

# SURVEY OF 1993 DEVELOPMENTS IN THE INDIANA LAW OF PROFESSIONAL RESPONSIBILITY

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## INTRODUCTION

The Indiana Supreme Court dealt with numerous aspects of the law of professional responsibility in a variety of ways during the past year. At least six areas merit comment: (1) evidence of mitigation in disciplinary cases; (2) summary suspensions from the practice of law; (3) imputing law firm status on lawyers practicing in "space sharing" arrangements; (4) suspension from practice as a form of discovery sanction; (5) *ex parte* communications with a "tribunal"; and (6) attempting to limit a lawyer's liability to a client he or she has wronged.

The Court was repeatedly called upon to weigh the needs of the profession against the need to protect the public. In each case, the paramount concern was for the clients or potential clients of the lawyer. To promote that end, new rules exist to guide the Bar at large with regard to the conduct expected from lawyers.

## I. MITIGATION REPRISE

As illustrated in the 1992 survey article on professional responsibility,<sup>1</sup> the existence of facts in mitigation can be an important tool for the lawyer facing disciplinary action. Given the diverse nature of these facts, no work could catalog a comprehensive list. By way of example, the more obvious factors include a lack of prior disciplinary action or inexperience in the practice of law.<sup>2</sup> It should be

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1. Charles M. Kidd, *Survey of 1992 Developments in the Indiana Law of Professional Responsibility*, 26 IND. L. REV. 1097 (1993).

2. For a short list of common factors which may be considered in mitigation, see AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32 (1991). This list states:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify the consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;

equally obvious that compelling and unusual facts in mitigation could also have a bearing on the prosecution of the lawyer's disciplinary action. Two such cases were decided by the Court during 1993. *In re Kristoff*<sup>3</sup> and *In re Transki*<sup>4</sup> both revolved around the lawyers' commission of crimes and involve facts in mitigation which the Court determined to be of some significance.

In *Kristoff*, the lawyer was retained by a homeowners' association to file liens against properties where the owners had failed to pay dues to the association. During 1988 and 1989, he accepted payments on the liens and did not turn them over to the client association. During the same period of time, the association received a "Certificate of Administrative Dissolution" from the Office of the Secretary of State because of the lawyer's failure to file an annual report. The association thereafter terminated its professional relationship with the lawyer. He did not, however, return the files on the outstanding liens. Instead, he continued to receive judgments that he did not forward to the client. The lawyer was ultimately charged with, and pleaded guilty to, one count of Theft, a Class D Felony. The trial court sentenced him to two years' imprisonment (which was suspended) and two years' probation.<sup>5</sup> The respondent lawyer successfully completed all the terms of the criminal sentence.<sup>6</sup>

During the pendency of the disciplinary case, the lawyer made full restitution to the client. This is an important, but not all-powerful, mitigating fact.<sup>7</sup> In *Kristoff*, restitution played a role in determining the severity of the sanction, but not in determining culpability for the underlying misconduct.<sup>8</sup>

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- (h) physical or mental disability or impairment;
  - (i) delay in disciplinary proceedings;
  - (j) interim rehabilitation;
  - (k) imposition of other penalties or sanctions;
  - (l) remorse;
  - (m) remoteness of prior offenses.

3. 611 N.E.2d 116 (Ind. 1993).

4. 620 N.E.2d 16 (Ind. 1993).

5. *Kristoff*, 611 N.E.2d at 117.

6. *Id.* at 117-18.

7. Restitution of converted client funds has traditionally been a difficult question in disciplinary cases. There are, in essence, two competing theories on this subject. On one side, courts believe that restitution diverts the focus of the disciplinary proceeding from its true point of regulating the bar and protecting the public. Under this view, restitution is not addressed to allow the lawyer and client to deal with any disputed funds in the regular course of litigation or mediation. The alternative view on restitution holds that the disciplinary process is a good place to deal with the question. The disciplinary process provides the greatest leverage available by which the lawyer can be forced to disgorge unearned client funds. For discussion of this subject of considerable length, see Patricia Jean Lamkin, Annotation, *Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding Against Attorney*, 75 A.L.R.3d 307, 310-14 (1977).

8. 611 N.E.2d at 118. Restitution must be voluntary to be used as an effective fact in mitigation. Forced or compelled restitution is neither an aggravating nor a mitigating fact. See AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.4(a) (1991). The logic behind this position is that the lawyer

The lawyer's abuse of alcohol, however, presented the court with an opportunity to announce its view on the proper role of this type of conduct in disciplinary cases. It is not surprising that the lawyer's chemical dependency created a variety of devastating personal and professional problems, including the acts calling him to the court's attention in the first place. For this discussion on mitigation, however, the most salient feature of the case was the court's exploration of the effect of his attempted recovery:

In January 1990, he voluntarily entered an alcohol treatment program at Methodist Hospital in Merrillville, Indiana. He has maintained sobriety since his release from the hospital and has fully complied with the hospital's outpatient program. The hearing officer was convinced that Respondent was aware of the need to continue outpatient therapy indefinitely. The Respondent has become active in the Fifth Street Club for substance abusers. He is on the club's board of directors and serves as its vice president. Also, he has joined the Porter County Coalition for a Drug Free Indiana and is active in the organization. The Respondent has made complete restitution. We are further mindful of the hearing officer's observation that Respondent's dissipation may have been averted if a lawyers assistance program had been available at the time.<sup>9</sup>

The court then suspended the lawyer for one year and required, as a condition precedent to reinstatement, that he demonstrate his continuing alcohol-free status.<sup>10</sup>

This view comports with the general consensus among states that chemical dependency, per se, is not a mitigating factor. The mitigating effect of chemical dependency comes from the lawyer's success at recovery.<sup>11</sup> It occurs over a number of levels with basic recovery being the lowest tier. The effect is even stronger when the lawyer has attempted to correct the damage done to the client. The mitigating effect of recovery is strongest when the lawyer assumes, as in *Kristoff*, a leadership role in making treatment available to others who are impaired.<sup>12</sup> Finally, the period of sobriety for the lawyer can also affect the determination of the appropriate sanction.<sup>13</sup>

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may have valid claims or defenses regarding all or part of the money. If so, the lawyer should be allowed to assert those positions in a court. *See In re Ackerman*, 330 N.E.2d 322, 324 (Ind. 1975).

9. 611 N.E.2d at 117-18.

10. *Id.*

11. E.g. *People v. Luxford*, 626 P.2d 675, 677 (Colo. 1981); *In re Strickland*, 436 A.2d 1337, 1339 (N.J. 1981); *In re Leardo*, 805 P.2d 948, 955 (Cal. 1991).

12. *See* 611 N.E.2d at 117-18. *See also* *Florida Bar v. Farbstein*, 570 So.2d 933, 935 (Fla. 1990).

13. *See In re Driscoll*, 423 N.E.2d 873, 874 (Ill. 1981).

