

Survey of 1992 Developments in the Indiana Law of Professional Responsibility

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INTRODUCTION

1992 was a very active year in the area of professional responsibility. In the disciplinary cases decided by the Indiana Supreme Court, three areas warrant careful evaluation by all practitioners. They are client fund conversion, restoring funds to clients, and improper courtroom behavior. These cases also demonstrate that the Rules of Professional Conduct are only the starting point for analyzing a professional responsibility issue. Precedent keeps this body of law both vital and contemporary with the needs of the profession.

I. CLIENT FUND CONVERSION

A. Background

Misappropriation of property belonging to someone else is one of the most serious violations of the Rules of Professional Conduct. The sanctions imposed by the Indiana Supreme Court for this kind of conduct are equally serious.

The methods by which lawyers convert funds are many, but there are three common avenues:

(1) The lawyer misappropriates assets from an estate in which he is either lawyer or personal representative or both,

(2) The lawyer holds monies with the client's permission (often in the form of a retainer or settlement proceeds) and begins using the funds for personal purposes, and

(3) The lawyer commingles his own funds with those of a client in a bank account and draws on the account until the balance drops below the minimum balance for the client's money. For example, assume a lawyer's trust account has an existing balance of \$500 and a client gives the lawyer a \$500 retainer. If the lawyer immediately writes a check for \$800 he has technically converted \$300 of client funds which he has yet to earn.

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Under the former Code of Professional Responsibility, Disciplinary Rule 1-102 prohibited, among other things, conduct involving dishonesty, fraud, deceit, or misrepresentation.¹ In years past, the conversion of client funds would, almost certainly, lead to the respondent lawyer's disbarment.²

In 1992, however, the Indiana Supreme Court handed down opinions in three cases involving client fund mishandling that differ distinctly from past sanctions for these acts. *In re Frosch*,³ *In re Jarrett*,⁴ and *In re Cawley*⁵ each involved a lawyer's misuse of client funds for personal purposes. In addition, *Cawley* involved a violation of Rule 8.4(b) of the Indiana Rules of Professional Conduct, which makes the commission of a criminal act a disciplinary offense.⁶ In each of the three cases, the sanctions were substantially less than the disbarment an offending lawyer would have expected a decade ago. It should also be noted that the standard under Rule 8.4(b) does not require the criminal conviction of the lawyer, but only the commission of the act.⁷

B. The Cases

In *Frosch* the respondent lawyer was charged with misconduct because of the way he handled funds collected on behalf of a client. Specifically, Frosch had a contingent-fee contract to pursue rent collection and eviction cases on behalf of Freeman in small claims court. A dispute arose between Frosch and his client, and Frosch was instructed to discontinue all representation on February 5, 1988. By February 20, Frosch was holding \$19,500 from Freeman's cases in four separate accounts, only

1. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR-1-102 (repealed 1986). The same language is currently found in INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (West 1992).

2. See, e.g., *In re Brault*, 471 N.E.2d 1124 (Ind. 1984); *In re Deloney*, 470 N.E.2d 65 (Ind. 1984); *In re Aungst*, 467 N.E.2d 698 (Ind. 1984); *In re Hayes*, 467 N.E.2d 20 (Ind. 1984); *In re Slenker*, 424 N.E.2d 1005 (Ind. 1981); *In re Costello*, 402 N.E.2d 970 (Ind. 1980); *In re Kesler*, 397 N.E.2d 574 (Ind. 1979); *In re Cochran*, 383 N.E.2d 54 (Ind. 1978); *In re Vincent*, 374 N.E.2d 40 (Ind. 1978).

3. 597 N.E.2d 310 (Ind. 1992).

4. 602 N.E.2d 131 (Ind. 1992).

5. 602 N.E.2d 1022 (Ind. 1992).

6. "It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (West 1992).

7. *Id.* This language divorces the disciplinary law from any dependence on the pursuit of criminal charges. For example, a lawyer could, conceivably, be acquitted of criminal wrongdoing after a jury trial and still face professional disciplinary action. Some jurisdictions, however, view a criminal acquittal as dispositive of professional misconduct. See generally 2 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 8.4:301 (Supp. 1991).

one of which was Frosch's trust account. He did not advise Freeman of the funds he was holding until March 10 and gave no written accounting of these funds to Freeman until late April. Ultimately, Freeman and Frosch agreed to arbitration, and, on October 24, 1989, Frosch was instructed to retain \$12,515 as his fee for the representation and return \$6,985 with interest to Freeman. Frosch complied.

