Survey of Professional Responsibility

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Although the survey period produced numerous and varied opinions on the subject of professional responsibility, this Article will focus on two opinions of significant importance to the practicing Bar. One opinion was delivered by the United States Supreme Court and the other by the Indiana Supreme Court.

I. PRETRIAL STATEMENTS TO THE MEDIA

A. Gentile v. State Bar of Nevada

In *Gentile v. State Bar of Nevada*,[1] the United States Supreme Court held Nevada Supreme Court Rule 177, which is identical to Indiana Rules of Professional Conduct Rule 3.6,[2] to be void for vagueness as

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1. 111 S. Ct. 2720 (1991).

2. (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation

applied by the Nevada Supreme Court.[3] This opinion reversed a decision by the Nevada Supreme Court that Gentile, a criminal defense attorney from Las Vegas, violated Rule 177 by making certain statements to the media at a press conference, which he held six months prior to his client's trial.[4]

The case arose from Gentile's representation of Grady Sanders, the owner of Western Vault Corporation. Western Vault was in the business of storing valuables for its customers in secure strongboxes. On January 31, 1987, the Las Vegas Metropolitan Police Department reported substantial quantities of cocaine and traveler's checks missing from one of the deposit boxes at Western Vault. These items were used in conjunction with an undercover operation. After these items were reported missing, the Las Vegas sheriff stated to the media that certain undercover police and Western Vault employees were suspects. Although two undercover policemen had free access to the vault, police investigators quickly focused on the theory that the employees of Western Vault took the missing items. This fact became public when the Las Vegas sheriff pronounced to the media early in the investigation that he had "complete faith and trust" in his officers.[5]

As the investigation progressed, the media reported that other vault owners were reporting items missing from deposit boxes at Western

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and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, a residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (West 1991) (effective Jan. 1, 1987).

3. *Gentile*, 111 S. Ct. at 2730.

4. *Id.* at 2738.

5. *Id.*

Vault. Soon after this information was made public, Western Vault began losing customers and was eventualiy forced out of business. The Las Vegas police then searched other boxes at Western Vault. It was reported in the press that these searches led to the seizure of $264,900 from a box that was listed as unrented.

As time passed, the media noted that the police investigation had failed to positively identify the thief. Through a process of elimination, the media then began to focus its own independent investigation in the direction of Sanders. The press reported that the police now theorized that the theft of the cocaine and traveler's checks was part of a concerted effort to discredit the undercover operation. It was further reported that a business relationship existed between Sanders and the target of a separate undercover police probe.

At this stage of the police investigation, the Deputy Police Chief of Las Vegas stated publicly that the two detectives who had access to the vault were no longer suspects. Local newspapers also reported that an unnamed source informed them that the police now believed the thief had unwittingly stolen the items from the police. The press concluded by indicating that Sanders "could not be reached for comment."[6] Later, the press reported that the two undercover detectives had been eliminated as suspects because each passed polygraph examinations. The same story ended with the observation that Sanders had refused to submit to a polygraph examination.

Sanders's attorney, Gentile, monitored these media reports and concluded that for the first time in his distinguished career, he would call his own press conference in an effort to counter the negative reporting about his client.[7] Before arriving at this conclusion, Gentile researched Rule 177 and United States Supreme Court opinions which addressed the issue of counsel's duties and ethical obligations regarding pretrial publicity.

Gentile decided that the timing of a statement was critical in assessing whether it might possibly prejudice the forthcoming trial and thereby expose him to disciplinary action.[8] With this in mind, Gentile scheduled

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6. *Id.*

7. In a separate opinion, Justice Kennedy noted that Gentile had been an Associate Dean of the National College for Criminal Defense Lawyers and Public Defenders as well as the author of articles about criminal law.

8. One case Gentile relied upon was Patton v. Yount, 467 U.S. 1025 (1984). In this case, Yount's original conviction for murder was overturned. Prior to this trial there had been extensive pretrial publicity about the case. Yount was convicted upon retrial and he appealed, claiming that pretrial publicity had made a fair trial impossible in the county where the proceedings took place. The Court rejected this argument, finding that there was little publicity prior to the second trial and that the one and one-half years which had passed between the reversal of the first conviction and the second trial rebutted any presumption of prejudice to the proceedings that existed at the time of the first trial.

his press conference for the day after his client was indicted. By waiting until after the indictment, he was aware that his client's trial would not take place for at least six months. This, he reasoned, was a sufficient amount of time prior to the trial to eliminate the possibility of prejudicing the proceeding.