In another unusual scenario, the Indiana Supreme Court found that the sanction for a lawyer's misconduct should be mitigated because of the physical disability of a family member. In *In re Transki*,<sup>14</sup> the lawyer pleaded guilty to one felony charge of filing a false income tax return in violation of federal law.<sup>15</sup> His sentence in the U.S. District Court of two years' imprisonment was suspended.<sup>16</sup> The court then placed him on probation.<sup>17</sup> Although he was specifically charged with underpaying his tax liability by about \$31,000, he repaid the government \$260,000 in taxes, interest and penalties.<sup>18</sup>

By way of mitigation, the Supreme Court found that no client funds had been misused and that personal monetary gain was not a factor in the underlying misconduct. The respondent lawyer's criminal charges grew out of an attempt to establish an informal trust for his daughter who was entering the final stages of a terminal case of juvenile diabetes.<sup>19</sup> The Internal Revenue Service subsequently recharacterized the trust as belonging to the lawyer. Those monies accounted for his under-reporting of his tax liability. The court found it significant that:

He spent much of his time and energy, and substantial sums, in an effort to save his daughter's life. No client or professional trust was ever betrayed through Respondent's criminal misconduct. Respondent has shown genuine remorse for his offense and made no effort to transfer blame. He fully complied with the terms of his probation. . . . Thus, we are convinced that the acts leading to Respondent's conviction are an unfortunate aberration in an otherwise exemplary legal career.<sup>20</sup>

The Court then suspended the lawyer from practice for ninety days.<sup>21</sup>

Although the facts in *Transki* are relatively uncommon, they address a theme in many disciplinary cases: Influences outside of the lawyer's role as a professional sometimes bear on professional misconduct charges that follow. The background of *Transki* differs from other cases in that the common situation involves some personal emotional or physical problem which affects the lawyer personally.<sup>22</sup> These cases generally take one of two forms. In the first, the

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14. 620 N.E.2d 16 (Ind. 1993).

15. *Id.* at 16; see 26 U.S.C. § 7206(1).

16. 620 N.E.2d at 16.

17. *Id.*

18. *Id.*

19. *Id.* at 17.

20. *Id.* (footnote omitted).

21. *Id.*

22. See *In re Clanin*, 619 N.E.2d 269 (Ind. 1993). In that case, the lawyer's health problems were the reason behind his unauthorized removal of funds from an estate. The problems did not prevent him from practicing law or affect his mental abilities in any significant fashion. Other mitigating factors included a long and productive career as an attorney in his

lawyer's problems are severe, but do not affect the lawyer's ability to practice.<sup>23</sup> In the second, the problems are of such a profound nature that the lawyer cannot continue to practice.<sup>24</sup> *Transki* presents a very rare circumstance where a problem directly involving a third person, rather than the attorney, can serve as the basis for mitigating the sanction in a disciplinary case.

## II. SUMMARY SUSPENSION FROM PRACTICE

By amendment to the Indiana Rules for Admission to the Bar and Discipline of Attorneys, effective May 25, 1993, a new mechanism was created whereby a lawyer can be suspended almost immediately after receiving a felony conviction. This change was amended into the rule governing procedure in disciplinary cases.<sup>25</sup> In essence, the new rule requires the Executive Secretary of the Disciplinary Commission to provide the Supreme Court with certified copies of the conviction as soon as it is available.<sup>26</sup> Those copies are then

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community. He received a one year suspension from practice.

23. See, e.g., *In re Cawley*, 602 N.E.2d 1022 (Ind. 1992). In that case, the attorney was "experiencing financial difficulties in the office compounded by domestic problems." *Id.* at 1023. The attorney was retained for an estate matter by co-personal representatives whom he had known since childhood. He withdrew \$12,000 from the estate, and attempted but failed to notify one of the co-representatives about the withdrawal. When confronted, the attorney repaid with interest and recognized the severity of his misconduct. The attorney received a six-month suspension.

24. See, e.g., *In re Stove-Pock*, 604 N.E.2d 606 (Ind. 1992). In that case, the lawyer's serious medical condition led to her addiction to prescription pain killers. She was subsequently convicted of forgery, and of obtaining a controlled substance by fraud or deceit. Although the lawyer entered a treatment program after her arrest and remained drug-free, the court found that her condition was so debilitating that it prevented her from practicing law. She received a three-year suspension from practice due to the particularly egregious circumstances in the underlying criminal case. See also *In re Barron*, 271 S.E.2d 474 (Ga. 1980).

25. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, §§ 10 & 11 (1993 Amendments).

26. The full text of the relevant portions of the amendment provides:

[§10](e) Upon receipt of information indicating that an attorney has been convicted of a crime punishable as a felony under the laws of any state or of the United States, the Executive Secretary shall verify the information, and, in addition to any other proceeding initiated pursuant to this Rule, shall file with the Supreme Court a Notice of Conviction and Request for Suspension, and shall forward notice to the attorney by certified mail.

[§11](a) Upon finding that an attorney has been convicted of a crime punishable as a felony, the Supreme Court may suspend such attorney from the practice of law pending further order of the Court or final determination of any resulting disciplinary proceeding.

(b) When it receives a Request for Suspension, the Court may issue an order suspending the attorney, and such suspension shall be effective thirty (30) days after the issuance of the order. Within twenty (20) days after the issuance of said order, the attorney may assert in writing any deficiency that establishes that the suspension may not properly be ordered.

forwarded to the court with a formal request for suspension and the court acts on the request in due course.

Suspension from practice is effective thirty days after an order regarding the convicted lawyer is issued. If the lawyer does not believe the suspension is proper, he or she is entitled to offer a written submission to the court within twenty days of the issuance of the order.<sup>27</sup> This mechanism allows the court to consider factors beyond those covered in the conviction before actually depriving the lawyer of his or her license. A summary suspension remains in effect until further order of the court.<sup>28</sup> The new suspension mechanism provides for almost immediate protection for the public where a lawyer is convicted of a crime.<sup>29</sup> This prophylactic effect prevents lawyers convicted of felonies from undertaking new matters or continuing to represent clients while facing possible imprisonment.

The new mechanism supplements one already provided in the rule.<sup>30</sup> Under that method, the Commission usually files a Motion for Suspension Pending Prosecution simultaneously with the filing of the Verified Complaint for Disciplinary Action. The primary distinction between the two methods is that the Motion to Suspend Pending Prosecution is analogous to a request for a temporary injunction. There are essentially three steps to suspending a lawyer under this motion. First, there is an evidentiary hearing before a hearing officer, which can take a considerable amount of time. Second, the hearing officer then reduces his or her findings and recommendations to a writing that is submitted to the court. Finally, the court decides whether the findings support a suspension *pendente lite* and when it should become effective.<sup>31</sup> Pursuing a suspension using this method can be time consuming, but it does provide for the maximum due process for the respondent lawyer. Use of this mechanism also requires one or both sides to present all or part of its case-in-chief before the final hearing on the merits of the disciplinary action.

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(c) The judge of any court in this state in which a lawyer is convicted of a crime shall, within ten (10) days after the conviction, transmit a certified copy of the judgment of conviction to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

27. *Id.* § 11(b).

28. *Id.* § 11(a).

29. *See, e.g., In re Dunnuck*, 615 N.E.2d 431 (Ind. 1993).

30. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 11(f) (1993) provides:

(f) If [after the Commission authorizes the filing of a disciplinary Complaint against the lawyer], the Commission determines that there is reasonable cause to believe respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall include a motion to that effect in the aforesaid report to this Court, and this Court shall so advise the hearing officer or officers.

31. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 14(g) (1993).