During the pendency of the arbitration, a check from Frosch's trust account in the amount of \$130 was returned because of insufficient funds. This check demonstrated that client funds were used by Frosch without the client's consent.

The Indiana Supreme Court found Frosch had negligently failed to supervise the paralegal to whom he had "delegated the responsibility of depositing funds in the office and personal accounts."⁸ In evaluating the charges, the Indiana Supreme Court found that Frosch failed to give his client prompt notice he had received the funds, failed to provide a prompt accounting to his client, failed to surrender funds to his client promptly upon termination of the representation, and had withdrawn funds about which he and the client had a dispute.⁹ These were found to be violations of Rules 1.15(b) and 1.16(d) of the Indiana Rules of Professional Conduct.¹⁰ The court then rejected the Commission's contention that Frosch had committed a criminal act reflecting adversely on his honesty, trustworthiness, and fitness as a lawyer in violation of Rule 8.4(b).¹¹ The court, in assessing the appropriate sanction, explained its decision this way:

Standing alone, Respondent's failure to account for and surrender funds held on behalf of the client and his withdrawal and use of such funds without the client's permission would warrant a severe sanction. However, we note that the Respondent did notify the client that he was holding the funds approximately one month after the termination of employment and did give an accounting some two months after the termination. The client acknowledged that the Respondent was owed some compensation for services and as reimbursement for court costs, but disputed the amount. These circumstances mitigate what otherwise would constitute a criminal act and extremely serious professional misconduct.¹²

Frosch was then given a sixty-day suspension.

8. *In re Frosch*, 597 N.E.2d 310, 311 (Ind. 1992).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 311-12.

In *Jarrett* the respondent lawyer was charged with six counts of misconduct in dealing with client affairs in civil matters.

Count I concerned a matter in which Lewis hired Jarrett to pursue a wrongful termination and civil rights claim. Lewis paid Jarrett and the case was filed shortly thereafter. Jarrett failed to appear for a disposition hearing, and the case was otherwise neglected. Although the case ended up being dismissed for a lack of prosecution, Jarrett told Lewis he had a meeting scheduled to discuss settlement. Lewis subsequently discovered on his own that his case had been dismissed. Jarrett was found to have violated Rule 1.2(a) of the Indiana Rules of Professional Conduct based on his failure to abide by Lewis' directions regarding the objectives of the representation; Rule 1.3 based on his lack of diligence in pursuing Lewis' claims; Rule 1.4 based on his failure to communicate with Lewis; Rule 1.5 based upon his charging an unreasonable fee; Rule 3.2 for failing to expedite the pending litigation; Rule 3.4(c) based on his failure to obey an obligation imposed by a tribunal; Rule 8.4(c) based on engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(d) for conduct prejudicial to the administration of justice.¹³

Count II concerned an instance in which Jarrett was hired to obtain the refund of an earnest money deposit and received a \$455 retainer. After negotiations failed, Jarrett told his client suit had been filed when it had not. He also gave his client a fictitious trial date. The client subsequently traveled from Michigan to Indiana to testify and Jarrett failed to appear. The client sued Jarrett for \$935 and won. Jarrett then failed on his promise to pay, and the client sought and received a bench warrant for Jarrett's arrest. After his arrest, he posted bond, and the bond was forfeited to satisfy the client's judgment. In addition to the more obvious violations involving Jarrett's neglect of an entrusted matter and his failure to communicate with this client, he was found to have violated Rule 1.1, which requires a lawyer to provide competent representation to his clients.¹⁴ Jarrett was also found to have engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.¹⁵

Count III concerned an act in which Jarrett placed \$8,000 into his trust account to pay off certain medical bills for which his client was responsible as part of a domestic relations case. After final judgment in the case, he took \$3,000 in fees and never paid any of the medical bills. The client hired successor counsel, and Jarrett negotiated a reduced fee settlement and then misrepresented that he had sent a settlement

13. *In re Jarrett*, 602 N.E.2d 131, 132-33 (Ind. 1992).

