

SURVEY OF INDIANA LAW OF PROFESSIONAL RESPONSIBILITY (2022-2023)

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INTRODUCTION

From July 1, 2022, through July 1, 2023, the Indiana Supreme Court handed down three per curiam decisions imposing sanctions for attorney misconduct.¹ The Court's focus in these decisions was a discussion of sanctions analysis.² Through this thread of cases, the Court illustrated the types of behavior, both before and during the disciplinary process, that lead to significant sanctions.³ During this same period, four public disciplines were issued against judges. Of those, three involved judicial officers engaging in improper *ex parte* communications in Child in Need of Services (CHINS) or family law cases.⁴

The Indiana Supreme Court Disciplinary Commission published three formal advisory opinions during the survey period.⁵ These advisory opinions provide Indiana lawyers with guidance on navigating conflicts of interest and ethical considerations when creating fee agreements, setting fees, and collecting fees.⁶

I. ATTORNEY DISCIPLINE CASES – SANCTIONS ANALYSIS

While each discipline matter is fact specific and must be evaluated independently, the Indiana Supreme Court routinely evaluates the following factors to determine an appropriate sanction: the nature of the misconduct, the

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1. See *In re Staples (Staples III)*, 196 N.E.3d 1224 (Ind. 2022); *In re Hardesty*, 202 N.E.3d 1083 (Ind. 2023); *In re McMahon*, 203 N.E.3d 1033 (Ind. 2023).

2. See *Staples III*, 196 N.E.3d at 1224; *In re Hardesty*, 202 N.E.3d at 1083; *In re McMahon*, 203 N.E.3d at 1033.

3. See *Staples III*, 196 N.E.3d at 1224; *In re Hardesty*, 202 N.E.3d at 1083; *In re McMahon*, 203 N.E.3d at 1033.

4. *In re Meade*, 200 N.E.3d 448 (Ind. 2023); *In re Day*, 206 N.E.3d 371 (Ind. 2023); Public Admonition of Referee Johnston (July 1, 2022), <https://www.in.gov/courts/jqc/files/jqc-admonition-johnston-2022-0701.pdf> [<https://perma.cc/R4FD-WD85>] [hereinafter Admonition of Johnston]. For the remaining public discipline, a judge agreed to a Public Commission Admonition for making injudicious comments at an investigative scene of the judge's son. See Public Admonition of Judge Davis (July 3, 2023), www.in.gov/courts/jqc/files/jqc-admonition-davis-2023-0703.pdf [<https://perma.cc/TN8R-S4XQ>] [hereinafter Public Admonition of Davis].

5. See discussion, *supra* Part II.

6. See discussion, *supra* Part II.

duties violated by a lawyer, any resulting or potential harm, the lawyer's state of mind, the Court's duty to preserve the integrity of the profession, the risk to the public if the Court allowed the lawyer to continue to practice law, and any other mitigating or aggravating factors.⁷ In the previous survey period, the Indiana Supreme Court discussed in *Matter of Thomas* the types of misconduct that have warranted disbarment—"crimes of dishonesty, misappropriation of client funds, creation of fraudulent documents, [and] forging of signatures."⁸

In the current survey period, the Court's per curiam opinions highlight sanction factors of misconduct that warrant suspension without automatic reinstatement. In Indiana, attorney license suspensions can be with or without automatic reinstatement.⁹ A suspension with automatic reinstatement is for a fixed period of time (not to exceed 180 days) and allows the disciplined lawyer to return to practice after completion of the suspension period and any conditions imposed in the Court's discipline order.¹⁰ In contrast, a lawyer who receives a suspension without automatic reinstatement must fulfill a number of conditions, including successfully proving at a reinstatement hearing that the lawyer can be safely recommended back to the practice of law.¹¹

7. *In re Davis*, 104 N.E.3d 1285, 1286 (Ind. 2018); *In re Newman*, 958 N.E.2d 792, 800 (Ind. 2011); *In re Winkler*, 834 N.E.2d 85, 89 (Ind. 2005).

8. *In re Thomas*, 184 N.E.3d 1157, 1158 (Ind. 2022) (citing *In re Fraley*, 138 N.E.3d 262 (Ind. 2020); *In re Schuyler*, 97 N.E.3d 618 (Ind. 2018); *In re Brown*, 766 N.E.2d 363 (Ind. 2002)).

9. IND. ADMIS. DISC. R. 23 § (3)(a) (2023).

10. *Id.*

11. To be considered for reinstatement, a lawyer must file a petition for reinstatement with the Supreme Court after the suspension period has ended. For a petition to move forward, a lawyer must pay a \$500 filing fee, have filed a notification affidavit pursuant to Admission and Discipline Rule, Section 26, before filing the petition, and have successfully taken and passed the Multistate Professional Responsibility Exam (MPRE) by a score of 80 or better within twelve months of the filing of the petition. IND. ADMIS. DISC. R. 23 § 18(b). Additionally, if the lawyer submitted a previous reinstatement petition that was denied by the court, then twelve months must have passed since the denial. *Id.*

At a reinstatement hearing, the lawyer bears the burden of establishing by clear and convincing evidence:

- The lawyer desires in good faith to obtain restoration to practice law;
- The lawyer has not practiced law in Indiana or attempted to do so since discipline was imposed;
- The lawyer has complied fully with the terms of the order for discipline and the duties set forth in Section 26, including the filing of a notification affidavit;
- The lawyer's attitude towards the misconduct for which the lawyer was disciplined is one of genuine remorse;
- The lawyer's conduct since the discipline was imposed has been exemplary and above reproach;
- The lawyer has a proper understanding of and attitude towards the standards that are imposed upon members of the bar and shall conduct himself or herself in conformity with these standards;
- The lawyer can safely be recommended to the legal profession, the courts and the public as a person fit to be consulted by others and to represent them and otherwise act

The per curiam decisions during this period illustrate three prototypes of behavior that warrant suspension without automatic reinstatement: 1) serial misconduct, 2) a spree of misconduct, and 3) a single episode of egregious misconduct.¹² For purposes of this Article, “serial misconduct” describes situations when an attorney commits similar misconduct on multiple occasions over a course of years.¹³ In many instances, a lawyer will have been given prior opportunities to reform behavior, which went unheeded. “Spree misconduct” refers to situations when an attorney commits a variety of misconduct over a relatively short period of time.¹⁴ “Egregious misconduct” is so severe that it shakes public confidence in the lawyer’s ability to be trusted to serve as a lawyer.¹⁵ While “egregious conduct” often involves criminal conduct, behavior falling short of criminal conduct but that is dishonest or substantially detrimental to clients may fall into this category.¹⁶

A. Serial Misconduct – Matter of Staples

Matter of Staples (“*Staples III*”) marked the third disciplinary action against Respondent Staples in a ten-year period.¹⁷ In October 2018, Client met with Staples’ office manager to hire Staples to represent him in three cases (a criminal domestic battery charge, a paternity case, and a CHINS case).¹⁸ Client and Client’s mother attended the meeting and agreed to pay \$11,500 with an initial \$2,500 retainer fee for Staples to exclusively represent Client in the three

in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and an officer of the courts; and

- The disability has been removed, if the suspension was imposed by reason of disability.

IND. ADMIS. DISC. R. 23 § 18(b)(3).

12. See *In re Staples (Staples III)*, 196 N.E.3d 1224 (Ind. 2022); *In re Hardesty*, 202 N.E.3d 1083 (Ind. 2023); *In re McMahon*, 203 N.E.3d 1033 (Ind. 2023).

13. *In re Williams*, 764 N.E.2d 613, 616-17 (Ind. 2002) (“Serial neglect by lawyers of their clients’ legal affairs indicates grave professional shortcomings activating this Court’s obligation to protect the public from unfit practitioners.” (citing *In re Roberts*, 727 N.E.2d 705, 710 (Ind. 2000))).

14. See, e.g., *In re Johnson*, 74 N.E.3d 550, 551-52 (Ind. 2017) (Chief public defender suspended for one year without automatic reinstatement for campaign of harassment and stalking of a woman who he previously had been romantically involved; his campaign violating a protective order which resulted in a conviction for criminal trespass; retaliating against the woman for obtaining the protective order by contacting her probation officer to assert she had violated probation, and berating the officer who was investigating the stalking allegations).

15. See *In re Bash*, 880 N.E.2d 1182, 1185 (Ind. 2008) (lawyer suspended for 180 days without automatic reinstatement, in part, due to attempting to engage in a sexual relationship with a client and sending that client unsolicited sexually explicit emails).