The court's use of the language ". . . a crime punishable as a felony" in section 10(e)<sup>32</sup> suggests that a convicted lawyer would also face summary suspension where the nature of the conviction is such that the lawyer would be eligible for Alternative Misdemeanor Sentencing under the Indiana Criminal Code.<sup>33</sup> Under that law, a person convicted of a felony can, in some circumstances, receive a misdemeanor sentence. The result, with respect to the new summary suspension mechanism, is that in determining whether the lawyer should be suspended from practice pending a disciplinary case based upon the criminal conduct, the conviction of a felony, not the sentence imposed by the trial court, controls.

### III. TRUEBLOOD: SUSPENSION AS DISCOVERY SANCTION

#### A. Background

In June 1993, the Indiana Supreme Court adopted a hearing officer's findings of fact and recommendation that attorney Karen S. Trueblood be suspended from practice until she complied with the hearing officer's orders compelling discovery.<sup>34</sup> The suspension of an attorney's license to practice law as a discovery sanction is unprecedented in the State of Indiana and may represent the first suspension of its kind to be issued by any state supreme court.

In *In re Trueblood*, the Disciplinary Commission filed a verified complaint against Trueblood, alleging several acts of misconduct. Prior to filing a verified complaint, the Commission subpoenaed information from the Respondent pursuant to the provisions of section nine of Indiana Rules for Admission to the Bar and the Discipline of Attorneys.<sup>35</sup> The Respondent failed to comply with the Commission subpoena and the Commission later sought the information through the use of conventional discovery methods available under section fourteen of Admission and Discipline Rule 23 and the Rules of Trial Procedure.<sup>36</sup>

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32. For the text of INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 10(e) (1993), see *supra* note 26.

33. See IND. CODE § 35-50-2-7(b) (1990).

34. *In re Trueblood*, 616 N.E.2d 8 (Ind. 1993).

35. The text of § 9 provides in pertinent part: "In addition to the powers and duties set forth in this Rule, the Executive Secretary shall have the power and duty to: . . . (f) issue subpoenas in the name of the Commission, including subpoenas duces tecum. The failure to obey such a subpoena shall be punished as a contempt of this Court." INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 9(f) (1993).

36. Section 14(b) provides, in pertinent part:

Either the Executive Secretary or the respondent may file with the hearing officer a motion to take depositions or a motion to produce certain documents or records, setting forth the reasons why such depositions should be taken or such records should be produced. The hearing officer may permit the taking of such depositions or may require the production of documents or records under such terms and conditions as he

Upon Trueblood's failure to comply, the hearing officer issued a Recommended Order of Sanction, recommending that the appropriate sanction for the Respondent's contempt be an order from the Indiana Supreme Court that Trueblood be suspended from the practice of law until she complied with the Commission's outstanding discovery requests. Accordingly, on June 18, 1993, the Indiana Supreme Court suspended Trueblood from practice pending compliance with the discovery order issued by the hearing officer.

### B. Authority

Admission and Discipline Rule 23, section 11(f) allows a prehearing suspension where the Commission determines that there is reasonable cause to believe that the Respondent committed the misconduct alleged and such misconduct would warrant suspension.<sup>37</sup> However, this provision was not applicable in *Trueblood*: the suspension was based solely on her failure to comply with discovery orders issued by the hearing officer, and had no basis in the underlying misconduct with which Trueblood was charged. Thus, the provisions of Rule 23, section 11(f) could not be used by the hearing officer as a basis for the recommendation to suspend Trueblood for her failure to provide discovery. Prior to filing its verified complaint, the Disciplinary Commission proceeded under the authority granted to it in Admission and Discipline Rule 23, section 9(f). This rule provides that the Executive Secretary of the Disciplinary Commission has the power to issue subpoenas duces tecum, and that failure to comply is punishable as contempt of the Supreme Court.<sup>38</sup>

However, rather than seeking sanctions under this rule, the Commission chose to seek discovery via the authority granted to the hearing officer in sections 13(d) and 14(b) of Admission and Discipline Rule 23 after a verified complaint had been filed.<sup>39</sup> Section 13(d) provides that hearing officers are authorized to take the necessary steps to fulfill their responsibilities. Section 14(b) provides that hearing officers may exercise their discretion in requiring the production of documents, but that the terms and conditions they impose shall follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings as closely as possible. Trial Rule 37(B)(2) provides that a trial court may take

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may deem proper. Such terms and conditions shall, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings.

INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 14(b) (1993). See IND. R. TRIAL P. 26-37 (Burns 1993).

37. For the text of § 11(f), see *supra* note 30.

38. See *supra* note 35.

39. The text of § 13 provides, in pertinent part: "In addition to the powers and duties set forth in the rule, hearing officers shall have the power and duty to: . . . (d) do all things necessary and proper to carry out their responsibilities under this rule." INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 13(d) (1993). For the text of § 14(b), see *supra* note 36.

any action that is just to address a party's failure to comply with a discovery order, including imposing expenses and attorney's fees. This rule governs sanctions when an attorney fails to provide discovery under the Indiana Rules of Civil Procedure.<sup>40</sup>

Admission and Discipline Rule 23, Section 14(b)<sup>41</sup> directs the hearing officer to follow as closely as possible Trial Rule 37(B)(2) ("the Trial Rule"), but does not limit the hearing officer to its provisions. Although it serves as a useful guideline for discerning which discovery sanctions are available to the hearing officer, the Trial Rule's provisions were not altogether applicable in *Trueblood*. In this instance, the Disciplinary Commission was seeking information that could only be supplied by Trueblood herself. Thus, any remedy for her failure to comply must address and seek to rectify her failure to provide that information. The provisions of the Trial Rule cannot accomplish that task. Although they are the most commonly used sanctions, since they generally rectify failure to provide discovery during the pendency of a case, a judge is not limited to them. Professor Harvey has commented that:

Rule 37 is designed to protect and enforce discovery as the principal means of ascertaining information about a trial or litigation. Its sanctions may be invoked when the conduct of a party or person is not

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40. IND. R. TRIAL P. 37(B)(2) provides, in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination under Rule 35;
- (e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

41. For the text of the rule, see *supra* note 36.

frivolous, or unreasonable, or groundless, but is careless or negligent, or inattentive, or disrespectful, or disobedient, or many other possible conditions, as well as when conduct is frivolous or unreasonable or groundless.<sup>42</sup>

The provisions of the Trial Rule were not adequate in *Trueblood* because of the Disciplinary Commission's unique position in requesting otherwise confidential information, and because of the possible harm Trueblood's conduct posed to members of the public. Remedies suggested in the Trial Rule include monetary sanctions, a bench warrant for the Respondent's arrest, or an order declaring either that certain facts be deemed admitted or prohibiting the Respondent from asserting certain claims or defenses. None of these provisions would have provided the information the Commission sought. In this case, the only way for the Respondent to purge the contempt was to provide the materials as ordered. Since the Trial Rule's usual remedies were not adequate, the hearing officer recommended suspension as the sanction best calculated to impress upon the Respondent the seriousness of the matter and the extent of her duty as an officer of the court to cooperate in disciplinary proceedings. Although Trueblood's suspension as a discovery sanction in the disciplinary matter is unusual, it is within the court's discretion under the Trial Rule.

