

SURVEY OF 1995 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

In 1995, the Indiana Supreme Court made substantial changes to the rules governing lawyers and the practice of law in Indiana.¹ A few of these changes impact every practicing member of the Indiana Bar because familiarity and compliance with the rules is imperative. For example, all practitioners will be affected by the requirement of mandatory continuing legal education hours on the subject of professional responsibility. The most significant change is, however, in trust account management. For the first time, Indiana lawyers will be required to comply with detailed standards for record keeping and administration of their trust accounts. The rule affecting the administration of trust accounts becomes effective January 1, 1997, allowing lawyers to become familiar with the requirements and to take appropriate measures to be in compliance by that date. The management of lawyer trust accounts will require the implementation of office procedures and the maintenance of records and, thus, a commitment by lawyers and law firms to understand the rules and assure they are in compliance.

The court also substantially changed the administration of the attorney discipline system during the past year. The modifications to Indiana Admission and Discipline Rule 23 revise the composition of the Disciplinary Commission, provide a new sanction, empower the Executive Secretary to audit lawyer trust accounts, and facilitate the discipline of Indiana attorneys who are sanctioned on a license in foreign jurisdictions.² This Article will provide an overview of these changes. In the past year, the supreme court also amended the Indiana Rules of Professional Conduct. The most significant modification is Rule 3.6 on trial publicity, which will be discussed herein. The court also modified Admission and Discipline Rule 2.1, regarding legal interns, and Admission and Discipline Rule 13, eliminating all of the specific law school course requirements, with the exception of legal ethics, as a prerequisite to sitting for the Indiana Bar.

In 1995, the supreme court, as in previous years, addressed in written opinions the discipline of lawyers for a variety of transgressions of the Indiana Rules of Professional Conduct. There is an unfortunate number of reported opinions and only those that may be generally helpful to the practitioner are summarized in this Article.

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1. See, e.g., INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS (1987) (amended 1995) [hereinafter IND. ADMIS. AND DISC.].

2. IND. ADMIS. AND DISC. Rule 23 (1996).

I. AMENDMENTS TO INDIANA ADMISSION AND DISCIPLINE RULES

A. *Lawyer Trust Accounts*

The supreme court added Admission and Discipline Rule 23, section 29, entitled "Maintenance of Trust Accounts in Approved Financial Institutions; Overdraft Notification," by order dated December 21, 1995. This section is effective January 1, 1997, and it impacts all practicing lawyers. In the past, there have been no detailed standards set forth by the court for the administration of trust accounts, the keeping of trust account records, and the enforcement of the requirement that lawyers use only financial institutions that agree to comply with these rules.

All funds that a lawyer holds in trust must be placed in an account clearly identified as a "trust" or "escrow" account.³ The depository institution shall be informed of the purpose and identity of the account and the account may be maintained only in financial institutions approved by the disciplinary commission.⁴ All funds held in any fiduciary capacity in connection with the representation of a person or entity, whether as trustee, agent, guardian, executor, or otherwise must be held in a trust account.⁵

Lawyers must maintain and preserve the records of the trust account for a period of at least five years after the disposition of a matter wherein the trust account was used.⁶ Attorneys are now specifically required to save for this five year period checkbooks, cancelled checks, check stubs, written withdrawal authorization, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements tendered to clients or other parties with regard to trust funds, or to maintain similar records that clearly and expressly reflect the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property held in trust.⁷

In the event of the dissolution of a partnership or professional corporation of attorneys, the attorneys must make written arrangements for the maintenance of the records required by this rule.⁸ In the event of the disposition of a law practice, again, the attorney must make appropriate written arrangements for maintaining the records required by section 29.⁹

The ledger required by section 29 must include a separate record for each client, trust, or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are held, the amount of the funds, a description in the amounts of charges or withdrawals, and the names of all persons to whom funds

3. *Id.* § 29(a)(1).

4. *Id.*

5. *Id.*

6. *Id.* § 29(a)(2).

7. *Id.*

8. *Id.* § 29(a)(8).

9. *Id.* § 29(a)(9).

were disbursed.¹⁰ Lawyers may maintain these records by electronic, photographic, computer, or other media, provided that printed copies can be produced.¹¹ Lawyers are advised to seek the counsel of their accountant and attend continuing legal education programs that have been offered and, will no doubt continue to be offered in an effort to enlighten lawyers on this new rule and assist the bar in compliance.¹²

The funds maintained in a trust account shall be deposited intact and not commingled with any other funds belonging to the lawyer or law firm.¹³ The records or deposits must be in sufficient detail so that each item can be identified.¹⁴ The checkbook register alone will not be sufficient to comply with this rule, and lawyers will have to maintain more sophisticated trust account records or risk non-compliance with section 29. All withdrawals from the lawyer trust account must be based on a written withdrawal authorization that sets forth the amount of the withdrawal, as well as the purpose of the withdrawal and the payee.¹⁵ The authorization must contain a signed approval of an attorney and shall be made only by check payable to a named payee.¹⁶ No trust check may be made to "cash" and any wire transfers from a trust account shall be authorized by written withdrawal authorization, evidenced by a document from a financial institution that indicates the date of the transfer, the amount, and the payee.¹⁷

The requirement that lawyers maintain trust accounts only in financial institutions approved by the disciplinary commission is a method for monitoring the requirement that banks notify the commission of overdrafts on trust accounts. A financial institution that desires to be a depository for trust funds must file an agreement with the disciplinary commission stating that it will report to the commission whenever a withdrawal is presented against a trust or escrow account with insufficient funds.¹⁸ This reporting requirement is mandatory, regardless of whether the instrument is honored by the bank pursuant to an overdraft agreement.¹⁹ The commission will set forth rules governing the approval and termination of financial institutions and will annually publish a list naming these approved financial institutions.²⁰

The overdraft notification agreement entered into between the commission and financial institutions must provide that in the case of a dishonored instrument, the

10. *Id.* § 29(a)(3).

11. *Id.* § 29(a)(7).

12. *See, e.g., Nuts and Bolts of Client Trust Account Management, in INDIANA CONTINUING LEGAL EDUCATION FORUM* (February 1996); *Ethically Charging, Banking and Securing Your Fees, in INDIANA CONTINUING LEGAL EDUCATION FORUM* (April 1995).

13. IND. ADMIS. AND DISC. Rule 23, § 29(a)(4) (1996).

14. *Id.*

15. *Id.* § 29(a)(5).

16. *Id.*

17. *Id.*

18. *Id.* § 29(b).

19. *Id.*

20. *Id.*

report shall be identical to the overdraft notice typically forwarded to a depositor, including a copy of the dishonored instrument.²¹ In the instance where checks are presented without sufficient funds to cover, but are honored by the institution, the notification must identify the bank, the attorney or law firm, the account number, date of presentation for payment, date paid, and the amount of the overdraft.²² These reports by financial institutions must be made to the commission within five banking days of the date of presentment.²³

The Executive Secretary may audit the accuracy and integrity of all trust accounts maintained by the lawyer,²⁴ if the Executive Secretary has probable cause to believe that a lawyer's trust account has been mishandled or not properly maintained pursuant to Admission and Discipline Rule 23, section 29 and has the approval of the Commission. This new section to Admission and Discipline Rule 23 does not authorize random audits of lawyer trust accounts. It only permits a review of a lawyer's trust account upon a determination by the Executive Secretary and the Commission that there is probable cause to believe that funds in a trust account have been improperly maintained or handled.

B. Continuing Legal Education

The second modification of the disciplinary rules that impacts the entire Indiana Bar is the modification of Admission and Discipline Rule 29, regarding mandatory continuing legal education. In the course of each three year CLE cycle, every lawyer must now complete at least three hours of approved continuing legal education in professional responsibility.²⁵ These three CLE hours may be integrated into a substantive program or offered as a free-standing program.²⁶

C. Suspension for Child Support Delinquency

The 1995 General Assembly enacted provisions to assist in the enforcement of child support orders, whereby professional licenses, including those of lawyers, are subject to suspension upon a finding by a court having jurisdiction over child support matters that an individual has intentionally violated a child support order.²⁷ The Indiana Supreme Court, in referencing this newly enacted statute, modified the disciplinary rules to provide for the suspension of a lawyer who has been found to be delinquent in the payment of child support as a result of an intentional violation of an order for support. Upon the Commission's receipt of an order from

21. *Id.* § 29(c)(1).