16. *Id.*

17. *In re Staples (Staples III)*, 196 N.E.3d 1224 (Ind. 2022).

18. *Id.* at 1225.

cases.¹⁹ No contract or other written agreement was executed during this meeting.²⁰

Staples and another attorney, a solo practitioner who shared office space with Staples but had no partnership or official firm affiliation with Staples, filed appearances in Client's criminal case.²¹ Staples failed to appear at a pretrial conference for the criminal case, and the other attorney was sent to appear when Client contacted Staples' office.²² The other attorney also appeared at Client's deposition; Staples filed a motion to withdraw from Client's case days after the deposition.²³ By this time, Client's mother had paid Staples \$4,300, of which Staples paid \$1,148 to the other attorney without the consent of Client or Client's mother.²⁴ Neither Client nor Client's mother agreed to the representation of any attorney other than Staples.²⁵ Client's mother requested a refund and sued Staples when he declined to tender one.²⁶ Staples did not answer the civil complaint, which resulted in the trial court entering a default judgment against him.²⁷ Following the default judgment, the trial court ordered Staples to produce financial documents, which Staples failed to do as well as failing to attend a show cause hearing about the records.²⁸ The trial court held Staples in contempt and ordered him to pay attorney's fees.²⁹ Staples still had not paid the judgment or attorney's fees on the refund case when the Indiana Supreme Court sanctioned him in *Staples III*.³⁰

Staples' conduct was referred to the Indiana Supreme Court Disciplinary Commission.³¹ Staples did not immediately cooperate with the Disciplinary Commission's investigation, only answering the Commission's inquiries after the Indiana Supreme Court issued a show cause order to respond why he should not be suspended for noncooperation.³² Staples claimed in his response that it was not his "custom, habit, or practice . . . to fail to respond to the Indiana Supreme Court Disciplinary Commission when required to do so[.]"³³ However, this was not the first time that Staples had not cooperated with a Disciplinary Commission investigation, nor would it be the last.³⁴ Staples had to be coerced with show-cause orders from the Indiana Supreme Court twice before *Staples*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1226.

34. *Id.*

III, and once again when he failed to comply with a subpoena *duces tecum* following his response in the case at hand.³⁵

The Disciplinary Commission subsequently filed a disciplinary complaint against Respondent Staples, alleging the following violations of the Indiana Rules of Professional Conduct:

- 1.5(e): Failing to obtain a client's approval of a fee division between lawyers who are not in the same firm;
- 3.4(c): Knowingly disobeying an obligation under the rules or an order of a court;
- 8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter; and
- 8.1(b): Failing to respond in a timely manner to the Commission's demands for information.³⁶

A hearing officer presided over an evidentiary hearing and after considering the parties' proposed findings, the hearing officer submitted a report concluding that Respondent Staples violated all four rules charged; the hearing officer recommended an eighteen-month suspension without automatic reinstatement.³⁷ Upon review *de novo*, the Indiana Supreme Court ultimately suspended Respondent Staples from the practice of law for one year without automatic reinstatement, with the additional requirement that Staples would not be eligible for reinstatement until he satisfies the judgment entered against him in Client's mother's refund lawsuit.³⁸

At first blush, this sanction might seem unduly harsh, as similar misconduct on a first occurrence typically results in a public reprimand or short suspension.³⁹ However, this was not Staples' first occurrence of misconduct. To fully appreciate the Court's evaluation of sanction factors and reasoning for

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1226-27.

39. *See, e.g., In re Moerlein*, 729 N.E.2d 587, 588 (Ind. 2000) (lawyer publicly reprimanded for failing to file a lawsuit or obtain a settlement for a client's contemplated claim over the course of two years); *In re Cawley*, 678 N.E.2d 1112, 1113 (Ind. 1997) (lawyer publicly reprimanded for failing to adequately provide substitute counsel upon being suspended from practice for unrelated misconduct, and then subsequently failing to take action on the client's matter after being reinstated); *In re Cherry*, 715 N.E.2d 382, 385 (Ind. 1999) (lawyer suspended for 60 days for neglecting to file client's post-conviction relief petition for over five years after the conclusion of the appeals process); *In re Norman*, 659 N.E.2d 1046, 1049 (Ind. 1996) (lawyer suspended for 30 days for neglecting to pursue damages suit against third parties after initial filing for a client in a personal injury matter).

Respondent's sanction, a review of Respondent Staples' 2012 discipline ("*Staples I*") and 2017 discipline ("*Staples II*") is necessary.⁴⁰

In *Staples I*, Staples was hired to defend MR and her company in a suit brought against them in 2005 by an independent contractor.⁴¹ During the course of representation, Staples failed to complete even the most basic tasks on MR's matter—he failed to respond to discovery requests and to the subsequent orders compelling him to do so; he failed to appear at multiple hearings; he failed to maintain MR's file; he failed to inform MR that he had left his firm; and he even failed to inform MR of a judgment entered against her.⁴² In fact, MR only learned of the judgment after her assets had been frozen in October 2006, as Staples previously had told MR that he had filed the proper paperwork for her case.⁴³

Staples apparently had for a long time suffered from depression and was aware of the "deleterious effect on his practice;" however, he did not withdraw from MR's case, despite having this knowledge.⁴⁴ Nonetheless, MR successfully sued Staples' firm, recovering her legal fees and damages from the firm's malpractice insurance carrier, and a disciplinary investigation ensued.⁴⁵

After the Disciplinary Commission filed disciplinary charges against him, Respondent Staples entered into a Conditional Agreement for Discipline with the Commission.⁴⁶ In the Conditional Agreement, Respondent Staples acknowledged that during his representation of MR, Staples violated the following Indiana Rules of Professional Conduct:

1.3: Failure to act with reasonable diligence and promptness.

1.4(a)(3): Failure to keep a client reasonably informed about the status of a matter.

1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions.

1.16(a)(2): Failure to withdraw from representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

8.4(c): Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.⁴⁷

Evaluating whether the parties' proposed discipline should be accepted and imposed, the Court took note of the significant financial damages that MR

40. See *In re Staples (Staples I)*, 969 N.E.2d 584 (Ind. 2012); *In re Staples (Staples II)*, 66 N.E.3d 939 (Ind. 2017).

41. *Staples I*, 969 N.E.2d at 584.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 584-85.

47. *Id.* at 584.

suffered due to Respondent Staples' misconduct as an aggravating factor.⁴⁸ Another aggravator cited by the Court was that Respondent Staples had been "advised to seek treatment for his depression in 2007 but did not do so until 2011."⁴⁹ The Court then balanced these aggravators with the mitigating factors that Respondent Staples cooperated with the Commission's investigation and complied with recommended treatment for his depression.⁵⁰ Respondent Staples' lack of a disciplinary history also was cited as a mitigating factor by the Court.⁵¹ Balancing the aggravators against the mitigators, the Court accepted the parties' Conditional Agreement and imposed on Respondent Staples the agreed-to sanction of a sixty-day suspension, "with 30 actively served and the remainder stayed subject to completion of [two years] of probation."⁵² As a condition of probation, the Court also required that Respondent Staples "comply with mental health treatment as determined and monitored by the Judges and Lawyers Assistance Program" (JLAP).⁵³

Five years after *Staples I*, Staples again appeared before the Court for a disciplinary matter due to attorney neglect.⁵⁴ However, between *Staples I* and *Staples II*, Staples was briefly suspended from May 6, 2016, through May 11, 2016, for failing to pay the costs charged to him in *Staples I*.⁵⁵

In *Staples II*, Staples entered an appearance as successor counsel in February 2013 for Client in a criminal case.⁵⁶ During his representation of Client, Staples "did not appear for a pretrial conference" and failed to "respond to inquiries from court staff [about] his absence."⁵⁷ In July 2013, Staples' Client did not appear for a hearing due to a hospitalization, so the trial court ordered Staples to file a motion for continuance with verification of Client's hospitalization.⁵⁸ Staples failed to file the motion for continuance and the other documentation ordered by the trial court.⁵⁹ He then failed to appear for the subsequent show cause hearing, "was found in contempt, and then failed to appear for the sanctions hearing."⁶⁰ Staples appeared for a subsequent hearing, so the trial judge decided to keep the show cause ruling under advisement.⁶¹ But months later, in January 2014, Staples and Client were ordered to appear for another hearing; "Client appeared, but [Staples] did not."⁶² The trial judge again

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 584-85.

53. *Id.* at 585.

54. *In re Staples*, 66 N.E.3d 939 (Ind. 2017).