14. *Id.* at 133.

15. *Id.*

check. When Jarrett's check was finally sent, it was returned from the bank due to non-sufficient funds in his account. Jarrett was charged with numerous violations. Of particular note, however, was the violation of Rule 8.4(c) regarding dishonesty, fraud, deceit, or misrepresentation. The Indiana Supreme Court, in reviewing the findings, found it very persuasive that Jarrett had done his level best to hang on to his client's funds as long as he could.¹⁶

Count IV concerned a matter in which Jarrett settled a civil rights case on behalf of a client for \$5,000. He took \$1,000 as his fee and then retained \$4,000 purportedly as his fee for a subsequent criminal representation. No monies were ever returned to the client. In addition to again finding a violation of Rule 8.4(c), the Indiana Supreme Court found Jarrett had committed a criminal act by retaining his client's funds in violation of Rule 8.4(b).¹⁷ The court also cited Jarrett for another competence violation under Rule 1.1.¹⁸

In Count V Jarrett was found to have violated the competent representation standard in Rule 1.1 again and to have violated Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice.¹⁹ In this count, Jarrett undertook representation of a client in a murder case. Although his stated fee was \$5,000, he had only received \$2,000 by the time of trial. After the client was convicted, the client and his family expected Jarrett to file and argue a Motion to Correct Errors and perfect the client's appeal. Jarrett did nothing after the verdict and refused to communicate with his client.

Finally, under Court VI, Jarrett was found to have violated Rules 1.1 on competence; 1.3 regarding diligent representation; and 8.4(c) and (d) regarding his honesty and engaging in conduct prejudicial to justice.²⁰ Under the rather bizarre facts of this count, Jarrett was paid \$275 to obtain a marriage dissolution for his client. After about sixty days, she called to find out what progress had been made with her case. Jarrett directed her to be at the Lake County Government Center on November 15th (approximately four months later) for a hearing which would "officially dissolve" the marriage.²¹ On the date specified, Jarrett met the client and her friend as arranged and told her, "We will wait outside the courtroom for ten minutes and if Mr. Bailey doesn't show then your marriage will be officially dissolved."²²

16. *Id.* at 134.

17. *Id.*

18. *Id.*

19. *Id.* at 135.

20. *Id.*

21. *Id.*

22. *Id.*

In assessing sanction, the Indiana Supreme Court considered six factors: (1) an examination of the nature and course of the lawyer's actions, (2) any consequences flowing from his actions, (3) his state of mind, (4) the court's duty to preserve the integrity of the profession, (5) the risk to the public, and (6) aggravating or mitigating factors.²³ In this case, the Indiana Supreme Court found that Jarrett's prior private reprimand aggravated his present misconduct and suspended him from the practice of law for three years.²⁴

The third case in this triad of client fund misappropriation cases is *In re Cawley*, in which the defendant lawyer was hired to process a relatively complicated estate in 1988. On June 13, 1990, Cawley, as copersonal representative, withdrew \$12,000 from the estate's account through the use of a presigned check. Cawley did not inform the other personal representative of this withdrawal. Instead, she learned of the withdrawal when she examined the estate's bank statement in July. When she questioned the lawyer about it, he readily admitted he had withdrawn the monies for personal use. He also promised to repay the monies with interest, although he did not do so until February 1992.

In its opinion, the Indiana Supreme Court was unanimous in the belief that Cawley's conduct constituted a violation of Rule 8.4(b) of the Indiana Rules of Professional Responsibility in that he had committed a criminal act reflecting adversely on his honesty and trustworthiness.²⁵ The court, however, split three-to-two on the question of the appropriate sanction to impose.²⁶ The majority, in imposing a six-month suspension, relied on six factors in mitigation:

- (1). After the conversion, Cawley remained as attorney for the estate with the permission of the copersonal representative,
- (2). At the time of the conversion, Cawley was experiencing financial difficulties compounded by domestic relations problems,
- (3). Cawley had no prior history of misconduct,
- (4). He readily admitted his wrongdoing,
- (5). He was remorseful, and
- (6). He recognized the seriousness of his misconduct and asked the court for mercy in imposing sanction.²⁷

In imposing sanction, the majority decided that, at the conclusion of the six-month suspension, Cawley's reinstatement to practice should be automatic.²⁸

23. *Id.*

24. *Id.* at 136.