At the press conference, Gentile declared: (1) the evidence demonstrated his client's innocence; (2) the likely thief was a police detective, Steve Scholl; and (3) the other victims were not credible because most were drug dealers or convicted money launderers, all but one of whom had only accused Sanders in response to police pressure in the process of "trying to work themselves out of something."[9] On more than one occasion Gentile was asked to elaborate on portions of his statements but refused. At one point, he indicated that he could not elaborate because ethics prohibited him from doing so.

Sanders's trial took place as scheduled in August of 1988. During the jury selection process, not a single juror selected acknowledged any specific recollection of Gentile's press conference when questioned by the trial court judge. The trial ended with the jury acquitting Gentile's client.

After the trial, the State Bar of Nevada filed a disciplinary complaint against Gentile alleging that his statements at the pretrial press conference constituted conduct which violated Nevada Supreme Court Rule 177. The Nevada Supreme Court upheld the Nevada Disciplinary Board's decision that Gentile violated the Rule and its conclusion that he should receive a private reprimand. In doing so, the Nevada Supreme Court rejected Gentile's argument that Rule 177, as it existed, violated his right to free speech guaranteed by the United States Constitution and found that Gentile knew or should have known that there was a substantial likelihood that his pretrial statements would materially prejudice his client's trial.[10]

On appeal to the United States Supreme Court, Gentile argued that the First Amendment required Nevada to demonstrate that his pretrial statements constituted a "clear and present danger" of "actual prejudice or an imminent threat" of prejudice to the trial before he could be subject to discipline.[11] His position was that the "substantial likelihood

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9. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2729 (1991) (citing Findings and Recommendations of the State Bar of Nevada, Southern Nevada Disciplinary Board).

10. Gentile v. State Bar of Nev., 787 P.2d 386, 387 (1990), *rev'd*, 111 S. Ct. 2720 (1991). Note that the prosecutor was not disciplined for violating Nevada's equivalent of Indiana Rules of Professional Conduct Rule 3.8 which requires prosecutors to exercise reasonable care to prevent the police from making extrajudicial statements that the prosecutor is prohibited from making. GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.6:102, at 666.1 (2d ed. 1991).

11. *Gentile*, 111 S. Ct. at 2742.

of material prejudice'' language used in Rule 177 was a standard which failed adequately to protect his right to free speech.[12] The Court rejected this argument for a more stringent standard for the protection of speech by a lawyer.[13] Despite this finding, the Court reversed the decision of the Supreme Court of Nevada for various other reasons.[14]

Gentile's argument for a stricter standard than enunciated in Rule 177 relied on cases in which the Court had examined the constitutionality of restraints on the press during the pendency of criminal trials such as *Nebraska Press Association v. Stuart*,[15] in which the Court held that media commentary on evidentiary matters could not be suppressed unless the publicity would result in the inability to find jurors who could render a verdict untainted by the publicity.[16] Writing for the majority, Chief Justice Rehnquist noted a palpable distinction between attorneys, who are actual participants in a trial, and the press, which simply observes and reports on judicial proceedings.[17] The majority found that statements made by an attorney prior to a trial are more likely to influence a prospective juror than are statements made by the media, who are not associated with the parties to the proceedings.[18] The Court further observed that historically, attorney speech has been subject to many restrictions, ranging from objections during trial to restraints placed upon the solicitation of clients.[19] Balancing a lawyer's First Amendment rights against the state's legitimate interest in regulating the lawyer's speech in order to protect the sanctity of judicial proceedings, the Court held that the ''substantial likelihood'' test found in Rule 177 is constitutionally sound because ''it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech.''[20]

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12. *Id.* at 2738.

13. *Id.*

14. *Id.* at 2736. Justice Kennedy announced the judgment of the Court and delivered the opinion with respect to Parts III and VI. Chief Justice Rehnquist delivered the opinion of the Court with respect to Parts I and II.

15. 427 U.S. 539 (1976).

16. *Id.* at 554.

17. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2755 (1991).

18. *Id.* at 2736.

