

SURVEY OF 1997 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

INTRODUCTION

As in years past, the Indiana Supreme Court has made profound changes in the professional responsibility landscape. The court has demonstrated an intense interest in raising the ethics level of the entire bar. Historically, the supreme court has spoken primarily through its opinions in disciplinary cases and, where appropriate, cases within both civil and criminal law.¹ In recent years, however, the supreme court has used its rule-making authority to make profound changes associated with the practice of law. To be sure, the court is as productive of disciplinary opinions as it has been in the past. Although the court has been very active during the survey period, this work will address three of the more remarkable changes to the rules regulating the practice of law. Thereafter, recent cases of note will be illuminated.

I. THE RULES

Almost twenty years ago, in *In re Perrello*,² the Indiana Supreme Court addressed the novel issue of whether the practice of law could be divided into two segments—a “practice” side and a “business” side.³ This 1979 case was a published decision in which the court exercised its rarely used power to find a lawyer in contempt of the supreme court for continuing to practice law while suspended. The *Perrello* decision left little doubt that the supreme court needed no expert opinion to decide whether its authority to regulate the practice of law was plenary.

Respondent attempted to call four witnesses which he qualified as experts in the area of professional responsibility by reason of their being practicing attorneys or law school professors. It was indicated by the Defendant that these witnesses would testify that there are two distinct areas in the practice of law: the practice end and the business end of handling a law practice. Respondent further indicated that the witnesses would testify that the business end of the practice was not the practice of law as contemplated in the suspension order. The testimony of these witnesses was excluded by the Court on the ground that it invaded the

* Staff Attorney, Indiana Supreme Court Disciplinary Commission. J.D., 1987, Indiana University School of Law—Indianapolis. The opinions expressed herein are solely those of the author and do not represent a statement of law or policy by the Indiana Supreme Court, any of its staff or attendant agencies.

1. For example, in *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165 (Ind. 1996), the supreme court examined issues of attorney-client privilege and work-product privilege in the situation where a party hires the former employee of an adverse party to provide an expert opinion.

2. 386 N.E.2d 174 (Ind. 1979).

3. See *id.* at 179.

province of the Court. It is the province of this Court to determine what the practice of law is, and the opinions of experts on the subject are not proper evidence. We might say however, that we do not recognize a division of the practice of law into a practice side and a business side. To manage any profession, there are incidental business elements that are a part of the total process. The performing of these business processes are a part of the total process and certainly cannot be separated and isolated from the total transaction. The conducting of the business management of a law practice, in conjunction with that practice, constitutes the practice of law.⁴

The rule changes created by the supreme court in late 1997 not only make important changes in the ethics landscape for Indiana lawyers, but also govern what might be regarded as exclusively the business aspects of the practice of law.

A. Interest on Lawyers Trust Accounts

Indiana joined the ranks of every other state in creating rules aimed at making client funds productive of interest for the public benefit. The interest thus collected will be turned over to the Indiana Bar Foundation. Under the Foundation's stewardship, the funds collected will then be used for legal projects designed to benefit the public.

1. *History.*—The concept of using interest on lawyers' trust accounts (IOLTA) for public service projects has been around for more than two decades. The basic idea is that the state should be the beneficiary of the interest earned by client funds in the trust account where, even though the funds are pooled with the funds of others, the amount of an individual client's funds can be considered nominal or held for such a brief period of time that the amount of interest earned is below the cost of subaccounting to each client. It has been the root of a popular myth in professional responsibility for many years that funds held in trust cannot be held at interest. This never was, in fact, a proscription under the Rules of Professional Conduct or the former Code of Professional Responsibility. The problem with holding client funds at interest stemmed from the duty to subaccount for the interest and pay it over to each client. Where the total sum for an individual client was nominal or not held for a long period of time, the lawyer did not cause his account to bear interest. Any money earned from those funds was made by the financial institution in which they were deposited.

Florida was the first state to change the practice and lay claim to the interest earned on pooled funds trust accounts.⁵ Since Florida's action in 1978, every other state (and the District of Columbia) has adopted a program whereby the IOLTA funds are collected by the state for use in programs for the support of law-related public service activities.⁶ These services center primarily around the

4. *Id.* at 178-79.

5. *See In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978).

6. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 45:201 (1994).

direct delivery of legal services to the poor.⁷ With the most recent rule changes, Indiana became the last jurisdiction to adopt such a program.⁸

Through the years, three specific types of IOLTA regulations have developed. The first is described as “mandatory” in which all lawyers who hold funds for others must participate.⁹ The second variety is the “voluntary” system in which a lawyer must expressly notify the state’s supreme court and his or her own financial institution regarding their intent to participate in the state’s IOLTA program.¹⁰ The third type of program is described as the “opt-out” system.¹¹ Under the “opt-out” system, all affected lawyers are required to participate in the program unless they explicitly “opt-out” from participation.¹² As of 1997, twenty-seven jurisdictions had adopted mandatory IOLTA programs, twenty jurisdictions, including Indiana, had adopted opt-out programs, and only four jurisdictions maintained programs of voluntary participation.¹³

2. *Uses by the States.*—As a general rule, the states have used the monies gathered from their IOLTA programs for purposes dedicated to public service practice. For example, most states have earmarked these funds for use in providing legal services directly to the disadvantaged in civil representation. States have also used these funds for providing education to the public about lawyers and the delivery of legal services.¹⁴ Some states, however, have dedicated IOLTA money to defraying the costs of litigation associated with improving the bar and paying for lobbying activities by the state’s bar association.¹⁵ The Michigan and South Dakota Supreme Courts use the funds not only for the traditional uses, but also to pay the public costs of representations by public defenders in criminal cases. The Michigan approach aside, the states have not used IOLTA money for the expenses directly attributable to the operation of the courts or bar associations except for those directly attributable to tracking and obtaining IOLTA funds.¹⁶

3. *The Indiana Formulation.*—The Indiana Supreme Court’s approach physically places the rule as an amendment to Rule 1.15 of the Indiana Rules of Professional Conduct.¹⁷ The existing portion of this rule defined the lawyer’s duties associated with safekeeping funds and property belonging to clients or third persons. The supreme court requires, opt-out provisions aside, that “a

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The ABA/BNA survey also points out that 17 states which originally started as voluntary or opt-out type programs have converted to mandatory compliance over the last 10 years.

14. *Id.*

15. *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993).

16. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 45:201 (1994).