55. *In re Staples*, 52 N.E.3d 794 (Ind. 2016).

56. *In re Staples (Staples II)*, 66 N.E.3d 939, 939 (Ind. 2017).

57. *Id.*

58. *Id.* at 939-40.

59. *Id.* at 940.

60. *Id.*

61. *Id.*

62. *Id.*

found Staples in contempt.⁶³ After a year's worth of mishaps with Staples, Client ultimately hired other counsel.⁶⁴

An investigation subsequently was launched by the Disciplinary Commission, but "Respondent [Staples] did not timely respond to the Commission's initial demand for a response," nor did he "comply with a subpoena duces tecum."⁶⁵ Those actions necessitated the Commission petitioning the Supreme Court twice for show cause proceedings on whether to suspend Respondent Staples for non-cooperation.⁶⁶ Respondent Staples eventually complied, and the petitions were dismissed.⁶⁷ For Staples' neglect of Client and his noncooperation during the investigation, the Disciplinary Commission charged Respondent Staples in August 2016 with violating Indiana Professional Conduct Rule 3.2 ("[f]ailure to expedite litigation consistent with the interests of a client"); Indiana Professional Conduct Rule 3.4(c) ("[k]nowingly disobeying an obligation under the rules or an order of a court"); and Indiana Professional Conduct Rule 8.1(b) and Indiana Admission and Discipline Rule 23(10)(e) ("[k]nowingly failing to respond to a lawful demand for information from a disciplinary authority").⁶⁸ The parties tendered a Conditional Agreement for Discipline to the Supreme Court with a proposed sanction of a public reprimand.⁶⁹ The Court cited to Respondent Staples' noncooperation, paired with the fact that he "was on disciplinary probation at the time of his misconduct", as aggravating factors, while also giving weight to "Respondent's acceptance of responsibility" and his steps taken to "prevent the recurrence of similar neglect" as mitigating factors.⁷⁰ Weighing these factors, the Court determined that the proposed sanction of a public reprimand was appropriate.⁷¹

It is against this backdrop that the Court was tasked in *Staples III* with fashioning an appropriate sanction for Staples' third episode of similar misconduct in ten years.⁷² The Court focused its sanction analysis on how Respondent Staples had not changed his practices, despite repeated attempts by the Court encouraging him to rehabilitate.⁷³ The Court noted:

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*; See IND. ADMIS. DISC. R. 23, § 10.1(a) (2023) ("It shall be the duty of every attorney to cooperate with an investigation by the Disciplinary Commission, accept service, and comply with the provisions of this Rule."); IND. ADMIS. DISC. R. 23, § 10 (When a lawyer fails to comply, Indiana Admission and Discipline Rule 23, Section 10.1 sets forth the procedures for how the Disciplinary Commission must address noncompliance issues with the Supreme Court to seek a noncooperation suspension).

67. *Staples II*, 66 N.E.3d at 940.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See *In re Staples (Staples III)*, 196 N.E.3d 1224 (Ind. 2022).

73. *Id.* at 1226.

We have disciplined Respondent twice in the past for neglecting clients' cases, failing to appear at hearings, and disregarding court orders. We publicly reprimanded him in one of the cases and suspended him with automatic reinstatement in the other. After 35 years of practice, and despite these gentler attempts at correction, Respondent continues to flout judicial authority and violate his client's trust. . . .

Respondent's obstinance and dishonesty continued during these disciplinary proceedings, during which he made a false statement to the Commission, missed a hearing, disregarded orders from the hearing officer, and generally continued his pattern of noncooperation.⁷⁴

Highlighting that it has previously "suspended attorneys without automatic reinstatement when they serially neglect their clients" "[t]o protect the public from ongoing harm and to preserve the integrity of the legal profession and system," the Court concluded that "Respondent's continued misconduct requires more substantial discipline than we have previously imposed on him."⁷⁵ The Court then suspended Respondent Staples for one year without automatic reinstatement and ordered him to satisfy the judgment filed by Client's mother before he may seek reinstatement.⁷⁶

The trilogy of *Staples* cases demonstrates how the Court approaches serial ethical misconduct. In *Staples I* and *Staples II*, the Court sanctioned with the goal of holding Respondent Staples accountable but allowing him the opportunity to rehabilitate his behaviors.⁷⁷ However, Respondent Staples did not learn the appropriate lesson, as he continued to disregard his clients' cases, failed to abide by Court orders, and failed to cooperate with the disciplinary process, leaving the Court with little choice than to suspend him without automatic reinstatement to protect the public.⁷⁸

Examining these cases together, the lasting message is as follows: while the Court attempts to give errant attorneys the opportunity to reform their behaviors, the Court will handle repeat ethical offenders with a stronger hand when rehabilitative measures do not produce improved conduct. Similar to baseball, when an errant attorney amasses three strikes of ethical misconduct, the attorney can expect to be called "out" (aka suspended without automatic reinstatement).

74. *Id.* (internal citations omitted).

75. *Id.* at 1227.

76. *Id.*

77. See *In re Staples (Staples I)*, 969 N.E.2d 584, 584 (Ind. 2012); *In re Staples (Staples II)*, 66 N.E.3d 939 (Ind. 2017).

78. *Staples III*, 196 N.E.3d at 1224.

B. Spree of Misconduct – Matter of Hardesty

While *Staples III* demonstrates that a lawyer who continuously commits misconduct (despite the intervention of the Court and attempts to rehabilitate) will garner heavy sanction, *Matter of Hardesty* showcases how a spree of misconduct over a short period of time also merits a strong sanction.⁷⁹

In *Matter of Hardesty*, in August of 2022, the Disciplinary Commission filed a two-count disciplinary complaint against Respondent Hardesty for repeated episodes of attorney neglect over an eight-month period in two different cases.⁸⁰ At the time, Hardesty was a relatively new attorney, having been admitted to Indiana’s bar in 2020.⁸¹

Count 1 of the Commission’s disciplinary complaint pertained to Respondent Hardesty’s representation in late 2021 of a defendant in a criminal case.⁸² For the first jury trial setting in September 2021, Hardesty arrived forty minutes late, blaming his tardiness on a flat tire.⁸³ After jury selection, Hardesty reported “he might have been exposed to COVID over the previous weekend”, and the trial judge was forced to declare a mistrial.⁸⁴ A month later, Hardesty failed to appear for a pretrial conference.⁸⁵ “The trial court attempted to reach Respondent [Hardesty] at both his cell and office phone[s]”, but to no avail, so the trial court ordered Hardesty to appear three days later to explain his absence.⁸⁶ He appeared at the hearing, and the trial court took no additional action for that unexplained absence.⁸⁷ At the second jury trial setting in November 2021, Hardesty appeared for the first day of trial with his client, jurors were selected, counsel gave opening statements, and the State began its presentation of evidence.⁸⁸ The second day of trial, Hardesty “failed to appear for the continuation of the jury trial” and provided no notice to explain his absence.⁸⁹ When the trial court was unable to reach Hardesty on his office and cell phones, the trial court contacted the sheriff’s department to conduct a wellness check.⁹⁰ Law enforcement officers located Hardesty, and he called the

79. *In re Hardesty*, 202 N.E.3d 1083 (Ind. 2023).

80. *See id.*; Disciplinary Complaint, *In re Hardesty*, 202 N.E.3d 1083 (Ind. 2023) (No. 22S-DI-00290) (on file with author).

81. Disciplinary Complaint at 1, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290); *see In re Hardesty*, 202 N.E.3d at 1083.

82. Disciplinary Complaint at 1-3, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290); *In re Hardesty*, 202 N.E.3d at 1083.

83. Disciplinary Complaint at 1-2, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290); *In re Hardesty*, 202 N.E.3d at 1083.

84. Disciplinary Complaint at 2, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290); *In re Hardesty*, 202 N.E.3d at 1083.

85. *In re Hardesty*, 202 N.E.3d at 1083; Disciplinary Complaint at 2, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290).

86. Disciplinary Complaint at 2, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290).

87. *Id.*

88. *Id.*

89. *Id.* at 3.