22. *Id.* § 29(c)(2).

23. *Id.* § 29(d).

24. *Id.* § 30.

25. IND. ADMIS. AND DISC. Rule 29, § 3(a) (1996).

26. *Id.*

27. IND. CODE § 31-1-11.5-13(k) (1993 & Supp. 1995), amended by Act of July 1, 1996, No. 1292, § 31, 1996 Ind. Adv. Legis. Serv. 2304, 2330-32 (Burns); IND. CODE § 31-6-6.1-16(k) (1993 & Supp. 1995), amended by Act of July 1, 1996, No. 1292, § 32, 1996 Ind. Adv. Legis. Serv. 2304, 2332-36 (Burns).

a trial court that a lawyer is delinquent due to an intentional violation of a support order, the Executive Secretary shall file a Notice of Intentional Violation of Support Order and Request for Suspension with the Indiana Supreme Court, notifying the attorney by certified mail.²⁸ The attorney will have fifteen days thereafter to file a response to this request and, thereafter, the supreme court may issue an order of suspension that will be effective until further order of the court.²⁹

A lawyer suspended pursuant to section 11.1(c) may be automatically reinstated by the court upon filing a petition for reinstatement, which includes a certified copy of a court order stating that the lawyer is no longer in intentional violation of a child support order.³⁰ A \$200.00 filing fee must accompany the petition for reinstatement.³¹

D. Modification to Procedural Rules in Attorney Discipline Cases

The Disciplinary Commission of the Supreme Court of Indiana has traditionally been a board comprised of seven members of the bench and bar. Although the rules have always allowed for two non-lawyer members, no non-lawyer has ever been appointed to the Commission. Effective February 1, 1996, the Commission has been expanded to nine members, appointed by the Indiana Supreme Court, seven of whom shall be members of the Bar and two of whom shall be lay persons.³² The length of the terms will continue to be five years, and a reasonable effort must be made to provide a geographical representation of the state.³³ The non-lawyer members of the Commission will not be eligible for appointment as hearing officers as allowed under the rules.³⁴

In the past, when a lawyer has received a grievance, there was no requirement that he or she file a response. The court amended the procedural rules and a response is now required within twenty days, or within such additional time as allowed by the Executive Secretary.³⁵ There were several reported cases wherein the supreme court held that a lawyer was not subject to discipline for not responding to a grievance.³⁶

Indiana Rule of Professional Conduct 8.1(b) prohibits a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority, unless the information is otherwise protected by Rule 1.6.³⁷

28. IND. ADMIS. AND DISC. Rule 23, § 11.1(c) (1996).

29. *Id.*

30. *Id.* § 18(c).

31. *Id.*

32. *Id.* § 6(b). The two new members to the Commission shall commence their terms effective February 1, 1996, and the length of their terms shall be two and four years, respectively.

33. *Id.*

34. *Id.*

35. *Id.* § 10(a)(2).

36. *See, e.g., In re Duffy*, 482 N.E.2d 1137 (Ind. 1985); *In re Koryl*, 481 N.E.2d 393 (Ind. 1985).

37. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.1(b) (1995).

This rule is also subject to the protections of the Fifth Amendment of the United States Constitution and Article I, Section 14 of the Indiana Constitution.³⁸ The amendment to Rule 8.1(b) is a change in the law that opens the door to disciplining a lawyer for the knowing failure to respond to a grievance.

The supreme court may suspend an attorney from the practice of law upon the finding that the lawyer has been convicted of a crime punishable as a felony.³⁹ These suspensions are in effect until further order of the court or a final determination of any resulting disciplinary proceeding.⁴⁰ Judges in Indiana are obligated to transmit a certified copy of the judgment of conviction of a lawyer to the Executive Secretary within ten days after the conviction.⁴¹ Upon receipt of information indicating that a lawyer has been convicted of a crime punishable as a felony under the laws of any state or federal jurisdiction, the Executive Secretary shall verify the information and file with the supreme court a notice of conviction and request for suspension, notifying the attorney by certified mail.⁴² The lawyer shall have fifteen days thereafter to file a response and the court may then issue an order of suspension.⁴³

The newly enacted rule on summary suspensions also provides a procedure for litigating suspensions pending prosecution of disciplinary complaints. If the Commission determines that there is reasonable cause to believe that the respondent is guilty of misconduct that, if proven, would warrant a suspension pending prosecution, a motion will be filed with the supreme court that will advise the hearing officer.⁴⁴ The hearing officer may, upon the Commission's motion, order the respondent to show cause why he or she should not be suspended pending final determination of the case, and a hearing will be scheduled not less than fifteen days after personal service of the notice and not less than twenty days after mailing a notice by certified or registered mail.⁴⁵

The burden of proof will be upon the respondent, and the procedures at the summary suspension hearing will be the same as in the disciplinary proceedings.⁴⁶ If the hearing officer believes that the respondent has failed to sustain his or her burden of proof, the hearing officer will submit to the supreme court a written recommendation stating whether the respondent should be suspended pending final determination of the disciplinary case.⁴⁷ The court may forthwith enter an order of suspension, based upon the written recommendations of the hearing officer, and the respondent will have fifteen days thereafter to petition the supreme

38. *Id.* Rule 8.1 cmt.

39. IND. ADMIS. AND DISC. Rule 23, § 11.1(a) (1996).

40. *Id.*

41. *Id.* § 11.1(a)(1).

42. *Id.* § 11.1(a)(2).

43. *Id.*

44. *Id.* § 11.1(b).

45. *Id.* § 11.1(b)(1).

46. *Id.*

47. *Id.*

court for a review of the order.⁴⁸

The supreme court rules now provide for a sanction, known as private administrative admonition, which is less severe than a private reprimand. If the Commission determines that there is reasonable cause to believe that a respondent has committed misconduct, but the misconduct would not likely result in a sanction greater than a public reprimand if successfully prosecuted, the parties may agree to an administrative resolution of the complaint.⁴⁹ This applies only to matters determined to be "minor misconduct" and these resolutions may be reached without filing a verified complaint with the clerk of the supreme court.⁵⁰ The court rules enumerate matters that will not be considered minor and, thus, not eligible for treatment by administrative resolution. The case cannot be resolved by administrative admonition if any of the following conditions exist: misappropriation of funds or property; misconduct that is likely to result in material prejudice to a client or other person; the respondent has been publicly disciplined in the past three years; the misconduct is of the same nature as misconduct for which the respondent was either publicly or privately disciplined in the past five years; the conduct includes dishonesty, misrepresentation, deceit or fraud; or the misconduct constitutes the commission of a felony.⁵¹

The administrative admonition will be a letter from the Executive Secretary to the respondent that summarizes the facts and sets out the applicable violations of the Rules of Professional Conduct.⁵² The admonition letter will be reviewed by each of the justices of the supreme court and will be final within thirty days thereafter, unless set aside by the court.⁵³ If the court does not set the admonition aside, the respondent will receive the letter, and notice of the fact that a lawyer has received a private administrative admonition will be provided to the grievant and the clerk of the supreme court.⁵⁴ The fact that a lawyer has received an admonition will be public record, but the letter of admonition is not a matter of public record.⁵⁵

The Disciplinary Commission and the Executive Secretary have the authority to request the assistance of law enforcement agencies to assist in an investigation.⁵⁶ An addition to the rule now allows the supreme court to order a person found within Indiana to give testimony or to produce documents or other things for use in a lawyer disciplinary proceeding in another state.⁵⁷ An interested party may make application to the court and may specify the procedure for giving testimony or gathering documents that is consistent with that of a foreign jurisdiction.⁵⁸ The

48. *Id.* § 11.1(b)(2).

49. *Id.* § 12(a).

50. *Id.*

51. *Id.* § 12(a)(1)-(6).

52. *Id.* § 12(b).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* § 19(a).

57. *Id.* § 19(b).