17. Rule 1.15 was amended February 1, 1998.

lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time (hereinafter sometimes referred to as an 'IOLTA account') in compliance with the following provisions"¹⁸ Those requirements include a prohibition against any of the earnings from an IOLTA account becoming available to the lawyer or law firm.¹⁹ The dedicated IOLTA account must include *all* clients' funds which are nominal in amount or held for a short time.²⁰ The account can be maintained at any financial institution which has been approved by the Disciplinary Commission.²¹ The supreme court also requires that the funds in an IOLTA account must be subject to withdrawal upon request and without delay or risk to the principal amount.²² Lawyers and law firms who participate in the IOLTA program must direct their financial institution to remit all the proceeds from the account to the Indiana Bar Foundation no less than every three months.²³ The financial institution also has a duty to identify the lawyer or law firm from which the money is received.²⁴ Other ancillary duties associated with statements and bank charges are spelled out in the rule as well.

In an effort to keep the IOLTA program cost-effective, the rule also explicitly provides:

Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.²⁵

The burden of good stewardship of the IOLTA funds is clearly on the Indiana Bar Foundation.²⁶ Oversight of these monies, however, is still in the province of the Indiana Supreme Court.²⁷ The supreme court requires the Foundation to prepare a plan for investment and distribution of the funds and submit it for approval by the court.²⁸ Approval of the Foundation's plan must be obtained on,

18. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d) (1998). Rule 1.15 is attached as Appendix A.

19. *Id.*

20. *Id.*

21. IND. ADMIS. & DISC. R. 23, § 29 (1997).

22. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(3) (1998).

23. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(5) (1998).

24. *Id.*

25. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(6) (1998).

26. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(8) (1998).

27. *Id.*

28. *Id.*

at least, an annual basis.²⁹ In fact, the Foundation must provide a financial statement of its revenues and expenditures to the court every year.³⁰ In addition, a summary of this financial statement will be published in the statewide legal publications.³¹

As might be expected, the financial institutions holding these accounts have a complex record keeping task. They must track and account for the interest drawn off the trust account for each lawyer and law firm participating in the IOLTA program.³² The institution must send these funds to the Foundation.³³ The institution can elect when to pay that interest over to the Foundation, but those remittances must be made no less than quarterly.³⁴ The rule permits the institution to make its remittances to the Foundation in a lump sum. The institution, however, must provide periodic statements to the lawyer or law firm including the average account balance, the amount of interest earned and remitted and the rate of interest applied to the funds. Similar information must be supplied to the Foundation with each remittance reporting the specific amounts attributable to specific lawyers or law firms.³⁵ Provision is made, however to ensure that the information provided to the Foundation is kept confidential.³⁶ The use of the information includes data compilations by the Foundation.³⁷

Finally, Rule 1.15 provides that the money received by the Indiana Bar Foundation is to be used not only for the administration of the IOLTA program, but to assist (as well as establish) *pro bono publico* programs as well as other programs for the benefit of the public.³⁸

4. *Pro Bono Publico Activities.*—Indiana's first version of the Rules of Professional Conduct became effective on January 1, 1987. That version included rules 6.1 through 6.4 governing *pro bono publico* service by lawyers. From the time they were adopted in Indiana until this survey period, the rules governing *pro bono* service were unchanged. In fact, these rules and their attendant Comments were adopted unchanged from the ABA's Model Rules of Professional Conduct.³⁹

Effective February 1, 1998, Indiana has included a new rule in the public service section of the rules. The purposes of the new rule are spelled out in its opening section:

The purpose of this voluntary attorney pro bono plan is to promote equal

29. *Id.*

30. *Id.*

31. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(i)(4) (1998).

32. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(5)(A) (1998).

33. *Id.*

34. *Id.*

35. *Id.*

36. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(9) (1998).

37. *Id.*

38. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(8) (1998).

39. MODEL RULES OF PROFESSIONAL CONDUCT Rules 6.1-6.4 (1996).

access to justice for all Indiana residents, regardless of economic status, by creating and promoting opportunities for attorneys to provide pro bono civil legal services to persons of limited means, as determined by each district pro bono committee. The voluntary pro bono attorney plan has the following goals:

- (1) To enable Indiana attorneys to discharge their professional responsibilities to provide pro bono services.
- (2) To improve the overall delivery of civil legal services to persons of limited means by facilitating the integration and coordination of services provided by pro bono organizations and other legal assistance organizations throughout the state of Indiana.
- (3) To ensure statewide access to high quality and timely pro bono civil legal services for persons of limited means by (i) fostering the development of new pro bono programs where needed and (ii) supporting and improving the quality of existing pro bono programs.
- (4) To foster the growth of a public service culture within the Indiana Bar which values pro bono publico service.
- (5) To promote the ongoing development of financial and other resources for pro bono organizations in Indiana.⁴⁰

To achieve the rather ambitious ends of the program, the supreme court created the Indiana Pro Bono Commission. This twenty-one member Commission is made up of lawyers and judges from a wide spectrum of the bench and bar.⁴¹ The supreme court appoints eleven members and the President of the Indiana Bar Foundation appoints the remaining ten.⁴² The Chair of the Commission is then selected from among its members by the Indiana Supreme Court.⁴³ The Commission itself is intended to operate as a program within the Foundation and it performs those tasks delegated to it by the Foundation.⁴⁴ The rule also mandates that district *pro bono* committees shall be created in each of the fourteen judicial districts in the state.⁴⁵ These districts were created several years ago and a list is attached as Appendix B.⁴⁶

A judge in each judicial district will preside over the district's *pro bono* committee and the committee will be composed of anywhere from four to eight

40. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(a) (1998).

41. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(b) (1998).

42. *Id.*

43. *Id.*

44. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(d) (1998).

45. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(f) (1998).

46. The districts are identified in Rule 3(A) of the Indiana Administrative Rules.

people. Their work will include creating and executing district, and even county, *pro bono* plans on an annual basis.⁴⁷ They will also make annual reports to the statewide Commission.⁴⁸ The primary purpose of the district committees is to serve in the role as something of a clearinghouse to coordinate the *pro bono* activities and opportunities within the district.⁴⁹ This coordination encompasses intake and referral of clients, reimbursement for out-of-pocket expenses associated with the actual delivery of *pro bono* legal service, providing malpractice insurance and many other services.⁵⁰ In addition, the rule identifies more than a dozen ways in which *pro bono* services can be provided by members of the bar.⁵¹

5. *Exempt Lawyers and Opting Out.*—The IOLTA rules require that every lawyer must certify to the supreme court every year that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm are held in an IOLTA account.⁵² But what of government lawyers and others who have no trust accounts? Under subsections (e) and (f) of Rule 1.15, lawyers can notify the supreme court that they are either exempt from participating⁵³ or are opting out of participation in the IOLTA program.⁵⁴ A lawyer who voluntarily removes himself from the program must notify the supreme court.