25. *In re Cawley*, 602 N.E.2d 1022, 1023 (Ind. 1992).

26. *Id.* at 1024.

27. *Id.* at 1023.

28. *Id.* at 1024.

The two dissenting Justices would have imposed an eighteen-month or a two-year suspension, respectively.²⁹ Such suspensions in excess of six months require the respondent lawyer to demonstrate his fitness to return to the practice by going through the reinstatement process spelled out in Admission and Discipline Rule 23, Section 4, which includes, among other steps, successful completion of the Multistate Professional Responsibility Examination (MPRE).³⁰

C. Analysis

The cases suggest that the Indiana Supreme Court's approach to financial misconduct by lawyers has been undergoing some reconstruction. Specifically, it appears that the methods used to misappropriate funds have not changed, but the presentation and reliance on mitigating factors is much greater than in cases from just a few years ago.

By way of illustration, six of the pre-1984 cases discussed previously³¹ involved financial misconduct associated with estates. Although the Indiana Supreme Court discussed the various facts in mitigation offered in these cases by the respondent lawyers, they ultimately relied on the perceived danger to the public and the damage done to the integrity of the profession in imposing disbarment.

Another indicator of the increased recognition of facts in mitigation is the rarity with which the lawyer's role as a fiduciary is discussed.³² Three of the pre-1984 cases mentioned earlier³³ expressly discuss the lawyer's heightened responsibilities as a fiduciary and the serious consequences flowing from the abandonment of those responsibilities. Some recognition of this enhanced duty is important in cases where a "criminal act" is found under Rule 8.4(b).³⁴ The lawyer, as a fiduciary, holds funds for others on condition that the funds are not commingled with his own and otherwise remain intact at all times.³⁵ Any other solution must be fiduciary conversion.

29. *Id.*

30. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS Rule 23, § 4(b)(9) (West 1992).

31. See *In re Aungst*, 467 N.E.2d 698 (Ind. 1984); *In re Brault*, 471 N.E.2d 1124 (Ind. 1984); *In re Slenker*, 424 N.E.2d 1005 (Ind. 1981); *In re Costello*, 402 N.E.2d 970 (Ind. 1980); *In re Kesler*, 397 N.E.2d 574 (Ind. 1979); *In re Cochran*, 383 N.E.2d 54 (Ind. 1978).

32. See RESTATEMENT OF RESTITUTION § 190(a) (1935) (catalogs a variety of fiduciary relationships including the attorney-client relationship).

33. See *In re Aungst*, 467 N.E.2d 698 (Ind. 1984); *In re Brault*, 471 N.E.2d 1124 (Ind. 1984); *In re Kesler*, 397 N.E.2d 574 (Ind. 1979).

34. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (West 1992).

35. See RESTATEMENT OF RESTITUTION § 209 (1935).

It also seems appropriate that, in situations such as *Frosch*, when a lawyer delegates his financial responsibility to a nonlawyer, objective and demonstrable safeguards should be in place to protect the client's interests. Only in this way would the fiduciary be able to vindicate himself successfully from claims of misconduct and conversion.³⁶ This line of reasoning, apparent in past cases, is not explicitly stated in the most recent decisions.³⁷ As a result of this absence, otherwise unrelated (and, to the client, irrelevant) facts in mitigation receive significantly greater weight than in years past.³⁸

II. THE THREE "R'S": REINSTATEMENT, REMORSE, AND RESTITUTION

A. *The Gutman Decision*

During 1992, the Indiana Supreme Court had occasion to opine on a rarely addressed subject in attorney discipline cases: the reinstatement of suspended or disbarred lawyers. In *In re Gutman*,³⁹ the petitioning

36. In fact, Rule 5.3 requires these safeguards presently:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer:

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and,

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

INDIANA RULES OF PROFESSIONAL CONDUCT Rule 5.3 (West 1992). Creation and use of these standards safeguard the lawyer, firm, support staff and clients equally.