19. *Id.* at 2742. *See* Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) (a state may discipline a lawyer for making misleading statements regarding alleged credentials as a certified specialist in a particular area of practice); Sacher v. United States, 343 U.S. 931 (1952) (counsel may argue points of law to a trial court, but may be held in contempt of court for arguing a point beyond that which is necessary to preserve his point for appeal).

20. *Gentile*, 111 S. Ct. at 2745. A leading treatise on professional responsibility noted that the ''substantial likelihood of material prejudice'' standard used in Model Rule of Professional Conduct Rule 3.6 was intended by the drafters to approximate the ''clear and present danger'' standard. HAZARD & HODES, *supra* note 10, at 666.

After examining the "material prejudice" standard as it relates to an attorney's First Amendment rights, a majority of the Court turned to the grammatical structure of Rule 177.[21] The Court found that the Rule contained a "safe harbor" provision which misled Gentile into believing that he would not be disciplined for making the type of pretrial statements he made to the press and held that this "safe harbor" provision rendered the Rule void for vagueness.[22] Noting that the prohibition against vague regulation of speech is meant to protect against discriminatory enforcement, the Court found Rule 177 to be so imprecise as to make discriminatory enforcement "a real possibility."[23]

The Court closely examined the language of Rule 177(3)(a)[24] from which it concluded that a lawyer

> "may state without elaboration . . . the general nature of the . . . defense." Statements under this provision are protected "[n]otwithstanding subsections 1 and 2(a-f)." By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the . . . defense" "without elaboration" need fear no discipline, even if he comments on "[t]he character, credibility, reputation or criminal record of a . . . witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[25]

The majority believed that the phrase "general nature of the defense" was so imprecise that it failed to give reasonable notice to Gentile as to what matters regarding the trial he could discuss without the fear of discipline from the State Bar.[26]

B. Effect on the Indiana Bar

Rule 3.6 of Indiana Rules of Professional Conduct is identical to Nevada Supreme Court Rule 177. The *Gentile* decision, therefore, also renders Indiana's Rule 3.6 void for vagueness. Until the Indiana Supreme Court modifies the Rule, its Disciplinary Commission cannot successfully prosecute a disciplinary charge for violation of the Rule.

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21. *Gentile*, 111 S. Ct. at 2731.
22. *Id.*
23. *Id.* at 2732.
24. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (a)-(f) (West 1991) (Indiana safe harbor provision).
25. Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2731 (1991) (quoting NEV. SUP. CT. R. 177(3)(a)).
26. *Id.*

Short of devising a completely new rule regarding trial publicity, the Indiana Supreme Court could simply eliminate the existing "safe harbor" provision. This would modify Rule 3.6 so as to give an attorney notice that a particular extrajudicial statement may be made only if the lawyer knows or should know that the statement will not have a substantial likelihood of materially prejudicing an adjudicative proceeding. Such a Rule would give counsel reasonable notice of the type of statements which may warrant disciplinary action and will result in a constitutionally sound restraint on lawyers' speech. If such a Rule is adopted by the Indiana Supreme Court, any disciplinary proceeding brought against an attorney alleging the violation of such a Rule will become extremely fact sensitive. The operative test will be whether statements have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The likelihood of prejudice naturally depends on the substance of the extrajudicial statement. In addition, the timing of the statement in relationship to the trial will be a key element of the disciplinary case. The greater the time between the statement and the trial, the less the likelihood of material prejudice.

A close examination of the size of the jury pool will also be relevant. The larger the community, the greater the chance that jurors could be found who have no recollection of the lawyer's statement. It could also be argued that a bench trial is less likely to be materially prejudiced by extrajudicial statements. Unlike jurors, judges are familiar with the idea that the trier of fact must render a verdict based solely upon the evidence presented at trial.

II. The Use of Retaining Liens as a Method of Securing the Payment of Attorney's Fees

An opinion issued by the Indiana Supreme Court during the survey period, *In re Gemmer*,[27] brings into question the continued efficacy of attorney's retaining liens in Indiana.

Two types of liens have traditionally been available to attorneys in this state. One is a charging lien and the other is a retaining lien. A charging lien is an equitable lien created by statute which provides that an attorney may hold a lien for fees earned on any judgment lawfully obtained on behalf of the client.[28] The distinguishing characteristic of a retaining lien is that it provides an attorney with the right to retain items of property belonging to the client which come into the possession

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27. 566 N.E.2d 528 (Ind. 1991).