A lawyer may elect to decline to maintain IOLTA accounts as described in paragraph (d) above for any calendar year by so notifying the Supreme Court in writing on or before October 1 of the previous year on a form prepared and promulgated by the Clerk of the Supreme Court. A lawyer who does not so advise the Supreme Court within any such period shall be required during the next calendar year to maintain all clients' funds which are nominal in amount or to be held for a short period of time in an IOLTA account.⁵⁵

During this survey period, the U.S. Supreme Court granted *certiorari* to a Texas case involving an IOLTA issue.⁵⁶ The primary issue is a holding by the

47. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(g) (1998).

48. *Id.*

49. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(h) (1998).

50. *Id.*

51. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(i) (1998).

52. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(e) (1998).

53. *Id.* (exempting lawyers not engaged in private practice, including government lawyers, judges, prosecutors (both state and federal) and corporate lawyers).

54. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(f) (1998) (allowing attorneys who are otherwise required to participate in the IOLTA program to voluntarily remove themselves from the program). Opting out, however, must be done on a form prescribed by the Clerk of the Supreme Court. *Id.*

55. *Id.*

56. Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996), *cert. granted sub nom.*, Phillips v. Washington Legal Found., 117 S. Ct. 2535 (1997).

Fifth U.S. Circuit Court of Appeals in which that court held that clients have an actual property interest in the funds created by pooled funds IOLTA accounts.⁵⁷ No decision had been made on this case at the time of this publication.

B. Sale of a Law Practice

The Model Rules of Professional Conduct and their attendant Comments were adopted by the House of Delegates of the American Bar Association in August 1983.⁵⁸ Since then, a vast majority of states have adopted some version of the Model Rules with variations from jurisdiction to jurisdiction. One model rule which did not receive universal acceptance was Rule 1.17. This rule was intended to address some difficult questions associated with the sale of a law practice like, for example, what happens to the firm's goodwill and what role, if any, do clients play in connection with the sale of a practice.⁵⁹

The Indiana Supreme Court adopted a version of Rule 1.17 which is similar to, but not identical to, the model rule.⁶⁰ Furthermore the supreme court did not adopt the Comment to the model rule, which they have done in other parts of the Rules of Professional Conduct. Although the Comments do not have the force and effect of law, they can provide valuable insight into the intent of the drafters of the model rules.⁶¹ The full text of the Indiana version of Rule 1.17 is attached to this work as Appendix C. Of particular relevance, however, is section (d) which provides:

A lawyer or law firm may sell or purchase a law practice, including goodwill, if the following conditions are satisfied:

. . . .

(d) The client consents to the sale. If a client cannot be given notice or fails to respond to notice of the sale, the representation of that client may not be transferred to the purchaser.⁶²

Specifically, paragraph (d) is an Indiana formulation. Under the model rule, there is a subsection (c)(4) which does not exist in Indiana's version of the rule.⁶³ The subject matter covered by these provisions is one of the primary areas of debate over this rule. The question has been often asked, "What happens to the

57. *Id.*

58. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 1:101 (1994).

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1995).

60. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1998).

61. *See* note on "Scope" of the INDIANA RULES OF PROFESSIONAL CONDUCT (1997) ("The Comment accompanying each rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").

62. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1998).

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17(c)(4) (1994).

clients in the sale of a law firm?" Under Indiana's version of the rule, the client must affirmatively consent, as a condition precedent to the transfer of their file to the purchasing lawyer or law firm. Absent consent, the representation of that client (more specifically, the file) remains with the selling lawyer and cannot be transferred to the lawyer buying the practice.⁶⁴ This approach to the question of client consent is both clear and clearly opposed to the approach taken by the American Bar Association on this subject. Bear in mind that, in Indiana, client consent is a condition precedent to transferring any file from the seller to the buyer. The ABA version treats client consent as a subordinate issue under section (c)(4) of its version of the rule.⁶⁵ The ABA's rule provides:

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

....

(c) Actual written notice is given to each of the seller's clients regarding:

....

(4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.⁶⁶

The weakness in the ABA's version is its silence as to the client's wishes in the matter. It covers the situation well where the client cannot be found or will not respond. It is silent, however, on the question, "what happens if the client does get the notice and objects to the transfer?" It is, after all, the client's representation to control.⁶⁷ The drafters, apparently, were aware of this problem and their Comment to this portion of the rule has a decidedly defensive tone when explaining why the lawyer's right to sell outweighs the client's ability to control not only the course of the representation, but which lawyer is actually in possession of the file.

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an

64. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17(d) (1998).

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1994).

66. *Id.*

67. See INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) & cmt. (1997).

identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.⁶⁸

The ABA, therefore, contemplates that the answer to a lack of client consent is judicial intervention. No judicial paradigm is offered in the model rule or its Comment. That step in the chain is left for each state to determine. Also unanswered are questions associated with judicial intervention and *in camera* conferences with a judge who may be presiding over the cases each file represents. Should opposing counsel be present during some of these *in camera* meetings? Does the lawyer prejudice his (soon to be former) client's interests by revealing otherwise privileged information in an attempt to withdraw? If the judge in this circumstance is the presiding judge in the underlying representation, does the lawyer's *in camera* representations set up the client for a dismissal or default because of his or her unavailability? The ABA formulation shifts the problem of dealing with the client from the selling lawyer to the local judge.

Under the Indiana formulation, the lawyer who undertook the representation,

68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 cmts. 6-8 (1994).

perhaps even accepted fees associated with the case, remains responsible for dealing with the unavailable client.⁶⁹ This approach is not without its weaknesses as well. After all, under an earlier provision of the rule, one of the conditions precedent to using this rule is that, "the seller ceases to engage in the private practice of law" in the state of Indiana.⁷⁰ This can cause a hardship for the client who is searching for his file after a long absence only to discover that his lawyer has retired or moved to another state. Still the burden remains on the selling lawyer to help the client. Under the ABA formulation, the local judge relieves the lawyer of that obligation and orders the file transferred to a law firm which could be completely unknown to the client.⁷¹

In the end, lawyers who will be using this rule would be well advised to do their research with extreme care. Searching for precedent in other jurisdictions may lead to disaster. The researcher should first determine that the other jurisdiction has adopted language identical to that in Indiana. The researcher should also be cautious in relying on authority from other jurisdictions expecting to find useful language. Even the Comment to the model rule is of limited utility based upon the formulation of the rule as adopted by the Indiana Supreme Court.