90. *Id.*

trial court—over two hours after the scheduled start time.⁹¹ “The trial court declared a second mistrial due to the unavailability of defense counsel.”⁹² In December 2021, the trial court judge ordered Hardesty withdrawn from the case and appointed new defense counsel.⁹³

Count 2 of the Commission’s disciplinary complaint pertained to Respondent Hardesty’s representation from April through June 2022 of a client in a Child in Need of Services (CHINS) case.⁹⁴ Hardesty was late to a hearing and failed to appear at another hearing, blaming his absence on running out of gas in another town.⁹⁵ The trial court ordered Hardesty’s appearance withdrawn from the case and appointed a different pauper counsel.⁹⁶

For these two counts, the Disciplinary Commission alleged that Respondent Hardesty violated: “Rule 1.3: Failing to act with reasonable diligence and promptness. Rule 3.4(c): Knowingly disobeying an obligation under the rules or an order of a court. Rule 8.4(d): Engaging in conduct prejudicial to the administration of justice.”⁹⁷

During the Disciplinary Commission’s investigation, Respondent Hardesty twice failed to submit written responses to the allegations of professional misconduct, which led to his temporary suspension from the practice of law for non-cooperation.⁹⁸ He also was administratively suspended in June 2022 for failing to meet his continuing legal education requirements.⁹⁹

After the Complaint was filed, Respondent Hardesty did not appear, respond, or otherwise participate in the disciplinary proceedings, so the hearing officer granted the Commission’s Motion for Judgment on the Complaint and issued a final report.¹⁰⁰ The Court concurred with the hearing officer’s findings of fact, concluding that Hardesty violated the three Professional Conduct Rules charged.¹⁰¹

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 4-5; *In re Hardesty*, 202 N.E.3d 1083, 1083 (Ind. 2023).

95. Disciplinary Complaint at 4, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290); *In re Hardesty*, 202 N.E.3d at 1083.

96. Disciplinary Complaint at 5, *In re Hardesty*, 202 N.E.3d 1083 (No. 22S-DI-00290); *In re Hardesty*, 202 N.E.3d at 1083.

97. *In re Hardesty*, 202 N.E.3d at 1083.

98. *Id.* at 1083-84.

99. *Id.*

100. *Id.* at 1083. If a respondent lawyer fails to file an answer to the disciplinary complaint, the Disciplinary Commission may file a motion for judgment on the complaint, requesting that all allegations set forth in the complaint be deemed true. After the motion is filed, the respondent lawyer has fourteen days to submit a response. If no response is submitted, the hearing officer shall enter a judgment on the complaint, find that the allegations set forth in the disciplinary complaint are conclusively established as true, and file a Hearing Officer’s report. IND. ADMIS. Disc. R. 22, § 14(c)(2), (3) (2023).

101. *Id.* at 1084.

In fashioning a sanction, the Indiana Supreme Court again applied the factors listed in Part I of this article.¹⁰² The Court summarized its analysis as follows:

In the short time since he was admitted to practice law in Indiana, Respondent has engaged in a pattern of misconduct and a dereliction of an attorney's most fundamental duties. Respondent caused two separate mistrials in one case, and in both cases his repeated failures to appear for scheduled court proceedings squandered judicial resources and caused inconvenience for his clients and others. Respondent has failed to participate in these proceedings and has failed to cooperate with the Commission's investigations. Respondent also has breached his duties to maintain accurate contact information with the Roll of Attorneys and to accept service of process, which has necessitated the use of constructive service in this and other matters.¹⁰³

The Court then stated, “[w]ith these considerations in mind, we agree with the hearing officer that Respondent cannot be safely recommended to the public as a lawyer who can be trusted to handle clients’ legal affairs” and imposed a suspension from the practice of law on Respondent Hardesty for two years without automatic reinstatement.¹⁰⁴ The Court does not withhold automatic reinstatement lightly, as there are additional duties placed on lawyers seeking reinstatement after a suspension without automatic reinstatement that present a major hurdle to rejoining the profession.¹⁰⁵ Nonetheless, the Court believed that preserving public confidence was a paramount factor, as it went on to remark, “a suspension without automatic reinstatement is warranted [here] to protect the public and preserve the integrity of the legal profession.”¹⁰⁶ By imposing such a hefty suspension on a lawyer’s first disciplinary case, the Court communicated two important concepts: 1) how critical it is for lawyers to maintain the public’s confidence in the legal profession, even for new attorneys; and 2) when a lawyer engages in a spree of neglectful conduct that causes serious detriment to clients, the lawyer can expect a severe professional sanction.¹⁰⁷

102. *Id.*; see *supra* note 11 and accompanying text.

103. *In re Hardesty*, 202 N.E.3d at 1084.

104. *Id.*

105. See IND. ADMIS. DISC. R. 23, § 18, 26 (2023).

106. *In re Hardesty*, 202 N.E.3d at 1084, (referencing *In re White*, 81 N.E.3d 211, 212 (Ind. 2017)).

107. On February 28, 2023, after Respondent Hardesty was suspended from the practice of law for misconduct, the Disciplinary Commission filed a Notice of Finding of Guilt and Request for Suspension after Hardesty was found guilty of Possession of Methamphetamine, a Level 6 felony. The Court issued its Published Order of Interim Suspension Upon Notice of Guilty Finding

C. Egregious Misconduct – Matter of McMahon

Matter of Staples and *Matter of Hardesty* are examples of how the Court handles relatively common attorney misconduct.¹⁰⁸ *Matter of McMahon*, on the other hand, demonstrates how the Court treats a single episode of severe attorney misconduct.¹⁰⁹

In March 2022, McMahon was charged by grand jury indictment with one count of Possession of Child Pornography in the U.S. District Court for the Northern District of Indiana.¹¹⁰ The indictment alleged that McMahon possessed pornographic images of a child under the age of twelve.¹¹¹ In May 2022, McMahon entered into a plea agreement, which the assigned U.S. District Court Judge accepted in June 2022.¹¹² In September 2022, McMahon was sentenced to twenty-four months imprisonment, to be followed by three years of supervised release.¹¹³ That same month, the Disciplinary Commission filed a disciplinary complaint against Respondent McMahon, following his guilty plea in federal court, alleging that he violated Indiana Professional Conduct Rule 8.4(b) by committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer.¹¹⁴ Respondent McMahon did not respond, appear, or participate in the disciplinary proceedings against him.¹¹⁵

Following the Disciplinary Commission's filing of a Motion for Judgement on the Complaint, the hearing officer took the facts alleged in the complaint as true and found Respondent McMahon had violated Rule 8.4(b).¹¹⁶ Upon review, the Court concurred, pointing out that:

Respondent's crime was insidious. Although we do not have a fully-developed evidentiary record before us because Respondent pled guilty in federal court and defaulted on these disciplinary proceedings, Respondent's conviction for possession of pornographic materials involving a child under

on May 5, 2023, in addition to the suspension order that was already in effect. *See* Order Dismissing Show Cause Proceedings as Moot By Reason of Resp'ts Suspension Without Automatic Reinstatement, *In re Hardesty*, 202 N.E.3d 1083 (Ind. 2023) (22S-DI-00311).

108. *See generally In re Staples (Staples III)*, 196 N.E.3d 1224 (Ind. 2022); *In re Hardesty*, 202 N.E.3d 1033 (Ind. 2023).

109. *In re McMahon*, 203 N.E.3d 1033 (Ind. 2023).

110. Verified Complaint for Disciplinary Action at 1, *In re McMahon*, 203 N.E.3d 1033 (Ind. 2023) (22S-DI-279); *In re McMahon*, 203 N.E.3d at 1033.

111. Verified Complaint for Disciplinary Action at 2, *In re McMahon*, 203 N.E.3d 1033 (22S-DI-279); *In re McMahon*, 203 N.E.3d at 1033.

112. Verified Complaint for Disciplinary Action at 2, *In re McMahon*, 203 N.E.3d 1033 (22S-DI-279); *In re McMahon*, 203 N.E.3d at 1033.

113. *In re McMahon*, 203 N.E.3d at 1033.

