

# SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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Very often, an examination of the role of professional responsibility of lawyers takes the form of a recitation of the latest and most significant disciplinary actions from the state's highest court. During the period covered by this Article, a number of significant developments occurred that provide important guidance to practicing lawyers with regard to the standards of civility and professionalism expected of them in day-to-day practice. Moreover, many of these guideposts have appeared in the form of opinions about areas of substantive law rather than in opinions directly disciplining a member of the profession. In other words, the Indiana Supreme Court is taking a proactive approach to defining the roles of lawyers and the legal profession. This approach may be at odds with the common understanding of lawyers as zealous advocates within the legal system. The court's stated vision may be described as a required balancing of the lawyer's role as advocate, limited by the judicial system's duty to uncover the truth. Put another way, the practicing lawyer must recognize that enforceable duties are owed to third parties outside the attorney-client relationship.

On another front, the supreme court addressed a "hot button" topic among litigators during this survey period: the use of salaried in-house lawyers to defend insureds in claims against their policies. As several other states have done, the Indiana Supreme Court held that the attorney-employer relationship was not a per se conflict of interest or inherently problematic.<sup>1</sup> Further, the court refused to condemn the arrangement on ideological grounds and decided to examine every such allowed problem on a case-by-case basis.<sup>2</sup> As long as the relationship between the lawyer and the insurance carrier is made clear to the insured client, there is no ethical problem assumed at the outset of the relationship.<sup>3</sup> Although dangers clearly exist, conscientious and ethical lawyers can avoid these shoals. The in-house lawyer must not, however, represent himself as somehow independent of the insurance carrier.<sup>4</sup>

## I. CIVILITY AND PROFESSIONALISM IN THE SEVENTH CIRCUIT AND INDIANA

The Honorable Marvin E. Aspen, Chief Judge of the United States District Court for the Northern District of Illinois, dates the "modern" civility movement

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1. See *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999).

2. See *id.* at 155.

3. See *id.* at 160.

4. See *id.* at 165.

back at least to 1971.<sup>5</sup> Judge Aspen chose this date because that was “when then-Chief Justice Warren Burger remarked that ‘overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters.’”<sup>6</sup> In the Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, the Committee defined civility as “professional conduct in litigation proceedings of judicial personnel and attorneys.”<sup>7</sup> The Committee, however, “did not limit the term to good manners or social grace.”<sup>8</sup> Monroe Freedman, a critic of the proponents for civility and professionalism in the legal profession, has noted the lack of a clear definition of the term “civility.”<sup>9</sup> Monroe Freedman stated that:

Everyone is for civility and courtesy, but everyone is defining those terms differently. In a recent series of exchanges on the online service Lexis Counsel Connect, for example, definitions of incivility ranged from fraud and deceit to failure to return telephone calls. In between were: being a junkyard dog; being sneaky, mean, or misleading; not being ethical; failing to provide discovery; obstructing discovery; badgering witnesses; ignoring deadlines; being rude; and being a jerk. Obviously, “civility” means radically different things to different people.<sup>10</sup>

As Freedman notes, civility and professionalism are frequently discussed topics in the literature of today’s legal community.<sup>11</sup>

5. Hon. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 254 (1998) (Judge Aspen was appointed by President Carter to the United States Court for the Northern District of Illinois on July 24, 1979. On July 1, 1995, he was elevated to Chief Judge. Judge Aspen served as chair of the Committee on Civility of the Seventh Federal Judicial Circuit); see also Monroe Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995, at 54 (crediting a series of speeches by then Chief Justice Warren Burger with creating “[t]he push for civility, courtesy, and professionalism. . . in the early 1970’s”).

6. Aspen, *supra* note 5, at 254 (quoting Chief Justice Warren E. Burger, in *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971)). Judge Aspen also notes: “Efforts toward civility in law, of course, date back much further.” *Id.* at 254 n.4. Further, Judge Aspen refers to a Nineteenth Century barrister’s thoughts on civility and Dean Roscoe Pound’s 1906 address to the American Bar Association. See *id.*; see also Freedman, *supra* note 5, at 54, paraphrasing then-Chief Justice Warren E. Burger’s comments in *The Necessity for Civility*, 52 F.R.D. 211 (1971).

7. *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 374 (1992).

8. *Id.*

9. Freedman, *supra* note 5, at 54.

10. *Id.*

11. See, e.g., Christopher W. Deering, *Candor Toward the Tribunal: Should An Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59 (1997); Daisy Hurst Floyd, *Candor Versus Advocacy: Courts’ Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035 (1995); Austin Sarat, *Enactments of Professionalism:*

Members of the Indiana and Seventh Circuit courts have informally joined in this discussion through their participation in symposiums and by writing law review and bar journal articles.<sup>12</sup> In 1989, the Seventh Circuit formed a nine-member committee to determine whether a civility problem existed in the Seventh Circuit and, if so, to recommend what can be done about the problem.<sup>13</sup> Indiana's judiciary and the Seventh Circuit's judiciary have not limited their discussion of the civility and professionalism problem to these more or less informal forums. The Seventh Circuit adopted the *Standards for Professional Conduct within the Seventh Federal Judicial Circuit*<sup>14</sup> as a result of the findings of its Committee on Civility. Recently, Indiana courts have addressed the civility and professionalism issue in several cases. Members of the judiciary in the Seventh Circuit and Indiana state courts have expressed the view that a lack of

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*A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809 (1998); Edward M. Waller, Jr., *Professionalism: The Client May Come Second*, 28 STETSON L. REV. 279 (1998); Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151 (1998); Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445 (1990); Arthur Garwin, *Uncivil Temptations: Lawyers Who Indulge in Hardball Tactics Could Face Suspension, Fee Reduction or Other Penalties*, A.B.A. J., June 1999, at 81; Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8.

12. See, e.g., Aspen, *supra* note 5; Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994) (this issue of the *Valparaiso University Law Review* was from symposium entitled *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s*); Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994) (from the same symposium issue of the *Valparaiso University Law Review*); Hon. Larry J. McKinney, *Some Thoughts on Civility and the Practice of Law*, 38 RES GESTAE, Apr. 1995, at 7; Justice Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 72 FLA. B.J., Mar. 1998, at 30. This list of law review and bar journal articles is by no means a complete list of the informal comment that the judges of the Seventh Circuit and the Indiana courts have made on the topic of civility and professionalism.

13. See Aspen, *supra* note 5, at 254. Three of the nine members of the Seventh Circuit's Committee on Civility were judges in the Seventh Circuit: Hon. Marvin E. Aspen, Chairman and U.S. District Judge, Northern District of Illinois; Hon. Larry J. McKinney, U.S. District Judge, Southern District of Indiana; and Hon. John C. Shabaz, U.S. District Judge, Western District of Wisconsin. The other members of the Seventh Circuit's Committee on Civility were lawyers in firms practicing in the Seventh Circuit's jurisdiction: William A. Montgomery from Schiff Hardin & Waite in Chicago, Illinois; David E. Beckwith from Foley & Ladner in Milwaukee, Wisconsin; George N. Leighton from Earl L. Neal & Associates in Chicago, Illinois; Bernard J. Nussbaum from Sonnenschein Nath & Rosenthal in Chicago, Illinois; Nancy Schaefer from Schaefer Resenwein & Fleming in Chicago, Illinois; and Stephen W. Terry, Jr. from Baker & Daniels in Indianapolis, Indiana.

14. *Final Report of the Committee on Civility of the Seventh Federal Judiciary Circuit*, 143 F.R.D. 441 (1992) [hereinafter *Seventh Circuit's Standards*].

civility and professionalism is currently a problem in the legal profession. These members believe part of their judicial duties is to advance the values of civility and professionalism in the legal community.

*A. The Seventh Circuit's Standards*

On December 14, 1992, the Seventh Circuit adopted the *Standards for Professional Conduct within the Seventh Federal Judicial Circuit* ("Seventh Circuit's Standards").<sup>15</sup> The Seventh Circuit's Standards are the result of work done by a committee of lawyers and judges from the Seventh Circuit that investigated the issue of civility.<sup>16</sup> The committee was formed in 1989 by then-Chief Judge William J. Bauer, who gave the committee the mandate to "determine whether there is a civility problem in litigation in the Seventh Circuit and, if so, what should be done about it."<sup>17</sup> In its Final Report, the committee made the following recommendations:

1. The Proposed Standards for Professional Conduct within the Seventh Federal Judicial Circuit . . . should be adopted.
2. Each lawyer admitted to practice (or appearing pro hac vice) in any court in the Seventh Federal Judicial Circuit should receive a copy of the Standards for Professional Conduct. Each court within the Circuit should consider adoption of a local rule requiring each lawyer admitted to practice (or appearing pro hac vice) to certify, as a precondition to admission and to filing an appearance in any court within the Seventh Federal Judicial Circuit, that he or she has read and will abide by the Standards.
3. Civility training, including education regarding the Standards for Professional Conduct, should be implemented by public law offices, private law firms, and corporations with in-house counsel. This training should also be available at federal judicial workshops.
4. All lawyers and judges within the Seventh Federal Judicial Circuit should consider participation in civility, professionalism, or mentoring programs in professional legal associations and bar associations as well as participation in one of the American Inns of Court.
5. If a professional legal organization or bar association does not have a civility, professionalism, or mentoring program, or an American Inn of Court does not exist in a particular area, lawyers and judges should consider establishing such a program or an Inn of Court.