28. Charging liens have been codified in Indiana for over 110 years. *See* Ind. Rev. Stat. § 5276 (1881) (presently codified at Ind. Code § 33-1-3-1 (1988)).

of the attorney during the course of her representation until the client pays the attorney for the services rendered. Retaining liens allow an attorney to retain not only monies, but papers provided to her by the client, as well as the attorney's work product. Retaining liens are equitable in origin and have been recognized by the common law for three centuries.[29] They can be an extremely effective tool for collecting fees. The attorney can exert great leverage when the client needs the retained material to continue to prosecute or defend a claim.

Rule 1.16 of the Indiana Rules of Professional Conduct touches upon the issue of retaining liens in that it requires an attorney to protect or preserve a client's claim in the event the representation is terminated.[30] Subsection (d) of this Rule focuses on the attorney's ethical obligations in regard to surrendering papers or property when the attorney-client relationship ends. The Rule states as follows:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.[31]

In addition, Disciplinary Rule 9-102(B)(4) of the Indiana Code of Professional Responsibility,[32] which governed attorney ethics in this area of practice prior to the adoption of the Indiana Rules of Professional Conduct, required that an attorney should "promptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive."[33]

The first Indiana Supreme Court decision to address the issue of retaining liens was *State ex rel. Shannon v. Hendricks Circuit Court*.[34] In *Shannon*, an attorney named Maxwell represented Shannon in an action to dissolve her marriage.[35] During the course of the representation,

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29. Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 COLUM. L. REV. 296, 298 (1965).

30. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.16 (West 1991).

31. *Id.*

32. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(B)(4) (repealed 1986).

33. *Id.*

34. 183 N.E.2d 331 (Ind. 1962).

35. Interestingly, Maxwell represented Shannon on a contingent fee basis. Contingent fees in family law matters are now prohibited by Indiana Rules of Professional Conduct Rule 1.5(d)(1) (West 1991).

Maxwell came into possession of two certified checks which represented a portion of the property settlement agreement entered into by the parties to the dissolution. Maxwell did not receive payment of his fees after the trial court issued a proper dissolution decree. As a result, Maxwell retained the certified checks which his client was to receive under the terms of the agreement and held them as a lien against the fees she owed to him. Of course, Maxwell's client wanted him to return the certified checks. She proceeded to request that the trial court issue an order requiring Maxwell to pay her the monies received by him. The court granted this request and after Maxwell failed to comply, found him in contempt of court.

On appeal, the Indiana Supreme Court reversed, holding that an attorney has the right to a retaining lien until her client has paid the balance of the attorney's fees.[36] The *Shannon* court failed to discuss the relationship, if any, between the right to such a lien and any ethical duty counsel may have reasonably to protect a client's interests upon termination of the representation.

The first case in Indiana to discuss attorney ethics and retaining liens was *Bennett v. N.S.R., Inc.*[37] Bennett served as counsel for N.S.R. in a matter requiring litigation. Before the litigation was completed, Bennett and N.S.R. severed their attorney-client relationship. When N.S.R. failed to pay Bennett for the legal services rendered, he brought an action against his former client to recover these fees. At the same time, N.S.R. demanded that Bennett return certain documents in his possession so that N.S.R. might proceed with litigation. Bennett refused, and as a result, the trial court issued a *subpoena duces tecum* to Bennett for the production of N.S.R.'s records. Bennett moved to modify the subpoena and claimed that he had a valid retaining lien over the documents. This motion was denied. Thereafter, Bennett moved to quash the subpoena. This motion was also denied. Bennett then appealed the denial of his motions.

The Indiana Court of Appeals reversed the trial court and recognized Bennett's right to assert a retaining lien over documents obtained during the course of the representation.[38] The court found that retaining liens are not materially distinguishable from a valid mechanic's lien.[39] Further, the court held that N.S.R. was entitled to the records in question only if it gave Bennett adequate security to obtain payment of the fees.[40]

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36. *Shannon*, 183 N.E.2d at 332.
37. 553 N.E.2d 881 (Ind. Ct. App. 1990).
38. *Id.* at 883.
39. *Id.* at 882.
40. *Id.* at 883.

