[15]

According to the Court, a letter is like any other form of printed advertisement and "can be readily put in a drawer to be considered later, ignored or discarded."[16] The Court observed that personalized letters to potential clients with particular legal problems may indeed provide the unscrupulous lawyer with an opportunity to exaggerate the lawyer's familiarity with the case or imply that the legal problem is more serious than it actually is. However, this does not justify a blanket prohibition on this mode of commercial speech. The Court further suggests specific measures the states could take to ferret out solicitation letters which are false, misleading, or intimidating.[17] These measures will be discussed further in the next section of this Article.

There was a rather long and vigorous dissenting opinion in *Shapero* authored by Justice O'Connor.[18] For essentially the same reasons as set forth in the dissenting opinion in *Bates* and *Zauderer*, Justice O'Connor urged the majority to re-examine its entire rationale in the lawyer advertising cases.[19]

According to the dissent, states have a substantial and legitimate interest in banning any advertisement that undermines "the high ethical standards that are necessary in the legal profession."[20] In addition to

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12. 471 U.S. 626 (1985).
13. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988).
14. *Id.* at 1923.
15. *Id.* at 1922.
16. *Id.* at 1923.
17. *Id.*
18. *Id.* at 1925 (O'Connor, J., dissenting).
19. *Id.* In *Bates*, there were three dissenting opinions, one authored by Chief Justice Burger, who concurred in part and dissented in part; one by Justice Powell, who also concurred in part and dissented in part; and one by Justice Rehnquist, who dissented in part. Justice O'Connor wrote an eight-page dissent in *Zauderer* joined by Chief Justice Burger and Justice Rehnquist.
20. *Id.* at 1928.

the potential for misleading potential clients, targeted, direct-mail solicitation "has a tendency to corrupt the solicitor's professional judgment"[21] and furthermore tends to denigrate the profession as a whole.[22]

Justice O'Connor argues quite spiritedly that the legal profession has unique power in our political system and, therefore, special ethical standards may appropriately be applied to restrain attorneys. Justice O'Connor is skeptical that the marketplace alone can provide sufficient protection for consumers of legal services who often lack the ability to evaluate a legal advocate. Allowing the states to restrict and even impose blanket prohibitions upon advertising and solicitation practices which have a great potential for abuse serves several goals. First, such restrictions would protect potential clients from lawyers who make exaggerated or misleading claims regarding their experience or ability. Second, state imposed restrictions would also serve as a "concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other."[23]

In short, the dissent bemoans the fact that the majority has allowed the spirit of consumerism to rule the day regarding the regulation of lawyer advertising. The dissent believes that leaving the important role of the regulation of lawyer advertising primarily to market forces will result in a further decline in the spirit of professionalism among attorneys, much to the detriment of the legal profession and the nation.[24]

B. Shapero's *Effect Upon Indiana's Regulation of Targeted, Direct-Mail Lawyer Advertising*

Rule 7.3(d)(1) of the Indiana Rules of Professional Conduct prohibits a lawyer from contacting or sending "a written communication to, a prospective client for the purpose of obtaining professional employment if (1) the contact or written communication is based upon the happening of a specific event . . . ."[25] Clearly, *Shapero* suggests this provision has little or no continued vitality as it relates to written communications targeted to specific clients. After *Shapero*, it seems highly unlikely that an Indiana lawyer could be disciplined for sending a targeted, direct-mail advertisement to those known to have a particularized need for legal services unless the letter contains false or misleading information.[26] However, it must be noted that Rule 7.3(d)(1) of Indiana's Rules of

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21. *Id.*
22. *Id.*
23. *Id.* at 1930.
24. *Id.* at 1931.
25. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 7.3(d)(1) (1987).
26. *Shapero*, 108 S. Ct. at 1925.

Professional Conduct was not at issue in *Shapero* and remains a part of the rules until excluded by an amendment of the rules by the Indiana Supreme Court or expressly overruled by a court of competent jurisdiction.

However, it also seems certain that *Shapero* does not affect Indiana's prohibition against in-person solicitation. *Shapero* contains clear language indicating that the potential for abuse of attorney in-person solicitation was such that states could constitutionally categorically ban such a practice. There is also language in *Shapero* suggesting that Indiana and the other states may in fact continue to exercise considerable latitude in the regulation of even targeted, direct-mail advertisements if the focus of that regulation is restricted to an evaluation of each individual letter for false and misleading statements.[27]

While the majority in *Shapero* invalidated categorical bans of targeted, direct-mail lawyer advertisements by the states, the majority was careful to specify areas in which state regulation could continue to play an important role. According to Justice Brennan's opinion, the states could require lawyers to seek approval from a state agency for any solicitation letter or advertisement.[28]

The Court further suggests that this state regulatory agency could require lawyers who state specific facts in a solicitation letter to prove those facts by attaching court documents or materials which support the truth of the facts alleged. Agencies could further require lawyers to explain how these facts were discovered and what measures the lawyer took to verify the accuracy of the facts. The Court also noted that states could require that the letter contain "a label identifying it as an advertisement . . . or directing the recipient how to report inaccurate or misleading letters."[29] Thus, while the Supreme Court in *Shapero* has significantly expanded the ability of lawyers to market themselves, it suggests that Indiana and the other states retain the power to curb the more obvious excesses of targeted, direct-mail lawyer advertising. In fact, it is arguable that Indiana could, consistent with *Shapero*, enact measures

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27. *Id.* at 1925, 1928.