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15. *Id.*

16. *See id.*

17. *Id.*; see also Aspen, *supra* note 5, at 254.

6. Law schools should encourage discussion of the Standards of Professional Conduct in the classroom and, especially, in clinical training programs, and should encourage discussion among faculty members.<sup>18</sup>

The Seventh Circuit's Standards, as adopted on December 14, 1992, contain a Preamble, a section on Lawyer's Duties to other Counsel, a section on Lawyer's Duties to the court, a section on the Court's Duties to Lawyers and a section on Judges' Duties to Each Other.<sup>19</sup> Even though the Seventh Circuit's Standards specify certain types of conduct that are not acceptable in the legal community, these standards are not regulatory (i.e., not enforceable by a disciplinary body), but rather, these standards are aspirational. The Preamble provides, in part:

The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.<sup>20</sup>

The first paragraph of the Preamble to the Seventh Circuit's Standards points out that lawyers' advocacy of clients is limited by their duties to the legal system:

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.<sup>21</sup>

By adopting a voluntary and aspirational code of civility, the Seventh Circuit provides to lawyers a guide to the proper limits of advocacy within a system of justice that is a truth-seeking process. As an aspirational guide to the proper limits of advocacy in the legal system, these standards, however, do not mandate

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18. *Seventh Circuit Standards*, 143 F.R.D. at 447.

19. *See id.* at 448-52.

20. *Id.* at 448.

21. *Id.*

an end to the incivility among the members of the legal profession. The Committee on Civility was aware that the Standards would not change the incivility among the members of the legal profession, and asserted that if change in the incivility of the bar "is to come, it must stem from the individual effort of each participant in the litigation process as part of a personal obligation assumed equally by lawyers and judges."<sup>22</sup> In short, what is needed to bring and end to the incivility among the members of the bar is a matter of integrity and character, neither of which may be gained by a mere reading the Seventh Circuit's Standards. Improving one's character is an obligation that each member of the bar must do on his or her own, according to the Committee on Civility.<sup>23</sup> Accordingly, the Seventh Circuit's Standards are to act as a bench-mark to help each member of the bar to measure his or her own progress in this endeavor.

In 1998, however, the United States Court of Appeals in the Seventh Circuit criticized a lawyer, *Grun v. Pneumo Abex Corp.*,<sup>24</sup> for conduct that did not measure up to aspirational goals of the Seventh Circuit's Standards. The *Pneumo Abex* case involved a suit against a corporation brought by a former president of a corporate division alleging that the corporation breached a severance compensation agreement and a management incentive compensation plan.<sup>25</sup> The district court dismissed the former president's case against the corporation after neither party appeared for a trial date.<sup>26</sup> Neither party had received notice of this trial date.<sup>27</sup> After dismissing the case, the district court sent notice of the dismissal to the parties.<sup>28</sup> The corporation's lawyer received notice of the dismissal; however, the former president's lawyer did not receive notice of the dismissal. Eight months after the case had been dismissed, the former president's lawyer sent a change of address form to the corporation's lawyer. The corporation's lawyer chose not to inform the former president's lawyer that the case had been dismissed when the corporation's lawyer received the change of address form from her.<sup>29</sup>

In a footnote, the Seventh Circuit Court criticized the decision of the corporation's lawyer "to remain silent when he admittedly knew that Grun [the former corporate president] was unaware of the dismissal order, *and* that neither party had received notice of the trial date."<sup>30</sup> The Seventh Circuit Court was offended that the corporation's lawyer admitted that he had researched whether he had a duty to inform the former president's lawyer of the dismissal notice and, when he found no such affirmative duty "in the rules, he chose to remain

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22. *Id.* at 446.

23. *See id.*

24. 163 F.3d 411 (7th Cir. 1998).

25. *See id.* at 417-18.

26. *See id.* at 417.

27. *See id.*

28. *See id.* at 418.

29. *See id.*

30. *Id.* at 422 n.9.

silent.”<sup>31</sup> The Seventh Circuit Court based its criticism of the corporation’s lawyer on the Rules of Professional Conduct for the Northern District of Illinois and the Seventh Circuit’s Standards.<sup>32</sup> Local Rule 83.58.4(a)(5) of the Rules of Professional Conduct for the Northern District of Illinois prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice.<sup>33</sup> Duty 18 in the section on Lawyers’ Duties to Other Counsel in the Seventh Circuit’s Standards provides: “We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.”<sup>34</sup>

The Seventh Circuit recognized that the corporation’s lawyer “did not affirmatively ‘cause’ the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play.”<sup>35</sup> Although the court recognized that the corporation’s lawyer had no affirmative duty to alert the former president’s lawyer of the dismissal, the Seventh Circuit Court criticized the corporation’s lawyer because “the spirit of the rules required such a result.”<sup>36</sup> Clearly, the Seventh Circuit Court seriously takes a lawyer’s duty to improve civility among the members of the bar and, by criticizing uncivil conduct by lawyers who appear before it, is willing to guide lawyers toward the aspirational goals of civility and professionalism.

### B. Indiana Courts and Civility

Addressing a notice issue similar to that in *Pneumo Abex*, the Indiana Supreme Court in 1999 tackled the civility and professionalism problem in a case entitled *Smith v. Johnston*.<sup>37</sup> Like the *Pneumo Abex* case, the court in *Smith v. Johnston* looked deeper than the legal duties of lawyers as spelled out in the various codes and rules of professional conduct. The court noted:

The [Indiana Rules of Professional Conduct] are guidelines for lawyers and do not spell out every duty a lawyer owes to clients, the court, other members of the bar and the public. The preamble to the Rules is clear that “[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Thus lawyers’ duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid

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31. *Id.*

32. *See id.*

33. *See id.* (citing ILCS S. CT. PROF. CONDUCT Rule 8.4, providing “[a] lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice.”).

34. *Seventh Circuit’s Standards*, 143 F.R.D. 441, 450 (1992).

35. *Grun*, 163 F.3d at 422 n.9.

36. *Id.*

37. 711 N.E.2d 1259 (Ind. 1999).

compromising the integrity of his or her own reputation and that of the legal process itself.<sup>38</sup>

To put it another way, lawyers, according to the *Smith v. Johnston* court, are more than mere advocates, zealously representing their clients; lawyers are officers of the court and owe a duty to the integrity of the "legal process itself."<sup>39</sup> This duty to the integrity of the legal process, according to *Smith v. Johnston*, is based partially on the specific rules governing procedure and lawyer conduct; however, this duty is also based partially on amorphous ethical norms that the court called "courtesy, common sense and the constraints of the judicial system."<sup>40</sup>

Before looking at the *Smith v. Johnston* analysis in detail, this section will contain an analysis of the development of civility and professionalism in the Indiana judicial system. First, this section will review an early Indiana Supreme Court case entitled *Pittsburgh, C., C. & St. L. Railway Co. v. Muncie & Portland Traction Co.*,<sup>41</sup> addressing the issue of what is the appropriate level of advocacy for a lawyer. Second, this section will address the issue of lawyer incivility in appellate briefs. Finally, it will examine a few Indiana cases in which the Indiana Supreme Court has initiated a discussion on the proper limits that should be placed on a lawyer in the course of his or her advocacy for a client, returning to *Smith v. Johnston*.

1. *An Early Case.*—In 1906, the Indiana Supreme Court addressed the issue of a lawyer's use of language in an appellate brief that was "discourteous" in a case styled as *Pittsburgh, C., C. & St. L. Railway Co. v. Muncie & Portland Traction Co.*<sup>42</sup> This case involved a railroad company's action to enjoin the construction of a grade crossing over a railroad.<sup>43</sup> The construction company filed a cross-complaint to enjoin the railroad company from interfering with the construction of the grade crossing.<sup>44</sup> The trial court found in favor of the construction company and granted an injunction against the railroad company. The railroad company appealed and filed its brief in support of its appeal.<sup>45</sup> The brief was 142 pages long and included language the court considered improper.<sup>46</sup> The court quoted the following passage from the railroad company's brief:

But the court, instead of granting appellant relief, has concluded and decreed that the operation of appellant's railroad is subservient to the rights of appellee, and that appellee [the construction company] may tear up and destroy its railroad, and obstruct and prevent appellant's

38. *Id.* at 1263-64 (quoting IND. PROFESSIONAL CONDUCT preamble).