C. Professional Corporations, Limited Liability Companies and Limited Liability Partnerships

As permitted in other jurisdictions, Indiana lawyers and law firms now have more options from which to choose when deciding which form of business association in which they wish to practice law. Heretofore, professional corporations (PC's) for lawyers and law firms were governed under Rule 27 of the Indiana Rules of Admission and Discipline.⁷² The rule itself has been amended repeatedly through the years.⁷³

In a decidedly modern move, the supreme court struck the language of the existing rule and adopted a new rule identifying not only PC's, but Limited Liability Companies (LLC's) and Limited Liability Partnerships (LLP's) as well.⁷⁴ Much of the new language is adapted from the former rule simply to accommodate the addition of the words "Limited Liability Company" and "Limited Liability Partnership" where only the words "Professional Corporation" existed before.⁷⁵ One new provision of the rule now mandates, "[t]he practice of

69. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17(d) (1998).

70. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17(a) (1998).

71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17(c) & cmt. 7 (1996).

72. This rule was originally adopted by the Indiana Supreme Court on January 1, 1976.

73. Amendments to the rule occurred August 31, 1976, December 4, 1980, November 16, 1984, October 15, 1986 and September 13, 1991.

74. IND. ADMIS. & DISC. R. 27.

75. For example, section (c) of the new rule is a revamped version of section (e) of the former rule. In addition, where the former rule makes reference to the term "all shareholders," the new rule now provides, "[e]ach officer, director, shareholder, member, partner or other equity owner"

law in Indiana as a professional corporation, limited liability company or limited liability partnership shall not relieve any lawyer of or diminish any obligation of a lawyer under the Rules of Professional Conduct or under these rules.⁷⁶ This is consistent with the Indiana Supreme Court's repeated emphasis on ethics and professional responsibility considerations when creating or amending its rules.⁷⁷

The core of the new rule is centered on the requirement that every professional corporation, limited liability company and limited liability partnership must maintain professional liability insurance at state prescribed levels. The supreme court explicitly cited Rule 5.1 of the Indiana Rules of Professional Conduct. This rule imposes certain responsibilities on supervisory lawyers to manage their subordinate lawyers. Under section (f) of Rule 27, the Indiana Supreme Court mandates:

Each officer, director, shareholder, member, partner or other equity owner of a professional corporation, limited liability company or limited liability partnership shall be liable for his or her own acts of fraud, defalcation or theft or errors or omissions committed in the course of rendering professional legal services as provided by law including, but not limited to, liability arising out of the acts of fraud, defalcation or theft or errors or omissions of another lawyer over whom such officer, director, shareholder, member, partner or other equity owner has supervisory responsibilities under Rule 5.1 of the Rules of Professional Conduct, without prejudice to any contractual or other right that the aggrieved party may be entitled to assert against a professional corporation, limited liability company, limited liability partnership, an insurance carrier, or other third party.⁷⁸

Lawyers who intend to do business in one of these forms of business associations must also maintain "adequate professional liability insurance."⁷⁹ This is the first time there has been a state imposed requirement for any lawyer to maintain professional liability insurance. The full text of the new rule follows this work as Appendix D.

Finally, it appears that this rule has been carefully crafted to permit non-Indiana lawyers to participate under the new formulation of these business associations.⁸⁰

76. IND. ADMIS. & DISC. R. 27(e).

77. *See, e.g.*, IND. ADMIS. & DISC. R. 29 (amended to include an ethics component for each lawyer's continuing legal education requirement).

78. IND. ADMIS. & DISC. R. 27(f).

79. IND. ADMIS. & DISC. R. 27(g).

80. Although no explicit statement to this effect is made, a good example of the wordsmithing used to create the rule can be found in Rule 27(i) of the Indiana Rules of Admission and Discipline:

Upon receipt of such application form and fees, the State Board of Law Examiners shall make an investigation of the professional corporation, limited liability company or limited liability partnership in regard to finding that all officers, directors, shareholders,

II. THE CASES

A. *Alas, Diligence*

Lawyers' failure to exercise good law practice management skills are a perennial source of disciplinary cases. Many of the decided cases deal with lawyers' lack of diligence and failure to communicate with their clients.⁸¹ As the supreme court often observes:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.⁸²

Year after year, this form of misconduct constitutes a substantial portion of the total number of disciplinary opinions handed down by the Indiana Supreme Court.

B. *Unusual Misconduct*

From the mundane to the sublime, a number of unusual cases were decided during this survey period in several different areas of law. These cases are unusual, at least as far as the factual bases behind the misconduct are concerned. The legal bases, as will be seen, are well established in the law governing the conduct of lawyers.

Avoiding conflicts of interest is a constant battle for many lawyers. Analyzing conflicts can be a very difficult process under most circumstances.⁸³

members, partners, other equity owners, managers of lawyer employees licensed to practice law in Indiana are each duly licensed to practice law in Indiana and that all hereinabove outlined elements of this Rule have been fully complied with, and the Clerk of the Supreme Court and Court of Appeals shall likewise certify this fact. . . . If it appears that no such disciplinary action is pending and that all officers, directors shareholders, members, partners, other equity owners managers of lawyer employees required to be are duly licensed to practice law in Indiana.

81. See, e.g., *In re Kehoe*, 678 N.E.2d 394 (Ind. 1997); *In re Roche*, 678 N.E.2d 797 (Ind. 1997); *In re Caputi*, 676 N.E.2d 1058 (Ind. 1997); *In re Putsey*, 675 N.E.2d 703 (Ind. 1997); *In re Cartmel*, 676 N.E.2d 1047 (Ind. 1997).

82. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1987).

83. For example, the case of *In re McCarthy*, 668 N.E.2d 256 (Ind. 1996), is one in which the lawyer handled a collection matter for an accountant. While still holding the accountant's funds in trust, the lawyer sued the accountant on behalf of another client. The lawyer was found to have violated Rule 1.7 of the Indiana Rules of Professional Conduct, which prohibits a lawyer from

In the case of *In re Dillon & Maternowski*,⁸⁴ the lawyers undertook the representation in federal district court of a young woman arrested at the Indianapolis International Airport with a suitcase full of cocaine. Respondents received their fees in large sums of cash from individuals identified only as "T" and "Moe."⁸⁵ Unsurprisingly, "T" and "Moe" never asked for receipts. It was assumed by the client and reasonably to be expected by the lawyers that the source of their fees was someone in the chain of drug distribution. Respondents, whose practice concentrated in the defense of drug cases, maintained a policy that they would not represent persons who cooperated with the government and would withdraw if the client elected to cooperate.⁸⁶ As the case progressed, the government tendered an offer of a reduced sentence in exchange for the woman's cooperation in identifying others in the drug distribution chain.⁸⁷ Whenever the client approached her lawyers about cooperating, the lawyers restated their policy against representing snitches and advised her of the disadvantages of cooperating, including endangerment to members of her family.⁸⁸ Ultimately, the client complained to the judge that her lawyers were preventing her from cooperating.⁸⁹ In suspending each lawyer for thirty days, the supreme court found:

[T]he findings indicate a reasonable possibility that [the client's] accomplices sought out the respondents and paid their fees for the very reason that under their established policy, the respondents would influence [the client] to not implicate the accomplices. Under such circumstances, a full disclosure required that the respondents discuss with [the client] the possibility that her attorneys' fees were being paid by her accomplices and that, if this were in fact true, disclose the conflict inherent in the representation. The convergence of the non-cooperation policy and the reasonable possibility that attorneys' fees were being paid by accomplices, impermissibly conflicted with the independence of the respondents' professional judgment.⁹⁰

In the case of *In re Levy*,⁹¹ the respondent lawyer had previously been suspended for two years after converting large sums of money from the estate of Ethel Parzen.⁹² The respondent was not disbarred in part because he demonstrated in that case that he had made full restitution to, and paid the attorney fees of, his victims, and because he submitted, and the hearing officer

undertaking a representation which is directly adverse to the interest of another client.

84. 674 N.E.2d 1287 (Ind. 1996).

85. *Id.* at 1288.

86. *Id.* at 1289.

87. *Id.*

88. *Id.* at 1289-90.

89. *Id.*

90. *Id.* at 1292.

91. 682 N.E.2d 490 (Ind. 1997).

92. This underlying case was also entitled *In re Levy*, 637 N.E.2d 795 (Ind. 1994).

accepted, that this was the only unethical conduct in which the respondent had engaged.⁹³

The 1997 case grew out of an earlier newspaper article in the Gary *Post-Tribune* in which it was reported that a certain physician in northwestern Indiana had been the subject of numerous medical malpractice judgments or settlements, one of which had been secured by the attorney on behalf of a client in 1988. The client in the medical malpractice case read the newspaper article and discovered a disparity between the amount of the reported settlement (\$344,944) and the gross amount of the settlement communicated to her by the attorney (\$120,000).⁹⁴ The attorney had used the difference between the actual settlement and the misrepresented settlement to make restitution in the Parzen matter in his previous disciplinary action.⁹⁵ The attorney was charged with misconduct and, as a result of these facts, subsequently tendered his resignation from the bar to the supreme court.⁹⁶

In the case of *In re Tracy*,⁹⁷ the respondent lawyer was licensed in Indiana, but practiced federal immigration law in California. He was not a member of the California bar. In 1987, the lawyer filed an affidavit with the Clerk of the Indiana Supreme Court exempting himself from payment of his annual registration fees and continuing legal education requirements. In the affidavit, he also asserted that he did not hold judicial office and was not engaged in the practice of law in Indiana.⁹⁸ Under the rules governing practice before the Immigration and Naturalization Service (INS), an attorney must be in good standing with the highest court of some state as a condition precedent to entering an appearance in an INS proceeding.⁹⁹ The respondent lawyer relied on his inactive Indiana license to support his appearances before the INS.¹⁰⁰ In addition, he used a regular checking account, not a dedicated trust account, to deposit his clients' checks for filing fees for INS proceedings.¹⁰¹ Between October 1990 and August 1991, the lawyer wrote eleven checks to the INS that were returned due to insufficient funds.¹⁰² Although the lawyer reported to the Disciplinary Commission that he made all the dishonored checks good, this representation was false.¹⁰³ As a result, the lawyer received a six month suspension from the practice of law. The Indiana Supreme Court found the respondent failed to keep

93. *Id.* at 799.

94. *In re Levy*, 682 N.E.2d at 490.

95. *Id.* at 490-91.

96. Registration is tendered pursuant to Rule 23(17) of the Indiana Rules of Admission and Discipline.

97. 676 N.E.2d 738 (Ind. 1997).

98. *Id.* at 738. The standard terms of the affidavit can be found in ADMIS. & DISC. R. 23 § 21.

99. 8 C.F.R. §§ 1.1(f) & 292.1 (1997).

100. *In re Tracy*, 676 N.E.2d at 738.

101. *Id.*

102. *Id.*

103. *Id.*

client funds separate from his own money and thereby violated Rule 1.15(a) of the Indiana Rules of Professional Conduct.¹⁰⁴ The supreme court also found that the lawyer violated Rule 8.1(a) by making a misrepresentation to the Disciplinary Commission.¹⁰⁵ Finally, the court found that the lawyer committed, or attempted to commit a criminal action (i.e. conversion) and thereby violated Rules 8.4(a) and (b).¹⁰⁶

Of particular interest to lawyers who practice in probate and related areas is the case of *In re Woolbert*.¹⁰⁷ In *Woolbert*, the respondent lawyer was a dual fiduciary by serving as both the attorney for a supervised estate and as co-personal representative.¹⁰⁸ During the four years that the estate was open, the respondent and his co-executor withdrew \$80,000 from the estate without seeking court approval. Of this amount, \$35,000 went to the respondent lawyer, a similar amount went to the co-executor and \$10,000 was paid out as a loan to a third party.¹⁰⁹ The fees were reported for the first time on the final accounting the lawyer submitted to the court. The accounting was challenged and the lawyer's fees were reduced from \$35,000 to \$14,500.¹¹⁰ In finding that the lawyer had committed professional misconduct, the Indiana Supreme Court noted that Indiana law prohibits the withdrawal of fees from the supervised

104. That rule provides:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(a) (1998).

105. *In re Tracy*, 676 N.E.2d at 739. Rule 8.1 of the Indiana Rules of Professional Conduct requires, "[a]n applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact"

106. *In re Tracy*, 676 N.E.2d at 739. In relevant part, Rule 8.4 of the Indiana Rules of Professional Conduct provides:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rule of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

107. 672 N.E.2d 412 (Ind. 1996).

108. *Id.*

109. *Id.* at 414.

110. *Id.*

administration of an estate without specific application to, and approval by, the probate court.¹¹¹ It did not matter to the court that no local rule restated this statutory requirement. The supreme court further likened the lawyer's state of mind to, at best, gross disregard for his fiduciary duty.¹¹² As with the *Tracy* case, the lawyer's misconduct included violations of Rules 1.15(a) and 8.4(b).¹¹³ The court also held the lawyer's conduct constituted dishonesty and misrepresentation, violating Rule 8.4(c) and conduct prejudicial to the administration of justice, violating Rule 8.4(d). For his misconduct, the lawyer was suspended from the bar and could not petition for reinstatement earlier than one year after the date of the suspension.¹¹⁴

CONCLUSION

During the period covered by this work, the Indiana Supreme Court made significant changes to the law governing the profession. The lion's share of these changes tended to modernize the operation of the Indiana bar in keeping with changes found elsewhere in the United States. Among the new rules are those creating a program for collecting and using the money developed from the interest on lawyer's trust accounts, for selling a law practice and transferring its files and for regulating the form of associations under which lawyers and law firms do business. This latter rule also includes, for the first time, that lawyers practicing in one of those forms must maintain adequate professional liability insurance or an acceptable substitute.