### C. *Applicability to Disciplinary Proceedings Generally*

In *Trueblood*, the hearing officer recommended that the Respondent be suspended from the practice of law for failing to comply with the order that she respond to the Disciplinary Commission's discovery requests. The fact that the Indiana Supreme Court followed the recommendation may lead to speculation about whether such a practice will become a matter of course in disciplinary matters where a Respondent fails to comply with the discovery requests of the Disciplinary Commission.

The Indiana Supreme Court has addressed the issue of the Disciplinary Commission's use of its authority to charge misconduct as a result of a Respondent's failure to provide requested information. In *In re Koryl*<sup>43</sup> and *In re Duffy*,<sup>44</sup> the Supreme Court determined that a Respondent is under no obligation to answer a complaint filed by the Commission. The Commission may seek, like any civil litigant, to gather information through the discovery process.<sup>45</sup>

*Trueblood* extends *Koryl* and *Duffy* to situations where the Respondent fails to comply with the Commission's attempts to gather information through the discovery process. It is understood that the Commission cannot force a party to

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42. WILLIAM F. HARVEY, INDIANA PRACTICE: RULES OF PROCEDURE ANNOTATED § 37.4, at 74-75 (1988).

43. 481 N.E.2d 393 (Ind. 1985).

44. 482 N.E.2d 1137 (Ind. 1985).

45. *In re Koryl*, 481 N.E.2d at 394; *In re Duffy*, 482 N.E.2d at 1138.

respond to a complaint. However, where traditional discovery procedures cannot rectify the Respondent's failure to comply, then under the provisions of *Trueblood*, the Disciplinary Commission may seek extraordinary sanctions through the hearing officer and the Supreme Court. *Trueblood* is unique not only because the sanctions were sought after the verified complaint was filed and the discovery process begun, but also because the Respondent was suspended for failure to comply with the hearing officer's order to comply, not the Commission's request for information.

*Trueblood* is not limited to its facts, but the circumstances of *Trueblood*'s suspension indicate the types of disciplinary cases in which such a suspension is appropriate. *Trueblood* will not apply to every disciplinary matter in which the Respondent refuses a Commission discovery request. Rather, the case sets precedent where the Commission seeks knowledge via formal discovery that only the Respondent can supply. The Disciplinary Commission is in a unique position in that it is permitted access to information that is not readily attainable by other investigative agencies. The Disciplinary Commission must be allowed access to such information in order to effectively investigate allegations of attorney misconduct. In many situations, the Commission investigates allegations of attorney misconduct by first seeking basic background information about a Respondent and their law practice. Often, the Respondent is the only source from which the Commission can obtain such information. *Trueblood* would have no effect on cases wherein the Commission seeks information attainable from the Respondent as well as other sources. In such cases, the Respondent may still be held in contempt for failure to comply with an order of the hearing officer, but suspension may not be the most appropriate remedy for that failure.

#### *D. Applicability to Other Types of Legal Proceedings*

Although *Trueblood* may be applicable to disciplinary proceedings, the question remains whether *Trueblood* is applicable to other types of legal proceedings. Under Article 7, section 4 of the Indiana Constitution, the Indiana Supreme Court is vested with the exclusive authority to admit and discipline attorneys of the Indiana Bar.<sup>46</sup> In 1979, the court decided whether a trial judge

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46. IND. CONST. art. 7, § 4 provides:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

could implement the type of sanction recommended in *Trueblood*.<sup>47</sup> In *McQueen*, the Indiana Supreme Court determined that although trial courts hold broad power to punish attorney misconduct, trial judges have no power to suspend attorneys from the practice of law in their courts.<sup>48</sup>

A. Vance McQueen, an attorney admitted in Indiana, was representing a criminal defendant in the Shelby Superior Court. McQueen filed a post-trial motion for change of judge for sentencing based upon comments made by the trial judge which McQueen considered prejudicial. After a hearing on the motion, the trial judge ruled that McQueen had intentionally misrepresented the court's remarks, and suspended McQueen from the practice of law in the Shelby Superior Court for ninety days.<sup>49</sup>

McQueen appealed after the trial court denied a "Verified Motion to Vacate Finding and Judgment," challenging the jurisdiction of the trial court to suspend him. The Indiana Supreme Court heard the appeal because it has jurisdiction over all appeals involving the discipline of attorneys.<sup>50</sup> The Supreme Court held that, without question, ". . . a trial judge can protect his court against insult and gross violations of decorum by the infliction of summary punishment by fine, imprisonment or both via a contempt citation."<sup>51</sup> The court also tracked the history of attorney disciplinary proceedings, noting that at one time the power to admit and suspend attorneys was placed in any court of record.<sup>52</sup> In 1931, Indiana law was changed and the exclusive authority to admit attorneys to the practice of law was placed in the Indiana Supreme Court.<sup>53</sup> In 1967, the Rules of the Indiana Supreme Court were amended to provide that the exclusive jurisdiction of actions to disbar, suspend or discipline attorneys would lie with the Supreme Court.<sup>54</sup> At that point the power of circuit and superior courts to suspend attorneys was abolished and vested only in the Indiana Supreme Court.<sup>55</sup>

The court concluded that the Shelby Superior Court's suspension of McQueen was an *ultra vires* act under the terms of Article 7, section 4 of the Indiana Constitution.<sup>56</sup> The court went on to note that the discretion to suspend attorneys invites abuse, and that such suspensions scattered throughout the legal

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47. *In re McQueen*, 396 N.E.2d 903 (Ind. 1979).

48. *Id.* at 904-05.

49. *Id.* at 903.

50. *Id.* at 904 (citing IND. R. APP. P. 4(A)(2)).

51. *Id.* (citing IND. CODE § 34-4-7-1 and 6 (Burns 1973) and *Ex Parte Smith*, 28 Ind. 47 (Ind. 1867)).

52. *In re McQueen*, 396 N.E.2d 903, 904 (Ind. 1979) (citing 2 GAVIN & HORD'S INDIANA STATUTES § DCCLXXVII, p. 329 (1870)).

53. *Id.* (citing IND. CODE ANN. § 4-3605 (Burns. 1933)).

54. *Id.* at 905 (citing RULES OF THE INDIANA SUPREME COURT, Rule 3-21 (1967)).

55. *Id.*

56. *Id.* at 906.

system as punishment for attorneys' contempt of court would serve neither the system nor the clients deprived of counsel.<sup>57</sup>

Even if the Indiana Supreme Court had not determined that circuit and superior courts do not have the power to suspend attorneys from the practice of law in their respective courts, the question is easily resolved. A hearing officer has authority that simply is not vested in a trial court judge. In the 1988 decision in *In re Cook*, the Indiana Supreme Court determined that in a disciplinary proceeding a hearing officer has discretion in discovery issues and the authority to do all things necessary and proper to carry out assigned responsibilities under the Disciplinary Rules, including enforcement of orders and directives.<sup>58</sup> In *Cook*, the Respondent contested the hearing officer's findings of misconduct, stating that he was denied due process because of actions taken by the hearing officer. The Supreme Court determined that the Respondent's right to due process was not violated by the hearing officer's actions in the disciplinary proceedings.<sup>59</sup> The court held that the hearing officer complied with the provisions outlined in Admission and Discipline Rule 23, and that the hearing officer's power includes the right to cite participants for contempt.<sup>60</sup>

Although hearing officers derive the authority to carry out their duties directly from the Supreme Court, they still cannot suspend or disbar an attorney from the practice of law. In disciplinary proceedings, the court is the ultimate fact-finder.<sup>61</sup> The court examines the findings presented by the hearing officer, which receive emphasis and attach credibility, but are not binding.<sup>62</sup> As in *Trueblood*, the hearing officer, unlike a trial judge, can find an attorney in contempt, make findings on the circumstances leading up to the contempt citation, and recommend an appropriate sanction to the court. The ultimate decision, however, is the nondelegable duty of the Indiana Supreme Court.