39. *Id.* at 1264.

40. *Id.*

41. 77 N.E. 941 (Ind. 1906).

42. *Id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*



operation thereof, and appellant is enjoined from interfering with whatever appellee may do or desire to do. A more outrageous decree never disgraced the record of any court.<sup>47</sup>

The court in *Muncie & Portland Traction Co.* ordered the railroad company's brief to be stricken.<sup>48</sup> The *Muncie & Portland Traction Co.* court referred to lawyers as "officers of the court" and "assistants in the administration of justice."<sup>49</sup> Anticipating language of the proponents of "modern civility," the court in *Muncie & Portland Traction Co.* reasoned:

[T]he purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or *professional discourtesy* of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord. The language referred to is offensive, impertinent, and scandalous.<sup>50</sup>

The *Muncie & Portland Traction Co.* court draws a distinction between what is proper advocacy in an appellate brief and what is improper (i.e., professional discourtesy). The *Muncie & Portland Traction Co.* court concludes that argument on the facts and law of a particular case is proper advocacy, but invectives have no place in legal discussion.<sup>51</sup>

2. *Incivility in Appellate Briefs.*—In the 1990s, the Indiana courts have addressed the issue of incivility in the legal profession in several cases involving lawyers' duties to the integrity of the legal profession while representing a client in a civil case. The significance of these cases is that the Indiana courts have begun to make a distinction between proper and effective advocacy within the limits of professionalism and civility and zealous advocacy (which the Indiana courts have often found ineffective) without limits. Several of these cases, like the *Muncie & Portland Traction Co.* case, look at the issue of lawyer civility in appellate briefs.<sup>52</sup>

In 1991, the Indiana Court of Appeals addressed an example of incivility in an appellate brief in *Clark v. Clark*.<sup>53</sup> The *Clark* case involved an appeal by the

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47. *Id.*

48. *See id.* at 942.

49. *Id.* at 941.

50. *Id.* at 942 (emphasis added).

51. *See id.*

52. *See B & L Appliances & Servs., Inc. v. McFerran*, 712 N.E.2d 1033 (Ind. Ct. App. 1999); *Bloomington Hosp. v. Stofko*, 709 N.E.2d 1078 (Ind. Ct. App. 1999); *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233 (Ind. Ct. App. 1998); *Amax Coal Co. v. Adams*, 597 N.E.2d 350 (Ind. Ct. App. 1992); *Clark v. Clark*, 578 N.E.2d 747 (Ind. Ct. App. 1991).

53. *Clark*, 578 N.E.2d at 747.

wife from the trial court's property settlement in a divorce.<sup>54</sup> The appellate court noted that the lawyer for the wife had used "intemperate language" in the wife's brief.<sup>55</sup> The *Clark* court refused to repeat the intemperate language from the brief written by the wife's lawyer.<sup>56</sup> Referring to the *Muncie & Portland Traction Co.* case, the *Clark* court noted that they had the power to order the brief stricken for the use of intemperate language by the wife's lawyer.<sup>57</sup> However, the *Clark* court did not exercise this right, primarily because they did not want to deny the wife her day in court.<sup>58</sup> Instead, the *Clark* court chastised the wife's lawyer, quoting extensively from *Muncie & Portland Traction Co.* to edify the wife's lawyer about the reasons why she should not have used intemperate language in her brief to the appellate court.<sup>59</sup>

Like the *Muncie & Portland Traction Co.* court, the *Clark* court focused on the practical aspect of using intemperate language in a brief to the appellate courts. In other words, the *Clark* court focused on the fact that the use of intemperate language may be counter-productive to the goals of the lawyer's client and may be ineffective advocacy on the part of the lawyer.<sup>60</sup> Thus, the *Clark* court found a limit to zealous advocacy when the zealousness by the lawyer becomes ineffective.

In 1992, the Indiana Court of Appeals again reviewed a case involving ad hominem attacks on the opposing lawyer in appellate briefs in a case entitled *Amax Coal Co. v. Adams*.<sup>61</sup> In this case, homeowners who lived near the mines sued a coal mining owner for damage to their homes caused by the blasting operations at the mines.<sup>62</sup> After the coal mining owner answered the complaint of the homeowners, the homeowners filed interrogatories and requests for production, broadly asking for "'all facts' and all documents 'supporting' or 'relating to'" the denials and affirmative defenses of the coal mining owner.<sup>63</sup> The trial court overruled the coal mining owner's objection to these discovery requests.<sup>64</sup> The coal mining owner sought an interlocutory appeal from this adverse ruling. Before addressing the merits of the appeal, the *Amax Coal Co.* court, sua sponte, raised the issue "whether cross-condemnation by each briefing counsel of their opposing counsels' off-record conduct, motivation, and supposed bad manners in the conduct of discovery, is appropriate material for appellate

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54. *See id.*

55. *Id.* at 748.

56. *See id.*

57. *See id.*

58. *See id.* at 749. Note, the *Clark* court actually affirmed the decision of the trial court on the merits of the case. *See id.* at 751.

59. *See id.* at 748-49.

60. *See id.* at 749.

61. 597 N.E.2d 350 (Ind. Ct. App. 1992).

62. *See id.* at 351.

63. *Id.* at 351-52.

64. *See id.* at 352.

briefs.”<sup>65</sup> The *Amax Coal Co.* court noted that the lawyers for each side had taken the opportunity in their respective briefs to attack each other’s “intellectual skills, motivations, and supposed violations of the rules of common courtesy.”<sup>66</sup> The *Amax Coal Co.* court condemned the practice of using appellate briefs to attack the lawyer of the opposing party.<sup>67</sup> The *Amax Coal Co.* court pointed out that the practice of using appellate briefs to attack the lawyer of the opposing party is a waste of judicial time, tends to take away from the appropriate arguments for the merits of the case, and violates the intent and purpose of the appellate rules.<sup>68</sup> In its own language, the *Amax Coal Co.* court puts it as follows:

[T]he judiciary . . . has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal.

Further, appellate counsel should realize, such petulant grousing has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static on a radio broadcast. It tends to blot out legitimate argument.

On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers’ psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.<sup>69</sup>

Through this language, the *Amex Coal Co.* court hoped to address an incivility problem the court perceives it is seeing “with ever-increasing frequency.”<sup>70</sup> Like the *Clark* court, the *Amex Coal Co.* court found ad hominem attacks on the opposing lawyer to be ineffective advocacy and, therefore, places a limit on the lawyer as a zealous advocate for his or her client.

Another case involving incivility in appellate briefs is *WorldCom Network Services, Inc. v. Thompson*,<sup>71</sup> decided by the Indiana Court of Appeals in 1998. The *WorldCom* case involved a dispute between a telecommunications company

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65. *Id.* at 351.

66. *Id.* at 352.

67. *See id.*

68. *See id.*

69. *Id.* (citations omitted).

70. *Id.*

71. 698 N.E.2d 1233 (Ind. Ct. App. 1998).

and landowners over cables buried on the landowners' property.<sup>72</sup> The telecommunications company had buried cables on the landowners' property without the landowners' consent.<sup>73</sup> The landowners objected to the installation of the cables on their property.<sup>74</sup> The telecommunications company filed an action seeking a preliminary injunction to prohibit the landowners from disturbing the cables.<sup>75</sup> The trial court denied the telecommunications company's request for a preliminary injunction. The telecommunications company took an interlocutory appeal, and the appellate court entered a stay pending appeal.<sup>76</sup> The appeal terminated and the case was remanded to the trial court to consider additional evidence.<sup>77</sup> After the appeal terminated, but before the next hearing, the landowners severed the cables.<sup>78</sup> On remand, the trial court confirmed the initial order.<sup>79</sup> The telecommunications company brought a second interlocutory appeal, and the appellate court issued a memorandum opinion.<sup>80</sup> The landowners petitioned for rehearing.<sup>81</sup>

According to the *WorldCom* court, the lawyers for the landowners passed the limits of "vigorous advocacy" in their representation during the rehearing.<sup>82</sup> The *WorldCom* court noted:

While the Thompsons [landowners] profess to hold this court in "high esteem," significant parts of their petition and brief are condescending and permeated with sarcasm and disrespect. By way of illustration, they allege that our decision, if not corrected, "can only lead to ridicule, if not contempt, for this Court by the Thompsons and their many friends and neighbors," and that "[t]oo many citizens are already cynical, if not contemptuous, of the judiciary." They assert that our decision contains "glaringly incorrect statements of supposed fact" which are "obviously wrong." They imply that the court lacks experience in real estate matters.