37. In *In re Smith*, 572 N.E.2d 1280 (Ind. 1991), the court discussed, at some length, the role of the lawyer as a fiduciary. That discussion, however, dealt with an issue parallel to the one here; namely, that transactions entered into during the existence of a fiduciary relationship are presumptively invalid as the product of undue influence.

38. Only two noteworthy exceptions to this pattern were found. *In re Huebner*, 561 N.E.2d 492 (Ind. 1990) and *In re O'Connor*, 553 N.E.2d 481 (Ind. 1990) were cases involving client fund conversion, and both lawyers were disbarred. Huebner failed to appear for his disciplinary hearing. O'Connor, meanwhile, was found in violation of the Rules of Professional Conduct in seven charged counts *and* while suffering from an alcohol and cocaine addiction problem.

39. 599 N.E.2d 604 (Ind. 1992).

lawyer had resigned from the bar in September 1985 while facing charges in a disciplinary action. The disciplinary charges were based on Gutman's convictions of crimes including the conspiracy to commit extortion. These charges were filed in the United States District Court for the Southern District of Indiana. The convictions were later affirmed in *United States v. Gutman*.⁴⁰ In the underlying case, Gutman, a former President Pro Tem of the Indiana Senate, solicited money from the Indiana Railroad Association on behalf of two other state senators. The Association made the payments from 1973 through 1976 in the form of \$1,000 checks to each senator who would then write checks for \$333 to the other two. In consideration for these payments, Gutman and the others were to render favorable assistance to the Association's interests in the Indiana General Assembly.

In keeping with Admission and Discipline Rule 23, Section 4(a),⁴¹ Gutman waited five years before filing his petition for reinstatement. Under Rule 23 Section 4(b), the lawyer seeking to be reinstated has the burden of showing the following by clear and convincing evidence:

1. He desires in good faith to obtain restoration of his privilege to practice law;
2. He has not practiced law in this state or attempted to do so since he was disciplined;
3. He has fully complied with the terms of the Order for discipline;
4. His attitude towards the misconduct for which he was disciplined was one of genuine remorse;
5. His conduct since the discipline was imposed has been exemplary and above reproach;
6. He has a proper understanding of and attitude towards the standards that are imposed upon members of the Bar and will conduct himself in conformity with such standards; and
7. He 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 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.⁴²

40. 725 F.2d 417 (7th Cir. 1984).

41. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS Rule 23, § 4(a) (West 1992).

42. *Id.* § 4(b). This section has since been amended to include a requirement that petitioners for reinstatement must pass the Multistate Professional Responsibility Examination as a condition precedent to even filing the petition. See INDIANA RULES FOR ADMISSION TO THE BAR Rule 23, § 4(b)(9) (West 1992).

In evaluating Gutman's case, the Indiana Supreme Court conducted an investigation into similar cases from many states⁴³ and found:

Because a petitioner for reinstatement comes before us with a record of impaired professional fitness, he must prove that he has overcome those weaknesses which produced the earlier misconduct, has been rehabilitated, and is now trustworthy. . . . Such petitioner bears a heavier burden than one who must prove fitness at an initial admission to the Bar. A petitioner for reinstatement must undergo a more exacting scrutiny, and a more rigorous showing of professional moral character is required for purposes of reinstatement than for original admission to the Bar.⁴⁴

The Indiana Supreme Court then relied on a balancing test where the seriousness of the misconduct is placed on one side of the scale and the lawyer's subsequent conduct and present character are evaluated on the other. The court declined to make the severity of the original sanction dispositive of the question of subsequent reinstatement. The court did believe, however, that the sanction could serve as a "guidepost" for evaluating the weight assigned the underlying misconduct.⁴⁵ Other jurisdictions, however, foreclose the question of reinstatement in specified cases at the time of imposing initial sanction.⁴⁶

In denying Gutman reinstatement, the Court relied on the Disciplinary Commission Hearing Officer's findings that Gutman had "failed to demonstrate genuine remorse"⁴⁷ in that he failed to apologize or make any concerted effort at restitution. This failure to make restitution was considered by the court to be a "strong indication of lack of rehabilitation."⁴⁸

The Indiana Supreme Court also accepted the Commission's conclusion that Gutman failed to carry his burden on the issue of professional competence. While his attendance at various legal education seminars and independent study was deemed insufficient to show his currency in legal skills, the court suggested that it would have found his successful

43. See *State v. Russo*, 630 P.2d 711 (Kan. 1981); *In re Raimondi*, 403 A.2d 1234 (Md. 1979); *In re Wegner*, 417 N.W.2d 97 (Minn. 1987); *In re Rossellini*, 739 P.2d 658 (Wash. 1987); *In re Brown*, 273 S.E.2d 567 (W. Va. 1980).