114. *Id.*

115. *Id.*

116. *Id.*

twelve years of age nonetheless reflects a panoply of harms inflicted on an extremely vulnerable victim.¹¹⁷

The Court's discussion primarily focused on the harm caused by individuals who commit such crimes against children and the Court's prior treatment of other lawyers who committed similar crimes.¹¹⁸ The Court described the exploitation of children through the production, distribution, and viewing of child pornography, especially in the rapidly expanding digital world, as a crime that: 1) perpetually harms its victims by extending the act of abuse past the initial creation of the material; 2) continuously invades the child's privacy; and 3) provides an economic motive for further production of child pornography.¹¹⁹

The question for the Court was not whether Respondent McMahon deserved a significant sanction, but rather whether he should ever be afforded the opportunity to practice law again.¹²⁰ Ultimately, the Court suspended Respondent McMahon for at least two years without automatic reinstatement, stating:

Should Respondent seek reinstatement after that minimum period of suspension has elapsed, his petition will be granted only if he is able to prove his fitness to resume the practice of law by clear and convincing evidence, a burden that will be particularly steep given the severity of Respondent's misconduct.¹²¹

This suspension was decided upon the hearing officer's recommendation, the discipline sought by the Disciplinary Commission, and disciplinary precedent that imposed sanctions of two-year suspension without automatic reinstatement for the lawyers who are convicted of similar offenses of possession of child pornography and sexual offense involving children.¹²² Although a majority of the Court determined a two-year suspension without automatic reinstatement sufficed, two justices dissented.¹²³ Chief Justice Rush and Justice Massa believed that Respondent's misconduct warranted disbarment.¹²⁴

117. *Id.*

118. *Id.*

119. *Id.* (citing *Brown v. State*, 912 N.E.2d 811, 895 (Ind. Ct. App. 2009)).

120. *Id.* at 1033-34.

121. *Id.* at 1034; *See In re Gutman*, 599 N.E.2d 604, 608 (Ind. 1992) ("The more serious the misconduct, the greater its negative impact on future rehabilitation and eventual reinstatement, the greater Petitioner's burden of proof to overcome the implication of unfitness which is conjured by the misconduct.").

122. *In re McMahon*, 203 N.E.3d at 1034; *see In re Conn*, 715 N.E.2d 379 (Ind. 1999); *In re Haigh*, 894 N.E.2d 550 (Ind. 2008); *In re Buker*, 615 N.E.2d 436 (Ind. 1993); *In re Kern*, 551 N.E.2d 454 (Ind. 1990).

123. *In re McMahon*, 203 N.E.3d at 1034.

124. *Id.*

II. JUDICIAL DISCIPLINE – *EX PARTE* ISSUES IN CHINS AND FAMILY LAW CASES

A trend emerged during this survey period in judicial discipline regarding *ex parte* communications. The Indiana Commission on Judicial Qualifications and the Indiana Supreme Court Disciplinary Commission both saw an increase in the number of viable complaints about improper *ex parte* communication, particularly in Child in Need of Services (CHINS) and family law cases.¹²⁵ The public judicial disciplines from this period illustrate some of the ethical perils faced by judges and practitioners in this practice area.

A. *Meetings in Chambers* – *Matter of Meade*

In *Matter of Meade*, the Indiana Supreme Court approved the parties' Conditional Agreement for Discipline and imposed a seven-day suspension on a judge for two counts of misconduct: 1) making intemperate remarks during hearings on a custody matter, and 2) holding an unrecorded hearing in chambers on a Child in Need of Services (CHINS) case without permitting all parties to attend.¹²⁶ For the first count, the Court found that Respondent Meade failed to promote public confidence in the independence, integrity, and impartiality of the judiciary (Rule 1.2 of the Code of Judicial Conduct) and failed to treat litigants in a patient, dignified, and courteous manner (Rule 2.8(B) of the Code of Judicial Conduct) by making disparaging statements to and about the parties during two custody hearings in a paternity case.¹²⁷ However, the second sanctioned episode of misconduct is more academically interesting, as that misconduct highlights a common ethical misstep for judges and practitioners that leads to violations of the *ex parte* rules¹²⁸—the in-chambers meeting.

Respondent Meade began presiding over CHINS matters involving three siblings in November 2018.¹²⁹ Late in 2019, the children's foster parents moved to intervene in the CHINS cases, with the intention of adopting the three

125. See Adrienne Meiring, *It's Not a Party If It's Ex Parte: A Review of the Ex Parte Rules*, 67 RES GESTAE 40 (2024); IND. SUP. CT., OFF. OF COMMC'N, EDUC. & OUTREACH, INDIANA SUPREME COURT ANNUAL REPORT 2022-2023, at 60-61 (2023) (Public access to caution and advisory letters is not authorized pursuant to IND. ADMIS. DISC. R. 23, § 10(a)(2), § 22(a)(3) and IND. ADMIS. DISC. R. 25 VIII(B)(1), (E)(2); however, generally speaking, several nonpublic resolutions listed in the Annual Report pertain to *ex parte* issues).

126. *In re Meade*, 200 N.E.3d 448, 449 (Ind. 2023).

127. *Id.* at 451-52.

128. Rule 2.9(A) of the Indiana Code of Judicial Conduct prohibits judges, except in certain limited circumstances, from initiating, permitting, or considering *ex parte* communications or other communications made to the judge outside the presence of the parties or their lawyers about a pending or impending matter. IND. CODE OF JUD. COND. R. 2.9 (2023). The corresponding *ex parte* rule for attorneys, Rule 3.5(b) of the Rules of Professional Conduct, provides that a lawyer may not “communicate *ex parte* with [a judicial officer] during the proceeding unless authorized to do so by law or court order.” IND. PROF. COND. R. 3.5(b) (2023).

129. *In re Meade*, 200 N.E.3d at 450.

children.¹³⁰ Respondent granted the motion.¹³¹ Then, “[i]n March 2020, the [p]aternal [g]randmother moved to intervene and filed for third-party custody[.]”¹³² A court reporter informed the parties, including the intervenor-foster parents, that the paternal grandmother’s motions would be heard at a May 14, 2020 hearing.¹³³

In the meantime, at an April 2020 telephonic hearing attended by the counsel for the Department of Child Services (DCS), the foster parents, the mother, the father, and the CASA Executive Director, Respondent Meade granted a motion for grandparent visitation for the paternal grandparents.¹³⁴ In the next two weeks, the paternal “[g]randmother petitioned for guardianship of [the] [c]hildren; DCS petitioned for permanency and joinder of the CHINS and guardianship cases; and [the] Foster Parents petitioned to adopt” the children.¹³⁵

Respondent held the May 14, 2020 hearing on the paternal grandmother’s motion to intervene in his chambers and did not record the hearing.¹³⁶ DCS’ counsel, Mother’s and Father’s counsel, and the CASA Executive Director appeared in person for the in-chambers hearing, and the foster parents’ counsel participated by speakerphone.¹³⁷ Although the paternal grandmother was present in the court hallway, Respondent Meade never asked the paternal grandmother to participate in the hearing, even after the judge granted her motion to intervene and then considered and granted DCS’ motion for permanency and joinder.¹³⁸

During the unrecorded hearing, Respondent Meade also considered three oral motions made that day: 1) “DCS’ motion to dismiss the CHINS case”; 2) the mother’s motion for the children to have extended visitation with the paternal grandparents; and 3) the mother’s “motion to remove the CASA assigned from the CHINS cases.”¹³⁹ Respondent Meade gave foster parents’ counsel fourteen days to respond to DCS’ motion to dismiss but granted the other motions, despite foster parents’ counsel’s objection and request to appear in person to present evidence on all three oral motions.¹⁴⁰

After the hearing and without the knowledge of the foster parents’ counsel, Respondent Meade asked the mother’s counsel to assist the court reporter in preparing a minute entry from the hearing.¹⁴¹ After seeing the entry, foster parents’ counsel reported to DCS’ counsel that she had a different recollection

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

of Respondent's oral rulings.¹⁴² However, those proposed changes were never incorporated into the judge's final order.¹⁴³ Later, in March 2022, Respondent Meade directed his staff to change the CCS entry for the May 2020 hearing from a "Hearing Journal Event" to an "Administrative Event."¹⁴⁴

The Indiana Commission on Judicial Qualifications charged, and Respondent Meade agreed, that Respondent's conduct was prejudicial to the administration of justice and violated the following rules of the Indiana Code of Judicial Conduct:

Rule 1.1, requiring judges to comply with the law, including the Code of Judicial Conduct;

Rule 1.2, requiring judges to avoid impropriety and act at all times in a manner promoting public confidences in the judiciary's integrity;

Rule 2.2, requiring judges to uphold and apply the law and to perform all judicial duties fairly and impartially;

Rule 2.5, requiring judges to perform judicial and administrative duties competently, diligently, and promptly;

Rule 2.6, requiring judges to accord to every person who has a legal interest in a proceeding the right to be heard according to law; . . . [and]

Rule 2.9(A), prohibiting judges from initiating, permitting, or considering *ex parte* communications.¹⁴⁵

In deciding whether to accept the parties' Conditional Agreement, the Court opened its analysis by noting that, "[t]he effectiveness of the judiciary ultimately rests on the confidence that citizens confer on judges. Judges, therefore, must remain vigilant to guard against any actions that erode that public trust."¹⁴⁶ The Court then remarked that Respondent Meade's "pejorative remarks to litigants, improper *ex parte* communications, and due process violations 'diminish[] public confidence in the judiciary' and 'erode the public's perception of the courts as dispensers of impartial justice.'"¹⁴⁷ In deciding whether the agreed sanction was appropriate, the Court expressed concern about Respondent's history of intemperate behavior, but agreed to accept the Conditional Agreement in light of the efforts Respondent took to remedy his demeanor issues, including attending formal mindfulness classes.¹⁴⁸

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 451 (finding that Respondent Meade also violated Rule 2.8(B) of the Indiana Code of Judicial Conduct; however, this violation pertained solely to the first count of misconduct).