58. *Id.*

court may order an individual to give a statement, testify or provide documents before a person appointed by the court.⁵⁹ The individual must give testimony only in the county wherein he or she resides, is employed or transacts business in person, or at another convenient place set forth in the order.⁶⁰ The supreme court's order may be enforced in the circuit court of the county where the person who was commanded to appear is domiciled.⁶¹

The supreme court also modified the rule on the public disclosure of disciplinary proceedings. Previously, once a verified complaint was filed by the Commission the only information that the Commission or the clerk of court were at liberty to disclose was information unrelated to the merits of the case.⁶² Once the case was resolved, the clerk was authorized to disclose "upon proper request" all matters filed in a closed cause, with the exception of the contents of a private reprimand.⁶³ Henceforth, all proceedings, with the exception of adjudicative deliberations, and all papers filed with the clerk shall be opened and available for public inspection.⁶⁴ Proceedings and documents that relate to matters that have not resulted in the filing of a verified complaint are not open to the public, nor may the investigative reports and other work product of the Commission be open to public inspection.⁶⁵

Hearings shall be open to the public unless the hearing officer orders a closed hearing on motion of one of the parties or sua sponte.⁶⁶ A hearing will be ordered closed if the hearing officer believes it necessary for any of the following purposes: (1) the protection of witnesses; (2) to prevent likely disruption of the proceedings; (3) for security reasons; (4) to prevent the unauthorized disclosure of attorney-client confidences that are not at issue in the proceedings; and (5) for good cause shown, which in the judgment of the hearing officer, requires a closed hearing.⁶⁷

A lawyer who is admitted to practice in Indiana and sanctioned in another state has the responsibility to notify the Executive Secretary.⁶⁸ The notice must be in writing and must be given within fifteen days of the issuance of a final order in another jurisdiction.⁶⁹ Thereafter, the Executive Secretary will file a notice with the supreme court, attaching a certified copy of the order of discipline and requesting an order to the Executive Secretary and the lawyer directing them to show cause, within thirty days from service of the order, why an identical

59. *Id.*

60. *Id.*

61. *Id.*

62. Ind. Admis. and Disc. Rule 23, § 22(a) (1987) (amended 1995).

63. *Id.*

64. *Id.*

65. IND. ADMIS. AND DISC. RULE 23, § 22(a) (1996).

66. *Id.* § 22(b).

67. *Id.* § 22(b)(1)-(5).

68. *Id.* § 28(a).

69. *Id.*

discipline in Indiana would be unwarranted.⁷⁰ Upon the expiration of thirty days from service of the order, the court will impose an identical sanction unless one of the following clearly appears on the face of the record from which the discipline is predicated: (1) the procedure lacked in notice or in opportunity to be heard and constituted a deprivation of due process; (2) there was an "infirmity of proof" to establish the misconduct, giving rise to the clear conviction that the Indiana Supreme Court could not accept the conclusion on that subject as final; (3) the imposition of the same discipline by the court would be inconsistent with standards governing sanctions in the Indiana rule or would result in a grave injustice; or (4) the misconduct established warrants substantially different discipline in Indiana.⁷¹

E. Legal Interns and Requirements for Admission to Examination

The supreme court changed two rules that affect law students. The supreme court added a requirement that a law student serving as a legal intern must have completed or be enrolled in a course in legal ethics or professional responsibility.⁷² The court also changed the requirements for admission to the Indiana Bar Examination. The former version of the rule designated courses in the law school curriculum that were to be completed as a prerequisite to taking the bar examination.⁷³ All of the specific class requirements have been deleted, with the exception of the requirement that one must have two cumulative semester hours of legal ethics or professional responsibility.⁷⁴

II. MODIFICATION TO TRIAL PUBLICITY RULE

Perhaps in reaction to the media circus surrounding a recent trial in California, Rule 3.6 of the Rules of Professional Conduct, regarding trial publicity, was modified effective February 1, 1996. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be publicly disseminated if the lawyer knows or should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding.⁷⁵ This has been the rule for some time. However, such a statement will now be rebuttably presumed to have a substantial likelihood of materially prejudicing a judicial proceeding if the public comments are related to the very specific issues set forth in Rule 3.6(b).⁷⁶

70. *Id.* § 28(b).

71. *Id.* § 28(c). The reciprocal disciplinary proceedings are similar to the RULES OF DISCIPLINARY ENFORCEMENT, LOCAL RULES OF THE UNITED STATES DIST. COURT FOR THE S. DIST. OF INDIANA and the LOCAL RULES OF THE UNITED STATES DIST. COURT FOR THE N. DIST. OF INDIANA.

72. IND. ADMIS. AND DISC. Rule 2.1(a)4 (1996).

73. Ind. Admis. and Disc. Rule 13(c) (1987) (amended 1995).

74. IND. ADMIS. AND DISC. Rule 13(c) (1996).

75. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1996).

76. Rule 3.6(b) states:

A statement referred to in paragraph (a) will be rebuttably presumed to have a

A lawyer involved in the investigation or litigation of a case may state the following: a brief description of the legal claim or legal defense; information contained in the public record; that an investigation is in progress; the offense, claim or defense involved and, except when prohibited by law, the identity of the persons involved; the scheduling or result of any stage in the litigation; a request for assistance in obtaining evidence and information necessary thereto; a warning of danger concerning the behavior of a person involved when there is a reason to believe that there is a likelihood of harm to an individual or the public interest; and certain information about the accused in a criminal case.⁷⁷

III. SYNOPSIS OF LAWYER DISCIPLINARY CASES

A. *Judicial Misconduct*

1. *In re Goodman*.—In *In re Goodman*,⁷⁸ Judge Goodman was charged with violating the 1975 Code of Judicial Conduct. He was charged with violating canons which state that a judge should avoid the appearance of impropriety, avoid nepotism and favoritism and canons that require the judge's staff to observe the standards of fidelity and diligence applicable to judges.

On May 17, 1994, Judge Goodman issued an anti-nepotism policy. However, before this time, and during his tenure as presiding judge of the Marion Municipal Court, from 1989 until June 1994, several employees were hired who were close

substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:

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

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

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

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

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

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1996).

77. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1996).

78. 649 N.E.2d 115 (Ind. 1995).

relatives of court employees. The Court Administrator hired his daughter, his daughter's fiancé, and the brother of his daughter's fiancé. The Court Administrator was also allowed to approve pay raises for his family members. The Assistant Court Administrator hired three family members. The daughter of the head of the Probation Department was hired, and Judge Goodman's son worked for the court during school vacations.

In June of 1992, Judge Goodman contracted with a corporation to provide certain services to the Marion Municipal Courts. The owner of the corporation was a close personal friend of the Court Administrator. The owner of the corporation hired the Court Administrator's son-in-law, who had left his employment with the Marion Municipal Court, and the son-in-law was placed in charge of the court program for the corporation. In September of 1992, Judge Goodman became engaged to marry the in-house accountant for the corporation and the owner of the corporation hosted an engagement party for the judge and his fiancé.

The Disciplinary Commission and Judge Goodman agreed that he did not profit or intend to profit by the corporation providing services to the court.⁷⁹ However, the parties also agreed that these circumstances gave rise to a perception that the court's business was based upon the exchange of favors.⁸⁰ The Indiana Supreme Court accepted the agreement that Judge Goodman had engaged in misconduct as he allowed a perception of impropriety to exist.⁸¹ The court also accepted the agreement with the Commission that the appropriate sanction in this case was a public reprimand.⁸²

2. *In re Hughes*.—In *In re Hughes*,⁸³ Robert Hughes was the elected judge of the Carmel, Indiana, City Court and he also maintained a private law practice. He was charged with submitting false reimbursement claims. Under Count I of the verified complaint, the Indiana Supreme Court found that on August 15, 1990, Judge Hughes attended a judicial conference and, although there was no tuition fee charged, Hughes requested reimbursement of \$200.00 for the cost of the conference.⁸⁴ He received a check for \$200.00 from the clerk-treasurer. Under Count II of the complaint the court found that Judge Hughes requested the clerk-treasurer to reimburse him the sum of \$294.00 for the tuition of an ICLEF seminar that only cost \$147.00 to attend.⁸⁵ In Count III the court found that Hughes received reimbursement in the amount of \$810.00 for the cost of attending conferences that never occurred.⁸⁶ Under Count IV of the verified complaint, the court found that the judge had submitted a claim for \$945.00 to the clerk-treasurer, purportedly for expenses incurred while attending a conference

79. *Id.* at 116.