44. 599 N.E.2d at 607-08 (citations omitted).

45. *Id.* at 609.

46. See, e.g., *In re Spina*, 580 A.2d 262 (N.J. 1990). This case is typical of the treatment given some attorneys in New Jersey where the offending lawyer is both disbarred and permanently enjoined from ever practicing law in the state again.

47. 599 N.E.2d at 609.

48. *Id.* at 610.

completion of the Multistate Professional Responsibility Examination "extremely persuasive on th[e] issue" had he elected to take it.⁴⁹

B. *The Impact of Gutman*

In itself, Gutman's case is a valuable decision for both the Commission and the limited number of lawyers who need to be concerned about the requisite showing for reinstatement post-discipline. The effect of the opinion, however, has a much broader impact on lawyers in their daily practice than first suspected. On December 9, 1992, the Indiana Supreme Court handed down its opinion in *In re Levinson*.⁵⁰ In that case, the respondent lawyer undertook the representation of a criminal defendant in a postconviction relief matter. The lawyer agreed to charge a total fee of \$1,700 if he pursued the matter, but first he would review the transcripts to determine the merits of pursuing the case. The court found that the lawyer accepted a retainer of \$500, made no attempt to obtain the transcripts and never contacted his clients in response to multiple requests for information. In ruling that Levinson had engaged in misconduct, the court found that his sanction should be aggravated because of a prior disciplinary action on similar grounds.⁵¹ The court imposed a suspension on the lawyer for one year and, as a condition precedent to reinstatement, required him to make restitution to the client. The *Levinson* opinion, following *Gutman* by only three months, suggests that the repayment of client funds is a vital step for the respondent lawyer in a disciplinary case. In a larger sense, then, *Gutman* should serve as a message to the Bar generally that restitution should be seriously considered in resolving any attorney-client dispute informally as long as the payment is not an attempt to limit the lawyer's liability for his action.⁵² This is true even if the Disciplinary Commission is not involved.

C. *Historical Perspective*

The Indiana Supreme Court has wrestled for more than a century with the question of whether restitution is appropriate in lawyer discipline cases. In each case, the tension between two countervailing views has

49. *Id.*

50. 604 N.E.2d 599 (Ind. 1992).

51. *Id.* at 600. See *In re Levinson*, 444 N.E.2d 1175 (Ind. 1983).

52. Rule 1.8(h) creates a discrete violation of law for a lawyer to enter into an agreement with a client which prospectively limits the lawyer's potential liability for malpractice. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (West 1992). The danger of conflict between the interests of the client and the lawyer's self interest is too great to ignore. Presumably, creating one of these agreements would require the lawyer's withdrawal from representing the client under Rule 1.16(a)(1).

been apparent. On one hand, the potential for restricting a lawyer's ability to practice is a powerful weapon for forcing the lawyer to disgorge unearned fees while simultaneously maintaining the integrity of the profession. On the other hand, the client may have actions both at law and in equity to which the lawyer may have valid and persuasive defenses to, at least, part of the claim. This view holds that a disciplinary action is not the appropriate forum for resolving what is an otherwise private dispute between the lawyer and his client.