The Thompsons also accuse the court of writing "with pens filled with the staining ink of innuendo," allege that portions of our decision give "the appearance of bias, prejudice and impropriety" and argue that "the decision will remain as a blemish on the record" of the court if those portions are not retracted. They assert that if this court were to

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72. *See id.* at 1235.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 1235-36.

77. *See id.* at 1236.

78. *See id.* at 1236 n.1.

79. *See id.* at 1236.

80. *See id.*

81. *See id.* at 1235.

82. *Id.* at 1236.

disagree with a certain finding "it would be ridiculous," and they question the court's good faith and ethics. They demand an "apology" from the court. At one point, in rhetorical high gear, the Thompsons warn the court against reaching a particular conclusion and declare that such a ruling would be "blatantly erroneous."<sup>83</sup>

The *WorldCom* court, however, did not strike the landowners' entire brief. Instead, the *WorldCom* court decided to only strike the "inappropriate portions" and admonished the landowners' lawyers "that the use of impertinent material disserves the client's interest and demeans the legal profession."<sup>84</sup> The *WorldCom* court did not strike the landowners' whole brief because the court did not believe that the landowners should be denied consideration of their appeal on the merits "due to the excessive zeal of their attorneys."<sup>85</sup> The *WorldCom* decision serves to warn lawyers that an attack on the court from which a lawyer is seeking a remedy is not effective advocacy; instead, it is ineffective zealotry.

Like the *WorldCom* case, two 1999 Indiana Court of Appeals cases, *Bloomington Hospital v. Stofko*<sup>86</sup> and *B & L Appliances & Services, Inc. v. McFerran*<sup>87</sup> involve lawyer incivility directed toward the appellate court. In the *Bloomington Hospital* case, the court of appeal's opinion is referred to as "incomprehensible" in a petition for rehearing.<sup>88</sup> In *Bloomington Hospital*, the employer requested that the court of appeals to reconsider its decision.<sup>89</sup> In the employer's brief the lawyer for the employer called the court of appeals decision "incomprehensible."<sup>90</sup> The *Bloomington Hospital* court affirmed its previous decision and in a footnote cautioned the employer's lawyer that "referring to an opinion as 'incomprehensible' when seeking reconsideration from the very judges who issued the opinion is unpersuasive and ill-advised."<sup>91</sup>

Similarly, the court of appeal's decision in the *B & L Appliance* case is referred to as a "bad lawyer joke" in a petition for rehearing.<sup>92</sup> In this case, a pedestrian fell on a sidewalk in front of a building.<sup>93</sup> The pedestrian filed suit against the owner of the building and a business leasing part of the building. After the complaint was filed, the lawyer for the pedestrian made the following promises to the business and the building owner by way of a letter to their respective insurance companies:

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83. *Id.*

84. *Id.* at 1237.

85. *Id.*

86. 709 N.E.2d 1078 (Ind. Ct. App. 1999).

87. 712 N.E.2d 1033 (Ind. Ct. App. 1999).

88. *Bloomington Hospital*, 709 N.E.2d at 1078.

89. *See id.*

90. *Id.*

91. *Id.* at 1079 n.1 (citing *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233, 1236 n.2 (Ind. Ct. App. 1998)).

92. *B & L Appliance*, 712 N.E.2d at 1037.

93. *See id.* at 1035.

Moreover, my clients have authorized me to instruct each of the carriers that we will not attempt to obtain a default judgment against your insureds. We pledge to both carriers that if this matter cannot be resolved between the parties, that we will give each of you written notice that answers should be filed (we will give you a minimum 30 [sic] window to hire counsel after our written notification to you).<sup>94</sup>

After settlement negotiations broke down, the lawyer for the pedestrian sent a second letter to the insurance companies for the business and the building owner.<sup>95</sup> The second letter stated in pertinent part:

Please allow this letter to serve as written notice to you that we are prepared to go forward with the lawsuit. If no serious offers are going to be made, then we would expect answers to our complaint for damages to be filed within thirty days of this letter.<sup>96</sup>

The day after the building owner received the letter, a lawyer entered an appearance on behalf of the building owner.<sup>97</sup> Almost three months after the lawyer for the pedestrian sent the second letter notifying the business and the building owner of the pedestrian's intention to proceed with the lawsuit, the lawyer for the pedestrian filed a motion for default judgment against the business, which the trial court granted the day after it was filed.<sup>98</sup> The next day, a lawyer for the business entered an appearance, and an answer was filed shortly thereafter. About two weeks after the trial court entered the default judgment against the business, the lawyers for the business filed a motion for relief from judgment, which the trial court denied.<sup>99</sup> The lawyers for the business then filed a "Motion to Enforce Plaintiffs' Agreement Not to Seek Default and for the Court to Reconsider Order Denying Defendant, B & L's [the business's] Motion for Relief from Judgment," which the trial court denied.<sup>100</sup> The business appealed the trial court's denial of its motion to set aside the default judgment, and the court of appeals affirmed the trial court's decision.<sup>101</sup> Then, the business petitioned the court of appeals for rehearing, "insisting that [its] decision 'omits and ignores' an agreement between the parties and is contrary to law."<sup>102</sup> In the petition for rehearing, the lawyers for the business characterized the appellate court's ruling as a "bad lawyer joke."<sup>103</sup> The *B & L Appliances* court quoted the business's argument attacking the integrity of the court:

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94. *Id.*

95. *See id.*

96. *Id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *Id.*

101. *See id.*

102. *Id.*

103. *Id.*

III. SADLY, THE RAMIFICATIONS OF THE COURT'S DECISION READS [sic] LIKE A BAD LAWYER JOKE . . . "WHEN IS IT OKAY FOR A LAWYER TO LIE? WHEN HIS LIPS ARE MOVING TO AN INSURANCE ADJUSTER."

This Court's opinion *continues* the perception that was discussed extensively in the *Indiana Lawyer*, March 3-16, 1999, where the legal profession is attempting a public relations campaign concerning the public's perception of lawyers. The *Indiana Lawyer* discussed the American Bar Association's study that said the public's perception is lawyers are more concerned with their own interests than the public's or their client's and expressed a concern to stop the cocktail party jokes or mute the motion picture stereotypes that paint the legal profession as greedy and ruthless.

The Court's opinion does nothing more than fuel these perceptions. It is a widely held belief by the general public that lawyers lie and the Court's [sic] protect them. This Court cannot ignore McFerrans' [the pedestrian's] lawyer lied to Bruce Kotek [the insurance agent for the business], when he promised not to seek a default, communicated both orally and in writing, and then later filed a default. The breaking of a promise is a lie and the essence of the Court's holding is that it is acceptable for a lawyer to lie to an insurance adjuster.

The Trial Court abused its' [sic] discretion in not enforcing McFerrans' [the pedestrian's] promise not to seek a default. This Court *could have advanced lawyer accountability* in communications by finding the Trial Court abused its' [sic] discretion in not enforcing McFerrans' [the pedestrian's] lawyer's promise and further, by stating the failure to enforce a lawyer's promise not to seek a default constitutes an abuse of discretion and holding that attorney misrepresentations or lying would not be tolerated.<sup>104</sup>

In response to this strongly worded attack on the integrity of the court, the *B & L* court held that this language was intemperate and struck this entire section of the business's Petition for Rehearing.<sup>105</sup> Moreover, the *B & L* court admonished the business's lawyer for his "impertinent arguments" as a "disservice to his client and demeaning to the judiciary and the legal profession."<sup>106</sup> In a footnote, the *B & L* court cautioned the business's lawyer that referring to the appellate court's opinion in a petition for rehearing to the same judges who issued the opinion as a "bad lawyer joke" is "unpersuasive and ill-advised."<sup>107</sup> The *B & L* court acknowledged that it is appropriate for lawyers to seek reconsideration of a court's decision "when warranted to zealously represent the interests of

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104. *Id.* 1037 (quoting from the Appellant's Pet. for Reh'g at 4 ).

105. *See id.* at 1038.

