SURVEY OF 1998 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

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During this survey period, a number of notable events occurred highlighting the multi-faceted nature of the law governing lawyering. Developments in the areas of solicitation of legal services, the Interest On Lawyer Trust Accounts program, mishandling client funds, and lawyers elected to public office all served to broaden the spectrum of ethical concerns for Indiana lawyers.

I. INTEREST ON LAWYER TRUST ACCOUNTS ("IOLTA")

Since the Florida Supreme Court created the original IOLTA program in 1978,[1] each of the states has, in turn, enacted their own programs for these funds.[2] IOLTA money, generally, is interest developed from lawyers' trust accounts wherein client funds that are either nominal in amount or held for a short period of time are placed in interest-bearing accounts.[3] The interest generated is paid to state run programs for a number of different public interest activities.[4] Often, the funds are used to provide direct legal services to the indigent, public education programs, and publications about the law.[5]

In 1997, Indiana became the fiftieth state to create an IOLTA program.[6] By amending Indiana's Rules of Professional Conduct, the Indiana Supreme Court created the program to be run by the Indiana Bar Foundation, with the aim of reimbursing expenses (not fees) incurred by Indiana lawyers directly delivering *pro bono* legal services to indigent clients.[7]

As the Indiana formulation began to gel, events elsewhere foreshadowed possible problems for the fledgling program. A Texas case, *Phillips v. Washington Legal Foundation*,[8] had been percolating up through the federal courts for a couple of years. In essence, the plaintiffs in *Phillips* claimed that if the principle sums on which interest was earned belonged to clients, then the interest on the money must, therefore, belong to the clients.[9] They reasoned that the states' IOLTA programs constituted a "taking" under the U.S. Constitution and filed suit to undo the Texas program.[10] The Supreme Court, however,

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1. *In re* Interest on Lawyer Trust Accounts, 356 So.2d 799 (Fla. 1978).
2. *See* LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 45: 202-5 (1997).
3. *See id.* § 45:201.
4. *See id.*
5. *See id.*
6. *See id.*
7. IND. RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)-(h) (amended 1997).
8. 118 S. Ct. 1925 (1998).
9. *See id.* at 1929.
10. *Id.*

refused to address the "taking" issue, but voiced a clear opinion as to whom the generated interest belonged. The Court held:

> the interest income generated by funds held in IOLTA accounts is the "private property" of the owner of the principal. We express no view as to whether these funds have been "taken" by the State; nor do we express an opinion as to the amount of "just compensation," if any, due respondents. We leave these issues to be addressed on remand. The judgment of the [c]ourt of [a]ppeals is affirmed.[11]

Historically, holding client funds at interest presented a knotty problem for lawyers. Until recently, it was extremely difficult—and not at all cost effective—for lawyers to "sub-account" for interest earned on pooled client funds.[12] For example, assume a lawyer used a single, interest-bearing, "pooled funds" trust account and held $100 for client A for 37 days, $1537 for client B for sixty-two days, and $21,514 for client C for four days. It should be readily apparent that the lawyer's ability to calculate and pay out the correct amount of interest attributable to each of the three clients was very burdensome and prone to error. This problem, of course, was compounded in direct proportion to the size of the firm and the number of clients with funds in the trust account. Because of this inability to sub-account for the interest due, it became part of the "lore of lawyering" that holding client funds at interest was unethical and contrary to disciplinary codes.[13] In truth, there was *never* a specific provision in the current Indiana Rules of Professional Conduct or its predecessor Indiana Code of Professional Responsibility that outlawed the practice of holding client funds at interest.[14] The premise of the IOLTA program avoided the sub-accounting problem by combining client funds that were either a nominal amount or held for a short period of time into one, interest-bearing account.[15] That accumulated interest could then pay into the state IOLTA program with considerably less trouble than attributing amounts to each client.[16]

In the *Phillips* case, the Supreme Court of the United States did not address the issue of whether state IOLTA programs constituted a taking under the U.S. Constitution. Instead, the Court limited its decision to hold only that the interest earned on client funds belonged to the respective clients.[17] The Court then remanded the case back to the district court for a decision on the merits of the "taking" issue.[18] Ultimately, the *Phillips* decision could substantially change the IOLTA environment nationwide.

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11. *Id.* at 1934.
12. *See, e.g., In re* Interest on Lawyers' Trust Accounts, 675 S.W.2d 355, 357 (Ark. 1984).
13. *See id.* at 356-57.
14. *See* IND. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1998) and the former IND. CODE OF PROF. RESP. DR 9-102 (repealed January 1, 1987).
15. IND. RULES OF PROFESSIONAL CONDUCT Rule 1.15(d) (effective February 1, 1998).
16. *Id.*
17. Phillips v. Washington Legal Found., 118 S. Ct. 1925, 1928 (1998).
18. *Id.* at 1934.

In Indiana, meanwhile, the finalization of the program is on hold by order of the Indiana Supreme Court. On September 30, 1998, the court issued an order[19] holding the effective date for compliance with the applicable rules[20] in abeyance until further order of the court. Under the order, the IOLTA program could not begin operation until it received final approval from the Internal Revenue Service.[21] Although IRS approval was subsequently given, no countermanding order from the Indiana Supreme Court had been issued at the time of this Article's publication.

II. THE CASES

A. Mishandling Client Funds

Mishandling client funds is a perennial source of disciplinary actions against lawyers.[22] During this survey period, one case highlighted two problems: How does one prove such a mishandling occurred and what is an appropriate sanction for the lawyer? *In re Towell*[23] involved a lawyer who both failed to refund unearned legal fees and converted client funds for uses that did not benefit the clients.