This latter view prevailed in the 1845 case of *Dawson v. Compton*.⁵³ Under the law at that time, a disciplinary action began as a private cause of action in the appropriate circuit court. In *Dawson*, the plaintiff joined his disciplinary claim with one for the return of monies the lawyer collected for him. The lawyer pleaded a variety of defenses with respect to the funds but lost in the Allen Circuit Court. In reversing the decision, the Indiana Supreme Court held that "the statute confers no power on the Court to pronounce any other judgment against the delinquent attorney than to suspend him from the practice of law. The injured client must seek redress in another form of action."⁵⁴ The court further held that the circuit court was required to hear the lawyer's defenses, as they might mitigate, if not justify, the conduct.⁵⁵

The Indiana Supreme Court was again called upon to examine the propriety of restitution in disciplinary cases in 1869 in *Reilly v. Cavanaugh*.⁵⁶ In that case, three clients charged Reilly with misconduct for refusing to turn over funds he had collected on their behalf. Based upon the totality of their allegations, Reilly asked for a jury trial and denied their claims. The Warren Circuit Court found against Reilly and ordered both his suspension from practice and repayment of monies to the plaintiffs. The Indiana Supreme Court reversed and found that the law had changed since *Dawson* and that an attorney could be both suspended and have a money judgment rendered against him in the same case. The reversal in *Reilly* was to allow for a trial by jury on the questions presented.⁵⁷

More than a century later, the Indiana Supreme Court again approached the question of restitution in *In re Case*.⁵⁸ There the lawyer was ordered to make restitution as a condition precedent to reinstatement after a one-year suspension.⁵⁹ In that case, the lawyer had been charged

53. 7 Blackf. 421 (Ind. 1845).

54. *Id.* at 422.

55. *Id.* at 423.

56. 32 Ind. 214 (1869).

57. *Id.* at 218.

58. 311 N.E.2d 797 (Ind. 1974).

59. *Id.*

with undertaking representations in two estate cases and subsequently neglecting both. In a dissenting opinion, Justice Roger O. DeBruler challenged both the length of the suspension and the order of restitution.⁶⁰ He cited five reasons for his dissent, paraphrased as follows:

1. The client has remedies available at the trial court level to which the defendant attorney can assert a full panoply of defenses;
2. The main purpose of disciplinary actions is to regulate the conduct of lawyers in the public interest. Issues of damages and restitution cause the focus of the disciplinary case to move to an area different from its main purpose;
3. The procedural rules for prosecuting a disciplinary case do not authorize damage awards as part of the regulatory process. The Court's order in *Case* was, in Justice DeBruler's opinion, unconstitutionally vague;
4. Awarding damages in a disciplinary proceeding unconstitutionally denies the Respondent attorney of his right to a trial by jury; and
5. There is no logical nexus between the lawyer's ability to make restitution and his ability to re-assume his fiduciary role after the period of suspension.⁶¹

Justice Richard Givan joined in this dissent to the extent that ordinary restitution was inappropriate.⁶²

The next year, however, the Indiana Supreme Court adopted the reasoning used by Justice DeBruler's dissenting opinion in *Case* in declining to order restitution in *In re Ackerman*.⁶³ After quoting the factors cited by Justice DeBruler, the court held, "We have concluded that such views are sound and that restitution cannot properly be ordered in disciplinary matters, although we are also unanimous in our belief that in good conscience restitution ought to be made."⁶⁴

D. *The Nexus*

Since *Ackerman* was decided in 1975 and before either *Gutman* or *Levinson*, no Indiana case had mentioned restitution as a condition for reinstatement or in any other form of order. Across the country, there

60. *Id.* at 799 (DeBruler, J., dissenting).

61. *Id.* at 799-800.

62. *Id.* at 800.

63. 330 N.E.2d 322 (Ind. 1975).

64. *Id.* at 324.

are three views on this topic.⁶⁵ One group of states has the legal authority to order restitution during the course of disciplinary proceedings and exercises that authority. Other state high courts believe that they have the authority but declines to make such orders. The third view, apparently unique to Indiana, is that there is no authority to order restitution and it should not be a part of the original order for discipline. *Levinson* appears to change that view.

Gutman is the logical choice for explaining the Indiana Supreme Court's now unanimous view that a nexus exists between a lawyer's willingness to make restitution and his fitness to serve in the fiduciary role of attorney. As mentioned previously, Gutman's lack of any effort at restitution provided a "strong indication of lack of rehabilitation."⁶⁶ The message seems clear: Sanctioned lawyers must somehow square accounts with the people they have aggrieved if they expect to be readmitted to the Bar. By issuing orders of this type, the court avoids the due process complaint identified in *Ackerman* while assisting the wronged client through the regulatory process. This approach to disciplinary cases augments the public protection function of lawyer discipline without unduly burdening the process with the resolution of fee dispute issues. Indeed, the Indiana Supreme Court's approach now takes the burden of initiating remedial action away from the client and places it squarely on the sanctioned lawyer. In a broader view, restitution should become one of the avenues regularly investigated by members of the Bar whenever attorney-client disputes arise.