146. *Id.* (quoting *In re Adams*, 134 N.E.3d 50, 54 (Ind. 2019)).

147. *Id.* (quoting *In re Van Rider*, 715 N.E.2d 402, 404 (Ind. 1999)).

148. *Id.* at 451-52.

Besides demonstrating the Court's commitment to civility in the profession, *Matter of Meade* showcases the perils, for both judges and practitioners, of the in-chambers meeting.¹⁴⁹ While Indiana appellate courts previously have warned about the dangers of entertaining private meetings in chambers with attorneys or litigants,¹⁵⁰ few Indiana public disciplines pertain to this practice. Of those prior public disciplines, judges have been sanctioned for meeting privately with litigants or other judges in an attempt to obtain a benefit for a litigant.¹⁵¹ *Matter of Meade* demonstrates that a judge must be scrupulous about adhering to the prohibition against *ex parte* communications when conducting meetings in chambers, even if the judge has no improper motive.¹⁵²

B. *Emails and Unsolicited Correspondence* – Matter of Day

While *Matter of Meade* serves as an ethical warning of the dangers of holding informal meetings in chambers, *Matter of Day* highlights the ethical missteps that may arise from overfamiliarity between judges and attorneys when using email and other electronic correspondence.¹⁵³ This decision further accentuates the need for judges to have appropriate procedures for handling unauthorized (and unsolicited) *ex parte* correspondence.

Respondent Day presided over a general jurisdiction docket that included CHINS, guardianship, and termination of parental rights cases.¹⁵⁴ Throughout 2020, and across multiple cases, Respondent Day participated in *ex parte* communication with DCS attorneys (often by email), excluding guardians ad litem, court-appointed special advocates, and unrepresented parties.¹⁵⁵ In one

149. *Id.* at 448.

150. *See, e.g.*, *Lombardi v. Van Deusen*, 938 N.E.2d 219, 226-27 (Ind. Ct. App. 2010) (appellate court critical of judicial officer holding an in-chambers meeting with the child support prosecutor and father's attorney while denying access to pro se mother, but court reversed and remanded the matter on other grounds); *Matheny v. State*, 688 N.E.2d 883 (Ind. 1997) (judge remarked on pending motion to a deputy public defender and county prosecutor while in chambers); *Maneikis v. State*, 411 N.E.2d 669 (Ind. Ct. App. 1980) (appellate court held that litigant who invited an *ex parte* communication with a judge during an in-chambers meeting could not later complain about the impropriety of such communication but remarked that the judge should have declined the litigant's request to meet in chambers, as "the confusion subsequently alleged by [the litigant] could no doubt have been allayed had the canon been scrupulously followed.").

151. *In re Lewis*, 535 N.E.2d 127, 128 (Ind 1989) (part-time judge disciplined for meeting privately in chambers with client about a matter involving the client's son); Public Admonition of Funke (July 8, 1999), <https://www.in.gov/courts/jqc/files/jud-qual-admon-funke-7-8-99.pdf> [<https://perma.cc/Q499-YTGN>] (judge admonished for permitting and acting as conduit in political ally's attempt to engage in an *ex parte* conversation with another judge presiding over a case involving the ally's son).

152. *In re Meade*, 200 N.E.3d at 448.

153. *In re Day*, 206 N.E.3d 371 (Ind. 2023).

154. *Id.* at 371.

155. *Id.*; *see* Notice of the Institution of Formal Proceedings and Statements of Charges, *In re Day*, 206 N.E.3d 371 (Ind. 2023) (No. 22S-JD-412) (on file with the author).

instance, Respondent Day received an *ex parte* communication from an attorney who regularly represented parents in CHINS cases.¹⁵⁶ Additionally, during the Judicial Qualifications Commission's investigation, Respondent Day admitted to shredding *ex parte* correspondence sent to him unsolicited by represented parents in CHINS cases.¹⁵⁷ Although Respondent Day indicated that he did not read the correspondence prior to shredding, he also did not notify the parties about receiving the communications or provide them with an opportunity to respond.¹⁵⁸

The Judicial Qualifications Commission charged, and Respondent Day agreed, that his conduct was prejudicial to the administration of justice and violated the following Rules of the Code of Judicial Conduct:

- Rule 1.1. Requiring “judges to comply with the law,” including the Code of Judicial Conduct;
- Rule 1.2. Requiring “judges to act at all times in a manner that promotes confidence in the independence, integrity, and impartiality of the judiciary,” and failing to avoid impropriety and the appearance of impropriety;
- Rule 2.9(A). Prohibiting judges from initiating, permitting, or considering *ex parte* communications or other communications made to the judge outside the presence of the parties or their lawyers concerning a pending matter; and
- Rule 2.9(B). Requiring judges to promptly notify the parties of unauthorized *ex parte* communications inadvertently received by the judge and provide the parties with an opportunity to respond.¹⁵⁹

The parties tendered to the Supreme Court a Conditional Agreement for Discipline for Respondent Day to receive a Public Reprimand.¹⁶⁰

The Court accepted the Conditional Agreement but took the opportunity in its Opinion to re-emphasize the requirements mandated by the Code of Judicial Conduct regarding *ex parte* communications.¹⁶¹ The Court noted that the general proscription in Rule 2.9 is that judges “shall not initiate, permit, or consider *ex parte* communications concerning a pending or imminent matter” and that the exceptions detailed in sections (A)(1) through (5) are narrowly defined.¹⁶² The Court then spoke specifically to the “administrative, scheduling, or emergency” exception, pointing out that for this exception to apply, not only must the communication not pertain to substantive matters, but the judge may only permit such communications if 1) the judge “reasonably believes no party will gain an advantage from the communication,” and 2) the judge “promptly notifies other

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *In re Day*, 206 N.E.3d 371, 372 (Ind. 2023).

162. *Id.*

parties of the substance of the communications and gives [them] an opportunity to respond.”¹⁶³ The Court noted that Respondent Day failed to follow these requirements.¹⁶⁴

The Court next addressed Respondent’s misconduct of shredding *ex parte* correspondence, remarking that:

Rule 2.9(B) [of the Code of Judicial Conduct] anticipates the possibility that a judge may inadvertently receive an unsolicited *ex parte* communication from an attorney, party, or nonparty bearing on the substance of a matter. When this occurs, the rule requires the judge to promptly notify the parties of the communication and give them an opportunity to respond.¹⁶⁵

The Court then noted that Respondent Day failed to take remedial measures consistent with the directives of the Rule.¹⁶⁶

Matter of Day demonstrates the importance of judges adhering to the letter of the Rule when seeking the safe harbor protection of the “administrative, scheduling, or emergency” exception¹⁶⁷ or the “inadvertent . . . [unauthorized] *ex parte* communication” exception.¹⁶⁸ Critical to both of these exceptions are the requirements that the judge promptly notify all other parties of the substance of the communication *and* give the parties an opportunity to respond.¹⁶⁹ *Matter of Day* highlights that loose compliance with the directives of these exceptions will provide no protection to ethical liability. Merely casting an *ex parte* conversation as “for scheduling purposes” or asserting that “I didn’t read the *ex parte* letter and just destroyed it” will not constitute compliance under the exceptions to the *ex parte* rule if the other parties received no notification of the communication and/or did not receive an opportunity to respond.¹⁷⁰

C. When Intent to Protect Children Leads to Noncompliance – Public Admonition of Johnston

The final public judicial discipline in the trio of *ex parte* cases during this survey period is *Public Admonition of Johnston*.¹⁷¹ Like *Matter of Meade* and *Matter of Day*, *Public Admonition of Johnston* details the actions of a judicial officer who violated the *ex parte* rule while presiding over a CHINS/family law

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. IND. JUD. COND. R. 2.9(A)(1) (2023).

168. IND. JUD. COND. R. 2.9(B).

169. See *supra* Part II.B. and accompanying footnotes.

170. *In re Day*, 206 N.E.3d at 371.