In *Towell*, the respondent lawyer was charged with multiple counts of misconduct under the Rules of Professional Conduct. In one count, the lawyer was retained by an elderly woman to handle a matter involving property situated in the state of Wisconsin. During the representation, he came into possession of various papers and documents belonging to the woman. In late February 1993, the client discharged the lawyer. She also directed the lawyer to deliver her files to her banker.[24] The client later sued the lawyer and he counterclaimed for his fees. The lawyer received a judgment on his counterclaim for $3020.[25] After a hearing in December 1993, the client was found in contempt and jailed. She remained in jail for five days until she paid the judgment on December 8, 1993.[26] She thereafter demanded return of her files and, having no response, filed her grievance with the Disciplinary Commission in June 1996.[27]

In another count, the lawyer received a $600 retainer to represent a woman in a dissolution proceeding with the understanding that he would attempt to

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19. *In re* Ind. Professional Conduct Rule 1.15 and Admission and Discipline Rule 23(21), No. 94S00-9809-MS-533 (Ind. Sept. 30, 1998).

20. IND. RULES OF PROFESSIONAL CONDUCT Rule 1.15(d-h) (1998); IND. ADMIS. & DISC. R. 23(21)(c) (1998).

21. *See supra* note 19.

22. *See, e.g., In re* Cochran, 383 N.E.2d 54 (Ind. 1978).

23. 699 N.E.2d 1138 (Ind. 1998).

24. *See id.* at 1139.

25. *See id.*

26. *See id.*

27. *See id.*

secure a court order requiring the client's husband to pay his fees.[28] The final decree was entered June 4, 1993, requiring the ex-husband to pay $3000 to the lawyer for his fees. The ex-husband paid in a timely matter but, despite repeated demands for the return of her retainer, the client did not get her money back until April 1996.[29] In his defense, the lawyer told the client simply that he was having "financial problems."[30]

In still another count, the lawyer was retained to represent a man in his pursuit of a worker's compensation claim. In August 1995, the lawyer entered into a settlement of the client's claim for $23,904.76. He deposited the funds into his escrow account.[31] On September 1, 1995, prior to the client receiving his share, two checks for $250 cleared the account. They were for the benefit of another client's friend and totally unrelated to the worker's compensation client.[32] Later the lawyer used $1035.25 to pay a medical bill of yet another client whose matter was completely unrelated to the workers compensation client's.[33] Although the lawyer was using the settlement proceeds to pay others' bills, he had not paid the chiropractor's bill due from the worker's compensation client.[34] In February 1996, the client filed a grievance with the Disciplinary Commission. He received payment in full from the lawyer in April 1996, some seven months after the settlement proceeds came into the lawyer's hands.[35] The trial court also found that his completely unauthorized use of the client's settlement proceeds constituted conversion as defined in Indiana's criminal code and thereby was a crime reflecting adversely on the lawyer's fitness and character as proscribed by the Indiana Rules of Professional Conduct.[36]

In presenting the case to the supreme court, the lawyer argued that his conduct was, at worst, neglectful and deserving only of a reprimand. He also argued that he should be ordered to take a law practice management course as the remedy for his problems.[37] The Commission argued that any lawyer who misappropriates client funds should be disbarred.[38] The court decided to strike a balance between the two and found:

> It is true that outright theft of client funds generally warrants severe sanction, up to and including disbarment. Those cases demonstrate that where a lawyer knowingly or intentionally steals client or third party funds held in trust for the lawyer's own selfish benefit, that lawyer is

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28. *See id.* at 1140.
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *Id.* at 1141. *See* IND. RULES OF PROFESSIONAL CONDUCT Rule 8.4(b).
37. *See In re Towell*, 699 N.E.2d at 1141.
38. *See id.*

> viewed as being unfit to continue in the profession absent extremely compelling mitigating or extenuating factors. Here, respondent Towell clearly engaged in serious client and third-party fund mismanagement. However, we are convinced that the respondent's mission was not theft of client money. As the respondent explained it, from his "pooled" trust account he unwittingly permitted one client's funds to be used for other, unrelated obligations of other clients and/or third parties in an apparent good faith belief that other client funds would soon arrive to cover the expenditures. We, of course, are not persuaded that the respondent's actions were totally inadvertent, or unwitting; however, we are convinced that he did not intend to deprive his worker's compensation client of the value or use of his funds sufficient to find theft of the funds. What he did was intentionally and without authorization use one client's funds for the benefit of others intending all along to replace the money "very shortly" when the expected "replacement" funds became available. Unfortunately for everyone, the other client funds did not materialize for some time. As a result, the chiropractor's bill remained unpaid, prompting initiation of a disciplinary grievance. That course of events demonstrate an example of the potential pitfalls of poor client fund management.
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> Nevertheless, the respondent's acts indicate no selfish motive in his inappropriate use of his client's funds. As such, we view his acts as somewhat less culpable than outright theft. However, even in the absence of a finding that the respondent stole his client's money, his gross mishandling of funds held in trust for others nonetheless indicates serious professional shortcomings deserving of significant sanction, primarily for the protection of other clients. Coupled with his callous and arrogant disregard of the Commission's authority and cavalier treatment of his clients' rights and interests upon termination of representation, we conclude that lengthy exclusion from practice is in order.[39]

The supreme court then ordered the lawyer suspended from the bar for a period of eighteen months.[40]

The unique feature of *Towell* is the distinction drawn between the lawyer's misuse of client funds for his personal needs and his misuse of client funds for the needs of others. This suggests that, to the extent possible, misappropriated client funds should be traced to demonstrate clearly and convincingly that money's destination. In *Towell*, the lawyer's use of the funds for others mitigated what would presumably be a more severe sanction for use of the money for himself.[41]

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39. *Id.* at 1141-42 (citations omitted).