106. *Id.*

107. *Id.* at 1037 n.2 (citing *Bloomington Hosp. v. Stofko*, 709 N.E.2d 1078, 1079 n.1 (Ind. Ct. App. 1999)).

clients.”<sup>108</sup> The *B & L* court, however, warned attorneys that “in framing arguments in support of rehearing or reconsideration, counsel are obliged to maintain a respectful bearing towards this court.”<sup>109</sup>

It is interesting that the reason the lawyer attacked the integrity of the court is because he believed that the lawyer for the pedestrian acted in an unprofessional manner, i.e., lied to the business in order to obtain a default judgment against the business. However, the *B & L* court was not persuaded that the pedestrian’s lawyer lied to the business to gain an advantage.<sup>110</sup> The *B & L* court allowed the business’s lawyer to make this argument as a proper factual argument for a zealous advocate within the proper bounds of advocacy. However, the *B & L* court did not agree with the interpretation of the facts held by the business’s lawyer.<sup>111</sup>

Although a factual argument over whether the opposing lawyer lied to gain an advantage may be proper advocacy, the *B & L* court rejected the notion that an attack on the integrity of the court can ever be proper advocacy.<sup>112</sup> To support its position that intemperate language in a brief is improper advocacy, the *B & L* court referred to the *Muncie & Portland Traction*<sup>113</sup> case, the *WorldCom*<sup>114</sup> case, and the *Clark*<sup>115</sup> case. The *B & L* court directed the business’s lawyer to the advice in the *WorldCom* case and the *Muncie & Portland Traction* case regarding proper advocacy in an appellate brief based on factual and legal argument and not “righteous indignation” or “invectives.”<sup>116</sup>

108. *Id.*

109. *Id.*

110. *See id.* at 1036.

111. *See id.*

112. *See id.*

113. *Pittsburgh, C., C. & St. L. Ry. Co. v. Muncie & Portland Traction Co.*, 77 N.E. 941 (Ind. 1906).

114. *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233 (Ind. Ct. App. 1998).

115. *Clark v. Clark*, 578 N.E.2d 747 (Ind. Ct. App. 1991).

116. *B & L Appliances*, 712 N.E.2d at 1038. The *B & L* court took the following quote from the *WorldCom* case:

[O]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

*Id.* (quoting *WorldCom*, 698 N.E.2d at 1236-37). The *B & L* court took the following quote from the *Muncie & Portland Traction* case:

Counsel has need of learning the ethics of his profession anew, if he believes that vituperation and scurrilous insinuation are useful to him or his client in presenting his case. The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for



Like the other cases in this section suggested, the *B & L* case stands for the proposition that proper advocacy does not necessarily create a conflict with lawyers' duties to uphold the integrity of the legal process. In other words, it is possible that the most effective lawyers may be advocates for their clients and still not exceed the proper limits to zealous advocacy, i.e., attacks on the opposing party, the opposing party's lawyer, trial courts, or appellate courts.

3. *Supreme Court Limits on Advocacy.*—In this section, this Article will examine two recent Indiana Supreme Court cases in which the Indiana Supreme Court set limits on zealous advocacy among the members of the Indiana bar. The first case is *Fire Insurance Exchange v. Bell*,<sup>117</sup> which addressed the ethical issue of whether a lawyer may make representations to the opposing lawyer during the course of settlement negotiations that are not trustworthy (i.e., misrepresentations). The second case is *Smith v. Johnston*,<sup>118</sup> in which the Indiana Supreme Court went beyond the ethical question in *Fire Insurance Exchange* and looked at the ethical issue of whether a lawyer who complied with the letter of the law has ethical obligations to the opposing lawyer.

In 1994, Justice Dickson wrote the opinion for the Indiana Supreme Court in the *Fire Insurance Exchange* case.<sup>119</sup> Justice Dickson framed the legal issue in the *Fire Ins. Exchange* case as "whether, and to what extent, a party who is represented by counsel has the right to rely on a representation of opposing counsel during settlement negotiations."<sup>120</sup> The *Fire Insurance Exchange* case involved a sixteen-month-old child who was severely burned in a fire at his grandfather's home.<sup>121</sup> The fire was caused by a gasoline leak in the utility room, which was ignited by a water heater. The fire department cited the grandfather for his careless storage of gasoline.<sup>122</sup> After the child suffered the injuries, the child's mother hired a lawyer to represent her son. The child's lawyer entered into settlement negotiations with the insurance agent and the insurance company's lawyer.<sup>123</sup> During these settlement negotiations, the insurance agent and the insurance company's lawyer informed the child's lawyer that the policy limit for the homeowner's insurance of the grandfather was \$100,000.<sup>124</sup> Contrary to these representations, the policy limit for the homeowner's insurance of the grandfather was actually \$300,000. The insurance company's lawyer

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the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord.

*Id.* (quoting *Muncie & Portland Traction Co.*, 77 N.E. at 941-42).

117. 643 N.E.2d 310 (Ind. 1994).

118. 711 N.E.2d 1259 (Ind. 1999).

119. See 643 N.E.2d at 311.

120. *Id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

knew the policy limit was \$300,000 when he made the misrepresentation to the child's lawyer.<sup>125</sup> After the child's condition stabilized, the insurance agent and the insurance company's lawyer each informed the child's lawyer that the insurance company would pay the \$100,000 policy limit. The child's lawyer advised the child's mother to settle, which she did.<sup>126</sup>

Later, the child's lawyer filed a products liability suit against the manufacturer of the water heater on behalf of the child.<sup>127</sup> During settlement negotiations with the water heater manufacturer, the child's lawyer learned for the first time that the policy limits for the homeowner's insurance of the grandfather was \$300,000. After learning of the misrepresentation by the insurance agent and the insurance company's lawyer, the child's mother filed a suit against the insurance company, the insurance company's lawyer, and his law firm, alleging that the insurance company, its lawyer, and his law firm fraudulently misrepresented the policy limits of the homeowner's insurance of the grandfather.<sup>128</sup>

In response to this complaint filed by the child's mother, the insurance company, the insurance company's lawyer, and his law firm filed a motion for summary judgment, contending they were entitled to summary judgment because the child's lawyer had no right to rely on the alleged misrepresentations of the insurance company's lawyer as a matter of law.<sup>129</sup> A component of the reliance element required to prove fraud is the right of the child's lawyer to rely on the alleged misrepresentations of the insurance company and its lawyer.<sup>130</sup> The insurance company's lawyer argued that the child's lawyer "had, as a matter of law, no right to rely on the alleged misrepresentations because he was a trained professional involved in adversarial settlement negotiation and had access to the relevant facts."<sup>131</sup> The trial court denied the motions for summary judgment, finding that the issue whether the child's lawyer had a right to rely on alleged misrepresentations regarding the policy limits is a question for the fact-finder.<sup>132</sup> This decision was certified for an interlocutory appeal, and the court of appeals affirmed the decision of the trial court.<sup>133</sup> The Indiana Supreme Court agreed with the analysis of the court of appeals and its conclusion, with respect to the claims against the insurance company, that whether the child's lawyer had a right to rely on the alleged misrepresentations of the insurance company is a question of fact for the jury to decide.<sup>134</sup>

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125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* at 311-12.

129. *See id.* at 312.

130. *See id.*

131. *Id.*

132. *See id.* at 311.

133. *See id.*; *Fire Ins. Exchange v. Bell*, 634 N.E.2d 517 (Ind. Ct. App. 1994), *aff'd*, 643 N.E.2d at 310.

134. *See Fire Ins. Exchange*, 643 N.E.2d at 312.

However, with respect to the insurance company's lawyer and his law firm, the Indiana Supreme Court disagreed and "grant[ed] transfer to recognize a separate and more demanding standard."<sup>135</sup> Specifically, the court in *Fire Insurance Exchange* held that the child's lawyer had a right to rely on any material misrepresentations that may have been made by the insurance company's lawyer.<sup>136</sup> Further, the court held that the right of child's lawyer to rely on these alleged material misrepresentations was "established as a matter of law."<sup>137</sup> In concluding their argument, the court declined,

to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.<sup>138</sup>

Clearly, the Indiana Supreme Court took the position that lawyers as advocates in the legal process must temper their zealous representation of their clients by making statements that are accurate and trustworthy. Thus, the court in *Fire Insurance Exchange* limited zealous advocacy by a lawyer's duty to be truthful. In other words, the proper advocate's zealous representation should be tempered by his or her duty to make truthful statements to others.

As a basis for holding a lawyer to this more demanding standard, the Indiana Supreme Court in *Fire Insurance Exchange*, first looked to its constitutional duty with respect to the supervision of the practice of law.<sup>139</sup> Relying on this constitutional duty, the Indiana Supreme Court reasoned that lawyers should be held to a more demanding standard because of a "particular expectation" that their representations will be honest and trustworthy.<sup>140</sup> In addition, the court stated: "The reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice. A lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness."<sup>141</sup> Although the court does not explicitly refer to it, the language in the above statement echoes the language in Indiana Rule of Professional Conduct 8.4(d), which provides "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of

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135. *Id.*

136. *See id.* at 313.

137. *Id.*

138. *Id.*

139. *See id.* at 312 (citing IND. CONST. art. VII, § 4, which provides, "The Supreme Court jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges . . .").