In arriving at its judgment, the court specifically rejected N.S.R.'s argument that retaining liens are unethical and "should be disallowed when they cause hardship or inconvenience to the client."[41] The court noted that Rule 1.16(d) provides for the retention of records belonging to a client to the extent permitted by law and that attorney's liens have been recognized in Indiana as proper.[42] The court therefore held that attorney's liens are lawful and ethical in this state until such time as Rule 1.16(d) is modified by the Indiana Supreme Court, which has exclusive jurisdiction over attorney discipline.[43]

Less than one year after *Bennett*, the Indiana Supreme Court issued its opinion in *In re Gemmer*.[44] Unlike either *Bennett* or *Shannon*, *Gemmer* was an attorney disciplinary case. In *Gemmer*, Donald Hall retained Gemmer to represent him in a dispute with the Indiana Department of Revenue. The Department of Revenue was asserting that Hall failed to pay over $100,000 in sale and use taxes in connection with two automotive businesses he owned. By October 1, 1983, Hall had paid Gemmer $2,300 of an agreed $2,500 retainer. Moreover, Hall's automotive businesses performed work worth $1,011 on Gemmer's automobile, which the two agreed would be deducted from Gemmer's fees.

Soon after he was retained, Gemmer negotiated an agreement with the Department of Revenue whereby Hall would pay $10,000 immediately to the Department of Revenue in exchange for a recall of the outstanding tax warrants. In addition, Gemmer agreed to review his client's records. This review was to be completed before October 31, 1983. Pursuant to this agreement, Hall provided Gemmer with voluminous records generated by his businesses. About one week prior to the review deadline, Gemmer told Hall that contrary to Hall's belief, the records failed to show a misapplication of sales tax to certain nontaxable items or to labor. Upon hearing this from Gemmer, Hall became convinced that neither Gemmer nor an accountant hired by Gemmer actually examined the records.

On October 11, 1983, Hall notified Gemmer in writing that his services were terminated because Hall wished to retain different counsel. In addition, Hall informed Gemmer that he would personally come to Gemmer's office on October 13, 1983 to collect his business records. The day before notifying Gemmer of termination, Hall received a bill from Gemmer totalling $5,125. This bill incorrectly credited Hall with having paid only $1,300 toward the retainer. Moreover, it incorrectly

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41. *Id.* at 884.
42. *Id.* at 883.
43. *Id.* at 884. (citing IND. CONST. art. VII, § 4; IND. R. ADMISSION & DISCIPLINE 23, § 1).
44. 566 N.E.2d 528 (Ind. 1991).

listed the value of the car repairs as $849.30. Finally, the bill requested $2,648.75 in fees owed to an accountant who, Gemmer claimed, had reviewed Hall's records.

On October 13, Gemmer failed to relinquish the records to Hall and informed Hall that he would not do so until his fees were paid. Subsequent attempts to obtain the documents by Hall and his new counsel fell on deaf ears. About three weeks after being discharged by Hall, Gemmer advised the Department of Revenue in writing that Hall had no records to support his theory that there had been a misapplication of the sales tax. Gemmer did not consult with Hall or receive Hall's permission to communicate with the Department of Revenue before making this pronouncement. Hall was never able to recover his records from Gemmer. As a result, he was unable to use the documents in his dispute with the Department of Revenue or in an Internal Revenue Service audit covering the same period.

Eventually, Gemmer filed a document entitled Attorneys Equitable Lien Against Real Estate, in the recorders office in the county where Hall lived. This "lien" was filed against Hall's residence and also against a parcel of land Hall was purchasing on contract from Paul and Jane Baldwin. Hall then filed for bankruptcy protection and obtained the discharge of Gemmer's attorney's fees. Thereafter, the Baldwins filed an action to foreclose upon the property Hall was purchasing on contract. Because of Gemmer's recorded "lien," the Baldwins were forced to include Gemmer as a party to the foreclosure action. Upon receiving notice of the Baldwin's claim, Gemmer filed a cross-claim against Hall in which he sought to foreclose his "lien." This required Hall to obtain counsel to defend against Gemmer's cross-claim.