40. *Id.*

41. *Id. See also In re* Frosch, 597 N.E.2d 310, 311 (Ind. 1992) (rejecting the suggestion that the lawyer's mishandling of client funds constituted a criminal action because of the lawyer's clear

In contrast, the supreme court decided the case of *In re Stivers*,[42] which also involved misappropriated client funds. In *Stivers*, while the lawyer should have been holding in trust $420 of the client money for expenses, the balance in the account fell below that amount on several occasions.[43] The lawyer explained that the inadequate balances resulted from monthly bank service charges assessed against the trust account balance without reimbursement by the lawyer.[44] In this case, the payout of client funds benefitted the lawyer to some extent.[45] The lawyer in *Stivers* received a two year suspension from the bar.[46]

In the same vein, the lawyer in *In re Campbell*[47] received an eighteen month suspension when he took $2000 for litigation expenses, deposited the money in his personal account when it should have been in trust, then abandoned his practice and took the client's funds with him.[48] Although the lawyer did not show up for his disciplinary hearing, he was still found to have committed a criminal act and ordered to make restitution before being eligible to petition for reinstatement to the bar.[49]

B. Self-interest and the Lawyer in Public Office

Two disciplinary cases involving lawyers holding public office merit attention by all members of the bench and bar. They are *In re Edwards*[50] and *In re Riddle*.[51] Both lawyers held public office (a judge and prosecutor, respectively) and both were disbarred. Although each has the common element of an elected lawyer,[52] there is an important ethics lesson for all lawyers laying behind the obvious ethical implications for public office holders who engage in self-dealing. These two cases echo sentiments advanced by the supreme court for almost twenty years.

In *Edwards*, the respondent lawyer was charged with personal misconduct in a number of counts. In at least two instances, the respondent engaged in sexual relationships with clients during the course of his representation.[53] In one instance, he created a fake dissolution decree on which the client relied in her

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fee dispute with the client).

42. 683 N.E.2d 1312 (Ind. 1997).

43. *See id.* at 1313.

44. *See id.*

45. *See id.*

46. *See id.* at 1314.

47. 702 N.E.2d 692 (Ind. 1998).

48. *See id.* at 693-94.

49. *See id.* at 693.

50. 694 N.E.2d 701 (Ind. 1998).

51. 700 N.E.2d 788 (Ind. 1998).

52. Disciplinary action against lawyers holding elected office is nothing new. *See, e.g.*, *In re* Curtis, 656 N.E.2d 258 (Ind. 1995); *In re* Moerlein, 520 N.E.2d 1275 (Ind. 1988); *In re* Holovachka, 198 N.E.2d 381 (Ind. 1964).

53. *See Edwards*, 694 N.E.2d at 705, 708.

dealings with others.[54] In another case, Edwards served as presiding judge in a case without disclosing that he had a prior attorney-client relationship with the husband and wife defendants.[55] Still further, Edwards was appointed as a judge pro tempore in Delaware County Superior Court in the spring of 1996. He continued to accept his full pay as a part-time deputy city attorney for the city of Muncie even though he was receiving pay as a full time judge.[56] Later that year, when he stood for re-election to the superior court bench he was holding, he continued to represent the city in legal matters *and* undertook new representations in his private law office.[57] Even more remarkably, Edwards also maintained a position as a part-time probate commissioner in the Henry County probate court, despite his election to a full-time judgeship in the adjacent county.[58]

In *Riddle*, the respondent lawyer was the elected prosecuting attorney for Crawford County, Indiana, having taken office in January 1995.[59] Initially, Riddle served as the part-time prosecuting attorney[60] and simultaneously maintained a private practice with an office in the small town of Marengo.[61] His private practice consisted of a group of bank and title company clients for whom Riddle did title work at a flat rate of $100 for title opinions plus incidental costs. Riddle hired a lawyer named Evans on the promise that Evans would work in Riddle's private office and also serve as Chief Deputy Prosecutor for that county. As permitted by statute,[62] Riddle chose to become full time prosecutor on January 1, 1996, which entitled him to a state-paid salary of $85,000 per year with the proviso that he devote his full energies to representing the state of Indiana and maintain no private law practice. A week later, Evans began working in Riddle's private law office as a partner with Riddle. The same day, Evans was appointed Chief Deputy, signed his oath of office, and went on the state payroll. The Riddle law office signage, office secretary, and letterhead remained essentially unchanged. In a newspaper interview, Riddle did not reveal that Evans had anything to do with the prosecutor's office and no formal announcement was made regarding Evans' appointment. In August 1996, Riddle summoned Evans to the Crawford Circuit Court's office for a second swearing-in ceremony to be performed by the judge. Prior to that time, Evans had done no prosecutions nor any significant work for the prosecutor's office. No one mentioned Evans' prior appointment in January when the circuit judge swore him in a second time in

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54. *See id.* at 705.

55. *See id.* at 709.

56. *See id.* at 714.

57. *See id.* at 714-15.

58. *See id.* Based on the misconduct, the factual development is quite extensive.

59. *In re* Riddle, 700 N.E.2d 788, 790 (Ind. 1998).