In a disciplinary proceeding, a hearing officer is appointed by and derives authority from the Indiana Supreme Court.<sup>63</sup> The Indiana Supreme Court in turn receives its authority regarding disciplinary proceedings from the Indiana Constitution.<sup>64</sup> Although a trial court, also receives its authority from the Indiana Constitution, it is not delegated the power to prohibit an attorney from

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57. *In re McQueen*, 396 N.E.2d 903, 904 (Ind. 1979).

58. *In re Cook*, 526 N.E.2d 703, 705 (Ind. 1988).

59. *Id.*

60. *Id.* at 705-06 (citing INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, §§ 13, 14(b) (1993)).

61. *Id.* at 706; *see also In re Allen*, 470 N.E.2d 1312, 1315 (Ind. 1984).

62. *In re Cook*, 526 N.E.2d 703, 706 (Ind. 1988).

63. *See* INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23 (1993).

64. *See* IND. CONST. art. 7, § 4.

practicing before that court.<sup>65</sup> Therefore, the effects of *Trueblood* do not apply to legal proceedings in general, but only to disciplinary proceedings specifically.

#### IV. SEXSON: WHEN DOES SPACE SHARING BECOME A LAW FIRM?

##### A. Facts

During 1993, the Indiana Supreme Court addressed the issue of attorney space sharing, and whether, under certain circumstances, such an arrangement can constitute a "law firm" under the provisions of Rule 1.10(a) of the Rules of Professional Conduct. In *In re Sexson*,<sup>66</sup> Sexson maintained law offices with five other attorneys, one of whom was named Thompson. The attorneys used common letterhead, and shared office space, a secretary, and three telephone lines. The individual offices were left open and accessible to the other attorneys in the office, and client file cabinets were observable from a common hallway. In addition, conversations in the individual offices could be heard from this common hallway.

In 1987, Thompson was retained to represent a couple ("the Zimmermans") in a personal injury suit in which they were the plaintiffs. In early 1991, Mr. Zimmerman filed for dissolution of marriage and hired an attorney outside the offices of Sexson ("the Respondent") and Thompson. Mrs. Zimmerman employed the Respondent to represent her in the dissolution proceedings. In March 1991, the Respondent appeared for Mrs. Zimmerman and filed a cross-petition for dissolution of marriage. On July 15, 1991, Thompson settled the Zimmerman's personal injury case. On July 18, 1991, the Respondent filed for and received an order restraining Mr. Zimmerman from negotiating his settlement check. The next day, Mr. Zimmerman called to set up a time to pick up his settlement check. Upon arriving at the law office approximately one hour later, he was met by the Respondent and served with the restraining order.

The Respondent was charged with violating Rules 1.7(a) and 1.10(a) of the Rules of Professional Conduct.<sup>67</sup> The Supreme Court determined that the Respondent had engaged in misconduct, and the facts represented only a single

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65. See IND. CONST. art. 7, § 8; IND. CONST. art. 7, § 1; see also *Kostas v. Johnson*, 69 N.E.2d 592 (Ind. 1946).

66. 613 N.E.2d 841 (Ind. 1993).

67. *Id.* at 842-43. Rule 1.7(a) provided: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.7(a) (1987)

Rule 1.10(a) provided: "While lawyers are associated in a firm, none of them shall represent a client if he knows or should know in the exercise of reasonable care and diligence that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a) (1987).

instance of misconduct, and therefore a public reprimand was the appropriate sanction.<sup>68</sup>

The Court found that the Respondent had represented only Mrs. Zimmerman. In order to find misconduct by the Respondent, the Court first had to decide whether Thompson was disqualified from representing Mrs. Zimmerman and whether the disqualification could be imputed to the Respondent.<sup>69</sup>

The Court went on to determine that under Rule 1.7(a), Thompson could not have represented Mrs. Zimmerman if such representation would have been adverse to Mr. Zimmerman. In 1984, the Indiana Supreme Court held in *In re Colestock* that the representation of one spouse in a divorce and the joint representation of both marital parties in other legal proceedings can amount to representation of adverse interests.<sup>70</sup> The court further found that in *Sexson*, Thompson had already been representing the Zimmermans in the personal injury case when the dissolution proceedings were filed. Because Mrs. Zimmerman's interests were adverse to those of Mr. Zimmerman in the dissolution, Thompson could not represent Mrs. Zimmerman in the dissolution, and represent both Zimmermans in the other proceeding.<sup>71</sup>

The court then addressed the issue of whether Thompson's disqualification could be imputed to the Respondent, stating that the central issue was whether the space sharing arrangement between Sexson, Thompson and the other attorneys fell within the meaning of the term "firm" as defined under the provisions of Rule 1.10(a) of the Rules of Professional Conduct.<sup>72</sup> The court looked to the commentary in Rule 1.10(a) in arriving at its decision:

[T]he definition of 'firm' is a question of fact. In such analysis, it is crucial to look at the level of association, the appearance of the association to the public, any specific agreements, access to confidential information, and the purpose of the rule. But in the end, as stated in this comment, if attorneys 'present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules'.<sup>73</sup>

In light of that commentary, the court found that the arrangement fit within the definition of a firm, thus imputing Thompson's disqualification to the Respondent, and causing the Respondent to engage in conflicting representation.<sup>74</sup> The use of common letterhead and telephone lines, the apparent access

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68. 613 N.E.2d at 843.

69. *Id.* at 842.

70. *Id.* at 842.

71. *Id.* at 843.

72. *In re Sexson*, 613 N.E.2d 841 (citing INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a) and cmt. (1987); *see supra* note 67).

73. 613 N.E.2d at 843 (quoting RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. (1992)).

74. 613 N.E.2d at 843.

to each other's confidential information, and the shared office personnel all combined to convey the impression to the general public that the attorneys were a firm.<sup>75</sup> The court relied on a reasonableness standard, where a space sharing arrangement is viewed from the client's perspective in ultimately determining whether a firm exists. The court held that it was reasonable for Mr. Zimmerman, when confronted by the Respondent with a restraining order prohibiting him from negotiating his settlement check, to conclude that Sexson, Thompson and the other attorneys were a "firm", and that the Respondent had engaged in adverse representation.<sup>76</sup>

### B. Analysis

*Sexson* provided the Indiana Supreme Court with its first opportunity to comment upon the common practice of space sharing by attorneys. As stated in a 1985 Legal Ethics Committee Opinion, the economics of private practice often require otherwise unassociated attorneys to share office space. However, the essential fact remains that a client's right to discreet and confidential dealings with their attorney must be protected.<sup>77</sup> *Sexson* warns attorneys representing opposing interests that imputed firm status can be imposed on attorneys who do not protect their clients' rights to confidential communications.