Decided cases, meanwhile, are always an important mechanism by which the supreme court instructs the bar on acceptable and unacceptable standards of conduct for lawyers. This period was no less active in judicial pronouncements than any other and, there is no reason to believe that the law in this area will remain static.

111. IND. CODE § 29-1-10-13 (1979).

112. *In re Woolbert*, 672 N.E.2d at 416.

113. *Supra* notes 103 and 104. The conduct in this case also violated Rule 3.4(c) of the Indiana Rules of Professional Conduct.

114. *In re Woolbert*, 672 N.E.2d at 416.

APPENDIX “A”
RULES OF PROFESSIONAL CONDUCT
Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance.

(b) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) Except as provided in paragraph (e) of this rule, a lawyer or law firm shall create and maintain an interest-bearing trust account for clients’ funds which are nominal in amount or to be held for a short period of time (hereinafter sometimes referred to as an “IOLTA account”) in compliance with the following provisions:

(1) No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

(2) The IOLTA account shall include all clients’ funds which are nominal in amount or to be held for a short period of time.

(3) An IOLTA account may be established with any financial institution (i) authorized by federal or state law to do business in Indiana, (ii) insured by the Federal Deposit Insurance Corporation or its equivalent, and (iii) approved as a depository for trust accounts pursuant to Indiana Admission and Discipline Rules, Rule 23, Section 29. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay and without risk to principal by reason of said withdrawal.

(4) The rate of interest payable on any IOLTA account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors using accounts of the same class within the institution. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the funds which otherwise qualify to be placed in an

IOLTA account so long as there is no impairment of the right to immediate withdrawal or transfer of principal (except that accounts generally may be subject to statutory notification requirements) even though interest may be sacrificed thereby, provided all interest earned net of fees or charges is remitted to the Indiana Bar Foundation (the "Foundation"), which is designated in paragraph (i) of this rule to organize and administer the IOLTA program, and the depository institution submits reports thereon as set forth below.

(5) Lawyers or law firms depositing client funds in an IOLTA account established pursuant to this rule shall, on forms approved by the Foundation, direct the depository institution:

(A) to remit all interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, solely to the Foundation. The depository institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the depository institution must provide, for each individual IOLTA account, the information to the lawyer or law firm and to the Foundation required by subparagraphs (d)(5)(B) and (d)(5)(C) of this rule;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and such other information as is reasonably required by the Foundation;

(C) to transmit to the depositing lawyer or law firm a periodic account statement for the IOLTA account reflecting the amount of interest paid to the Foundation, the rate of interest applied, the average account balance for the period for which the interest was earned, and such other information as is reasonably required by the Foundation; and

(D) to waive any reasonable service charge that exceeds the interest earned on any IOLTA account during a reporting period ("excess charge"), or bill the excess charge to the Foundation.

(6) Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.

(7) In the event that any client asserts a claim against an attorney based upon such attorney's determination to place client funds in an IOLTA account because such balance is nominal in amount or will be held for a short period of time, the Foundation shall, upon written request by such

attorney, review such claim and either:

(A) approve such claim (if such balances are found not to be nominal in amount or short in duration) and remit directly to the claimant any sum of interest remitted to the Foundation on account of such funds; or

(B) reject such claim (if such balances are found to be sufficiently nominal in amount or short in duration) and advise the claimant in writing of the grounds therefor. In the event of any subsequent litigation involving such a claim, the Foundation shall interplead any such sum of interest and shall assume the defense of the action.

(8) All interest transmitted to the Foundation shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by the Foundation and approved at least annually by the Supreme Court of Indiana, for the following purposes:

(A) to pay or provide for all costs, expenses and fees associated with the administration of the IOLTA program;

(B) to establish appropriate reserves;

(C) to assist or establish approved pro bono programs as provided in Ind.Prof.Cond.R. 6.5;

(D) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

(9) The information contained in the statements forwarded to the Foundation under subparagraph (d)(5) of this rule shall remain confidential and the provisions of Ind.Prof.Cond.R. 1.6 (Confidentiality of Information), are not hereby abrogated; therefore, the Foundation shall not release any information contained in any such statement other than as a compilation of data from such statements, except as directed in writing by the Supreme Court.

(10) The Foundation shall have full authority to and shall, from time to time, prepare and submit to the Supreme Court for approval, forms, procedures, instructions and guidelines necessary and appropriate to implement the provisions set forth in this rule and, after approval thereof by the Court, shall promulgate same.

(e) Every lawyer admitted to practice in this State shall annually certify to this Court, pursuant to Ind.Adms.Disc.R. 23(21), that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm are held in an IOLTA account, or that the lawyer is exempt because:

(1) the lawyer or law firm's client trust account has been exempted and removed from the IOLTA program by the Foundation pursuant to subparagraph (d)(6) of this rule; or

(2) the lawyer elected to decline to maintain an IOLTA account in accordance with the procedures set forth in paragraph (f) below; or

(3) the lawyer:

(A) is not engaged in the private practice of law;

(B) does not have an office within the State of Indiana;

(C) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

(D) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law; or

(E) has been exempted by an order of general or special application of this Court which is cited in the certification.

(f) A lawyer may elect to decline to maintain IOLTA accounts as described in paragraph (d) above for any calendar year by so notifying the Supreme Court in writing on or before October 1 of the previous year on a form prepared and promulgated by the Clerk of the Supreme Court. A lawyer who does not so advise the Supreme Court within any such period shall be required during the next calendar year to maintain all clients' funds which are nominal in amount or to be held for a short period of time in an IOLTA account.

(g) A lawyer or law firm may establish a separate interest-bearing trust account for clients' funds which are neither nominal in amount nor to be held for a short period of time for a particular client or client's matter. All of the interest on such account, net of any transaction costs, shall be paid to the client, and no earnings from such account shall be made available to a lawyer or law firm.

(h) In the exercise of a lawyer's good faith judgment in determining whether funds of a client are of such nominal amount or are expected to be held for a short period of time, that a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures; and

(3) the nature of the transaction(s) involved.

The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(i) The Foundation is hereby designated as the entity to organize and administer the IOLTA program established by paragraph (d) of this rule in accordance with the following provisions:

(1) The Board of Directors of the Foundation (the "Board") shall have general supervisory authority over the administration of the IOLTA program, subject to the continuing jurisdiction of the Supreme Court.