60. This has been permissible in Indiana for some time. Indiana has a specific rule to guard against the dangers of conflict of interest for part-time prosecutors and deputies. *See* IND. RULES OF PROFESSIONAL CONDUCT Rule 1.8(k) (amended 1986).

61. *Riddle*, 700 N.E.2d at 790.

62. IND. CODE § 33-14-19.5 (1998).

August. Evans had no desk at the court house, was assigned no work or investigations, and had received no training. Although Riddle later testified that Evans performed vast amounts of research, he was unable to produce anything that Evans had done for the prosecutor's office. During the year when Evans ran the Riddle law office, Riddle made almost $35,000 from his private practice while Evans received only $540.[63] Riddle was later charged both in his disciplinary case and in a criminal action with having committed ghost employment[64] and, on the basis of that misconduct and its attendant violations, was disbarred.[65]

Obviously, the actions of both lawyers in *Edwards* and *Riddle* represented clear cases of self-dealing while holding public office, which was, of course, intolerable to the supreme court. The court's observations, however, are worthy of additional analysis. In *Edwards*, the court noted:

> The pertinent facts found by the Masters to have been clearly and convincingly proven are summarized below. In some instances, the factual testimony of Respondent was in conflict with the testimony of others. In their report, the Masters expressly stated, "Wherever in the record of proceedings the testimony of Judge Joseph G. Edwards contradicts the testimony of other witnesses we find that his testimony regarding such matters is less credible than the testimony of other witnesses." The Masters were in the best position to observe and assess witness credibility and their judgment in reconciling conflicting evidence carries great weight.[66]

This would be a remarkable finding under any circumstance, but the respondent lawyer in *Edwards* simultaneously held positions of high trust within his community. Similarly, in *Riddle*, the court found:

> At the hearing of these disciplinary charges, the respondent testified under oath that Evans performed vast amounts of research for the Crawford County prosecutor's office between January 8 and August 5, 1996. He was unable to support that contention with a single iota of corroborating evidence. In fact, other employees of the office testified in substance that to their knowledge Evans essentially did no work for the office during this period. Evans himself also testified to that effect. We therefore find that the respondent's contrary statements at the hearing were knowingly false and, therefore, violative of [Professional Conduct Rule] 8.1(a). Similarly, by stating that he received no fees from the Riddle Law Office after electing full-time status as prosecuting attorney of Crawford County when he had, in fact, received almost

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63. *See Riddle*, 700 N.E.2d at 790-92.

64. IND. CODE § 35-44-2-4.

65. *See Riddle*, 700 N.E.2d at 786.

66. *In re* Edwards, 694 N.E.2d 701, 704 (Ind. 1998) (citing *In re* Frosch, 643 N.E.2d 902, 904 (Ind. 1994)).

> $35,000 in net proceeds from Evans' preparation of title opinions, the respondent again violated [Professional Conduct Rule] 8.1(a).[67]

The court's finding was very similar to that in *Edwards*: The lawyer's word carried no greater presumption of truthfulness than that of any other witness in the proceeding.

Findings of this type go far back in the line of disciplinary cases. In *In re Barefoot*,[68] the court held:

> Accordingly, we will proceed with the review process, whereby we examine all matters presented, including the Hearing Officer's findings and conclusions. Although such findings are not binding on this Court,[69] they do receive emphasis due to the Hearing Officer's unique opportunity for direct observation of the witnesses.[70]
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> We are not persuaded by Respondent's unsubstantiated, self-serving contentions. We conclude, as did the Hearing Officer, that the Respondent, by using as his own, client's funds entrusted to him for payment of inheritance taxes, engaged in criminal conversion in violation of Indiana Code [section] 35-43-4-3.[71]

The lawyer in *Barefoot* was disbarred.[72]

Later, in *In re McDaniel*,[73] the problem of lawyer self-interest rose again. In that case, the lawyer, as manager of the local license branch had, inter alia, created a fictitious person, paid her a weekly salary, and then pocketed the money himself. Again the court held:

> Although this Court is not bound by the findings tendered by the Hearing Officer, such findings do receive emphasis in that the Hearing Officer observes the witnesses, absorbs the nuances of unspoken communication, and by this observation attaches credibility to the testimony.
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> In this case, Respondent's testimony is in conflict with other evidence presented in this cause. The Hearing Officer chose not accept all of the Respondent's representations. The record presented for review supports the findings of the Hearing Officer.[74]

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67. *Riddle*, 700 N.E.2d at 794.

68. 533 N.E.2d 128, 129 (Ind. 1989).

69. Because the supreme court's jurisdiction in disciplinary proceedings is plenary, their review of the findings made at trial is de novo. *See In re* Barnes, 691 N.E.2d 1225 (Ind. 1998); *In re* Towell, 690 N.E.2d 1138 (Ind. 1998).

70. *In re Barefoot*, 533 N.E.2d at 129 (citations omitted).

71. *Id.* at 133.

72. *See id.*

73. 470 N.E.2d 1327 (Ind. 1984).

74. *Id.* at 1328 (citation omitted).