In enumerating factors which contribute to imputed firm status, the court specifically adopted those listed in the commentary to Rule 1.10(a): the appearance of association to the public; the existence of any specific agreements; attorneys' access to each other's confidential information; the policy behind the rule; and, most significantly, whether the manner in which attorneys present themselves to the public suggests that they are a firm.<sup>78</sup> Thus, according to *Sexson*, if an attorney enters into a space sharing arrangement, a good question to ask prior to undertaking potentially adverse representation is whether it would be reasonable for that client to assume, based upon the appearance and practices of the attorneys, that the attorneys are a firm rather than a group of attorneys sharing office space.<sup>79</sup> If there are no clear lines delineating that the attorneys each enjoy distinct law practices, firm status is likely to be imputed under *Sexson*.

*Sexson* puts attorneys engaged in space sharing arrangements on notice that the Supreme Court lends greater weight to the impression that such an arrangement conveys to clients than the attorneys' characterization of the relationship. While *Sexson* is one guideline for attorneys in space sharing situations who wish to avoid imputed firm status, the Legal Ethics Committee

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75. *Id.*

76. *Id.*

77. Indiana State Bar Association Legal Ethics Comm., Formal Op. 8 (1985).

78. 613 N.E.2d at 843. See *supra* notes 72-73 and accompanying text.

79. *Id.*

has also opined on other measures that should be taken to avoid the appearance of firm status.

Opinion 3-1973 discusses whether criminal defendants can be represented by attorneys sharing space with prosecuting attorneys and deputy prosecuting attorneys.<sup>80</sup> In the situation before the Committee, a prosecutor or deputy prosecutor shared an office with other lawyers, used common stationery, had a common sign on the door, and, in one of the situations, used a common telephone listing. The question presented to the Committee was whether one of the attorneys sharing space with the prosecutor or deputy prosecutor could represent a defendant in a criminal case provided that the prosecutor or deputy prosecutor was not involved in the case.<sup>81</sup>

The Committee rendered an opinion, stating that the most important consideration is whether the relationship of the attorneys is presented to the public in such a way that the public is led to believe that the attorneys are a law firm.<sup>82</sup> The Committee also pointed out that a lawyer has a duty not to misrepresent the lawyer's professional status by allowing clients to be misled into believing that the attorneys in that particular space sharing arrangement are associated in some way.<sup>83</sup> Use of common offices, letterhead, signs and telephone listings violates this duty.<sup>84</sup> The Committee recommended that, at a minimum, the following test should be applied when an attorney who shares space with a prosecutor or deputy prosecutor undertakes criminal representation:

- (1) There should be no sharing of liability, profits or responsibility;
- (2) Each attorney should use separate letterheads, cards and announcements containing his name only;
- (3) Each attorney should be listed separately in law lists and telephone directories;
- (4) Each attorney should have a separate office telephone number;
- (5) The building or office door should show no closer connection than 'Law Offices, Fred Doe, Arthur Smith.'<sup>85</sup>

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80. Indiana State Bar Association Legal Ethics Comm., Formal Op. 3 (1973).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Indiana State Bar Association Legal Ethics Comm., Formal Op. 3 (1973).

The Committee further stated that “[i]t must be accepted that the adherence to standards of professional responsibility will at times be inconvenient, and will at times, work to the financial disadvantage of lawyers.”<sup>86</sup>

The Committee extended their opinion in 3-1973 to all types of space sharing arrangements in Opinion 8-1985.<sup>87</sup> The question presented to the Committee in Opinion 8-1985 was whether attorneys who share office space may represent opposing litigants in the same case.<sup>88</sup> In Opinion 8-1985, although there was no formal association between them, three attorneys shared a building, a common lobby, a single telephone system, library and copying machine.<sup>89</sup> However, the attorneys maintained separate offices with entrances from the lobby or outside, separate secretaries, separate locked filing systems, and individual signs.<sup>90</sup>

The Committee observed that Opinion 8-1985 involved the same principles applied in Opinion 3-1973, and applied the same minimum test to the situation in Opinion 8-1985, stating that the chief concern was still whether the appearance of partnership or association was great enough to invoke the restrictions on representing adverse interests upon space sharers.<sup>91</sup> It determined that although the attorneys in Opinion 8-1985 met the minimum standards set in Opinion 3-1973, a concern regarding client confidentiality remained.<sup>92</sup> The Committee stated that in a space sharing arrangement where the attorneys share a building with common areas,

[T]he client will be conscious of the fact that his every visit to his attorney's office may be known to the opposing attorney. The arrival of witnesses or potential witnesses at his attorney's office may be known to the opposing attorney.

Phone messages and correspondence may be perceived to be accessible to the opponent's attorney or staff. Research projects in the library may be in view of the opponent's attorney or his staff. Material inadvertently left in the copier is accessible.<sup>93</sup>

Based on these concerns, the Committee determined that the attorneys practiced in a setting that gave the appearance to the public that client confidentiality was impaired, and that the mere appearance of such a breach was enough to diminish a client's confidence that his dealings with his attorney will remain carefully guarded.<sup>94</sup> The Committee suggested that the telephone system be changed so

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86. *Id.*

87. Indiana State Bar Association Legal Ethics Comm., Op. 8 (1985).

88. *Id.*

89. *Id.*

90. *Id.*

91. Indiana State Bar Association, Legal Ethics Comm., Op. 8 (1985).

92. *Id.*

93. *Id.*

94. *Id.*

that each attorney had access to only that attorney's personal system. The Committee also noted that the presence of one secretary's desk in the lobby created a situation where the clients of one attorney may overhear confidences meant only for the secretary or the secretary's respective employer.<sup>95</sup> The Committee went on to suggest that this arrangement be changed. The Committee also noted that while the situation did not violate any disciplinary rules, care must be taken to avoid leaving materials in the copy machine or library, and that if the attorneys were to undertake opposing representation, the clients involved should be told about the space sharing situation in order to make an informed decision about whether or not to continue the representation.<sup>96</sup>

The Ethics Committee Opinions along with the *Sexson* case outline prophylactic measures that attorneys in space sharing situations should implement to avoid being classified as a law firm. With the evolution of improved office procedures and electronic technology, attorneys must make every effort to recognize areas of concern and to correct them before allegations of misconduct arise. Three relatively recent technological advances—office computer systems, voice mail and fax machines—are possible problem areas. Computer filing systems accessible to all attorneys sharing space or those attorneys' staff members could certainly give the appearance that client confidentiality is not being properly preserved. The same is true when member attorneys share laptop computers, common computer programs or computer discs. Secondly, the widespread use of voice mail raises concern. The use of personal identification numbers within voice mail systems preserves a degree of confidentiality, but if other members of an office have access to an attorney's voice mail, then client confidentiality is at risk and imputed firm status is more likely. Shared fax machines are a third cause for concern. Considering the cost of an average fax machine and the fact that most attorneys enter into space sharing arrangements to economize on office and equipment costs, it may defeat the purpose of space sharing to require participating attorneys to maintain separate fax machines. However, fax machines in common areas invite breaches of client confidentiality. Extreme caution must be exercised to assure that only the intended recipient or an authorized staff member handle fax transmissions. Again, if a risk to client confidentiality is posed by the use of a common fax machine, and that risk cannot be eliminated via office procedures, then office economy may have to take a back seat to client consideration.