28. *Id.* at 1923. Whether a state could require prior approval for such letters appears to be an open question. The Court speaks of requiring lawyers to file prospective solicitation letters in order to give the states "ample opportunity to supervise mailings and penalize actual abuses." 108 S. Ct. at 1923. While this suggests states could require prior approval for solicitation letters, it does not specifically say so, even though the letter at issue in *Shapero* was presented to the Kentucky Bar Association prior to its being sent to anyone. It might well be argued that requiring the prior approval of solicitation letters constitutes a prior restraint upon free speech in violation of the First and Fourteenth Amendments. This issue seems likely to emerge in the event a state does impose a prior approval requirement for solicitation letters.

29. *Id.* at 1924.

which significantly restrict targeted, direct-mail lawyer solicitation.

For instance, if Indiana required lawyers to submit solicitation letters to an agency for approval, that act alone would likely discourage many lawyers from exerting the effort required to obtain the necessary approval. Furthermore, if the approval agency established the various requirements for approval of such letters as outlined in *Shapero*, it would seem that few lawyers would want to apply. For instance, if a lawyer was required to demonstrate the accuracy of all facts asserted, show how these facts were discovered, label the letter as an advertisement, and include information, presumably in a conspicuous place, as to the procedures for reporting inaccurate or misleading letters, the agency would likely not be overburdened with work. Given the well-established maxim that state agencies are not known for the speed with which they act, by the time Shapero would have had his letter approved from the hypothetical agency just described, the prospective client's house may have changed hands several times! In short, *Shapero* suggests that states can still erect substantial barriers for lawyers seeking to employ this method of marketing. Whether or not states will expend the energy and go to the expense of establishing another level of bureaucracy to deal with lawyer solicitation letters remains to be seen.

C. Shapero's *Effect Upon Other Indiana Rules Regulating Lawyer Publicity and Advertising*

There are at least two other areas of regulated lawyer advertising practices which conceivably will be affected by the Supreme Court's ruling in *Shapero v. Kentucky Bar Association*.[30] The prohibition against commercial lawyer referral services[31] as well as the categorical bans upon certain types of information and data contained in lawyer advertisements are two such areas. The rationale set forth in Justice Brennan's opinion in *Shapero* suggests that the continuing validity of this categorical ban of commercial referral services may be suspect.

The minority opinion in *Shapero* disapproved of blanket prohibitions by states upon certain forms of lawyer advertising practices without a showing that the particular advertising practice in issue was false or misleading. The Court took pains to remind the states that lawyer advertising, like other forms of constitutionally protected commercial speech, may not be restricted except by means which are "no broader than reasonably necessary to prevent the' perceived evil."[32] The majority

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30. 108 S. Ct. 1916 (1988).

31. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1987).

32. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916, 1921 (1988) (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)).

in *Shapero* emphasized that the focus of inquiry in evaluating any particular mode of communication is upon two factors. First, it is necessary to inquire whether the practice involved is "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence and outright fraud."[33] The second factor is whether the practice is sufficiently visible to provide opportunities for effective regulation.[34] In applying that focus upon in-person solicitation, the Court ruled that a blanket prohibition was permissible.[35] As for targeted, direct-mail solicitations, the Court suggested other methods of regulation which were less restrictive than the invalidated categorical ban.[36] In applying the *Shapero* rationale to Indiana's blanket prohibition of commercial referral agencies by lawyers, it could be effectively argued that certain types of commercial referral agencies have less potential for abuse than does targeted, direct-mail solicitation.

For instance, if the referral agency restricts its advertising practices to the use of written newspaper advertisements and those on radio, or television, these forms of marketing would be available for scrutiny just as any other newspaper, radio or television lawyer advertisement. There would also appear to be less potential for fraud, undue influence, and overreaching through the use of a commercial referral agency as compared to targeted, direct-mailings.

Of course, if an advertisement encouraged the consumer to call a telephone number where a salesperson working on a commission basis pressures the caller to enlist a particular lawyer's services, such a practice is virtually analogous to the type of in-person solicitation which the Court and states may properly prohibit.[37] A categorical ban on the use of commercial referral agencies may not pass constitutional muster since a state could employ less restrictive means to regulate abuses, such as requiring approval of the particular advertising practices involved, a measure *Shapero* suggests is constitutionally permissible. With the growing popularity of television advertisements by commercial lawyer referral companies, it seems likely that a challenge to blanket prohibitions of commercial lawyer referral agencies may soon ensue.

Indiana rules which impose blanket prohibitions on specific types of information and data contained in advertisements by lawyers may also lack continued viability under *Shapero*. Rule 7.1(d) of the Indiana

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33. 108 S. Ct. at 1922 (1988) (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641 (1985)).

34. 108 S. Ct. at 1922.