One respondent lawyer suggested that the Hearing Officer's refusal to believe his version constituted an impermissible shifting of the burden of proof. In *In re Kerr*,[75] the respondent lawyer mishandled a client's tax refund over a period of time requiring the client to seek judicial resolution of his claim against the lawyer. In the underlying representation, Kerr was made personally responsible for paying the client's new lawyer to recover his money for him. In discounting the lawyer's credibility, the court admonished:

> The Respondent insists that because the hearing officer did not adopt Respondent's explanations as findings of fact, somehow the burden of proof was shifted upon him to prove his innocence. Respondent confuses the concepts of the shifting of the burden of proof with the hearing officer's obligation to weigh conflicting evidence, including the credibility of a witness who takes the witness stand in his own behalf.[76]

The message, then, seems clear. Lawyers who speak in their own defense would be well advised to offer solid corroboration beyond their own testimony. *Edwards* and *Riddle* confirm that self-serving testimony in a case with an allegation of self-dealing will be given little, if any, weight. In addition, the court also decided *In re Brooks*[77] with many of the same issues involving the misappropriation of client funds as described above. In *Brooks*, the lawyer received a nine month suspension from the bar.[78] Like the other cases discussed herein, the lawyer offered defenses as to the misappropriation charges, but due to his uncorroborated testimony, the court found his defenses unpersuasive, thereby accepting the hearing officer's conclusions on credibility.[79]

In each of the cases described herein the respondent lawyers had no proof that their actions were in any way motivated by a reason other than personal gain. Although free to demonstrate otherwise, lawyers cannot rely on the strength of their own words in proving their motivations. As the court has observed, this close scrutiny does not constitute a burden shift, but merely a critical examination of the evidence—or lack thereof—to support the lawyer's version of events.

C. The Scope of a Lawyer's Authority

During this survey period, a pair of cases addressed the issue of whether an attorney has the implied authority to settle a civil case without the authorization or consent of the client. The treatments given by both the Indiana Court of Appeals and the Indiana Supreme Court are very illuminating for all lawyers.

In *Red Arrow Ventures, LTD v. Miller*, [80] the Fifth District of the Court of

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75. 640 N.E.2d 1056 (Ind. 1994).
76. *Id.* at 1058.
77. 694 N.E.2d 724 (Ind. 1998).
78. *See id.* at 729.
79. *Id.* at 726.
80. 692 N.E.2d 939 (Ind. Ct. App. 1998).

Appeals was presented with a situation where a settlement was enforced against defendants in a civil case based upon the actions of the their attorney. In *Red Arrow*, suit was commenced for breach of a promissory note wherein the defendants had stopped making payments. After a failed attempt at mediation, the case was tried over the course of three days in May 1996. At the end of the trial, the judge announced that he would rule against the defendants on the issue of liability, but he did not mention the amount of damages he would award Miller. Over the next couple of days, the lawyers for the parties met and discussed a settlement of the case. They arrived at a proposed settlement of $21,000 and, in follow-up correspondence, the defendant's lawyer memorialized the agreement and the mechanism by which it would be paid. A few weeks later, the defendant's lawyer communicated that his clients did not want to pay the settlement. Because the settlement was not in the plaintiff's hands by the end of July 1996, the plaintiff filed a motion to enforce the settlement and for attorney's fees. The court ultimately bound the defendants to the settlement and ordered them to pay an additional $1000 in attorney fees.[81]

The court of appeals reviewed a long line of Indiana cases holding that attorneys have the apparent authority to settle a claim without the consent of the client. The Fifth District opinion, however, wrestled with the court's analysis in *Gravens v. Auto-Owners Insurance Co.*,[82] which held that the client has the ultimate authority to decide when to settle a civil case.[83] Ultimately, the court of appeals held:

> We believe that our supreme court's decision in *Ferrara v. Genduso*[84] . . . clearly stands for the proposition that a settlement agreement into which an attorney enters is enforceable against his client who has not consented to be bound by it. We note that "the Court of Appeals is obliged to follow the precedents established by the Indiana Supreme Court." We therefore hold that, when an attorney enters into a settlement agreement without his client's consent, the agreement is enforceable against the non-consenting client. We disapprove of *Klebes* and *Gravens* to the extent they conflict with our holding.[85]

The court then went on to vacate the award of attorney fees to the plaintiff's lawyers as not authorized by prior law.[86]

At the same time *Gravens* and *Red Arrow* were working their way through the court of appeals, the federal case of *Koval v. Simon-Telelect, Inc.*[87] was wrestling with a similar problem involving a lawyer's ability to bind a client to a settlement after the client balked. In August 1997, the U.S. District Court in

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81. *Id.* at 946.
82. 666 N.E.2d 964 (Ind. Ct. App. 1996).
83. *Id.* at 966.
84. 14 N.E.2d 580 (Ind. 1938).
85. *Red Arrow Ventures*, 692 N.E.2d at 945-46 (citation omitted).
86. *Id.* at 947.
87. 979 F. Supp. 1222 (N.D. Ind. 1997).

the South Bend division certified two questions of law to the Indiana Supreme Court:

> 1. If an attorney settles a claim as to which the attorney has been retained, but does so without the client's consent, is the settlement binding between third parties and the client?
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> 2. Under the portion of [Indiana] Code [section] 22-3-2-13 that provides, "consent shall not be required where the employer or the employer's compensation insurance carrier has been fully indemnified or protected by court order," does it constitute "protection by a court order" such that consent is not required for the settlement of claims and satisfaction of judgment in proceedings, for the court to specifically preserve a compensation insurance carrier/lienholder's right to bring suit against its agent for settling its claim while enforcing an oral settlement of claims by reason of injury or death?[88]

A week after the court of appeals decision in *Red Arrow*, the Indiana Supreme Court issued an answer to the certified questions in the Indiana case of *Koval v. Simon-Telelect, Inc.*[89] In a scholarly opinion by Justice Boehm, the supreme court examined an attorney's implied authority, an attorney's apparent authority, and an attorney's inherent agency power in court proceedings.[90] In the end, the court held:

> We conclude that a client's retention of an attorney does not in itself confer implied or apparent authority on that attorney to settle or compromise the client's claim. However, retention does confer the inherent power on the attorney to bind the client to an in court proceeding. For purposes of an attorney's inherent power, proceedings that are regulated by the [Indiana Rules for Alternative Dispute Resolution][91] in which the parties are directed or agree to appear by settlement authorized representatives are in court proceedings. We also conclude that for purposes of Indiana Code [section] 22-3-2-13 it does not constitute "protection by court order" for a court specifically to preserve an employer's or an employer's insurance carrier's right to bring suit for breach of duty by its agent.[92]

What then, of the client's rights that his lawyer has compromised? Those rights become a potential malpractice claim against the lawyer.

An attorney may without express authority bind his client by agreement

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88. *Id.* at 1232.

89. 693 N.E.2d 1299 (Ind. 1998).

90. *Id.* at 1302-07.

91. IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION (as amended through February 1, 1998).

92. 693 N.E.2d 1309-10.

> that judgment may be taken against him, and that, too, though the attorney know that his client has a good defense to said action. If [the attorney] acts contrary to the express directions of his client, or to his injury, the client must look to the attorney for redress. Although the theoretical underpinnings of this rule are not always fully explained, and on occasion are set forth in terms slightly at variance with standard agency doctrines, these cases uniformly bind the client to an in court agreement by the attorney and remit the client to any recovery that may be available from the attorney. This distinction between in court consents and out of court agreements is also found in Indiana statutory law at least since the civil code of 1881 and currently embodied in Indiana Code [section] 34-1-60-5: "An attorney has authority, until discharged or superceded by another . . . [t]o bind his client in an action or special proceeding, by his agreement, filed with the clerk, or entered upon the minutes of the court, and not otherwise." Although the statute perpetuates the archaic term "minutes of the court" today it presumably refers to the transcript and chronological case summary and, in the context of an [Alternative Dispute Resolution], whatever memorializes that proceeding.
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> Indeed one rarely encounters a rule that is so commonly cited and yet so infrequently explained.[93]

Thereafter, the court examined the need to vest such authority in attorneys. In essence, lawyers in trial offer evidence and make arguments that invariably bind their clients to a particular position. It is the desire of the court to foster resolution of disputes without resort to trial; the logic of holding that mediation proceedings are "in-court" matters predictably follows.[94]

The *Koval* and *Red Arrow* cases bear close reading by all practicing lawyers. These two cases, and those cited therein, give an important outline of the lawyer's power in dealing on behalf of clients. At the very least, they suggest that not only should the lawyer know the limits of his authority, but he should confer regularly with his client to create clear boundaries for the course of the representation.

II. RULE AMENDMENTS OF NOTE

A. Pro Hac Vice *Admission*

The methods by which attorneys are admitted to the bar (and disciplined as well) are described in the Indiana Rules of Admission to the Bar and the Discipline of Attorneys.[95] With the exception of some minor amendments in

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93. *Id.* at 1305-06. This last comment is the product of case research going as far back into British jurisprudence as 1699.

94. *See id.* at 1307.

95. The various individual rules have been promulgated by the supreme court through the

1990, the rule on *pro hac vice* admission has remained essentially unchanged since its original adoption. In 1999, however, the rule received a major overhaul.

In the past, the question of *pro hac vice* admission was a matter within the discretion of the presiding judge.[96] Beyond that, there were few objective standards on which a court could reject such a request. The new formulation of the rule requires that the presiding judge make certain findings to justify the foreign attorney's temporary admission. The judge must find, inter alia, that a member of the Indiana bar has appeared and agreed to act as co-counsel, that the foreign attorney is not a resident of the state, regularly employed in Indiana, or regularly engaged in business or professional activities in the state.[97] In addition, the foreign attorney must file a verified petition reciting a number of averments including his residence, his standing in his home jurisdiction's bar, and a list of all Indiana proceedings in which he is participating.[98] Additionally, the clerk of the Indiana Supreme Court must now keep what is essentially a "registry" of all attorneys who appear *pro hac vice* in Indiana proceedings.[99] The full text of the new rule is set out in Appendix A.

B. Mandatory Continuing Legal Education

The primary change in the rule[100] governing mandatory continuing legal education involves new admittees to the Indiana bar. For those new lawyers admitted in 1999 and thereafter, each must obtain continuing legal education from the beginning of their careers.[101] Since the rule's inception, new admittees were granted a three-year grace period from their admission before they had to attend continuing education seminars.[102] Under the amendment, new admittees will have to complete "programs designated by the Commission as appropriate for new lawyers."[103] That class of programs is not, as yet, defined by rule. The educational requirements for all other lawyers remains unchanged. The text of the new rule follows this article as Appendix B.

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years and were ultimately collected in this body referred to colloquially as the IND. ADMIS. & DISC. RULES. The Oath of Attorneys, for example, was adopted by the Indiana Supreme Court in 1954, but finds its roots in the CANONS OF THE AMERICAN BAR ASSOCIATION, adopted on August 27, 1908.

96. *See, e.g.*, Michael A. Disabatino, Annotation, *Attorney's Right to Appear Pro Hoc Vice in State Court*, 20 A.L.R. 4TH 855 (1981).