80. *Id.*

81. *Id.* at 116-17.

82. *Id.* at 117.

83. 640 N.E.2d 1065 (Ind. 1994).

84. *Id.* at 1066.

85. *Id.*

86. *Id.*

sponsored by the National Judicial College in Montana, but the judge never attended such a conference because it was never conducted.⁸⁷

On March 2, 1993, Hughes was charged in Hamilton Superior Court with three counts of theft (each a Class D felony) and one count of official misconduct (a Class A misdemeanor). He gave up his position as judge, and on February 1, 1994, Hughes pled guilty to all charges.⁸⁸ He received four one year sentences in the Hamilton County Jail, each to run concurrently. The sentences were suspended and he was placed on probation for one year.⁸⁹ The Indiana Supreme Court found that Hughes had violated Rule 8.4(b) by committing criminal acts that reflected adversely upon his "honesty, integrity, trustworthiness and fitness as a lawyer."⁹⁰ Hughes had also violated Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation.⁹¹

In assessing an appropriate disciplinary sanction, the Indiana Supreme Court took into account several mitigating factors. Hughes had a good reputation and a record of honesty and integrity. He appeared to be remorseful for his misconduct and testified that his health had deteriorated due to the stress involved in trying to balance his judicial duties and private law practice. He was diagnosed as suffering from bipolar disorder, mixed with depression. Hughes made full restitution to Hamilton County before the criminal charges were filed. The court recognized the mitigating factors and stated that those factors could not overshadow the fact that his egregious misconduct and dishonesty had risen to levels of felonious conduct.⁹² The court stated that the respondent violated the public's trust and confidence in the judiciary and that such actions were likely to injure the public's perception of the judiciary.⁹³ The court found that it was appropriate to impose the strongest disciplinary sanction and disbarred Robert E. Hughes from the practice of law in the State of Indiana.⁹⁴

B. Contempt of Court

In *In re Anonymous*,⁹⁵ the attorney had been suspended for his failure to pay his attorney's registration fee and for failure to comply with the mandatory continuing legal education requirements. He was employed in a position that was not related to the practice of law. While still under suspension, the attorney wrote a letter on behalf of his employer to the Court of Common Pleas in Delaware

87. *Id.* at 1067.

88. *Id.*

89. *Id.* Hughes was also prohibited, by court order, from holding public office of trust or profit for five years. *Id.*

90. *Id.*; see also INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1987).

91. *In re Hughes*, 640 N.E.2d at 1067; see also INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1987).

92. *In re Hughes*, 640 N.E.2d at 1067.

93. *Id.*

94. *Id.* at 1068.

95. 646 N.E.2d 666 (Ind. 1995).

County, Ohio. In this letter, the attorney requested an extension of time within which to answer a complaint that had been filed against the employer to allow the employer time to engage local counsel. The attorney signed the letter as attorney for the defendant, although he was suspended from the practice of law. Following this, the attorney met his requirements and again became a member of the Bar in good standing.

The attorney was found in contempt of the Indiana Supreme Court for failing to abide by the court's order of suspension.⁹⁶ The attorney stated that on reflection he realized the implications of signing his name as an attorney, although neither he nor his employer intended for him to represent the employer in the litigation. The attorney expressed his sincere remorse and apology. The Indiana Supreme Court stated that it was mindful that the attorney's conduct did not result in harm to the public or his client or the opposing party.⁹⁷ The attorney had been engaged in the practice of law from 1963 to 1988 without any disciplinary or contemptuous incidents. Given the attorney's overall professional and personal record, and his remorse, the court entered a finding of contempt and assessed costs against the attorney, but did not impose other penalties.⁹⁸

C. Confidential Communications

1. *In re Anonymous*.—In *In re Anonymous*,⁹⁹ the attorney was charged with violation of Rules 1.6(a), 1.8(b) and 1.16(a)(1).¹⁰⁰ The Disciplinary Commission and the attorney submitted an agreed statement of circumstances and a conditional agreement for discipline to the supreme court for approval pursuant to Admission and Discipline Rule 23, section 11(c).¹⁰¹ The agreed upon sanction was a private reprimand, which was approved by the Indiana Supreme Court.¹⁰² The facts of the case were set forth in an anonymous opinion to educate the bar, a means which was used in several cases during this reporting period.

The attorney was contacted by a client to represent her in an action to recover unpaid child support. During a review of the various documents supplied by the client, the attorney noted that the client and the client's former husband were jointly liable for a \$4,500.00 debt in favor of the local county welfare department. At the time, the attorney was under contract to represent the same local county welfare department. The attorney informed the client that the representation could not be undertaken, and with the client's permission forwarded the documents to another attorney.

Following this, the attorney received approval from the local county welfare

96. *Id.* at 667.

97. *Id.*

98. *Id.*

99. 654 N.E.2d 1128 (Ind. 1995).

100. See INDIANA RULES OF PROFESSIONAL CONDUCT Rules 1.6(a), 1.8(b) & 1.16(a)(1) (1987).

101. See IND. ADMIS. AND DISC. Rule 23, § 11(c) (1996).

102. *In re Anonymous*, 654 N.E.2d at 1129.

department to file a collection suit against her client's former husband for the unpaid debt. Later, the former husband's counsel joined the attorney's former client as a party to the suit and the attorney did not withdraw from the case after the former client was joined as a party-defendant. The attorney ultimately obtained summary judgment against her former client and the client's ex-husband.¹⁰³

The Indiana Supreme Court found that the attorney had revealed information related to the representation of the former client without the former client's consent and thus violated Rule 1.6(a).¹⁰⁴ By using this information to the disadvantage of the client, the attorney also violated Rule 1.8(b).¹⁰⁵ By failing to withdraw as counsel for the local welfare department during the collection suit against the former client the attorney violated Rule 1.16(a)(1).¹⁰⁶

As a mitigating factor, the court recognized that all of the information gained by the attorney during the representation of the client was readily available from public sources and was not confidential in nature.¹⁰⁷ The attorney had declined to represent the client after she had learned of the outstanding debt owed to the county welfare department and advised her to seek other counsel.¹⁰⁸ She did not at any time request that the client sign an employment agreement, seek a retainer fee or otherwise charge her.¹⁰⁹ The court found no evidence of selfish motive on the attorney's part, and agreed that a private reprimand was a suitable disciplinary measure.¹¹⁰

2. *In re Mullins*.—In *In re Mullins*,¹¹¹ the parents of Sue Ann Lawrance petitioned the Hamilton Superior Court for authority to compel Sue Ann's health care provider to withdraw her artificially administered hydration and nutrition in March 1991. Sue Ann had been in a vegetative state due to severe brain damage since June 1987. Sue Ann's parents asserted in their petition that Sue Ann was not expected to recover and that future treatment was futile. On May 2, 1991, the court held that Sue Ann's parents had legal authority to consent to the withdrawal of her artificially delivered nutrition and hydration.¹¹² Sue Ann was removed from the Hamilton County Nursing Home to St. Vincent's Hospice in Marion County some time after May 2, 1991.

On or about March 26, 1991, the attorney, Patti Sue Mullins, created the Christian Fellowship For The Disabled, Inc. On May 16, 1991, Mullins filed, on behalf of the Christian Fellowship, a petition for the appointment of a guardian over an adult incompetent in the Marion Superior Court. In that petition, Mullins

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1129-30.

111. 649 N.E.2d 1024 (Ind. 1995).