35. *Id.*

36. *Id.* at 1923.

37. *See* Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601 (1986) (the author lists other policy considerations for this rule).

Rules of Professional Conduct prohibits, *inter alia*, lawyer advertising which "(2) contains statistical data or other information based on past performance or prediction of future success; (3) contains a testimonial about or endorsement of a lawyer; [or] (4) contains a statement of opinion as to the quality of the services. . . ."[38] The rationale for these prohibitions is that testimonials and endorsements normally contain references to the quality of the endorsed lawyer's services. Statements concerning the quality of legal services are banned generally for the reason that such claims are not subject to factual verification.[39]

However, it has been common practice for many years for lawyer information services such as Martindale-Hubbell and the Indiana Legal Directory to list regularly represented clients as part of the biographical sketch. Although Indiana has not adopted ABA Model Rule 7.2 *in toto*, this provision allows lawyers to list regularly represented clients in lawyer advertisements.[40] It is difficult to justify the distinction between permitting a lawyer to list regularly represented clients and prohibiting the use of endorsements and testimonials. Listing regularly represented clients is surely an implied endorsement if not a testimonial.[41]

Furthermore, a categorical ban on testimonials and endorsements may be difficult to sustain under *Shapero*. Given the Court's concern in protecting "the free flow of commercial information,"[42] demonstrating the necessity of a blanket prohibition of certain types of information in lawyer advertisements might prove to be a formidable task unless the regulatory body is able to prove that testimonials and endorsements are inherently deceptive.[43] It could be, as Justice O'Connor argues in the

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38. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 7.1(d) (1987).

39. Rule 7.1(d)(4) bans public communications by a lawyer which "contains a statement or opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services." *Id.*

40. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1978).

41. Moss, *supra* note 37. This Article suggests the Model Rules on advertising are "biased" in favor of firms with a business and commercial practice and against personal injury and criminal defense lawyers. Commercial practice firms generally have "regularly represented clients" while criminal defense and personal injury firms do not. *Id.*

42. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916, 1924 (1988).

43. Apparently, the United States Supreme Court will soon be ruling on the issue of client testimonials in lawyer advertising. On June 30, 1988, the Supreme Court noted probable jurisdiction in Oring v. State Bar of Cal., 108 S. Ct. 2895 (1988). Oring is a California lawyer and a member of the law firm of Grey and Oring. Grey had previously received a public reprieval for a radio advertisement which contained a client testimonial praising the firm for obtaining a large insurance settlement but failed to state that a major portion of the settlement related to a bad faith claim. Grey sought certiorari from the United States Supreme Court to review the discipline imposed upon him. Certiorari was denied in Grey's case in January 1987. Grey v. State Bar of Cal., 479 U.S. 1034 (1987). It was agreed in Oring's case that Oring would receive the same discipline as Grey

dissent to *Shapero*, that the ability of the states to regulate lawyer advertising in any meaningful way is greatly impaired by the majority's reliance upon the notion that the marketplace can appropriately determine lawyer selection. The majority's unwarranted faith in the spirit of consumerism to control the advertising methods of lawyers may well lead to a significantly diminished sense of professionalism among the Bar as Justice O'Connor so forcefully points out. Whether the Court further extends the limits of permissible lawyer marketing is unquestionably of great significance not only to those attorneys anxious to use all forms of advertising methods available to increase their practices but also to members of the profession concerned about the overall effect of such a development. Given the obvious willingness of lawyers to test limits, it seems certain that the profession will ultimately, if not soon, learn the boundaries of *Shapero*.

III. Professional Liability: The Decision to Settle or Proceed to Trial in Personal Injury Cases

Attorneys' malpractice related to the settlement of personal injury cases is a troublesome issue for practitioners. In *Sanders v. Townsend*,[44] the Indiana Court of Appeals considered this issue in a case where a client claimed her attorney coerced her to accept an inadequate and unfair settlement. *Sanders* addressed several matters of first impression in Indiana.

In *Sanders*, the appellant was injured in an automobile accident with a third party. Following the accident, Mrs. Sanders and her husband retained the appellee, Townsend, to represent her in a claim for damages and her husband for loss of consortium. After the suit was filed, Townsend negotiated a $3,000 settlement which the Sanders accepted.

The Sanders subsequently filed a malpractice action against Townsend claiming they were coerced into an unfair and inadequate settlement. The trial court granted a motion for summary judgment in favor of Townsend which the Sanders appealed.

The Indiana Court of Appeals separated the case into two issues, attorney negligence/malpractice, and constructive fraud, which it discussed separately. Each of the two issues raised a matter of first impression in Indiana. The court discussed the issue of the negligence claim first. The court of appeals held that the evidence submitted by the parties

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after the *Grey* decision was final. At issue is the validity of California's rules prohibiting deceptive or misleading advertisements and client testimonials. Rule 7.1(d)(3) of Indiana's Rules of Professional Conduct prohibits lawyer advertising containing client testimonials and will certainly be affected by the Court's decision in *Oring*.

44. 509 N.E.2d 860 (Ind. Ct. App. 1987).

did raise a material issue as to whether Townsend breached the duty he owed to his clients. The court next considered the level of proof required by each party on the issue of damages.