140. *Id.*

141. *Id.*

justice.”<sup>142</sup> Despite this language, the Indiana Supreme Court has a more direct nexus with the Indiana Rules of Professional Conduct for their expectation of honesty and trustworthiness from lawyers. Furthermore, the court specifically looked to Indiana Rule of Professional Conduct 8.4(c), as an embodiment of the expectation of honesty and trustworthiness for lawyers.<sup>143</sup> Indiana Rule of Professional Conduct 8.4(c) prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentations.”<sup>144</sup> Although Indiana Rule of Professional Conduct 4.1 also supports the court’s position that lawyers are expected to be honest and trustworthy, the court did not include this rule in its reasoning. Indiana Rule of Professional Conduct 4.1 provides, “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . .”<sup>145</sup>

Despite the support that Indiana Rule of Professional Conduct 8.4(c) and 4.1 give to the court’s position, the court does not use the Indiana Rules of Professional Conduct as the sole basis of its more demanding standard. Instead, the court in *Fire Insurance Exchange* also found support for its position in the Indiana Oath of Attorneys,<sup>146</sup> the Standards for Professional Conduct within the

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142. IND. PROF. COND. R. 8.4(d). By using language that echoes Rule 8.4(d), the supreme court may be foreshadowing the use of Rule 8.4(d) in *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999). In *Smith v. Johnston*, the Indiana Supreme Court bootstraps ethical norms into the legal duties of lawyers by saying a breach of these ethical norms is prejudicial to the administration of justice. *See id.* at 1263-64.

143. *See Fire Ins. Exchange*, 643 N.E.2d at 312.

144. IND. PROF. COND. R. 8.4(c).

145. *Id.* at R. 4.1.

146. IND. ADMISSION AND DISCIPLINE Rule 22. The Indiana *Oath of Attorneys* provides:  
Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation:

“I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; so help me God.”

Seventh Federal Judicial Circuit,<sup>147</sup> and the Indianapolis Bar Association's *Tenets of Professional Courtesy*.<sup>148</sup> As the court puts it, "[c]ommitment to these values [of honesty and trustworthiness] begins with the oath taken by every Indiana lawyer; it is formally embodied in rules of professional conduct, the violation of which may result in the imposition of severe sanctions; and it is repeatedly emphasized and reinforced by professional associations and organizations."<sup>149</sup> To support this statement, the court in *Fire Insurance Exchange* quoted a part of the Indiana Oath of Attorneys in which the lawyer promises to employ "such means only as are consistent with the truth."<sup>150</sup> Then, the court quoted the Preamble of the Seventh Circuit's Standards:

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In

147. *Seventh Circuit's Standards*, 143 F.R.D. 441 (1992).

148. *Fire Ins. Exchange*, 643 N.E.2d at 313. The court quoted the entire text of the *Tenets of Professional Courtesy*:

The Tenets of Professional Courtesy adopted by the Indianapolis Bar Association in 1989 provide:

In order to promote a high level of professional courtesy and improve the professional relationships among members of the Indianapolis Bar Association, the Board of Managers of the Association adopts the following Tenets of Professional Courtesy.

I

In all professional activity, a lawyer should maintain a cordial and respectful demeanor and should be guided by a fundamental sense of integrity and fair play.

II

A lawyer should never knowingly deceive another lawyer or the court.

III

A lawyer should honor promises or commitments to other lawyers and to the court, and should always act pursuant to the maxim, 'My word is my bond.'

IV

A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.

V

A lawyer should make all reasonable efforts to reach informal agreement on preliminary and procedural matters.

VI

A lawyer should not abuse the judicial process by pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.

VII

A lawyer should always be punctual in communications with others and in honoring scheduled appearances.

*Id.* at 313 n.1 (quoting Indianapolis Bar Association's *Tenets of Professional Courtesy*).

149. *Id.* at 312.

150. *Id.* (quoting IND. ADMIS. DISC. R. 22).

fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.<sup>151</sup>

In addition, the court in *Fire Insurance Exchange* included a quotation from duty number 6 under the section "Lawyers' Duties to Other Counsel," in the Seventh Circuit's Standards: "We will adhere to all express promises and to agreements with other counsel, whether oral or in writing . . ." <sup>152</sup> Finally, the court quoted statements from two professional associations. The court quoted two tenets from the Indianapolis Bar Association's *Tenets of Professional Courtesy*:

A lawyer should never knowingly deceive another lawyer or the court.

A lawyer should honor promises or commitments to other lawyers and to the court, and should always act pursuant to the maxim, "My word is my bond."<sup>153</sup>

Then, the court quoted a statement from the International Association of Defense Counsel, "We will honor all promises or commitments whether oral or in writing, and strive to build a reputation for dignity, honesty and integrity."<sup>154</sup> Except for the Indiana Rules of Professional Conduct and possibly the Indiana Oath of Attorneys, each of these statements quoted by the Indiana Supreme Court are typically regarded as aspirational statements and not as regulatory codes. Based on these aspirational statements, the court concluded that lawyers should be held to a "more demanding standard."<sup>155</sup>

Clearly, the court in *Fire Insurance Exchange* announced a rule that lawyers are prohibited from making material misrepresentations to the opposing party, even if the opposing party is represented by a lawyer.<sup>156</sup> The court supported its "more demanding standard" for lawyers by bootstrapping ethical and moral norms as outlined in various, non-enforceable statements on professionalism and civility into its holding. According to the court in *Fire Insurance Exchange*, it is not proper advocacy for lawyer to mislead the opposing party while engaged in settlement negotiations.<sup>157</sup>

However, it is not clear from the *Fire Insurance Exchange* case how far a lawyer can go in using "puffery" in settlement negotiations. The supreme court demands more from lawyers than it does from laypeople.<sup>158</sup> Under the holding

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151. *Id.* (quoting *Seventh Circuit's Standards*, 143 F.R.D. at 448).

152. *Id.* (quoting *Seventh Circuit's Standards*, 143 F.R.D. at 449).

153. *Id.* (quoting Tenets II and III of *Tenets of Professional Courtesy* adopted by the Indianapolis Bar Association); see *Tenets of Professional Courtesy*, *supra* note 148, at 31.

154. *Id.* at 313 (quoting 60 DEF. COUN. J. 190 (1993)).

155. *Id.* at 312.

156. See *id.* at 313.

157. See *id.*

158. See *id.* at 312.

of the *Fire Insurance Exchange* case, an insurance agent may be found to have acted fraudulently when making misrepresentations to a lawyer because a lawyer, as a sophisticated negotiator, is not permitted to rely on the insurance agent's misrepresentation.<sup>159</sup> A lawyer for an insurance company, however, is not permitted to make the same misrepresentation to the adverse party as the insurance agent because the Indiana Supreme Court, as the constitutional guardian of the legal profession in Indiana, imposes a more demanding standard on lawyers to be honest and trustworthy.<sup>160</sup> It seems that the *Fire Insurance Exchange* case recognized that lawyers are advocates for their clients. However, lawyers' advocacy is limited by their obligations to the legal process as officers of the court.<sup>161</sup> Proper advocacy, according to the standards outlined in the *Fire Insurance Exchange* case, exacts a more demanding standard from lawyers than their duty as zealous advocates for their clients' goals.<sup>162</sup> The Indiana Supreme Court requires lawyers to be honest and trustworthy in addition to being advocates while representing their clients.<sup>163</sup>

In 1999, the Indiana Supreme Court returned to their discussion of the proper limits to place on lawyers as advocates for their clients in *Smith v. Johnston*.<sup>164</sup> In *Smith v. Johnston*, the husband of a patient filed a proposed complaint with the Indiana Department of Insurance against a doctor and the doctor's medical group for medical malpractice in the treatment of his wife.<sup>165</sup> The husband was represented by a lawyer during the course of the panel proceeding before the medical review panel. The doctor and his group were represented by a law firm throughout the panel proceeding. After the medical review panel found that the doctor failed to comply with the appropriate standards of care, the husband's lawyer sent a letter to the law firm representing the doctor demanding policy limits to settle the medical malpractice claim.<sup>166</sup>

After a month passed with no response to this demand letter, the husband filed suit against the doctor and his group. On that same day, the husband's lawyer received a letter from the law firm representing the doctor rejecting the husband's settlement demand.<sup>167</sup> The doctor and his group were served by certified mail on January 11, 1996, at their place of business.<sup>168</sup> A nurse signed for the summonses. No lawyers filed an appearance on behalf of the doctor or his group.<sup>169</sup> On February 20, 1996 (a little less than six weeks after filing the complaint), the husband's lawyer filed a motion for default judgment. The

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159. The court said this would be a question for the jury. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* at 313.

164. 711 N.E.2d 1259 (Ind. 1999).