112. *Id.* at 1025.

sought the establishment of an emergency guardianship of Sue Ann, asserting that at the time of the petition Sue Ann was the victim of intentional, willful and purposeful neglect and/or abuse by her parents, her medical doctors and health care providers and that she was being denied essential nutrition and hydration contrary to law. The Marion Superior Court ruled that a temporary limited guardian should be appointed for Sue Ann.¹¹³ Mullins then secured a twenty-one day stay of the Hamilton Superior Court's Order directing the withdrawal of Sue Ann's hydration and nutrition.¹¹⁴ Shortly after this stay was issued, Mullins transmitted portions of Sue Ann's medical records by fax to several news media outlets throughout Marion County.¹¹⁵

Mullins was charged with three distinct violations of the Rules of Professional Conduct. First, she was charged with violating Rule 1.6; by transmitting Sue Ann's medical records to various media outlets in Marion County, Mullins intentionally revealed information relating to the representation of the client without the client's consent.¹¹⁶ The Indiana Supreme Court found that Mullins had violated this rule because there was no legitimate reason for Mullins to disseminate the records of Sue Ann.¹¹⁷ Not only were these records information relating to the representation of a client, but they were also classified as non-public records under Indiana Public Record Law,¹¹⁸ and as confidential court records pursuant to Indiana Administrative Rule 9(k).¹¹⁹ The court also found that Mullins had violated Rule 4.4 in that the act of transmitting Sue Ann's medical records had no substantial purpose other than to embarrass, delay or burden a third person during the representation of a client.¹²⁰ The third charge alleged that Mullins was in violation of Rule 3.3(d), based on Mullins' requested relief in the Marion Superior Court for an *ex parte* proceeding, without sufficiently or fully advising that court of all relevant aspects of the pending parallel proceeding in the Hamilton Superior Court. The court found that Mullins had violated Rule 3.3(d).¹²¹

The court imposed the sanction of a public reprimand against Patti Sue Mullins.¹²² It based this reprimand upon several mitigating factors. The court noted that Mullins had no prior disciplinary record, and that she had devoted significant amounts of time and energy during her legal career to public causes.¹²³ Further, the court found that Mullins' actions were not because of any "sinister motive, but instead resulted from her misguided pursuit of ideological

113. *Id.*

114. *Id.*

115. This appears to have been an attempt to justify her involvement in the litigation.

116. *In re Mullins*, 649 N.E.2d at 1025.

117. *Id.*

118. IND. CODE § 5-14-3-4(a)(8) (1993).

119. *In re Mullins*, 649 N.E.2d at 1025-26.

120. *Id.* at 1026.

121. *Id.*

122. *Id.*

123. *Id.*

objectives."¹²⁴

3. *In re Robak*.—In *In re Robak*,¹²⁵ the attorney had represented a client in numerous legal matters over a number of years. On July 15, 1978, the client married, and soon thereafter the client and his new wife signed a marital property agreement. The attorney did not draft this document. The agreement provided that any will made by either party need not contain provisions in favor of the other party. At various times after the agreement was signed, the attorney drafted wills for his client and the last will that he made for his client contained no provisions for the benefit of the wife. On the same day that the client executed this will, he also executed a trust agreement that gave his wife the income from the trust corpus and the right to live in the marital home. Shortly thereafter, Robak drafted a will for his client's wife.

The client later died and the attorney was employed to represent the estate. The will that he had drafted was entered to probate and, thereafter, the wife instituted proceedings against the estate to claim her one-third Indiana statutory spouses share. The validity of the marital property agreement, which provided against the election, was disputed.

The attorney represented the estate against the claims of the wife. The court found that the wife had been a former client of the attorney, and that in opposing her, the attorney violated Rules of Professional Conduct 1.9 and 8.4(a). The attorney contended that the Commission offered no evidence that the wife's claims against the estate were substantially related to the attorney's prior representation of the wife.¹²⁶ He also claimed that the Commission failed to prove that the interests of the estate and those of the wife were materially adverse, stating that in fact his representation of the wife had nothing to do with her claim against the estate.¹²⁷

The supreme court recognized that it had never specifically defined the meaning of "substantially related matter" within the context of Rule 1.9(a).¹²⁸ The court found that the Commission had met its burden of proof by showing that the attorney represented the wife in the preparation of her will and then represented the estate in a substantially related matter.¹²⁹ The Indiana Supreme Court examined the record and explained as follows:

[The court is] satisfied that the preparation and execution of the wife's will in 1981, being by nature a provision for the ultimate disposition of her property in accord with the existing marital property agreement, was sufficiently interwoven with her later attempts in the estate action to challenge the validity of the marital property agreement so as to satisfy the

124. *Id.*

125. 654 N.E.2d 731 (Ind. 1995).

126. *Id.* at 734.

127. *Id.*

128. *Id.*

129. *Id.*

“substantially related” element.¹³⁰

The court was also satisfied that the wife’s claim against the estate was materially adverse to the interests of the estate.¹³¹ The court suggested that there were certain factors that could be examined in order to determine whether a matter was materially adverse. These factors included, the “duration and intimacy of the lawyer’s relationship with the clients, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client if conflict does arise.”¹³²

In the underlying case, the attorney represented the co-executors of the estate. An executor is duty bound to manage and protect those assets over which he has possession for both the creditors and the distributees by employing reasonable precautions against any loss to the estate.¹³³ The attorney’s duty to aid in the preservation of the estate’s assets was materially adverse to the wife’s objective of seeking more from the estate than was originally provided to her in her husband’s estate plan.¹³⁴ The attorney sought to establish the validity of the marital property agreement to preserve the estate’s assets while the wife sought to invalidate the same agreement. As such, the supreme court concluded that the attorney’s representation of the estate was materially adverse to his former representation of the wife and, therefore, the attorney violated Rule 1.9(a).¹³⁵

The attorney also disputed the finding that he had violated Rule 1.9(b). The attorney contended that his preparation of the wife’s will had nothing to do with the wife’s subsequent challenge to the client’s will, arguing the information gained during the prior representation could not have been used to the wife’s disadvantage. In litigating the wife’s claim against the estate, the attorney deposed the wife, asking various questions concerning the meeting that they had when he drafted her will. By his questions, he attempted to elicit from the wife that she recognized the validity of the marital property agreement at the time she executed her will. The supreme court found that during the questioning, the attorney had sought to elicit from the wife testimony about events which had occurred during their meeting.¹³⁶ The attorney had specifically questioned the wife as to whether she cried during the meeting.¹³⁷ The wife asserted that she did cry as she was emotionally overwhelmed by the execution of her will, and the attorney maintained that she did not cry during the process of the making of the will. The attorney attempted to elicit this information to prove the wife was fully cognizant of the provisions of the marital property agreement at the time she made her will. The wife, however, took the position that she was not aware of the provisions of

130. *Id.*

131. *Id.*

132. *Id.* at 735.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

the marital property agreement and did not understand its scope.

The Indiana Supreme Court found that the attorney's statement that the wife did not cry during the meeting was information relating to the prior representation of the wife.¹³⁸ The court found that a lawyer had a legal and ethical duty to maintain confidences and secrets of a client both during and subsequent to the attorney-client relationship.¹³⁹ The court found that the attorney violated Rules 1.9(b) and 8.4(a).¹⁴⁰

In assessing an appropriate disciplinary sanction, the court examined several relevant factors. Among these were the nature of the misconduct, the actual or potential injury flowing from the misconduct, the state of mind of the attorney, the duty of the court to preserve the integrity of the profession, the potential injury to the public in permitting the attorney to continue in the profession, and matters in mitigation or aggravation of the misconduct.¹⁴¹ In aggravation, the court stated that the attorney had violated a fundamental tenet of the lawyer-client relationship, that being loyalty.¹⁴² "One of the cornerstones of competent legal service is an attorney-client relationship wherein the client is assured of having confidences kept and loyalties preserved."¹⁴³ At the very least, there was an appearance that the attorney had used confidential information of a former client to make himself more valuable to a subsequent adverse client.¹⁴⁴ The court also recognized that the attorney's conflict appeared to be an isolated occurrence and that he had never been previously subjected to any disciplinary proceedings.¹⁴⁵ This indicated to the court that the attorney was not a continuing threat to the public or to the profession and that a public reprimand was an appropriate sanction.¹⁴⁶

D. Criminal Convictions

1. *In re Stults*.—In *In re Stults*,¹⁴⁷ Count I of the verified complaint charged the attorney with violating Rule 8.4(b) by engaging in criminal acts that "reflect adversely upon his honesty, trustworthiness or fitness as a lawyer in other respects."¹⁴⁸ This criminal act was possession of cocaine. On February 1, 1992, the attorney was charged in Lake Superior Court with possession of cocaine in excess of three grams, a Class C felony. On February 10, 1992, the attorney was charged once again in Lake Superior Court with possession of cocaine in excess of three grams. On January 8, 1993, both cases were amended to include

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 736.

145. *Id.*

146. *Id.*

147. 644 N.E.2d 1239 (Ind. 1994).