In a unanimous opinion, the Indiana Supreme Court found that Gemmer violated Indiana Code of Professional Responsibility Disciplinary Rule 4-101(B)(1)[45] by disclosing client confidences to the Department of Revenue and Indiana Code of Professional Responsibility Disciplinary Rule 7-102(A)(2)[46] by placing a lien against the real estate before obtaining a judgment.[47] These conclusions are not remarkable based upon the court's findings of fact. What does warrant attention is the court's

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45. Indiana Code of Professional Responsibility DR 4-101(B)(1) (repealed 1986) provided: "Except when permitted under D.R. 4-101(C), a lawyer shall not knowingly . . . reveal a confidence or secret of his client."

46. Indiana Code of Professional Responsibility DR 7-102(A)(2) (repealed 1986) provided: "In his representation of a client, a lawyer shall not . . . [k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for extension, modification or reversal of existing law."

47. *Gemmer*, 566 N.E.2d at 531.

conclusion that "such findings clearly establish that by failing to return Hall's records, the Respondent violated D.R. 9-102(B)(4)."[48]

In arriving at this conclusion, the court failed to reconcile its decision with *Bennett* or *Shannon* which clearly held that retaining liens are valid and ethical in Indiana.[49] The failure of the court to discuss *Shannon* or *Bennett* in arriving at its decision in *Gemmer* makes its holding difficult to justify; however, several possible reasons exist for the court's decision in *Gemmer*.

First, *Gemmer* is strictly a disciplinary case. In a disciplinary matter, a hearing officer appointed by the court hears evidence and makes findings of fact and conclusions of law which are then reviewed by the court.[50] When reviewing these findings, the court is not acting in its appellate capacity. Rather, the review process entails a de novo examination of all matters presented. The review is not only of the hearing officer's findings, but also of the entire record tendered in the case. Although the hearing officer's findings receive emphasis, the court ultimately makes its own findings as to misconduct and then determines the appropriate sanction.[51]

This de novo review of the evidence forces the court to focus on the facts of the case before it. The court then analyzes the facts under the Indiana Rules of Professional Conduct. Disciplinary opinions are typically devoid of citations to precedent, except in the portion of the opinion dealing with the appropriate sanction for the attorney. It is quite rare to find an opinion which contains citations to anything other than earlier disciplinary opinions. Because the court was the ultimate finder of fact, it may have focused on making factual findings to the neglect of discussing civil precedent such as *Bennett*, which touched on only one aspect of the *Gemmer* case.[52]

A second possible explanation for the court's failure to distinguish *Gemmer* from *Bennett* and *Shannon* may be that the court found it unnecessary. In both *Shannon* and *Bennett*, the attorneys claiming retaining liens had essentially clean hands, which is a prerequisite to invoking an equitable remedy such as a retaining lien. In particular, the amount of their fees was not in dispute. By contrast, Gemmer failed

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48. *Id.*

49. *See* State *ex rel.* Shannon v. Hendricks Circuit Ct., 183 N.E.2d 331, 334 (Ind. 1962); Bennett v. N.S.R., Inc., 553 N.E.2d 881, 884 (Ind. Ct. App. 1990).

50. *See* IND. R. ADMISSION & DISCIPLINE 23, § 14.

51. *In re* Kern, 555 N.E.2d 479 (1990).

52. Attorney Gemmer was found guilty of violating Indiana Code of Professional Responsibility DR 9-102(B)(4), 4-101(B)(1), 1-102(A)(5), (6) (repealed 1986) in two separate counts of the Verified Complaint for Disciplinary Action. After reviewing his conduct as a whole, the court suspended him from the practice of law for a period of three years.

to credit his client for over $1,000 in payments made and charged him approximately $2,600 for an accountant's services, despite the lack of evidence that an accountant actually reviewed the relevant records. If Gemmer's fraudulent claim forfeited his right to a retaining lien for additional fees, then he had no legal authority to retain the records. His conduct then would unquestionably be in violation of Disciplinary Rule 9-102(B)(4) and Disciplinary Rule 1.16(d) of the Indiana Rules of Professional Conduct.

In conclusion, the Indiana Supreme Court's decision in *Gemmer* leaves in doubt whether attorney retaining liens are ethical in this state. Until the court issues an opinion reconciling *Bennett*, *Shannon*, and *Gemmer*, Indiana attorneys should be aware that a claim to a retaining lien may result in disciplinary action.