The court noted that the burden of proof necessary to defeat a defendant's motion for summary judgment in the context of an alleged inadequate settlement or jury award is an issue which had not been previously addressed in Indiana. However, the court followed other recent decisions on this issue in finding that "a plaintiff, in proving attorney negligence in the context of challenging a settlement or jury award as inadequate, must show, had the attorney not been negligent, the settlement or verdict award would have been greater."[45] In applying this standard to the case before them, the court held that Sanders had failed to present facts admissible in evidence to raise a material issue as to the adequacy of the settlement issue.

In opposition to Townsend's summary judgment motion, Mr. and Mrs. Sanders each submitted affidavits expressing their view that a scar on Sanders' forehead was worth more than $3,000. In evaluating this evidence, the court stated that "[a] litigant's personal opinion of a scar's value to the litigant, standing alone, is irrelevant to the issue of the settlement value of the scar."[46]

The court of appeals also held as inadmissible two other documents submitted by Sanders on the issue of damages. One document was an evaluation of the Sanders' claim prepared by Jury Verdict Research, Inc., with an attached affidavit by counsel for Sanders setting forth the information supplied to the company. However, since the author of the evaluation report did not submit an affidavit in compliance with Trial Rule 56,[47] the court of appeals ruled the report valuing the Sanders' claim at $17,500 to be inadmissible hearsay. Correspondingly, the court also ruled excerpts from Verdict Magazine as hearsay. The trial court did not consider either document in its ruling on defendant's motion for summary judgment, and the court of appeals affirmed the trial court's decision in granting summary judgment in favor of Townsend.[48]

The court of appeals, however, reversed the trial court's granting of summary judgment on the issue of Townsend's alleged constructive fraud. The court noted that an allegation of constructive fraud raises different issues than a claim of attorney negligence.

In a case involving an attorney negligence claim, "the injury is the loss of the worth of the underlying claim; but, with respect to constructive

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45. *Id.* at 863.
46. *Id.* at 864.
47. IND. R. TR. P. 56.
48. 509 N.E.2d at 864-65.

fraud where fiduciary duties are breached, the primary injury is the loss of rights belonging to the weaker party."[49] In applying this distinction to the facts of the case, the court of appeals noted that the injury under the constructive fraud claim "is the deprivation of the right to choose between trial or settlement, or rejection of one settlement offer in the hopes of a better offer."[50] Thus, the value of the underlying claim is not the full measure of recoverable damages on the issue of constructive fraud.

In attempting to show a deprivation of her rights, Mrs. Sanders submitted a deposition which contained, *inter alia*, an allegation that Townsend threatened to lose her file if she did not settle the case for $3,000. The Indiana Court of Appeals ruled that, unlike the first case involving attorney negligence, the facts asserted in the deposition raise a material issue of fact regarding the claim of constructive fraud. The fact that Sanders failed to submit competent evidence on the issue of the adequacy of the settlement award is not dispositive of the constructive fraud claim because the measure of damages in each cause of action differs.

The court went on to point out that while nominal damages may be awarded in cases where a party has proved an injury as a result of a fraud, forfeiture of the attorney's fees may also be appropriate.[51] In making the suggestion that the forfeiture of attorney fees is a proper element of damages, the court of appeals cited a Minnesota case in which the lawyer representing one client in the settlement of a personal injury case simultaneously represented the insurance adjuster on other matters.[52] After finding that the lawyer's conflict of interest constituted an act of fraud, the Minnesota court held that forfeiture of the attorney's fees was an appropriate remedy.

The court's ruling in *Sanders* raises a number of interesting issues. The first issue is the level of proof required for a plaintiff to defeat a Trial Rule 56 motion in an attorney malpractice action based upon an allegation of a coerced settlement. *Sanders* suggests that a plaintiff will be foreclosed from proceeding on a negligence claim without presenting probative and admissible evidence as to value of the underlying claim in addition to evidence tending to show acts of coercion.[53]

However, establishing the value of a personal injury claim is frequently a difficult matter. Unlike tangible commercial items, there is no

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49. *Id.* at 866.

50. *Id.* at 867.

51. *Id.*

52. Rice v. Perl, 320 N.W.2d 407 (Minn. 1982). The possible significance of this case is discussed later in this section. *See infra* notes 60-61 and accompanying text.

53. *Sanders*, 509 N.E.2d at 864.

market to provide an objective value for personal injury claims. Even though comparing jury verdicts in cases involving similar factual situations may be helpful in fixing the approximate value of a particular case, personal injury lawsuits are frequently known for the unique characteristics of the variable factors of the cases. In fact, trial lawyers might want to argue that an important, if not the most important, factor in the ultimate outcome of the case is the relative skill of the litigators involved. Certainly, the value of the personal injury claim is in many respects a matter of opinion.

It is interesting to note that the court in *Sanders* held that the opinion of the victims as to the value of the injuries suffered by them lacks sufficiency to raise a matter of factual dispute within the meaning of Trial Rule 56. The probative value of this type of evidence relative to a Trial Rule 56 motion is a matter of conjecture because the court held verdict comparisons inadmissible due to the form in which the evidence was offered. Certainly *Sanders* suggests that future plaintiffs must take special care in submitting proper proof as to the value of the underlying personal injury claim when defending a summary judgment motion in a case of an alleged coerced settlement.