171. *Admonition of Johnston*, *supra* note 4.

case.¹⁷² In contrast to the other judicial officers, Referee Johnston “proactive[ly took] corrective actions to remedy her mistake.”¹⁷³

In *Public Admonition of Johnston*, a referee agreed to a public admonishment from the Indiana Commission on Judicial Qualifications for “temporarily suspending a father’s parenting time with his minor daughter based, in part, on notes received from a Guardian Ad Litem (GAL)” that the referee “did not circulate to the father and his counsel or allow either to review when they requested to do so.”¹⁷⁴ In April 2021, the GAL appointed to represent the interests of the child in a long-running custody dispute submitted a report, after interviewing the child, expressing concerns about the child returning to live with her father.¹⁷⁵ The GAL also filed motions requesting, on behalf of the child, that portions of the report remain confidential and that the referee conduct an *in camera* interview of the child or, in the alternative, review the GAL’s notes of her earlier interview of the child.¹⁷⁶

In late April 2021, Referee Johnston ordered the GAL to tender her notes to the court.¹⁷⁷ Although neither the father nor his counsel received a copy of the GAL’s notes, Referee Johnston reviewed the notes *in camera* instead of conducting an *in camera* interview of the child in an effort to avoid emotionally traumatizing the child by requiring her to give another statement against her parent.¹⁷⁸ On May 4, 2021, at a scheduled hearing on the father’s petition to modify custody, Referee Johnston temporarily suspended the father’s visitation rights based on the GAL’s notes and set an evidentiary hearing for a month later.¹⁷⁹ At that hearing, the father’s counsel requested a copy of the notes, which Referee Johnston denied because she felt “the matters raised in the notes [which raised questions about the child’s safety] were enough to justify the termination of visitation rights.”¹⁸⁰

Referee Johnston agreed with the Judicial Qualifications Commission’s determination that she violated the Code of Judicial Conduct by unjustly suspending the father’s visitation rights based on the GAL’s *ex parte* notes and consented to a Public Admonition in lieu of formal disciplinary charges being filed.¹⁸¹ The Commission set forth in the Admonition that Referee Johnston’s conduct violated Rules 1.1, 1.2, 2.2, and 2.5(A) of the Code of Judicial Conduct, which collectively require judicial officers to ensure the fairness, impartiality, diligence, and integrity of the judiciary, and Rule 2.9 of the Code of Judicial

172. *Id.*

173. *Id.* at 2.

174. *Id.* at 1.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 2.

181. *Id.*

Conduct, which forbids judges from initiating, permitting, or considering *ex parte* communications concerning a pending legal proceeding.¹⁸²

Referee Johnston acknowledged that the better practice would have been to distribute the GAL's notes to all parties and to give them an opportunity to present counter evidence rather than considering the notes *in camera*.¹⁸³ In turn, the Judicial Qualifications Commission recognized that "judicial officers may be confronted with difficult situations in child custody matters regarding child welfare" and that they "may wish to modify certain court procedures to alleviate stress on the child."¹⁸⁴ The Commission further acknowledged that the law does provide some flexibility by "allowing judges to conduct an *in camera* interview of a child who is the subject of custody proceedings."¹⁸⁵ But the Commission emphasized, "to ensure that litigants are afforded the right to fair and impartial proceedings, judges still must conduct proceedings in a manner that complies with the Code of Judicial Conduct and refrain from engaging in or considering *ex parte* communications unless authorized by law."¹⁸⁶ Because no legal authority authorized Referee Johnston to review the GAL's notes *in camera* or to otherwise take the actions she took, Referee Johnston denied the father a meaningful opportunity to be heard before temporarily suspending his visitation rights.¹⁸⁷

Just as *Matter of Day* demonstrated that a judicial officer cannot rely on one of the safe harbor exceptions to the *ex parte* rule if strict compliance with the exception's requirements is not met, *Public Admonition of Johnston* illustrates that a judicial officer's well-meaning *ex parte* conduct also will violate the *ex parte* rule if the conduct is not otherwise expressly authorized by law.¹⁸⁸ Nonetheless, Referee Johnston received a lesser sanction than Respondent Day because Referee Johnston took proactive corrective actions following her mistake, including immediately granting the father's request for a new judge, participating in additional ethics learning opportunities, and cooperating fully with the Commission's investigation.¹⁸⁹

III. FORMAL ADVISORY OPINIONS

In addition to investigating and prosecuting attorney misconduct, the Disciplinary Commission released three formal advisory opinions between July 2022 and August 2023:

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*; see IND. CODE § 31-17-2-9(a) (1997) ("The court may interview the child in chambers to ascertain the child's wishes.").

186. Admonition of Johnston, *supra* note 4.

187. *Id.*

188. *Id.*

189. *Id.*

1. 3-22 – Detecting and Navigating Imputed Conflicts of Interest.¹⁹⁰
2. 1-23 – Detecting and Navigating Imputed Conflicts of Interest of Current and Former Government Officials, Lawyers, and Employees.¹⁹¹
3. 2-23 – Ethical Considerations about Getting Paid.¹⁹²

Advisory Opinions 3-22 and 1-23 are the Commission’s second and third installments in its three-part guidance to lawyers about navigating various conflicts of interest. Advisory Opinion 2-23 assists lawyers in considering ethical issues in forming fee agreements, setting fees, and collecting fees.

A. Detecting and Navigating Imputed Conflicts of Interest

In Advisory Opinion 3-22, the Commission addresses the question “when is a firm prohibited by [Indiana Professional Conduct] Rule 1.10 from representing a client based on the conflict of one of its current, prospective, or former” lawyers.¹⁹³ The Commission also addresses how law firms can minimize the impact of imputed conflicts of interest by having in place effective conflicts check and screening procedures to keep attorneys with a conflict from participating in the representation or having access to current client information.¹⁹⁴ Continuing with the themes set forth in Advisory Opinion 2-22, the Commission reiterates in this Advisory Opinion that “lawyers associated in a firm owe a duty of loyalty to the clients of the firm,” and note that Indiana Professional Conduct Rules 1.7,¹⁹⁵ 1.9,¹⁹⁶ and 2.2¹⁹⁷ apply to each lawyer in the firm.¹⁹⁸ The Commission utilizes several hypotheticals to illustrate the duties that law firms owe to their clients under these Rules.¹⁹⁹

In Hypothetical 1, the Commission demonstrates the duties a firm owes to its current clients when two lawyers form a partnership, but each represents opposing clients in a matter.²⁰⁰ Upon the formation of the partnership, neither lawyer would be permitted to continue representing their clients, as issues with

190. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 3-22 (2022), <https://www.in.gov/courts/discipline/files/dc-opn-3-22.pdf> [<https://perma.cc/XKU3-72J8>].

191. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 1-23 (2023), <https://www.in.gov/courts/discipline/files/dc-opn-1-23.pdf> [<https://perma.cc/6TQC-8CVL>].

192. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 2-23 (2023), <https://www.in.gov/courts/discipline/files/dc-opn-2-23.pdf> [<https://perma.cc/NE5G-AQ8D>].

193. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 3-22, *supra* note 190 (discussing how lawyers can detect and navigate imputed conflicts of interest); *see* IND. PROF. COND. R. 1.10 (2023) (Imputation of Conflicts of Interests: general rule).

194. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 3-22, *supra* note 190.

195. IND. PROF. COND. R. 1.7 (Conflict of Interest: Current Clients).

196. IND. PROF. COND. R. 1.9 (Duties to Former Clients).

197. IND. PROF. COND. R. 2.2 (Intermediary).

198. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 3-22, *supra* note 190, at

1.

199. *Id.* at 2-5.

200. *Id.* at 2.