97. IND. ADMIS. & DISC. R. 3 §§ 2 (a)(1) & (2) (as amended 1999). See *infra* Appendix A for rule text.

98. IND. ADMIS. & DISC. R. 3 § 2(a)(3) (as amended 1999).

99. IND. ADMIS. & DISC. R. 3 § 2(b) (as amended 1999).

100. IND. ADMIS. & DISC. R. 29 § 3 (as amended 1999).

101. IND. ADMIS. & DISC. R. 29 § 3(a) (as amended 1999).

102. IND. ADMIS. & DISC. R. 29 § 3(b) (as amended 1999).

103. *Id.*

C. Oversight of Lawyer Trust Accounts

In 1997, the supreme court created the Indiana Supreme Court Disciplinary Commission Rules Governing Attorney Trust Account Overdraft Reporting. These six rules regulated the methodology by which financial institutions in Indiana qualified to keep attorney trust accounts and agreed to report overdrafts on such accounts.[104] By amending the rules during this survey period, the supreme court tailored the rules to more closely fit existing practice. The court recognized that, in many instances, lawyers and law firms keep non-lawyer support staff members as signatories on the office's trust account. In some cases, this practice is not only necessary, but desirable.[105] Although the lawyers in the firm can delegate this authority, they cannot delegate the responsibility for the acts of their staff or the integrity of their trust account management practices.[106] To safeguard lawyers' handling of client funds, the court will now require that the firm use certain safeguards to insure that the trust account is run properly. At a minimum, the bank statements for the trust account must be delivered unopened and reviewed by a supervising attorney. In addition, the reconciliation of the trust account must be done by a person who has no signature authority over the account.[107] The full text of the new requirements follows this article as Appendix C.

D. Electronic Access

A growing number of counties throughout the state are making records available through electronic means via their clerk's office. The supreme court amended Trial Rule 77[108] to authorize electronic posting of court records and the mechanism by which fees for records can be obtained. The text of the new rule follows this article as Appendix D.

CONCLUSION

The supreme court and its Disciplinary Commission address problems involving lawyer trust accounts and continually refine the rules and practices used by the bar to hold client funds in trust. Advances have been made in this area through both rule amendments and through disciplinary action to improve accountability to clients. Lawyers also have significantly more guidance as to the

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104. IND. SUP. CT. DISC. COMM. R. GOV. ATT'Y TRUST ACCOUNT OVERDRAFT REP., Rules 1-6 (1997 version) [hereinafter DISC. COMM. R.].

105. This can be particularly true in "form driven" practices, such as bankruptcy and probate in which filing fees or similar expense money is routinely held in trust until the initial documents are ready for filing. In those circumstances, it might provide better service to clients if a legal assistant can sign trust checks rather than holding up document processing to wait on a lawyer signatory.

106. IND. RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1998).

107. DISC. COMM. R. 6(D) (as amended 1999).

108. IND. R. TR. P. 77(K) (as amended 1999).

scope of their authority whether it be apparent, inherent, or implied. The court also significantly formalized the process by which *pro hac vice* admission is conducted. Hopefully, these new rules amendments will provide a more objective standard for courts to make the decision as to whether to admit a foreign lawyer to practice.

APPENDIX A

RULE 3. ADMISSION OF ATTORNEYS

Section 1. Admission of Attorneys.

The Supreme Court shall have exclusive jurisdiction to admit attorneys to practice in Indiana. Admission by the Court shall entitle attorneys to practice in any of the courts of this state.

Section 2. Limited Admission on Petition.

(a) Requirements for Limited Admission on Petition.

A member of the bar of another state or territory of the United States, or the District of Columbia, may appear in the Supreme Court, the Court of Appeals, the Tax Court, or the trial courts of this state in any particular proceeding, if the court before which the attorney wishes to appear determines that there is good cause for such appearance and each of the following conditions is met:

(1) A member of the bar of this state has appeared and agreed to act as co-counsel.

(2) The attorney is not a resident of the state of Indiana, regularly employed in the state of Indiana, or regularly engaged in business or professional activities in the state of Indiana.

(3) The attorney files a verified petition stating:

(i) The attorney's residential address, office address, and the name and address of the attorney's law firm or employer, if applicable;

(ii) The states or territories in which the attorney has ever been licensed to practice law, including the dates of admission to practice and any attorney registration numbers;

(iii) That the attorney is currently a member in good standing in all jurisdictions listed in (ii);

(iv) That the attorney has never been suspended, disbarred or resigned as a result of a disciplinary charge, investigation, or proceeding from the practice of law in any jurisdiction; or, if the attorney has been suspended, disbarred or resigned from the practice of law, the petition shall specify the jurisdiction, the charges, the address of the court and disciplinary authority

which imposed the sanction, and the reasons why the court should grant limited admission not withstanding prior acts of misconduct;

(v) That no disciplinary proceeding is presently pending against the attorney in any jurisdiction; or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule shall have the continuing obligation during the period of such admission promptly to advise the court of a disposition made of pending charges or the institution of new disciplinary proceedings;

(vi) A list of all proceedings, including caption and cause number, in which the attorney, or any member of a firm with which the attorney is currently affiliated, has appeared in any of the courts of this state during the last five years. Absent special circumstances, repeated appearances by any person or by members of a single law firm pursuant to this rule shall be cause for denial of the petition;

(vii) A demonstration that good cause exists for the appearance. Good cause shall include at least one of the following:

(a) the cause in which the attorney seeks admission involves a complex field of law in which the attorney is a specialist, or

(b) there has been an attorney-client relationship with the client for an extended period of time, or

(c) there is a lack of local counsel with adequate expertise in the field involved, or

(d) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(e) such other reason similar to those set forth in this subsection as would present good cause for the *pro hac vice* admission.