However, the court of appeals decision in *Sanders* suggests several reasons why a claim of constructive fraud against an attorney is more likely to survive a motion for summary judgment than a claim based upon a negligence theory. First of all, the court noted that no intent is required in a case of constructive fraud.[54] Furthermore, duty is firmly established as a result of the attorney-client relationship. Also, a client will usually be able to easily establish that he or she relied on the attorney's statements, or silence, in view of the attorney's superior knowledge and training. Of course, evidence as to what the attorney did or did not advise will often be in dispute.

Even more importantly, the issue of damages poses a significantly lower barrier to recovery in a constructive fraud case than in the case of attorney malpractice grounded solely upon negligence. Damages in a constructive fraud case are not limited by the value of the underlying claim as is a claim based upon a negligence theory. The primary injury resulting from an act of constructive fraud is not the value of the claim, but the deprivation of the client's right to make a choice between settling on the terms of an offer or proceeding to trial. Damages which flow from the attorney's depriving his client of an informed choice may be nominal, or, as the court of appeals suggested in *Sanders*, may include the forfeiture of the attorney's fees collected in the settlements.[55]

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54. *Id.* at 866.
55. *Id.* at 867.

It is, however, an open question as to whether a client who proves the elements of constructive fraud can also recover the value of the underlying claim less the amount of settlement in addition to the forfeiture of attorney's fees. It is, of course, well established that rescission and restitution are the remedies for fraud and constructive fraud actions, a fact specifically noted by the court of appeals in *Sanders*.[56] However, a skillful trial lawyer might well offer an argument that rescission and restitution in a case of a coerced settlement require placing the client in the position he or she held prior to the fraudulent act. Restoring the status quo in a case of constructive fraud means putting the client in a position he or she held prior to acts of fraud.

If this argument is accepted, the client has the opportunity of seeking full value of his or her underlying claim. However, establishing that claim may prove difficult as previously discussed. In an especially aggravated case, an aggrieved client could conceivably recover punitive damages.[57]

It is also important to note that under the recently adopted Rules of Professional Conduct, specific language requires the lawyer to "abide by a client's decision whether to accept an offer of settlement."[58] The rules also now require contingent fee agreements to be in writing.[59] It would, therefore, seem prudent for the practitioner to set forth in the fee agreement the process by which settlement offers shall be presented to the client and the method by which the client shall reach the decision.

Lawyers may find it to their advantage to include language in all written fee agreements that all offers of settlement will be communicated to the client, possibly in writing, and that the client will be responsible for making a final determination regarding the settlement offer. An attorney may set out how he or she will advise the client, what relevant considerations exist, and all other necessary information so that the client may make an informed decision in regard to the settlement offer. By properly documenting the manner by which settlement offers are communicated and the process by which the client reaches the decision regarding the offer, the attorney can possibly avoid a future malpractice claim alleging coerced settlement.

Sanders also causes one to wonder about the extent to which the rationale will be applied to other instances of alleged attorney misconduct. The court relied upon a Minnesota Supreme Court case for the proposition that a client may recover as damages the attorney fees in cases

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56. *Id.*

57. *See e.g.*, Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135 (Ind. 1988); Millison v. Hoch, 17 Ind. 227 (1861).

58. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1987).

59. *Id.* Rule 1.5(c).

where constructive fraud is proven.[60] The Minnesota case concerned a conflict of interest by the attorney in the communication of a settlement offer rather than any overt conduct indicating coercion. In the Minnesota case the attorney was representing a personal injury client while his firm simultaneously represented the insurance adjuster on other matters.[61]

If an action for constructive fraud can be brought against an attorney who violates a conflict of interest provision, a major new area of attorney malpractice may be opened. Law firms and attorneys providing a broad range of legal services frequently find themselves simultaneously representing clients adverse to former or even present clients. *Sanders* may be a warning for attorneys to give even more attention to this troublesome matter.

IV. Indiana Disciplinary Cases

A. Conflict of Interest and Improper Use of Client Confidences

In *In re Orbison*,[62] the Indiana Supreme Court found that an attorney had violated the conflict of interest rules[63] by his firm having prepared a will in which the lawyer and other members of his family received substantial bequests without having advised the client of the potential conflict in such bequests nor advising the client to consult with independent counsel. The court also found that the Respondent, as Executor, violated the Indiana Code of Professional Responsibility[64] by making partial distributions of the client's estate to himself and other members of his family, several months prior to making distributions to other legatees, and paying executor fees to himself and attorneys fees to another member of his firm without prior court approval.

In approving the Conditional Agreement which called for a public reprimand, the court cited several mitigating circumstances. Respondent's prior unblemished record and his long service to the practicing bar were two mitigating factors. Another consideration was the fact that the Respondent himself did not actually prepare the will and he was unaware of its terms until it was probated. Finally, the decedent was a close family friend of Respondent for over thirty years.