148. See INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1987).

conspiracy to possess cocaine. The initial charge was dropped when the court found the evidence seized was inadmissible for the lack of a proper search warrant.¹⁴⁹ On April 22, 1994, the attorney entered a plea of guilty to the amended charge of possession of cocaine, a Class D felony, and the charge of conspiracy was dropped.¹⁵⁰ The attorney was sentenced to two years at the Indiana Department of Corrections with one year suspended and one year probation.¹⁵¹

Under the former Disciplinary Rules, specifically Rule 1-102(A)(3), (5) and (6), the Indiana Supreme Court had found that possession of cocaine constituted moral turpitude and conduct prejudicial to the administration of justice, thus reflecting adversely on the attorney's fitness to practice law.¹⁵² The court had not yet specifically decided whether possession of cocaine constitutes a criminal act that adversely reflects on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as prohibited by Rule 8.4(b).¹⁵³

Rule 8.4(b) states that a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law, and the analysis of criminal conduct under the current rules no longer involves reference to moral turpitude.¹⁵⁴ The court "must now determine if there is a nexus between the criminal act and one of the three personal qualities set forth in Prof.Cond.R. 8.4(b), to-wit: honesty, trustworthiness, or fitness as an attorney."¹⁵⁵ In *In re Stults*, the court found that Rule 8.4(d) closely parallels former Discipline Rule 1-102(A)(6), which prohibited conduct adversely reflecting on a lawyer's fitness to practice law.¹⁵⁶ Therefore, the court concluded that prior cases involving issues of fitness in relation to criminal acts were applicable to an analysis of the present rule.¹⁵⁷

The court determined that possession of cocaine involved participation in an illegal transaction.¹⁵⁸ The court also found it important that after having been released from one charge for possession, the attorney was arrested for a second offense.¹⁵⁹ The court believed the second offense suggested that the attorney was addicted to cocaine.¹⁶⁰ The Indiana Supreme Court found that this "clearly established that respondent could not be trusted to keep his clients' secrets, give effective legal advice, fulfill his obligations to the courts and so on."¹⁶¹

149. *In re Stults*, 644 N.E.2d at 1240.

150. *Id.* at 1240-41.

151. *Id.* at 1241.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

Accordingly, the court concluded that the attorney had violated Rule 8.4(b).¹⁶²

Count II of the verified complaint also charged the attorney with violating Rule 8.4(b) for the commission of a criminal act, operating a vehicle while intoxicated. The attorney pled guilty to this charge, was sentenced to one year in jail, 361 days of which was suspended, and the attorney was placed on probation for one year.¹⁶³ At the time of the attorney's arrest, he was a fugitive from justice. The court concluded this pattern of conduct indicated that the attorney was not fit to represent clients and found that the attorney had violated Rule 8.4(b).¹⁶⁴

The court recognized several mitigating factors regarding the attorney's chemical dependency.¹⁶⁵ The chemical dependency started during a time of personal marital problems.¹⁶⁶ Operating a motor vehicle while intoxicated came during a period of time when the attorney was separated from his family.¹⁶⁷ As a result of these acts, the attorney resigned from his father's law firm.¹⁶⁸ The court also found that the attorney realized that he had brought shame and humiliation upon his family name, upon his father and brothers who also practiced in the firm, and upon the legal profession as a whole. The attorney appeared to be remorseful for his conduct.¹⁶⁹ The court suspended the attorney for six months without automatic reinstatement.¹⁷⁰

2. *In re Wright*.—In *In re Wright*,¹⁷¹ the parties submitted to the Indiana Supreme Court an agreed statement of circumstances and conditional agreement for discipline. Therein, it stated that on April 25, 1994 the attorney was charged in the Allen Superior Court on two counts of possession of cocaine and failure to pay the substance excise tax, Class D felonies.

On August 17, 1994, pursuant to a plea agreement, he was sentenced to a Class A misdemeanor, received one year suspended sentence and was placed on one year of probation.¹⁷² Upon his arrest, the attorney admitted to being addicted to and dependent upon alcohol and drugs.¹⁷³ The Indiana Supreme Court cited the case of *In re Stults*,¹⁷⁴ finding that the possession of cocaine reflected adversely on the attorney's fitness to practice law.¹⁷⁵ The statement submitted by the Commission and the attorney agreed upon a six-month period of suspension with part of that period conditionally stayed, followed by a two-year probationary

162. *Id.*

163. *Id.*

164. *Id.* at 1242.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. 648 N.E.2d 1148 (Ind. 1995).

172. *Id.* at 1149.

173. *Id.*

174. 644 N.E.2d 1239 (Ind. 1994).

175. *In re Wright*, 648 N.E.2d at 1150.

period. The supreme court accepted this suspension citing the many mitigating factors the parties had stipulated to.¹⁷⁶ The supreme court found that the attorney's willingness to admit his wrongdoing, to acknowledge the chemical and alcohol dependency leading to his professional misconduct and to seek relevant medical and professional treatment in rehabilitative programs to be among the most important of the mitigating factors.¹⁷⁷ The Commission and attorney also stipulated that the attorney's misconduct had no adverse effect on any client. The court recognized that no harm had befallen the client, however, it was not controlling in the matter.¹⁷⁸ In approving the agreed upon six month suspension, the court specifically set out a detailed list of the conditions to which the attorney had to adhere.¹⁷⁹

E. Misuse Of Client Funds

1. *In re Frosch*.—In *In re Frosch*,¹⁸⁰ the attorney was charged with violating Rules 1.15, 8.4(b), 8.4(c) and 8.4(d). The charges arose from two counts alleging that the attorney mishandled client funds. Count I of the verified complaint alleged that on December 18, 1990, the attorney deposited into his client trust account the sum of \$17,667.18, which belonged to an elderly resident in a nursing home who had inherited the money. The client's family was unsure how to handle the inheritance and entrusted it to the attorney with the understanding that he would pay out whatever sums were necessary for the benefit of the elderly nursing home resident. The attorney wrote numerous checks from the trust account to pay his personal and business expenses totally unrelated to the client.

Between December 1990 and July 1991, the attorney spent at least \$20,000.00 of client funds for his personal expenses. The expenses included numerous rent obligations, various insurance policies, his mortgage, several utility bills, personal loan obligations, and his credit card bills. On January 29, 1991, the balance in his trust account dropped below \$17,667.88. However, he continued to write checks on the client trust account for personal expenses. On March 4, 1991, the balance in the attorney's trust account once again dropped below \$17,667.88, and from that date until July 7, 1991, the balance in the account remained below the amount of the elderly client's funds, falling to a low of \$296.33 on June 13, 1991.

On July 7, 1991, the attorney deposited into the trust account a settlement check belonging to two other clients in the amount of \$52,000.00. This deposit brought the balance in the attorney's trust account above \$17,667.88 for the first time since March of 1991. The attorney challenged the findings of the Disciplinary Commission, stating that the Commission had ignored evidence that funds which should have been placed into the account were diverted by others and that various amounts had been spent by the elderly beneficiary of the

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1151.

180. 643 N.E.2d 902 (Ind. 1994).

inheritance.¹⁸¹

The supreme court found that the hearing officer had heard and observed all the witnesses and their exhibits and had carefully weighed all of the arguments.¹⁸² The court examined the record and concluded that the hearing officer's findings properly reflected the evidence presented at the hearing.¹⁸³ The evidence was uncontroverted that the attorney used his client funds to satisfy his personal obligations.¹⁸⁴ Out of the deposit of the \$17,667.18 into his trust account, the attorney depleted the account to a point where a check he wrote for \$900.00 was returned due to insufficient funds. The court found that "[t]his was not the result of a rare lapse in judgment but was Respondent's established method and means for paying his personal financial obligations."¹⁸⁵

In Count II of the complaint, the attorney admitted that he failed to remit to his clients the interest earned on their funds deposited in the client trust account at Union Federal Savings Bank.¹⁸⁶ This failure constituted conversion of client's funds, a criminal act in violation of section 35-43-4-3 of the Indiana Code and further adversely reflected on his honesty, trustworthiness and fitness as a lawyer in violation of Rule 8.4(b).¹⁸⁷ It was also a violation of Rule 1.15 because the attorney had failed to hold client funds separate from his own.¹⁸⁸

The Indiana Supreme Court recognized that it is misuse of client funds which reflects most unfavorably upon the legal profession.¹⁸⁹ The court also noted that the attorney had been previously suspended for sixty days for violating Rule 1.15.¹⁹⁰ The court held this aggravating factor to strongly indicate that the attorney was incapable of conforming to the Rules of Professional Conduct, and the court concluded that disbarment was clearly warranted in this case.¹⁹¹

2. *In re Lustina*.—In *In re Lustina*,¹⁹² on May 3, 1991, the attorney received \$15,000.00 in insurance settlement checks on behalf of his clients. Pursuant to a contingent fee arrangement with the clients, the attorney was to receive one-third of the settlement, leaving the clients with a net recovery of \$10,000.00. The attorney deposited the entire \$15,000.00 into his trust checking account on May 3, 1991. Between the May 3, 1991 and July of 1991, the attorney deposited various personal funds into the same trust account, and also used funds from that account for payment of his personal expenses. Also during this period, the balance of the trust account dropped below the \$10,000.00 amount that he owed

181. *Id.* at 903.