165. *See id.* at 1261.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

husband's lawyer made no effort to communicate with the doctor's law firm after she sent the settlement demand letter to the law firm representing the doctor.<sup>170</sup> In an affidavit to the trial court, the husband's lawyer stated that:

I certify that no pleading has been delivered to Plaintiffs [the husband and his wife] or to their counsel by the Defendants [the doctor and his group] or any attorney appearing for Defendants, nor to the knowledge of the undersigned has any attorney entered an appearance since the filing of this cause, nor has any attorney contacted undersigned regarding entering their appearance on behalf of Defendants in this case since the filing of this cause.<sup>171</sup>

The trial court granted the default judgment one day later, and set the matter for hearing on the amount of damages thirty days later. Judgment was entered on the day of the damages' hearing and was served on the doctor but not the doctor's law firm.<sup>172</sup>

Six days after judgment was entered, lawyers from the doctor's law firm entered their appearances on behalf of the doctor and filed a notice of intent to petition to set aside the default judgment.<sup>173</sup> The doctor moved to set aside the default judgment under Indiana Trial Rule 60(B)(1) for excusable neglect and under Indiana Trial Rule 60(B)(3) for misconduct by the husband's lawyer.<sup>174</sup> The doctor alleged that the husband's lawyer "was obligated to provide a copy of the complaint and subsequent papers to [the doctor's] attorneys when she knew [the doctor] was represented by counsel."<sup>175</sup> The trial court denied the doctor's motion to set aside the judgment.<sup>176</sup> The doctor appealed, and the court of appeals affirmed the trial court's denial of the motion to set aside the judgment, and the Indiana Supreme Court granted the doctor's petition to transfer.<sup>177</sup>

The Indiana Supreme Court was not persuaded that the doctor's failure to read his own mail was excusable neglect so as to set aside a default judgment

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170. *See id.*

171. *Id.*

172. *See id.*

173. *See id.*

174. IND. T.R. 60(B)(1), 60(B)(3) provide:

(B) Mistake-Excusable neglect-Newly discovered evidence-Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect . . .

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . .

175. *Smith*, 711 N.E.2d at 1261.

176. *See id.*

177. *See id.*



under Indiana Trial Rule 60 (B)(1).<sup>178</sup> However, the Indiana Supreme Court concluded that the actions of the husband's lawyer "were prejudicial to the administration of justice and therefore constitute misconduct warranting relief under Trial Rule 60(B)(3)."<sup>179</sup> The *Smith* court held in that "a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter."<sup>180</sup>

The Indiana Supreme Court in *Smith v. Johnston* was not able to find a duty in the Indiana Trial Rules requiring a plaintiff's lawyer to serve the complaint on a defendant's lawyer.<sup>181</sup> The *Smith* court even went so far as to acknowledge that the failure of husband's lawyer to serve the complaint on the doctor's law firm was consistent with the Indiana Trial Rules.<sup>182</sup> The court explained that they agree with the argument of the husband's lawyer that:

Trial Rule 4 calls for service of the summons and complaint on the party, not the attorney, to secure jurisdiction. We also agree that Trial Rule 5(B) requires service of subsequent papers only on attorneys who have filed their appearance in the case. Trial Rules 4 and 5 anticipate that a defendant in a lawsuit may not have retained an attorney at the time suit is filed. Even if the defendant has a lawyer, the plaintiff may not know that. Accordingly, these Rules do not require notice service on an attorney. But neither provision excludes the possibility that the plaintiff's attorney has knowledge of the defendant's representation. We hold that that knowledge gives rise to a corresponding duty under the Rules of Professional Conduct to provide notice before seeking any relief from the court.<sup>183</sup>

To find this duty, the court in *Smith v. Johnston* looked both to the preamble of the Indiana Rules of Professional Conduct and to Indiana Rule of Professional Conduct 8.4(d).<sup>184</sup> The court stated:

The preamble to the Rules is clear that "[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Thus lawyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid compromising the integrity of his or her own

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178. *See id.* at 1262.

179. *Id.* at 1264.

180. *Id.* at 1262.

181. *See id.* at 1263.

182. *See id.*

183. *Id.*

184. *See id.* at 1263-64.

reputation and that of the legal process itself.<sup>185</sup>

Based solely on the ethical and moral norms of courtesy, common sense and the constraints of our judicial system, the court found that the husband's lawyer had a duty to "take the relatively simple step of placing a phone call" to the doctor's law firm before filing the motion seeking default judgment.<sup>186</sup> The Indiana Supreme Court in *Smith v. Johnston* is bootstrapping ethical and moral norms into the area regulating the conduct of lawyers based on a truism found in the preamble to the Indiana Rules of Professional Conduct, i.e., "[t]he Rules, do not . . . exhaust the moral and ethical considerations that should inform a lawyer . . ."<sup>187</sup>

The court in *Smith v. Johnston* also looked to Indiana Professional Conduct Rule 8.4(d) as a guide to determine whether the conduct of the husband's lawyer constituted misconduct which would require the court to set aside the default judgment.<sup>188</sup> Indiana Rule of Professional Conduct 8.4(d) provides, "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . ."<sup>189</sup> The court found that the conduct of the husband's lawyer was prejudicial to the administration of justice.<sup>190</sup> The court explained:

The administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment. A default judgment is appropriate only where a party has not appeared in person or by counsel and, if there is a lawyer known to represent the opposing party in the matter, counsel had made reasonable effort to contact that lawyer.<sup>191</sup>

The court suggested that a lawyer's advocacy for a client is limited by the requirement of the efficient administration of justice.<sup>192</sup> Thus, a lawyer should not seek to gain an unfair advantage by seeking a default judgment without making a reasonable effort to contact the opposing party's lawyer when it is known that the opposing party is represented by a lawyer.

In addition, the court in *Smith v. Johnston* found that the conduct of the husband's lawyer was prejudicial to the administration of justice when she made representations in her affidavit to the court that were literally true, but could be misleading.<sup>193</sup> The court explained its position as follows:

Neiswinger [the husband's lawyer] filed an affidavit in support of

185. *Id.* (quoting IND. PROFESSIONAL CONDUCT Rules preamble).

186. *Id.* at 1264.

187. *Id.* at 1263-64 (quoting IND. PROFESSIONAL CONDUCT Rules preamble).

188. *See id.* at 1264.

189. IND. PROF. COND. Rule 8.4(d).

190. *Smith*, 711 N.E.2d at 1264.

191. *Id.* (footnote omitted).

192. *See id.*

193. *See id.*

the motion for default which stated that no "attorney contacted [her] regarding entering their appearance on behalf of Defendants in the cause since the filing of this cause." Although the letter from Smith's attorneys rejecting settlement did not specifically address their appearance in the suit, "it clearly indicated that they still represented Smith's interests in the matter. The representation that Neiswinger [the husband's lawyer] had not been contacted by Smith's lawyers "regarding entering their appearance" is literally true. However, it would be easy for a busy trial judge to take this as a statement that Neiswinger had not been contacted *at all* by Smith's attorneys, not that they had contacted her regarding settlement, but not their appearance. This statement may not be a direct misrepresentation, but it certainly creates a potential for misperception on the part of the trial court, and to that extent was also prejudicial to the administration of justice.<sup>194</sup>

Here, the court suggested that conduct by a lawyer that creates a mere "potential for misperception" by a trial court exceeds the limits of proper advocacy because this type of conduct by a lawyer can cause problems that waste the time of the judicial system.<sup>195</sup> If the husband's lawyer had picked up the telephone and informed the doctor's lawyer she was intending to seek default judgment, then the case could have been decided on the merits, avoiding the post-judgment process in the *Smith v. Johnston* case. Thus, the lawyer for the husband would not have wasted the time of the judicial system.

The husband's lawyer argued that she had a duty to seek the default judgment as an advocate for her client.<sup>196</sup> The court in *Smith v. Johnston* responded:

Whether or not she had a duty to file for default as soon as the time limit expired, that duty did not preclude her from notifying [the doctor's] attorneys of the suit at the time of filing or when she moved for default. Any lawyer's duty to advance her client's interest is circumscribed by the bounds of the law and her ethical obligations.<sup>197</sup>

The court here clearly stated that a lawyer's duty as an advocate for his or her client is not unlimited. The court in *Smith v. Johnston* did not see a lawyer's duty as an advocate for his or her client as an exclusive duty.

However, the court's language in *Smith v. Johnston* is amorphous when it refers to a lawyer's "ethical obligations" as placing a limit on a lawyer's advocacy of his or her client. Ethical and moral norms are not as easily identified as the rules of procedure and professional conduct.<sup>198</sup> Even so, the court in *Smith v. Johnston* suggested that they are proper bases for limiting a lawyer's advocacy

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194. *Id.* (emphasis added).