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60. Rice v. Perl, 320 N.W.2d 407 (Minn. 1982).

61. *Id.* at 410-11.

62. 524 N.E.2d 792 (Ind. 1988).

63. Ind. Code of Professional Responsibility DR 5-101(A) and DR 5-105(D) (1986) (the two conflict of interest rules cited by the court).

64. The court ruled that Respondent's actions also violated the Code of Professional Responsibility DR 1-102(A)(5), (6); DR 2-105(A); DR 7-101(A)(1), (3); DR 7-103(A)(2), (8), and DR 9-102(B)(1), (3), (4).

Under the recently adopted Rules of Professional Conduct,[65] the facts here establish a much stronger case for discipline than under the former Code of Professional Responsibility which was in effect when the conduct in issue occurred. Under the conflict of interest rules in the former Code, it has been widely held that testamentary bequests from a client to an unrelated lawyer were presumed to be the result of fraud or overreaching.[66] Although this presumption was considered rebuttable, a lawyer who was a beneficiary under a will he or she had written had a very difficult burden to prove that the decedent's bequest was the product of an informed choice made after full disclosure.

Under Rule 1.8(c) of the Rules of Professional Conduct, it is now a *per se* violation to "prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client including a testamentary gift, except where the child is related to the donee."[67] It is no longer possible to avoid a disciplinary sanction by showing that the decedent's gift to an unrelated lawyer was a voluntary act performed after full disclosure. If the lawyer is not related to the donee and the gift is substantial, a lawyer may not prepare a will or any other instrument which makes the lawyer a beneficiary.

Of course the definition of "substantial gift" may prove fertile ground for future interpretation. The language providing an exception for lawyers related to the donee will likely result in judicial interpretations as to limits of this exception. It is not difficult to imagine that a lawyer who is distantly related by marriage to an elderly, wealthy client may have trouble relying exclusively upon this exception if the lawyer receives a substantial bequest when there are other closely related, or prospective, heirs.[68]

A loan from a client to a lawyer which was the product of a written instrument prepared by the lawyer's law partner was ruled a violation of the Code of Professional Responsibility in *In re Briggs*.[69] In accepting

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65. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1987).

66. *In re* Anderson, 52 Ill. 2d 202, 287 N.E.2d 682 (1972); Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d 838 (Iowa 1979); Marron v. Bowen, 235 Iowa 108, 16 N.W.2d 14 (1944); Cline v. Larson, 234 Or. 384, 383 P.2d 74 (1963); Estate of Younger, 314 Pa. Super. 480, 461 A.2d 259 (Pa. Super. 1983); *In re* Theodosen, 303 N.W.2d 104 (S.D. 1981); *In re* Swan's Estate, 4 Utah 2d 277, 293 P.2d 682 (1956); *In re* Spenner's Estate, 17 Wis. 2d 645, 117 N.W.2d 641 (1962). *Contra* State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963), *cited in* ABA, BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, 51:601.

67. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1987).

68. In Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982), a lawyer was suspended for two years for accepting *inter vivos* and testamentary gifts from an older woman even though it was found that no attorney client relationship existed between the two.

69. 502 N.E.2d 879 (Ind. 1987).

the Conditional Agreement which called for a public reprimand, the Indiana Supreme Court chided Respondent for failing to apprise his client of the differing interests at stake in a relationship which is "always potentially and often inherently (adversarial) in nature."[70] The court also found a DR 6-102[71] violation in Respondent's attempt to exonerate himself from prospective liability through other language in the written agreement providing for the loan.

The circumstances under which a lawyer may enter into business transactions with a client or acquire an economic interest adverse to a client are now set forth in clear and concise language under the Code of Professional Conduct. According to Rule 1.8(a), the terms of the transaction must be fully disclosed and in writing, as must be the client's consent, only after "the client is given a reasonable opportunity to seek the advice of independent counsel."[72] It is a further requirement under Rule 1.8(a) that the terms be fair and reasonable to the client. Thus, Rule 1.8(a) provides definitive guidelines as to the acceptable behavior on the part of lawyers who seek to engage in business transactions with clients. It does not, however, appreciably change the standards as they were previously applied in cases decided under the former disciplinary rules, as the cases indicated, a lawyer has a very heavy burden of showing that gifts from a client were the product of a fully informed choice.

In a review of a hearing officer's findings in a contested disciplinary case, the Indiana Supreme Court found that the evidence supported a finding that a part-time prosecutor had violated the conflict of interest rules in three separate instances.[73] The court found a violation in Respondent's representing a client in a dissolution action while Respondent's deputy was simultaneously prosecuting the client in a URESA action.[74]

The court further held that it was a violation of DR 4-101(A)[75] for the prosecutor to have filed a bigamy charge against a woman who had sought Respondent's assistance in his private capacity to resolve her problem of being married to two men at the same time.[76] The final violation rested upon evidence showing that Respondent represented a client in a divorce contempt matter arising from an incident which resulted in the man's former spouse making a criminal charge against Respondent's client which Respondent refused to file.[77] The court found the