182. *Id.* at 904.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. 647 N.E.2d 317 (Ind. 1995).

to his clients. On July 19, 1991, the attorney paid to his clients the \$10,000.00 that he owed them, this money having been provided to him by a third party.

The agreed statement of facts explained that in January of 1992 the attorney wrote a bad check to a restaurant in the amount of \$446.38 and failed to reimburse the restaurant. Based upon this failure to reimburse the restaurant, the restaurant filed suit and obtained a default judgment against the attorney.¹⁹³ The statement of facts reflected that the attorney's clients expressed their utmost satisfaction with his legal representation and were not the initiators of the request for investigation by the Commission.¹⁹⁴ The clients stated that they agreed to wait until July 1991 to receive their share of the settlement proceeds.¹⁹⁵ However, they did not authorize the attorney to use their settlement proceeds to pay his personal expenses.¹⁹⁶ The attorney was unable to produce or locate a copy of the cashier's check he used to pay his clients or to locate the file relating to the clients' representation.

The court looked at the following mitigating facts: the attorney had never before been the subject of any disciplinary grievance; the attorney had gone through a period of substantial financial hardship; the attorney contributed time and efforts to a number of civic and legal organizations including his local bar association.¹⁹⁷

The court agreed that the facts stated in the agreement between the Commission and the attorney clearly established that the attorney had commingled client funds with his personal funds in violation of Rule 1.15(a).¹⁹⁸ He also knowingly made a false statement of material fact in connection with the disciplinary matter in violation of Rule 8.1(a).¹⁹⁹ His failure to keep complete records for five years after termination of the representation of a client was in violation of Rule 1.15(a).²⁰⁰ His use of his clients' funds constituted a criminal act in violation of Indiana Code section 35-43-4-3 and thus violated Rules 8.4(b) and 8.4(c).²⁰¹

The agreement between the attorney and the Disciplinary Commission stated that an appropriate suspension in the case would be for the period of one year, after which the attorney could seek reinstatement to the practice of law.²⁰² The Indiana Supreme Court found that this was an appropriate suspension and therefore approved the agreement tendered by the parties.²⁰³ Accordingly, the attorney was suspended from the practice of law for a period not less than one

193. *Id.*

194. *Id.* at 318.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

year beginning April 6, 1995, without automatic reinstatement.²⁰⁴

3. *In re McLin*.—In *In re McLin*,²⁰⁵ the attorney was retained by Dora Haskett to represent her in a personal injury case in May 1990. The attorney and his client agreed upon a contingency fee arrangement. The attorney subsequently negotiated a \$3,000.00 insurance settlement on his client's behalf. On December 17, 1991, the attorney deposited the settlement proceeds into his personal checking account at the Indiana National Bank. After his deposit, the balance in the account was \$5,714.07. On December 30, 1991, the attorney wrote Haskett a check for \$2,000.00 drawn on his personal account. On January 13, 1992, Haskett deposited the check into a savings account at the Union Federal Savings Bank. When she tried to withdraw funds from the account she was informed that the check had been returned due to insufficient funds in the attorney's account. On February 19, 1992, the attorney drew a check on his attorney trust account in order to purchase a cashier's check payable to Union Federal, to cover the returned check.

When the attorney's misconduct first came to light he claimed that his account had been short "a few scant dollars." In fact, the account was over \$1,000.00 short of being able to satisfy Haskett's check. The attorney's trust account and his personal checking account contained various mixtures of his personal funds and his client's funds. The Indiana Supreme Court found that the agreed upon facts established that the attorney had violated Rule 1.15(a) in that the attorney deposited client funds into his personal checking account that involved the commingling of client and personal monies.²⁰⁶ The attorney also violated Rule 1.15(b) by neglecting to reimburse Haskett for the returned check for a period of over one month, and by failing to promptly deliver funds to a client who was entitled to those funds.²⁰⁷ The attorney violated Rule 8.4(b) by making use of the funds belonging to Haskett to finance his personal expenditures.²⁰⁸ The Indiana Supreme Court also found that his various misrepresentations to the Commission during the investigation of the matter led to a violation of Rule 8.1(a).²⁰⁹

In deciding upon the appropriate sanction, the court looked at various mitigating factors. The attorney had no prior disciplinary record and had no motive to deprive Haskett of the money permanently.²¹⁰ He had expressed some remorse about the incident, and Haskett did not suffer any significant financial injury as a result of being temporarily deprived of the use of her funds.²¹¹ The supreme court agreed with the suggested sanction and ruled that McLin be suspended from the practice of law in the State of Indiana for a period of not less

204. *Id.*

205. 644 N.E.2d 100 (Ind. 1994).

206. *Id.* at 102.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

than thirty days.²¹²

F. Neglect Of Client Matters

1. *In re Brown*.—In *In re Brown*,²¹³ the attorney was retained by a client in September of 1992 to represent him in an action brought by the client's former spouse seeking past due child support payments. Additionally, the former spouse petitioned the court to attach an inheritance due to the client, for the purpose of satisfying the alleged past due child obligation. After two continuances, the matter was finally scheduled for a hearing to be held on November 6, 1992. The attorney failed to notify his client of this hearing. He also failed to investigate the client's claims that the client's former wife was motivated in her efforts to attach the inheritance not by a concern for the children but to alleviate her own financial misfortune. The attorney did not attempt to discover whether his client had actually made payments directly to his former wife as the client claimed. Neither the attorney nor his client appeared at the November 6 hearing.

On November 12, 1992, the court entered judgment in the amount of \$26,860.00 against the client, and the attorney failed to inform his client of this judgment. The client learned of this adverse ruling from his daughter. Between November 12, 1992 and December 10, 1992, the attorney collected various information from the client relating to his claims and contentions, and incorporated this information into a motion to correct error, which he filed on December 10, 1992. The court denied the motion on December 21, 1992 and set a hearing date of January 22, 1993, to hear argument pertaining to the petition to attach the client's inheritance. The attorney acknowledged the hearing date in a letter dated January 11, 1993, but failed to appear at the hearing due to his involvement in another trial that day. The client attempted to represent himself at the hearing, resulting in the inheritance being attached to satisfy the earlier judgment.²¹⁴

Throughout the representation, the attorney relayed information about the case to the client through the client's sister, despite the fact that the attorney had his client's toll free work telephone number. As a result of this arrangement, the client did not often receive prompt answers to questions that he had posed concerning the case.

The court concluded that the attorney had violated Rule 1.1 by failing to provide competent representation; the court stated that the attorney had also violated Rule 1.3 by the attorney's failure to act with reasonable diligence and promptness during the course of the representation.²¹⁵ The attorney violated Rule 1.4(a) by his failure to keep the client reasonably informed about the status of the matter and to promptly comply with requests for information.²¹⁶ He violated Rule 1.4(b) by his failure to explain matters to the extent reasonably necessary to

212. *Id.*

213. 646 N.E.2d 664 (Ind. 1995).

214. *Id.* at 666.