Indiana Professional Conduct Rules 1.6,²⁰¹ 1.7(a), and 1.9(c) would arise.²⁰² The Commission reminds practitioners that “conflict analysis is nuanced,” and a small alteration of the hypothetical’s facts could lead to different results—allowing one or both attorneys to continue their representation.²⁰³

In Hypothetical 2, the Commission emphasizes that a firm’s duty to a client may not cease when the client and the attorney who worked on the client’s matter leave the firm.²⁰⁴ When evaluating if potential conflicts of interest exist for a new prospective client, it is important to screen past, present, and incoming members of the firm for conflicts.²⁰⁵ Whether a conflict exists is largely fact dependent and must be evaluated carefully.²⁰⁶ Factors to consider include whether any attorney still at the firm has disqualifying information, whether the firm still holds files from its previous client that pertain to the prospective client’s matter, and whether the former client has been informed of the firm’s representation of the prospective client.²⁰⁷

Hypothetical 3 describes the issues that may arise when meeting with multiple potential clients who are on opposing sides of the same matter and the duties that law firms owe to potential clients.²⁰⁸ When an attorney meets with a potential client and learns confidential and potentially damaging information about that client’s case, the lawyer is prohibited under Rule 1.10(b) from representing an adversarial client on the same matter.²⁰⁹ Even if a potential client chooses to not employ the law firm, the firm would still have a conflict of interest under the Rules of Professional Conduct that would prohibit the firm from representing any other prospective client relating to the same matter, absent informed consent from the initial potential client.²¹⁰

As this Advisory Opinion details, adherence to the identified Rules of Professional Conduct is critical for attorneys to uphold the duty of loyalty to their clients.²¹¹ Putting screening mechanisms in place to check for conflicts of interest; communicating the measures taken to affected clients; and, when necessary, obtaining informed consent from all affected parties will preserve the duty of loyalty law firms and their attorneys owe to clients while limiting forced disqualifications due to conflicts of interest.²¹²

201. Rule 1.6 pertains to a lawyer’s duty to keep client information confidential. IND. PROF. COND. R. 1.6 (Confidentiality of Information).

202. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 3-22, *supra* note 190, at 1.

203. *Id.* at 3.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 4.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

B. Detecting and Navigating Imputed Conflicts of Interest of Current and Former Government Officials, Lawyers, and Employees

Advisory Opinion 1-23 concludes the three-part series of Advisory Opinions that the Commission released pertaining to conflicts of interest.²¹³ In this Advisory Opinion, the Commission addresses when conflicts of interest require current or former government personnel to disqualify from a matter.²¹⁴ The Commission makes a point that “[c]onflict analysis for current or former government employees is slightly more complicated than the customary Rule 1.9 analysis” described in Advisory Opinions 2-22 and 3-22²¹⁵ because “the conduct of government employees implicates public interest in a way that private practice usually does not[.]”²¹⁶

The Commission notes that for former government employees who have moved to private practice and are evaluating whether a conflict of interest exists precluding new representation or participation in an existing matter, the lawyer must consider the following factors under Indiana Professional Conduct Rule 1.11:²¹⁷ 1) whether the work the lawyer performed as a government employee rises to the level of a legal matter; 2) whether the matter involves the same parties; 3) whether the lawyer was personally and substantially involved in the matter while employed by the government; 4) whether the lawyer, while a government employee, received confidential information about a person that could damage that person in the matter; and 5) whether any factors under traditional Rule 1.9 analysis apply.²¹⁸ In contrast, the Commission advises that lawyers who move from the private sector to government employment need only employ the more traditional Rule 1.9 conflict analysis described in Advisory Opinions 2-22 and 3-22.²¹⁹

The Commission further recommends in Opinion 1-23 that partners at law firms who wish to avoid imputed conflicts for the firm, due to employing former government employees, should implement a screening mechanism at the firm.²²⁰ That procedure should effectively ensure that “1) the conflicted [former government employee] does not participate in the matter; 2) no information regarding the matter is shared between the conflicted attorney and other

213. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 1-23, *supra* note 191.

214. *Id.*

215. *Id.*; *see* IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 2-22 (2022) <http://www.in.gov/courts/discipline/files/dc-opn-2-22.pdf> [<http://perma.cc/FNH9-ARJE>]; IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 3-22, *supra* note 190.

216. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 1-23, *supra* note 191, at 2.

217. IND. PROF. COND. R. 1.11 (2023) (Special Conflicts of Interest for Former and Current Government Officers and Employees).

218. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 1-23, *supra* note 191, at 2.

219. *Id.*

220. *Id.*

members of the firm; 3) the conflicted attorney earns no part of the fee for the matter; and 4) the former government agency of the conflicted attorney is given sufficient notice to determine if the firm has complied with [Rules 1.10 and 1.11].”²²¹

Hypotheticals in this Advisory Opinion address the factors a former government employee must consider in determining what activities constitute a “matter” and “personal and substantial involvement” that would prohibit the former government employee’s participation in a new matter.²²² The hypotheticals also highlight how to evaluate whether the former government employee received confidential information while employed with the government that would preclude representation in a current matter.²²³

C. Ethical Considerations About Getting Paid

In Advisory Opinion 2-23, the Commission describes the conditions under which a fee agreement is reasonable, when a refund of fees is required, and how lawyers must handle fees when there is a fee dispute.²²⁴ The Commission reiterates throughout the Opinion that a fiduciary relationship exists between lawyers and their clients, which is governed by the Indiana Rules of Professional Conduct.²²⁵ The obligations of this duty are wide ranging but ultimately boil down to three responsibilities: 1) lawyers should avoid confusing and unenforceable provisions in their fee agreements; 2) lawyers should keep unearned funds in a trust account and return unearned funds upon the termination of representation; and 3) lawyers should practice clear communication with their clients regarding fees.²²⁶ These principles are exemplified in a series of six hypotheticals.

Hypothetical 1 demonstrates how failing to promptly refund unearned fees upon the termination of the attorney-client relationship is a violation of Rule 1.16(d).²²⁷ Furthermore, the Commission uses this hypothetical to remind lawyers that nonrefundable clauses are generally not enforceable in fee agreements, as these clauses violate Rule 1.5(a).²²⁸

221. *Id.* at 2-3.

222. *Id.* at 3-7.

223. *Id.*

224. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 2-23, *supra* note 192.

225. *Id.*

226. *Id.*

227. *Id.* at 2-3; *see* IND. PROF. COND. R. 1.16(d) (2023) (“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.”).

228. IND. SUP. CT. DISCIPLINARY COMM’N FORMAL ADVISORY OP. 2-23, *supra* note 192, at 2-3; *see* IND. PROF. COND. R. 1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”).

Hypothetical 2 is utilized to show that fees that are disputed should be held in a lawyer's trust account until the dispute is resolved.²²⁹ A lawyer who deposits an unearned or disputed fee into the lawyer's operating account instead of the lawyer's trust account violates Rule 1.15(e).²³⁰ This concept is revisited in Hypothetical 4, which pertains to the commingling of funds.²³¹ An attorney is responsible for holding securely money that does not belong to the attorney (e.g. unearned fees or monies owed to a third party) in a trust account to keep those funds separate from funds the attorney owns in an operating account.²³² The Commission notes that commingling funds is a violation of Rule 1.15(a),²³³ and lawyers who do so also run the risk of violating Rule 1.16(d) should their client terminate the representation and the appropriate funds are not available for refund.²³⁴

Hypotheticals 3 and 5 relate to violations of Rule 1.5 through charging excessive fees and utilizing inherently unfair fee agreements.²³⁵ The Commission emphasizes that what is considered "reasonable" is dependent on the facts specific for each case.²³⁶ Lawyers may actively avoid the risk of committing a Rule 1.5 violation by clearly communicating with their clients about how fees will be charged.²³⁷

Hypothetical 6 reminds lawyers that if a client files a disciplinary grievance against the lawyer, and the lawyer continues to work on the client's case, the lawyer may not charge the client for the time spent responding to the Disciplinary Commission.²³⁸ Because such attorney time is not for the benefit of the client's case, such action is considered an unreasonable fee under Rule 1.5(a).²³⁹

CONCLUSION

In the current survey period, the Indiana Supreme Court reaffirmed the types of conduct; whether it be serial misconduct, a spree of misconduct in a short

229. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 2-23, *supra* note 192, at 3.

230. *Id.*; see IND. PROF. COND. R. 1.15(e) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved.").

231. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 2-23, *supra* note 192, at 4-5.

232. *Id.*

233. IND. PROF. COND. R. 1.15(a) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.").

234. IND. SUP. CT. DISCIPLINARY COMM'N FORMAL ADVISORY OP. 2-23, *supra* note 192, at 4-5.

235. *Id.* at 3-5.

236. *Id.*

237. *Id.*

238. *Id.* at 5-6.

239. *Id.*

time span, or a single episode of egregious misconduct, that warrant a suspension without automatic reinstatement. The public judicial disciplines in this period also reveal a concerning trend of improper *ex parte* communications in CHINS and family law cases, which may reflect the need for additional education for the Bar and judiciary in this area. Finally, on the preventive side, the Disciplinary Commission issued formal advisory opinions providing further guidance on how to navigate conflicts of interest and to ethically set and collect attorney fees.