(2) The Board shall receive the net earnings from IOLTA accounts established in accordance with paragraph (d) of this rule and shall make appropriate temporary investments of IOLTA program funds pending disbursement of such funds.

(3) The Board shall, by grants, appropriations and other appropriate measures, make disbursements from the IOLTA program funds, including current and accumulated net earnings, in accordance with the

plan of distribution approved by the Supreme Court from time to time referenced in subparagraph (d)(8) of this rule.

(4) The Board shall maintain proper records of all IOLTA program receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant selected by the Board. The Board shall annually cause to be presented to the Supreme Court a reviewed or audited financial statement of its IOLTA program receipts and expenditures for the prior year. The report shall not identify any clients of lawyers or law firms or reveal confidential information. The statement shall be filed with the Clerk of the Supreme Court and a summary thereof shall be published in the next available issue of one or more state-wide publications for attorneys, such as *Res Gestae* and *The Indiana Lawyer*.

(5) The president and other members of the Board shall administer the IOLTA program without compensation, but may be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties, and shall be indemnified by the Foundation against any liability or expense arising directly or indirectly out of the good faith performance of their duties.

(6) In the event the IOLTA program or its administration by the Foundation is terminated, all assets of the IOLTA program, including any program funds then on hand, shall be transferred in accordance with the Order of the Supreme Court terminating the IOLTA program or its administration by the Foundation; provided, such transfer shall be to an entity which will not violate the requirements the Foundation must observe regarding transfer of its assets in order to retain its tax-exempt status under the Internal Revenue Code of 1986, as amended, or similar future provisions of law.

APPENDIX "B"**ADMINISTRATIVE RULE 3.
COURT DISTRICTS**

(A) The state of Indiana is hereby divided into fourteen (14) administrative districts as follows:

(1) District 1, consisting of the counties of Lake, Porter, LaPorte Starke, Pulaski, Jasper, and Newton;

(2) District 2, consisting of the counties of St. Joseph, Elkhart, Marshall, and Kosciusko;

(3) District 3, consisting of the counties of LaGrange, Adams, Allen, DeKalb, Huntington, Noble, Stueben, Wells, and Whitley;

(4) District 4, consisting of the counties of Clinton, Fountain, Montgomery, Tippecanoe, Warren, Benton, Carroll, and White;

(5) District 5, consisting of the counties of Cass, Fulton, Howard, Miami, Tipton, and Wabash;

(6) District 6, consisting of the counties of Blackford, Delaware, Grant, Henry, Jay, Madison, and Randolph;

(7) District 7, consisting of the counties of Clay, Parke, Putnam, Sullivan, Vermillion, and Vigo;

(8) District 8, consisting of the counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan and Shelby;

(9) District 9, consisting of the counties of Fayette, Franklin, Rush, Union, and Wayne;

(10) District 10, consisting of the counties of Greene, Lawrence, Monroe and Owen;

(11) District 11, consisting of the counties of Bartholomew, Brown, Decatur, Jackson, and Jennings;

(12) District 12, consisting of the counties of Dearborn, Jefferson, Ohio, Ripley, and Switzerland;

(13) District 13, consisting of the counties of Daviess, Dubois, Gibson, Knox, Martin, Perry, Pike, Posey, Spencer, Vanderburgh, and Warrick; and

(14) District 14, consisting of the counties of Clark, Crawford, Floyd, Harrison, Organe, Scott, and Washington.

APPENDIX "C"**PROFESSIONAL CONDUCT RULE 1.17
SALE OF LAW PRACTICE**

A lawyer or a law firm may sell or purchase a law practice, including goodwill, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law in the jurisdiction in which the practice has been conducted.
- (b) The practice is sold as an entirety to another lawyer or law firm.
- (c) Actual written notice is given to each of the seller's clients regarding:
 - (1) the proposed sale;
 - (2) the terms of any proposed change in the fee arrangement authorized by paragraph (e); and
 - (3) the client's right to retain other counsel or to take possession of the file.
- (d) The client consents to the sale. If a client cannot be given notice or fails to respond to notice of the sale, the representation of that client may not be transferred to the purchaser.
- (e) The fees charged clients shall not be increased by reason of the sale.

The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

APPENDIX "D"**PROFESSIONAL CORPORATIONS, LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS**

One or more lawyers may form a professional corporation, limited liability company or a limited liability partnership for the practice of law under Indiana code 23-1.5-1, IC 23-18-1 and IC 23-4-1, respectively.

(a) The name of the professional corporation, limited liability company or limited liability partnership shall contain the surnames of some of its members, partners or other equity owners followed by the words "Professional Corporation," "PC," "P.C.," "Limited Liability Company," "L.L.C.," "LLC," "Limited Liability Partnership," "L.L.P.," or "LLP," as appropriate. Such a professional corporation, limited liability company, or limited liability partnership shall be permitted to use as its name the name or names of one or more deceased or retired members of a predecessor law firm in a continuing line of succession, subject to Rule of Professional Conduct 7.2.

(b) The professional corporation, limited liability company or limited liability partnership shall be organized solely for the purpose of conducting the practice of law, and, with respect to the practice of law in Indiana, shall conduct such practice only through persons licensed by the Supreme Court of Indiana to do so.

(c) Each officer, director, shareholder, member, partner or other equity owner shall be an individual who shall at all times own his or her interest in the professional corporation, limited liability company or limited liability partnership in his or her own right and, except for illness, accident, time spent in the armed services or during vacations and/or leaves of absence, shall be actively engaged in the practice of law through such professional corporation, limited liability company or limited liability partnership.

(d) The practice of law in Indiana as a professional corporation, limited liability company or limited liability partnership shall not modify any law applicable to the relationship between the person or persons furnishing professional legal services and the person or entity receiving such services, including, but not limited to, laws regarding privileged communications.

(e) The practice of law in Indiana as a professional corporation, limited liability company or limited liability partnership shall not relieve any lawyer of or diminish any obligation of a lawyer under the Rules of Professional Conduct or under these rules.

(f) Each officer, director, shareholder, member, partner or other equity owner of a professional corporation, limited liability company, or limited liability partnership shall be liable for his or her own acts of fraud, defalcation or theft or errors or omissions committed in the course of rendering professional legal

services as provided by law including, but not limited to, liability arising out of the acts of fraud, defalcation or theft or errors or omissions of another lawyer over whom such officer, director, shareholder, member, partner or other equity owner has supervisory responsibilities under Rule 5.1 of the Rules of Professional Conduct, without prejudice to any contractual or other right that the aggrieved party may be entitled to assert against a professional corporation, limited liability company, limited liability partnership, an insurance carrier, or other third party.