III. COURTROOM Demeanor

The Indiana Supreme Court also had occasion in 1992 to express their view on disruptive courtroom behavior in *In re Ortiz*.⁶⁷ In *Ortiz*, the respondent lawyer represented a defendant in a criminal case in the Tippecanoe Superior Court. After the jury convicted the defendant, the case moved on to the habitual offender phase. During this phase, the client's criminal record was presented to the jury. The deputy prosecutor, in rebuttal closing argument, referred to an arrest of the defendant. Although the respondent objected, the trial court overruled the objection, and the deputy prosecutor cited other arrests to the jury. After the jury was sent to lunch, the judge held a conference in chambers in which the respondent lawyer threatened to leave unless he was placed under

65. This trilogy of views is discussed at length in Patricia Jean Lamkin, Annotation, *Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding Against Attorney*, 75 A.L.R. 3d 307 (1977).

66. *In re Gutman*, 599 N.E.2d 604, 610 (Ind. 1992).

67. 604 N.E.2d 602 (Ind. 1992).

arrest. Ortiz told the judge he would not, “[go] in there in front of the jury and allow the State to railroad [his] client into a conviction by uncharged, unconvicted . . . misconduct.”⁶⁸

Thereafter, the respondent lawyer, the deputy prosecutor and the judge engaged in a lengthy colloquy reprinted at length in the court’s opinion. Eventually, a physical altercation between the lawyer and a deputy sheriff occurred. Although the lawyer sat with his client when the jury was sent to deliberate, the judge cited the lawyer for direct criminal contempt and sent him to the Tippecanoe County Jail to await their verdict. He returned to the court and sat with his client “under protest” while the verdict was read.⁶⁹ Ortiz apologized to the court, but disciplinary charges were subsequently filed.

The Commission charged the lawyer with conduct intended to disrupt a tribunal in violation of Rule 3.5(c) of the Rules of Professional Conduct.⁷⁰ Not surprisingly, the Indiana Supreme Court was unequivocal in condemning the misconduct in this case:

The findings in this case clearly establish that Respondent intentionally disrupted a proceeding, ostensibly as the result of an unfavorable decision by the trial court. There is no justification for this conduct, regardless of the need for effective representation The record quoted above suggests that the Respondent intentionally endangered his client’s interests by his histrionics. His threat to “walk out” in front of the jury was a declaration to the court that he was aware of the potential harm his conduct would create and that he would inflict this harm as a measure of his pique. And amid all of this confusion, hostility and emotion sat a bewildered client who very simply expressed his state of mind as follows: “I don’t know what in the hell is going on.”⁷¹

Finally, the court noted that Ortiz had been sanctioned for similar conduct in 1990 with a private reprimand.⁷² As a result of this perceived pattern, the Indiana Supreme Court ordered the lawyer suspended for sixty days.⁷³

One of the salient features of this case, however, is the fact that the respondent’s misconduct originated in a dispute over a point of law and did not become personally abusive of those present when the outburst

68. *Id.* at 603.

69. *Id.* at 604.

70. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.5(c) (West 1992).

71. *Ortiz*, 604 N.E.2d at 605.

72. *Id. See In re Ortiz*, No. 49S00-9004-DI-299 (Ind. Sept. 20, 1990).

73. 604 N.E.2d at 605.

occurred. This is unusual because the more common disciplinary case involving conduct disruptive of a tribunal is rife with personal attacks, profanity, invective, and, occasionally, physical assaults.⁷⁴

In any event, this kind of conduct is always ill-advised and will, eventually, return to haunt the actor. The Comment to Rule 3.5 provides, perhaps, the best guidance for courtroom conduct: "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence and theatrics."⁷⁵

74. See *In re Crumpacker*, 383 N.E.2d 36 (Ind. 1978) and the cases cited therein for examples of more typical conduct in these cases.

75. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.5 (West 1992).