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70. *Id.* at 880.
71. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102 (1986).
72. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (1987).
73. *In re* Moerlein, 520 N.E.2d 1275 (Ind. 1988).
74. *Id.* at 1277-78.
75. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1986).
76. *Moerlein*, 520 N.E.2d at 1278.
77. *Id.* at 1279.

evidence lacking on several other similar allegations, yet assessed a public reprimand.[78]

Conflict between the private and public functions of part-time prosecutors is an area of continuing concern.[79] In September 1987, the Indiana Supreme Court adopted Rule 1.8(k) of the Rules of Professional Conduct which, *inter alia*, allows part-time deputy prosecutors to represent clients in dissolution actions if there exists a prior written arrangement excluding that part-time deputy prosecutor from exercising prosecutorial authority in family law matters.[80] By creating a useful mechanism for part-time deputy prosecutors to engage in the representation of divorce clients, the court has made it possible for Indiana's part-time deputy prosecutors to maintain a civil dissolution practice while serving the criminal justice system. This situation is a matter of special concern to prosecutors in rural counties who are statutorily precluded from full-time prosecutor status and where opportunities for civil cases are somewhat more limited.

The only other case involving conflict of interest or client confidences issues decided during the survey period was *In re Swihart*.[81] In *Swihart*, a lawyer received a thirty-day suspension from the practice of law where the lawyer had become personally involved in an adoption matter adverse to his client.[82]

B. Personal Misconduct

The improper use of alcohol and drugs resulted in three court imposed disciplinary sanctions during the survey period. In *In re Petit*[83] and *In re Musser*,[84] both Respondents were deputy prosecutors convicted of

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78. *Id.*

79. *See* Jackson, *Developments in Professional Responsibility*, 21 IND. L. REV. 291, 304-06 (1988).

80. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(k) (1987) provides:

> 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.

81. 517 N.E.2d 792 (Ind. 1988).

82. *Id.* at 794.

83. 517 N.E.2d 396 (Ind. 1988).

84. 517 N.E.2d 395 (Ind. 1988).

driving while intoxicated arising from traffic accidents. In both cases, the court approved a conditional agreement imposing a public reprimand. The Indiana Supreme Court also ruled that the conduct in question in both cases violated DR 1-102(A)(5) as conduct prejudicial to the administration of justice. However, the court refused to find a violation of DR 1-102(A)(3) in *Musser* or a DR 1-102(A)(6) violation in *Petit*.

In *In re Jones*,[85] the Indiana Supreme Court imposed a public reprimand in approving a conditional agreement where an attorney was convicted of possession of marijuana. In holding that Respondent's behavior reflected adversely on Respondent's fitness to practice law but was not an act of moral turpitude, the court explained its view as to the relative seriousness of possession of marijuana as compared with driving while intoxicated.[86]

The court evaluated the facts in *Jones* in light of the standards set forth in *In re Oliver*.[87] The court stated that the use of alcohol is legal for adults, and even intoxication is not a crime unless in public or it involves drunk driving. The court concluded that the misuse of alcohol in itself does not necessarily affect the fitness of a lawyer to practice law.[88]

However, the use and possession of marijuana, according to the court, is a different situation. The act of possession of marijuana requires inevitable contact with the trafficking of illegal drugs. The court further stated that the public views such acts as inconsistent with the lawyer's role as an officer of the court. The court concluded that the act of possession of marijuana by Respondent in itself reflects adversely on his fitness to practice law. The court proceeded to conclude that the facts presented in *Jones* were insufficient to support a finding that Respondent had committed an act of "moral turpitude."[89]

The court's comparison of drunk driving and marijuana possession is interesting. The court reasons that the public's perception of a lawyer who possesses marijuana is so severely negative that it adversely affects the lawyer's fitness to be an officer of the court. However, the court apparently believes the public does not view the offense of drunk driving in the same light because drunk driving involves the misuse of a legal drug, alcohol, rather than an illegal one, marijuana. Presumably, the

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85. 515 N.E.2d 855 (Ind. 1987).

86. *Id.*

87. In *In re* Oliver, 493 N.E.2d 1237, 1242-43 (Ind. 1986), the Indiana Supreme Court ruled that a lawyer's private misconduct which affect the lawyer's trustworthiness also affects the lawyer's fitness to practice law. The court also held that it would analyze the particular conduct *in toto* to determine whether the behavior involves moral turpitude. *Id.* at 1241.

88. *Id.*

89. *Jones*, 515 N.E.2d at 856.

fact that marijuana possession puts the lawyer in contact with drug trafficking is a more serious consideration for the public in evaluating the character of this conduct, than evaluating the relative dangerousness of drunk driving.

The treatment of acts involving private misconduct by lawyers under the recently adopted Rules of Professional Conduct raises some interesting questions. Rule 8.4 of the newly adopted Rules of Professional Conduct avoids the use of the phrase "illegal conduct involving moral turpitude" as formerly contained in DR 1-102(A)(3) of the Code of Professional Responsibility.[90] The comments to Rule 8.4 indicate that the authors specifically excluded such language to limit lawyer disciplinary cases to instances of personal morality which are specifically connected to the fitness for the practice of law.[91]

Conduct which directly affects the administration of justice or a lawyer's honesty is given special attention under Rule 8.4. Much of the language used to define misconduct under Rule 8.4 is virtually identical to the prohibitions formerly contained in DR 1-102(A).