(g) A professional corporation, limited liability company or limited liability partnership shall maintain adequate professional liability insurance or other form of adequate financial responsibility for any liability of the professional corporation, limited liability company, or limited liability partnership arising from acts of fraud, defalcation or theft or error or omissions committed in the rendering of professional legal services by an officer, director, shareholder, member, partner, other equity owner, agent, employee or manager of the professional corporation, limited liability company or limited liability partnership.

(1) “Adequate professional liability insurance” means one or more policies of attorneys’ professional liability insurance or other form of adequate financial responsibility that insure the professional corporation, limited liability company or limited liability partnership or both;

(i) in an amount for each claim, in excess of any insurance deductible or deductibles, of fifty thousand dollars (\$50,000), multiplied by the number of lawyers practicing with the professional corporation, limited liability company or limited liability partnership; and

(ii) in an amount of one hundred thousand dollars (\$100,000) in excess of any insurance deductible or deductibles for all claims during the policy year, multiplied by the number of lawyers practicing with the professional corporation, limited liability company or limited liability partnership.

However, no professional corporation, limited liability company or limited liability partnership shall be required to carry insurance or other form of adequate financial responsibility of more than five million dollars (\$5,000,000) per claim, in excess of any insurance deductibles, or more than ten million dollars (\$10,000,000) for all claims during the policy year, in excess of any insurance deductible.

The maximum amount of any insurance deductible under this Rule shall be as prescribed from time to time by the Board of Law Examiners.

(2) "Other form of adequate financial responsibility" means funds, in an amount not less than the amount of professional liability insurance applicable to a professional corporation, limited liability company or limited liability partnership under section (g)(1) of this Rule, available to satisfy any liability of the professional corporation, limited liability company or limited liability partnership arising from acts of fraud, defalcation or theft or errors or omissions committed in the rendering of professional legal services by an officer, director, shareholder, other equity owner, member, partner, agent, employee or manager of the professional corporation, limited liability company or limited liability partnership. These funds shall be available in the form of a deposit in trust of cash, bank certificates of deposit, United States Treasury obligations, bank letters of credit or surety bonds, segregated from all other funds of the professional corporation, limited liability company or limited liability partnership and held for the exclusive purpose of protecting any aggrieved party of the professional corporation, limited liability company or limited partnership in compliance with this Rule.

(h) Each officer, director, shareholder, member, partner or other equity owner of a professional corporation, limited liability company or limited liability partnership shall be jointly and severally liable for any liability of the professional corporation, limited liability company or limited liability partnership based upon a claim arising from acts of fraud, defalcation or theft or errors or omissions committed in the rendering of professional legal services while he or she was an officer, director, member, shareholder, partner or other equity owner, in an amount not to exceed the aggregate of both of the following:

(1) The per claim amount of professional liability insurance or other form of adequate financial responsibility applicable to the professional corporation, limited liability company or limited liability partnership under this Rule, but only to the extent that the professional corporation, limited liability company or limited liability partnership fails to have the professional liability insurance or other form of adequate financial responsibility required by this Rule; and

(2) The deductible amount of the professional liability insurance applicable to the claim.

The joint and several liability of the shareholder, member, partner or other equity owner shall be reduced to the extent that the liability of the professional corporation, limited liability company or limited liability partnership has been satisfied by the assets of the professional corporation, limited liability company or limited liability partnership.

(i) Lawyers seeking to organize or practice by means of a professional corporation, limited liability company or limited liability partnership shall obtain applications to do so and instructions for preparing and submitting these applications from the State Board of Law Examiners. Applications shall be

upon a form prescribed by the State Board of Law Examiners. Two copies of the application for a certificate of registration shall be delivered to the State Board of Law Examiners, accompanied by a registration fee of two hundred dollars (\$200.00), plus ten dollars (\$10.00) for each officer, director, shareholder, member, partner, other equity owner or lawyer employee licensed to practice law in Indiana of the professional corporation, limited liability company or limited liability partnership, two copies of a certification of the Clerk of the Supreme Court and Court of Appeals of Indiana that each officer, director, shareholder, member, partner, other equity owner or lawyer employee who will practice law in Indiana holds an unlimited license to practice law in Indiana, and two copies of a certification of the Indiana Disciplinary Commission that each officer, director, shareholder, member, partner, other equity owner or lawyer employee licensed to practice in Indiana has no disciplinary complaints pending against him or her and if he or she does, what the nature of each such complaint is. Applications must be accompanied by four copies of the Articles of Incorporation, Articles of Organization or Registration of the professional corporation, limited liability company or limited liability partnership with appropriate fees for the Secretary of State. All forms are to be filed with the State Board of Law Examiners.

Upon receipt of such application form and fees, the State Board of Law Examiners shall make an investigation of the professional corporation, limited liability company or limited liability partnership in regard to finding that all officers, directors, shareholders, members, partners, other equity owners, managers of lawyer employees licensed to practice law in Indiana are each duly licensed to practice law in Indiana and that all hereinabove outlined elements of this rule have been fully complied with, and the Clerk of the Supreme Court and Court of Appeals shall likewise certify this fact. The Executive Secretary of the Indiana Disciplinary Commission shall certify whether a disciplinary action is pending against any of the officers, directors, shareholders, members, partners, other equity owners, managers or [sic] lawyer employees licensed to practice in Indiana. If it appears that no such disciplinary action is pending and that all officers, directors, shareholders, members, partners, other equity owners, managers of lawyer employees required to be are duly licensed to practice law in Indiana are, and that all hereinabove outlined elements of this Rule have been fully complied with, the Board shall issue a certificate of registration which will remain effective until January 1st of the year following the date of such registration.

Upon written application of the holder, upon a form prescribed by the State Board of Law Examiners, accompanied by a fee of fifty dollars (\$50.00), the Executive Director of the Board shall annually renew the certificate of registration, if the Board finds that the professional corporation, limited liability company or limited liability partnership has complied with the provisions of the statute under which it was formed

and this Rule. Such application for renewal shall be filed each year on or before November 30th. Within ten (10) days after any change in the officers, directors, shareholders, members, partners, other equity owners or lawyer employees licensed to practice in Indiana, a written listing setting forth the names and addresses of each shall be filed with the State Board of Law Examiners with a fee of ten dollars (\$10.00) for each new person listed.

Copies of any amendments to the Articles of Incorporation, Articles of Organization or Registration of the professional corporation, limited liability company or limited liability partnership thereafter filed with the Secretary of State's office shall also be filed with the State Board of Law Examiners.