(viii) A statement that the attorney has read and will be bound by the Rules of Professional Conduct adopted by the Supreme Court, and that the attorney consents to the jurisdiction of the State of Indiana, the Indiana Supreme Court, and the Indiana Supreme Court Disciplinary Commission to resolve any

disciplinary matter that might arise as a result of the representation.

(ix) A statement that the attorney will file a Notice of *Pro Hac Vice* Admission with the clerk of this court in compliance with Section (b) of this rule within thirty (30) days after the court grants permission to appear in the proceeding.

(b) Notice of *Pro Hac Vice* Status.

All attorneys admitted *pro hac vice* under the provisions of Section 2(a) shall file a Notice with the clerk of this court within thirty (30) days after a court grants permission to appear in the proceeding. Failure to file the notice within the time specified will result in automatic exclusion from practice within this state. The notice shall include the following:

(1) A current statement of good standing issued to the attorney by the highest court in each jurisdiction in which the attorney is admitted to practice law;

(2) A copy of the verified petition requesting permission to appear in the court proceedings, along with the court order granting permission;

(3) A list of all grievances, petitions, or complaints filed against the attorney with any disciplinary authority of any jurisdiction with the determination thereon.

(c) Registration Fee for Attorney Admitted Pro Hac Vice.

The attorney shall pay, during the pendency of the proceedings, the annual registration fee required of members of the bar of this state as set out in Admission and Discipline Rule 23, Section 21.

(d) Responsibilities of Attorneys.

Members of the bar of this state serving as co-counsel under this rule shall sign all briefs, papers and pleadings in the cause and shall be jointly responsible therefor. The signature of co-counsel constitutes a certificate that, to the best of co-counsel's knowledge, information and belief, there is good ground to support the signed document and that it is not interposed for delay or any other improper reason.

APPENDIX B

RULE 29. MANDATORY CONTINUING LEGAL EDUCATION

Section 3. Education Requirements

(a) Every attorney and every judge of a city, town or Marion County small claims court, who is not licensed as an attorney, shall complete no less than six (6) hours of approved continuing legal education each year and shall complete no less than thirty-six (36) hours of approved continuing legal education each Educational Period. At least three (3) hours of approved continuing legal education in professional responsibility shall be included within the hours of continuing legal education required during each three (3) year Educational Period. Such hours may be integrated as part of a substantive program or as a free standing program. All credits for a single educational activity will be applied in one (1) calendar year. No more than twelve (12) hours of the Educational Period requirement shall be filled by Non Legal Subject Matter Courses.

(b) Attorneys admitted to the Indiana Bar before December 31, 1998, on the basis of successfully passing the Indiana Bar examination, shall have a grace period of three (3) years commencing on January 1 of the year of admission and then shall commence meeting the minimum yearly and Educational Period requirements thereafter. Attorneys admitted after December 31, 1998, shall commence meeting the yearly and Educational Period requirements starting on January 1 after the year of their admission by completing programs designated by the Commission as appropriate for new lawyers.

(c) Attorneys admitted on foreign license or attorneys who terminate their inactive status shall have no grace period. Their first three year Educational Period shall commence on January 1 of the year of admission or termination of inactive status.

(d) For judges of city, town and Marion County small claims courts, who are not attorneys, the first three year Educational Period shall commence on January 1 of the first full calendar year in office.

A judge who fails to comply with the educational requirements of this rule shall be subject to suspension from office and to all sanctions under Section 10. A judge so suspended shall be automatically reinstated upon compliance with Section 10(b) "Reinstatement Procedures". The Commission shall issue a statement reflecting reinstatement which shall also be sent to the clerk to show on the Roll of Attorneys that the judge is in good standing.

APPENDIX C

INDIANA SUPREME COURT DISCIPLINARY COMMISSION RULES GOVERNING ATTORNEY TRUST ACCOUNT OVERDRAFT REPORTING

RULE 6. MISCELLANEOUS MATTERS

D. Admission and Discipline Rule 23, section 29(a)(6) contemplates that a designee who is not admitted to practice law in Indiana may be an authorized signatory on a trust account. In the event an attorney or law firm delegates trust account signature authority to any person who is not admitted to practice law in Indiana, such delegation shall be accompanied by specific safeguards, including at a minimum the following:

a. All periodic account activity statements form the financial institution shall be delivered unopened to and reviewed by an attorney having supervisory authority over the non-attorney signatory; and

b. Responsibility for conducting periodic reconciliations between internal trust account records and periodic trust account activity statements from the financial institution shall be vested in a person who has no signature authority over the trust account.

E. All communications from financial institutions to the Disciplinary Commission shall be directed to: Executive Secretary, Indiana Supreme Court Disciplinary Commission, 115 West Washington Street, Suite 1060, Indianapolis, Indiana 46204.

APPENDIX D

RULE 77. COURT RECORDS

K. **Electronic Posting of Court Records**. The clerk, with the consent of the majority of the judges in the courts of record, may make court records, including but not limited to the chronological case summary, record of judgments and orders, index, and case file, available to the public through remote electronic access such as the Internet or other electronic method. The records to be posted, the specific information that is to be included, its format, pricing structure, if any, method of dissemination, and any subsequent changes thereto must be approved by the Division of State Court Administration under the direction of the Supreme Court of Indiana. Such availability of court records shall be subject to applicable laws regarding confidentiality.