The *Petit* and *Musser* cases suggest that lawyers who are public officials or prosecutors will violate Rule 8.4(d) of the Rules of Professional Conduct by engaging in drunk driving. *Jones* suggests lawyers who are in possession of marijuana will violate Rule 8.4(b) of the Rules of Professional Conduct as adversely affecting a lawyer's fitness.

Because Rule 8.4 contains no reference to moral turpitude, acts of drunk driving by attorneys who are not public officials or prosecutors will likely be evaluated with reference to the issue of the lawyer's fitness under Rule 8.4(b). However, this probably will not change the outcome of such cases.

In *Jones* the court considered the public's perception of the character of a lawyer's act of private misbehavior (marijuana possession) as an important factor in evaluating a lawyer's fitness.[92] The "judgment of

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90. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1987) provides:
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

91. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4 comment (1987).

92. 515 N.E.2d at 856.

the community" and "the state of the public morals" are likewise considerations in the definition of moral turpitude according to the court in *In re Oliver*.[93] Thus, if the public's perception of an attorney's private act of misconduct is a meaningful consideration in evaluating a lawyer's fitness, behavior formerly considered an act of moral turpitude will continue to be violations of the Rules of Professional Conduct under Rule 8.4(b). Because the acts of marijuana possession and repeated acts of drunk driving have been held to adversely affect the lawyer's fitness under certain circumstances, these behaviors may be prohibited under Rule 8.4(b).

Whether the court will apply the same analysis to other behavior formerly considered to be acts of "moral turpitude," such as sexual misconduct, is an open question. Presumably, if the misconduct is illegal and adversely reflects in any manner on the lawyer's honesty, trustworthiness, or the lawyer's fitness, the act will violate Rule 8.4(b). If the act is not illegal, the act may violate Rule 8.4(d) as "conduct prejudicial to the administration of justice" if the conduct in question carries a stigma of significant public disapproval. If the court considers the conduct in question as carrying a significant negative stigma by the public, the conduct may then be characterized as adversely affecting "the public's perception of (the attorney's) fitness to be an officer of the court,"[94] thereby violating Rule 8.4(d).

C. Other Indiana Cases

During the survey period, there were several other disciplinary cases decided by the Indiana Supreme Court which will be given brief comment. In a recently reported case, the court imposed a one year suspension from the practice of law on a lawyer for twice submitting false documents to an administrative law judge at a social security hearing.[95] On both occasions, the lawyer filed a backdated Requested For Hearing form with the Social Security Administration which contained a forged signature of a social security employee. The court ruled that such behavior was an intentional misrepresentation of an adjudicatory body and deserved the serious sanction of a suspension.[96]

A one year suspension was also imposed in *In re Holloway*[97] where a lawyer wrote a bad check to pay medical bills on behalf of a client and failed to repay the amount owed for twenty-one months. The court

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93. 493 N.E.2d at 1241.
94. *In re* Jones, 515 N.E.2d at 856.
95. *In re* Brown, 524 N.E.2d 1291 (Ind. 1988).
96. *Id.* at 1293.
97. 514 N.E.2d 829 (Ind. 1987).

further found an act of misconduct in Respondent's failure to pay medical bills for two years for a second client from funds Respondent received for that purpose. The court ruled that Respondent's failure to repay a $5,000 loan from another client was an additional act of misconduct supporting its imposition of the one-year suspension.[98]

In the five reported cases involving acts of serious neglect of clients by attorneys, the Indiana Supreme Court imposed suspensions from the practice of law ranging from thirty days to disbarment. The sanctions imposed in the cases reflected the degree of aggravated circumstances as tempered by the various facts of mitigation.[99]

In a case where an attorney had negotiated a contingency fee in a criminal case, the Indiana Supreme Court approved a conditional agreement imposing a public reprimand.[100] The court pointed out in its opinion that the fee arrangement was clearly a violation of DR 2-105(c) of the Code of Professional Responsibility at the time it was negotiated and would further be a violation of Rule 1.5(d)(2) of the newly adopted Rules of Professional Conduct.[101]

In the final case for comment in this Article, the Indiana Supreme Court imposed a public reprimand in approving a conditional agreement where an attorney had failed to return a client's file in a criminal post-conviction relief matter after having promised to do so and having collected a fee. The court noted several mitigating facts in agreeing to accept the conditional agreement.[102]

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98. *Id.* at 831.

99. *See In re* Brown, 519 N.E.2d 1216 (Ind. 1988); *In re* Woods, 516 N.E.2d 33 (Ind. 1987); *In re* Geron, 515 N.E.2d 853 (Ind. 1987); *In re* Erbecker, 513 N.E.2d 1214 (Ind. 1987); *In re* Carmody, 513 N.E.2d 649 (Ind. 1987).

100. *In re* Stivers, 516 N.E.2d 1066 (Ind. 1987).

101. *Id.*

102. *In re* Taylor, 525 N.E.2d 286 (Ind. 1988).)