The practical aspects of maintaining a law office are rapidly changing. *Sexson* and the Ethics Committee Opinions articulate minimum standards for attorneys in space sharing arrangements for preserving client confidences and avoiding imputed firm status. However, each time a new piece of office equipment is purchased or a new office system or procedure is implemented,

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95. *Id.*

96. Indiana State Bar Association Legal Ethics Comm., Op. 8 (1985).

space sharing attorneys should ask themselves how their clients would perceive such an arrangement. Above all, space sharing attorneys should take precautions to assure their clients that when information is disclosed it will remain confidential.

## V. EX PARTE COMMUNICATION WITH A TRIBUNAL

Ex parte contact with a judge has long been prohibited in the law of professional responsibility.<sup>97</sup> At present, the practice is forbidden under Rule 3.5(b) of the Rules of Professional Conduct.<sup>98</sup> In general, the rule is intended to prevent the trial of a case outside of court and behind another party's back. In practice, however, the scope of the prohibition can be blurred by the proliferation of administrative tribunals and similar quasi-judicial bodies which affect the property rights of citizens.<sup>99</sup> The scope of the rule prohibiting ex parte contact was the subject of *In re LaCava*.<sup>100</sup>

In *LaCava*, the respondent lawyer represented the defendant podiatrist in an action brought under Indiana's Medical Malpractice Act ("the Act").<sup>101</sup> Under the Act, malpractice actions must first be presented to a Medical Review Panel before proceeding to a civil trial court.<sup>102</sup> In this case, the plaintiffs nominated a podiatrist ("the Podiatrist") to the Medical Review Panel who was, at the time, a client of the defense attorney in an unrelated medical malpractice action. In addition, the lawyer and Podiatrist were friends. Neither the professional nor personal relationship between the two men was ever disclosed to plaintiff's counsel or the chairman of the Medical Review Panel.

After both parties made their submissions to the Panel, the matter was taken under advisement by the physicians. On the day the panel's decision was mailed to the parties, the respondent lawyer learned from the panel chairman that the panel unanimously found against his client. The lawyer next called the Podiatrist

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97. It was prohibited under the former INDIANA CODE OF PROFESSIONAL RESPONSIBILITY to communicate, or cause another to communicate, with the judge in an adversarial proceeding without the consent or presence of the other party. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-110(b) (repealed 1986). There is a parallel proscription under the INDIANA CODE OF JUDICIAL CONDUCT Canon 3.B.8 (1993).

98. "A lawyer shall not: . . . (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law." RULES OF PROFESSIONAL CONDUCT RULE, Rule 3.5(b) (1992).

99. An unanswered issue involves the status of a mediator or someone serving in that role under the Alternative Dispute Resolution rules and whether contacts with them could be considered ex parte.

100. 615 N.E.2d 93 (Ind. 1993).

101. IND. CODE ANN. § 16-9.4 (West 1993) (current version at IND. CODE ANN. § 27-12).

102. See IND. CODE ANN. §§ 16-9.5-9-1 through 16-9.5-10-2 (West 1993) (current version at IND. CODE ANN. §§ 27-12-8-4, -12-10).

member of the panel and “berated and bombasted”<sup>103</sup> him regarding the Panel’s decision.

The next day, the Podiatrist member called the Panel chairman and announced that he had changed his mind about the defendant’s negligence. He did not, however, inform the Panel Chairman that he had spoken with the respondent lawyer. Subsequently, the other two members of the panel indicated that they had relied on the Podiatrist member of the panel in casting their votes and each, in turn, switched their opinions in favor of the defendant. Finally, the respondent lawyer withdrew from the case and the matter was submitted to a second Medical Review Panel.<sup>104</sup>

The Supreme Court, in its analysis, focused on the scope of the prohibition against *ex parte* communication. In particular, the Court examined the relationship between Rule 3.9 of the Rules of Professional Conduct and the prohibition against *ex parte* communication found in Rule 3.5. Rule 3.9 provides:

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.<sup>105</sup>

In addition, the Court reviewed the comment to the Rule which, in pertinent part, provides:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.<sup>106</sup>

This analysis led the court to overturn the hearing officer’s finding that no *ex parte* communication had occurred. The court stated unequivocally that the prohibition against *ex parte* contact should be given broad application:

The Hearing Officer, upon review of the commentary under Rule 3.9, concluded that in that the medical review panel was not a rulemaking or policy-making tribunal, the prohibition was not applicable. This Court does not so confine the operation of the rule.

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103. 615 N.E.2d at 94.

104. *Id.* at 95.

105. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.9 (1987).

106. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.9 cmt. (1987).

A medical review panel is an integral part of the adversary process in the medical malpractice arena. The statutory procedure of the panel anticipates adversarial representation. (IC 16-9.5-9-5) Thereafter, the decision of the panel is admissible as expert opinion in subsequent judicial proceedings. (IC 16-9.5-9-9) This being the case, the entire dispositional process requires the appearance of fairness in the attainment of the panel's decision. Accordingly, just as the participants of a malpractice judicial proceeding must be free from ex parte communications, expert opinion derived in the adversary administrative pre-trial process must result from a process with the same limitations. We find that the members of the malpractice panel are "officials" within the confines of this rule. . . . We also find it troubling that Respondent shows absolutely no remorse for his conduct. The simple fact is that, before a final decision was rendered, Respondent communicated ex parte with an individual impartially considering the acts of Respondent's client. Respondent has defended his actions on a technical, narrow application of the statute. We cannot accept this approach. The issues of fundamental decisional fairness in this case are too obvious to permit credence in the overly technical arguments offered by Respondent.<sup>107</sup>

*LaCava* presented a rare opportunity to examine the mandates of Rule 3.9. There was no truly parallel provision under the former Code of Professional Responsibility.<sup>108</sup> There was likewise no formal definition of a "tribunal" under prior law which encompassed the definition found in Rule 3.9 and the accompanying comment.<sup>109</sup> This Rule formally required an advocate to uphold the same ethical responsibilities in a wide variety of adversarial fora as the advocate would in any court. In fact, the rule currently adds one requirement: When representing a party in a "nonadjudicative" proceeding, the lawyer must make it known that the lawyer's presence is in a representative capacity.<sup>110</sup> It further mandates that the same duties of candor<sup>111</sup> and fairness in dealing with

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107. 615 N.E.2d 95-97.

108. The former INDIANA CODE OF PROFESSIONAL RESPONSIBILITY required that, "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 9-101(c) (repealed 1986). Other provisions under Canon 7 of the Code hinted at different features which were later codified under Rule 3.9 of the Rules of Professional Conduct. Nowhere in the Code, however, was an advocate's role explicitly dealt with when appearing before a non-adjudicative body.

109. The definition in the INDIANA CODE OF PROFESSIONAL RESPONSIBILITY simply included "all courts and all other adjudicatory bodies." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Definitions, 6 (repealed 1986).

110. See *supra* note 105 and accompanying text. See generally 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.9:101 (1990).

111. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.3 (1987).

opposing parties<sup>112</sup> that are expected of the lawyer when appearing in any court be maintained while working in a professional capacity in arenas not traditionally thought of as tribunals.<sup>113</sup>

## VI. LIMITATION OF PROFESSIONAL LIABILITY TO CLIENTS

The lawyer's ability to limit his or her malpractice liability to clients was one of the most notable changes between the former Code<sup>114</sup> and the current Rules.<sup>115</sup> Under the Code, the practice was forbidden.<sup>116</sup> Under the Rules, a proposed limitation of liability is treated much the same as any other situation in which the lawyer's personal interests are potentially at odds with the client's. The lawyer must advise the client in writing that the client should be independently represented by another lawyer when considering whether to allow the limitation.<sup>117</sup> In other words, the drafters of the Rules of Professional Conduct recognized that there might be situations in which the client could make an informed waiver of certain rights or remedies associated with a possible lawyer's future breach of the duty owed his clients.

This was the state of the law when the Court decided *In re Blackwelder*,<sup>118</sup> in which the clients, named Gosnell, hired the lawyer to pursue an appeal of a default judgment rendered against them. At the time the lawyer was retained, the Gosnell's had filed a *pro se* Motion to Correct Errors and the trial court had denied it. Although the lawyer timely filed a praecipe for the record, and received it, he miscalculated the filing date and missed a jurisdictional deadline for filing the appeal. This occurred about three months after their first meeting.

The lawyer then arranged another meeting with the Gosnells and presented them with a document entitled, "Retainer Agreement an (sic) Release of Claims and Covenant Not To Sue."<sup>119</sup> The lawyer proposed to reimburse the Gosnells for their out-of-pocket expenses associated with the appeal and file a bankruptcy petition on their behalf in exchange for the lawyer's release from liability. Under the agreement, the Gosnells would agree to forego filing both a

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112. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.4 (1987).

113. See *supra* note 105 and accompanying text.

114. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY (repealed 1986).

115. INDIANA RULES OF PROFESSIONAL CONDUCT (effective 1987).

116. The INDIANA CODE OF PROFESSIONAL RESPONSIBILITY simply provided, "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 6-102(A) (repealed 1986).

117. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.8(h) (1987) provides: A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

118. 615 N.E.2d 106 (Ind. 1993).

119. *Id.* at 107.

malpractice suit and grievance with the Disciplinary Commission. The proposed agreement recited:

Attorney also recommended that the Clients take sufficient time to thoroughly consider the offer and to seek the advice of another attorney(s) before making a final decision; and Whereas, Clients have considered the offer and have consulted with another attorney. . . .<sup>120</sup>

After executing the release, the lawyer reimbursed the Gosnells about \$2,000, filed a petition for bankruptcy on their behalf, and paid the filing fees associated with the bankruptcy. Thereafter, the Gosnells obtained a discharge of about \$300,000 in debts, including discharge of the default judgment which was the subject of the original appeal. The Gosnells then filed a grievance against the lawyer with the Disciplinary Commission and instituted a civil action for damages as well. At the trial of the disciplinary case, the evidence showed that, although the Gosnells spoke with another attorney before signing the Release, the subject of the Release was never discussed.

In finding that the lawyer committed misconduct, the Court recognized that any attempt by a lawyer to limit the lawyer's liability had been forbidden under prior law.<sup>121</sup> The court explained its reasoning for imposing a public reprimand on the lawyer in some depth:

Such practices are still subject to close scrutiny but may not be subject to discipline under certain specific circumstances, where the client has been adequately advised in writing well in advance of final execution of any release or settlement. Providing to the client a copy of the proposed document so that it can be reviewed by independent counsel would further assure compliance with the intent of this rule.

Respondent failed to comply with the express requirement of this rule. The only written reference to the necessary advice was contained in the release prepared by Respondent and presented to the Gosnells at the time of execution. Such after-the-fact advice clearly fails to meet the letter and spirit of the rule.

In light of the findings and foregoing considerations, we conclude that, by limiting his liability for malpractice without adequate prior advice to seek independent counsel, the respondent violated Rule 1.8(h). We also conclude that respondent's conduct in preparing the release for his client's signature violates Rule 1.7(b).<sup>122</sup> By procuring a promise not

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120. *Id.*

121. *Id.* at 108.

122. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b) (1987) provides, in pertinent part, "A lawyer shall not represent a client if the representation of that client may be

to file a disciplinary grievance, the respondent attempted to obstruct the disciplinary process and engaged in conduct prejudicial to the administration of justice, in violation of Prof. Cond. R. 8.4(d).<sup>123</sup>

There are several problems with the agreement in *Blackwelder*. Chief among them is the fact that the proposed agreement was not "prospective" as required under the terms of the Rule. In this instance, the lawyer sought relief after committing the act which gave rise to liability. Viewed another way, it was an attempt to summarily settle a cause of action for malpractice without the benefit of independent legal advice for the client.

The comment to Rule 1.8 offers no guidance as to how subsection (h) was viewed by the drafters. At least one commentary<sup>124</sup> suggests that these types of prospective limitation agreements might be appropriate where the case presented to the lawyer is so fraught with danger for the lawyer that a prospective limitation might be the only feasible way for the client to obtain representation at all.<sup>125</sup> Such a circumstance was not present in *Blackwelder*. There is no suggestion in the opinion that the underlying appeal sought by the Gosnells was, in any way, tenuous or incapable of prosecution by the lawyer before the deadline for filing the record of proceedings expired.

Also important is the distinction drawn by the court between the violation associated with the release and the violation for the conflict of interest presented by the lawyer's preparation of the document itself.<sup>126</sup> Either violation, standing alone, would have been sufficient to sustain sanction based upon the lawyer's conduct. Although nothing in the Court's opinion suggests this analysis, a violation of Rule 1.7(b) could exist every time there is a violation involving prospective limitation of liability because the lawyer will always consider personal interests whenever such a limitation is created. In practice then, *Blackwelder* suggests that both rules, and any available commentary on each, should be consulted before attempting to create an agreement with a client limiting the lawyer's personal liability for malpractice.

Finally, *Blackwelder* reinforces the traditional view that it is misconduct for a lawyer to attempt to prevent a client from filing a grievance with the Disciplinary

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materially limited by . . . the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. . . ."

123. 615 N.E.2d at 108. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 8.4(d) (1987) ("It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.").

124. 1 GEOFFREY HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.8:901 (1992 Supp.).

125. The authors of THE LAW OF LAWYERING also make the observation when a lawyer undertakes such precarious litigation "virtually any action the lawyer [takes] would be reasonable under the circumstances, and, paradoxically, no malpractice action would lie." *Id.*

126. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b) (1987). For text of the rule, see *supra* note 122.

Commission. There is no provision in either the Rules or the Code identifying any situation in which this practice might be appropriate. *Blackwelder* specifically identifies this conduct as prejudicial to the administration of justice.<sup>127</sup>

## VII. CONCLUSION

As this Article attempts to demonstrate, the Indiana Supreme Court's opinions regarding matters of professional responsibility have focused, in large part, on the protection of the public from wrongdoing by members of the Bar. As the rule changes and cases suggest, this concern for public protection includes suspensions prior to any final adjudication of misconduct. This sort of prophylactic measure suggests a steadfast commitment by the Court to hold lawyers to a high ethical standard. At the same time, facts in mitigation are given fair consideration provided they are not used at the expense of client welfare.<sup>128</sup>

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127. 615 N.E.2d at 108. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 8.4(d) (1987).

128. The authors wish to note that the views expressed herein are not to be interpreted as those of the Indiana Supreme Court or the members of its Disciplinary Commission. The analyses presented are solely the product of the authors.