215. *Id.*

216. *Id.*

permit his client to make an informed decision.²¹⁷ The attorney and the Disciplinary Commission had agreed upon a sanction of a public reprimand which the court instituted.²¹⁸

2. *In re Cushing*.—In *In re Cushing*,²¹⁹ the attorney was charged in a two count verified complaint. The basic nature of the allegations was that the attorney failed to represent his clients with sufficient diligence. In June 1987, the attorney was contacted by two clients regarding possible legal action regarding the death of their dog. In October 1986, the clients boarded their dog in a kennel and told the employees that the dog was diabetic. The employees allegedly neglected to feed the dog causing it to lapse into a coma. The dog ultimately died. The clients incurred significant veterinary expenses in unsuccessful attempts to treat it.

In January 1988, the attorney met with the clients to discuss filing suit and seeking an insurance settlement against the kennel. The attorney informed the clients that he would take their case on a contingency fee basis, although no written agreement was signed. Between January 1988 and June 1992, the attorney wrote two letters to the kennel's insurance carrier regarding the settlement. The attorney failed to inform the clients that the insurance carrier was unwilling to settle. The clients made approximately twenty attempts to reach the attorney by telephone. When they finally reached the attorney, he indicated that the time to pursue the case was running out and that he was pursuing the matter. The clients were left with the impression that documentation necessary to preserve their claim had been filed. Ultimately the attorney failed to file suit on behalf of his clients or to negotiate a settlement with the insurance carrier. He did not advise the clients that he no longer wanted to represent them, he failed to advise them to seek other counsel and he did not return their file in a timely manner.

The court found that this conduct violated Rule 1.3 in that the attorney failed to act with reasonable diligence and promptness when representing his clients.²²⁰ He also violated Rule 1.4(a) by failing to keep his clients reasonably informed about the status of their case and by failing to promptly comply with reasonable requests for information.²²¹

In January of 1990, the attorney was retained by another client in regard to a dissolution action. The attorney filed a petition for dissolution in the Marion Superior Court on February 5, 1990, and on February 13, 1990, the client's wife filed a petition for dissolution in the Superior Court of California. On February 23, 1990, the attorney sent a motion to dismiss to the California court. In this motion he asserted that the wife did not meet the California residency requirements and as such, her petition for dissolution should be dismissed in the California court. The attorney was not licensed to practice law in the State of California nor had he secured the assistance of local counsel. For various reasons the California court refused to accept the pleading and in order to accept the

217. *Id.*

218. *Id.*

219. 646 N.E.2d 662 (Ind. 1995).

220. *Id.* at 663.

221. *Id.*

motion, the California court requested an \$88.00 first appearance fee. The attorney received the money for the fee from his client on March 15, 1990, but did not resubmit the motion.

The wife requested a default judgment from the California court, and the attorney was notified on April 6, 1990. The attorney failed to inform his client and a default judgment was entered on behalf of the wife on August 24, 1990.²²² In October, the attorney's client received a copy of the order granting the divorce. The client then paid the attorney \$1,000.00 to continue the representation and an additional \$1,500.00 on January 1, 1991. Five hundred dollars of the \$1,500.00 was intended to retain local counsel in the State of California, but the attorney never retained local counsel. On December 17, 1991, the client, by letter, terminated the representation and demanded the return of the unearned fees. The attorney did not respond to this letter. After an additional letter had gone unanswered, the client filed a grievance against the attorney with the Disciplinary Commission, and following the filing of the grievance, the attorney returned \$1,588.00 to the client.

The Indiana Supreme Court found that the attorney's attempt to file a motion in the California court when not licensed to practice law in that state, was in violation of Rule 5.5(a), which provides that a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.²²³ The court concluded that the attorney failed to take significant action on behalf of his client for a period of four and one-half years, and the attorney's less than diligent representation in the second count resulted in a default judgment being entered against his client.²²⁴ The court stated that in both instances his client's substantive legal rights were adversely affected or threatened by the attorney's conduct.²²⁵ The court suspended the attorney for a period of thirty days beginning on March 17, 1995.²²⁶

3. *In re Dils*.—In *In re Dils*,²²⁷ the charges against Dils arose out of his representation of two estates. The attorney and the Disciplinary Commission agreed upon a resolution of this matter and presented it to the Indiana Supreme Court for its approval. Approving the agreement, the court held that the attorney had engaged in misconduct and that a public reprimand was an appropriate sanction.²²⁸

On May 31, 1989, the attorney was named the personal representative of an estate. In early 1991, the court discovered that the attorney had taken no action since March 15, 1990, and that the estate remained open. After a subsequent hearing, the attorney stated that he would file an accounting and closing statement to conclude the estate by March 28, 1991. The court ordered that all documents

222. *Id.*

223. *Id.* at 664.

224. *Id.*

225. *Id.*

226. *Id.*

227. 646 N.E.2d 667 (Ind. 1995).

228. *Id.* at 669.

be filed no later than April 1, 1991, and ordered the attorney to appear in court that day.²²⁹ The attorney failed to file any documents on or before April 1, 1991.

On August 30, 1991, the court ordered the attorney in his capacity as personal representative of the estate, to pay \$19,601.52 to Central State Hospital for care of the estate's deceased mother.²³⁰ On April 10, 1992, the court removed the attorney as personal representative and ordered him to file an inventory and financial accounting within ten days.²³¹ The attorney failed to file an accounting or other documentation within ten days; he also failed to appear to explain his actions. The attorney did not provide his successor personal representative with an inventory or accounting and neglected to forward the file or assets of the estate until approximately one year after the attorney's removal as personal representative.

The court concluded that the attorney had failed to diligently administer or ultimately close the estate and therefore he had violated Rule 1.3.²³² By failing to turn over the case to his successor personal representative until approximately one year after the attorney's removal as personal representative, the attorney had also violated Rule 1.16(d).²³³

Count II of the complaint stemmed from the attorney's representation of an estate opened on November 12, 1991. The court supervising the administration of the estate appointed the attorney as the estate's attorney, and the court appointed the decedent's daughter as the estate's executor. On December 3, 1991, the decedent's widow filed an election to take against the will. Beginning September 3, 1991, the widow's attorney attempted to contact the attorney to negotiate the claims filed against the estate. From November 12, 1991, until March 1993, the attorney failed to file an accounting or inheritance tax return and failed to otherwise properly close the estate. The attorney also failed to respond to the widow's request regarding her election.

The Indiana Supreme Court noted that the attorney had been privately reprimanded by the court once before.²³⁴ However, the Disciplinary Commission and the attorney had agreed that there was no selfish motive fueling the attorney's misconduct, and that the attorney had in good faith attempted to rectify the consequences of his misconduct by eventually turning over the estate files to his successor counsel.²³⁵ The court concluded that the sanction of a public reprimand was appropriate in this case.²³⁶

229. *Id.* at 668.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 669.

235. *Id.*

236. *Id.*

CONCLUSION

During this survey period, the law of professional responsibility, particularly the organization and procedural aspects, was dramatically revised. The Indiana practitioner must follow very specific account management regulations for trust and escrow accounts. What one might have previously considered to be sound business practice in maintaining detailed trust account records is now mandated by the Indiana Supreme Court; accounts will be monitored by the financial institutions and the Disciplinary Commission will receive reports of any mismanagement. The court has allowed sufficient time for all lawyers and law firms to comply, but it will be up to the practitioner to educate him or herself and follow this directive.

The comments lawyers are permitted to make during the course of legal proceedings are subject to the supreme court's scrutiny. The press conferences and sound bites to which we have become accustomed may be sanctionable in Indiana. The practitioner should be familiar with Rule 3.6, and guard against violative public statements during the investigation or pendency of a case.

In an effort to increase the awareness of the Bar on these and other ethics issues, there is now a mandatory continuing legal education requirement to attend sessions on ethics. The requirement of three hours on ethics over a three year period should be relatively easy for practitioners to attain.

The disciplinary process has been changed, beginning with the constitution of the Disciplinary Commission to include non-lawyer members, the increase in the enforcement of powers of the Executive Secretary and the Commission, and the addition of a new sanction, the administrative admonition, to name the more significant modifications. The availability of this new measure of discipline could result in an increase in attorney discipline cases if the Commission does not dismiss matters that previously did not warrant a private reprimand. Those lawyers practicing in the field of professional responsibility, or who find themselves the object of a grievance, should be advised of the availability of the administrative admonition as a vehicle for resolving attorney discipline cases without publicity.