195. *Id.*

196. *See id.*

197. *Id.*

198. *See id.*

duties to duty as an advocate for his or her client.<sup>199</sup>

Finally, the husband's lawyer argued that requiring a lawyer to provide notice to the opposing lawyers would make it difficult to obtain a default judgment against health care providers.<sup>200</sup> The court responded, "We hope so."<sup>201</sup> The court explained that a default judgment "is not a trap to be set by counsel to catch unsuspecting litigants."<sup>202</sup> In fact, this argument was described by the court as the "gaming view of the legal system," and rejected as unacceptable.<sup>203</sup> The court concluded that the failure of the husband's lawyer to provide notice was not proper conduct for a lawyer.

The "gaming view of the legal system" is one which places the value of zealous advocacy above the value of truth-seeking. The court in *Smith v. Johnston* sees the gaming view as an improper view of the legal system, one which compromises the integrity of the legal system and the integrity of the lawyer.<sup>204</sup> Under the court's view in *Smith v. Johnston*, lawyers are not merely hired guns who do whatever the client demands of him or her. The court recognized that lawyers are advocates for their clients; however, the court believed that lawyers are limited in their advocacy by the rules of procedure, the rules of professional conduct, constraints of the judicial system, and ethical and moral norms.<sup>205</sup> It is not always clear what the limits of proper advocacy are, but, as a self-governing profession, it is the duty of every lawyer to preserve the reputation of the judicial system as one of integrity.

After reviewing *Smith v. Johnston* and *Fire Insurance Exchange*, it is clear that the Indiana Supreme Court has drawn a line in the sand. In Indiana, lawyers have duties that exceed their role as zealous advocates. These duties include being honest and trustworthy. But honesty and trustworthiness are the outer limits of what the Indiana Supreme Court expects. The Indiana Supreme Court demands that lawyers give the search for truth in the judicial process a higher priority than advocacy, especially that form of advocacy which uses the procedural tools of the law as a trap to catch unsuspecting opponents.

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199. *See id.*

200. *See id.*

201. *Id.*

202. *Id.*

203. *Id.* *See also* *McGee v. Reynolds*, 618 N.E.2d 40 (Ind. App. 1993). The *McGee* court held that failure of the plaintiff's attorney to give notice of a lawsuit to the defendant's insurer constituted misconduct sufficient to warrant setting aside the default judgment under Indiana Trial Rule 60(B)(3). *See id.* at 41. Justice Robert Rucker, the newest member of the Indiana Supreme Court, was on the panel of judges from the court of appeals in the *McGee* case. *See id.* at 40. Justice Rucker concurred with the result of the majority opinion in the *McGee* case; however, he was not persuaded that the plaintiff's attorney "engaged in either fraud, misrepresentation, or other misconduct contemplated by *Ind. Trial Rule 60(B)(3)*." *Id.* (Rucker, J., concurring). An interesting question is whether Justice Rucker would have found that the conduct of the husband's lawyer in the *Smith v. Johnston* case constituted misconduct.

204. *See Smith*, 711 N.E.2d at 1264.

205. *See id.* at 1262-64.

## II. "HOUSE COUNSEL" OR "CAPTIVE FIRM" LITIGATION

During the period covered by this Article, the Indiana Supreme Court addressed an important professional responsibility issue regarding the way in which the law is practiced when a third-party payor—an insurer—is in the mix. The case is *Cincinnati Insurance Co. v. Wills*.<sup>206</sup> At issue is the developing practice by liability insurers of using lawyer-employees to represent insured defendants in personal injury litigation.<sup>207</sup> The case was also important to other entities which provide lawyers to render legal services to those other than the insurer proper.<sup>208</sup> By way of example, some not-for-profit corporations directly provide lawyers to assist non-members of the corporation.<sup>209</sup> Many policies, meanwhile, contain "duty to defend" clauses which require the insurer to provide counsel.<sup>210</sup> By way of further example, errors and omissions carriers for corporate officers and directors often use policies containing such language. Hence, the opinion generated fairly widespread interest by the bar.<sup>211</sup>

On November 11, 1994, Betty Suter's dog started to run into the path of Elaine Mellinger's car on State Road 26 in Tippecanoe County.<sup>212</sup> Mellinger lost control of her car and hit David Wills.<sup>213</sup> Wills then sued Mellinger and Suter for his resulting injuries.<sup>214</sup> Suter was insured through the Celina Insurance Group and, under the terms of Suter's policy, Celina assigned attorney Keith Faber to defend Suter.<sup>215</sup> Unlike the traditional arrangement where an insurance company would hire a lawyer from a private firm to represent a defendant, Faber was a salaried employee of Celina.<sup>216</sup> "Suter was advised that although Faber was employed and paid by Celina, his ethical obligations were owed to Suter alone."<sup>217</sup> After she consulted with another lawyer, Suter agreed to Faber's

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206. 717 N.E.2d 151 (Ind. 1999) (evolving out of personal injury litigation *sub nom. Wills v. Mellinger*, case number 79D01-9605-CP-132, which began in the Tippecanoe County Superior Court).

207. *See id.* at 153.

208. More than a dozen amici curiae participated in the briefing of this case before the Indiana Supreme Court representing all the viewpoints identified in the main body of this Article. *See id.* at 152-53; *see also* Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995).

209. *See Wills*, 717 N.E.2d at 152-53.

210. *Id.*

211. *See id.*

212. Fact summary taken from the "Order Disqualifying Keith L. Faber From Representing Betty Suter and Requiring Celina Insurance Group and Cincinnati Insurance Company to Cease and Desist from Engaging in the Unauthorized Practice of Law" issued by the Tippecanoe Superior Court on June 11, 1998.

213. *Id.*

214. *See Wills*, 717 N.E.2d at 153.

215. *See id.*

216. *See id.*

217. *Id.*

representation.<sup>218</sup>

Wills, the plaintiff, moved to disqualify Faber as defendant Suter's lawyer claiming that Celina was engaged in the unauthorized practice of law.<sup>219</sup> Celina is not the only insurer to use salaried lawyers to represent its insureds.<sup>220</sup> The Cincinnati Insurance Company moved to intervene in the litigation because, like Celina, they provided Indiana counsel for their insureds through an entity known as Berlon & Timmel.<sup>221</sup> Berlon & Timmel is staffed by salaried employees of the insurance company who represent only insureds and the insurance company itself.<sup>222</sup>

Cincinnati Insurance Company was allowed to intervene and on June 11, 1998, the trial court entered an order granting the plaintiff's motion to disqualify Faber "so long as he continue[d] to be an employee or agent of Celina Insurance Group. . . ."<sup>223</sup> The trial court reasoned that Faber's continued employment with Celina may aid and abet the insurer's unauthorized practice of law by a corporation.<sup>224</sup> The trial court made a similar finding relative to the Berlon & Timmel lawyers employed by Cincinnati Insurance Company.<sup>225</sup> Based upon these findings, the trial court ordered Berlon & Timmel to close their Indianapolis office.<sup>226</sup> The trial court's order was stayed by the Indiana Court of Appeals and the insurers successfully petitioned for immediate transfer to the Indiana Supreme Court.<sup>227</sup>

In a lengthy opinion authored by Justice Boehm, the Indiana Supreme Court identified three central ethical issues associated with the case:<sup>228</sup>

1. Whether an insurance company is engaged in the unauthorized practice of law when it employs house counsel to represent its insureds.
2. Whether there is an inherent conflict of interest where an insurance company employs house counsel to represent its insureds.
3. Whether the representation was properly entered into in each particular case.<sup>229</sup>

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *Id.* at 153-54.

224. *See id.* at 154.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.* at 154-55.

229. *Id.* at 155. In relevant part, Indiana Professional Conduct Rule 7.2 provides, "A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading [or] deceptive . . . ." IND. PROF.

### *A. The Jurisdictional Issue*

At the outset, the Indiana Supreme Court noted that the regulation of the bar is, as a general matter, within their exclusive jurisdiction under the Indiana Constitution.<sup>230</sup> The court explained that the trial court had wide authority in regulating the activity in its court in relation to the attorneys who appear before it, but that does not include regulation of the bar as a whole.<sup>231</sup> It also noted that the trial court's order to Berlon & Timmel to close its doors was a sweeping remedy that is only available to the Indiana Supreme Court through its constitutional grant.<sup>232</sup> Finally, the court explained that it granted immediate transfer not only to resolve the jurisdictional issue, but to deal with what it perceived to be an important question for the members of the bar.<sup>233</sup>

### *B. The Unauthorized Practice of Law by a Corporation Issue*

The Indiana Supreme outlined the syllogism used by the trial court in concluding that "house" counsel were assisting their corporate employer in the unauthorized practice of law.

- (1) the attorney-agents of Celina are engaged in the practice of law;
- (2) Celina, a corporation, can act only through agents;
- (3) the acts of the attorneys are those of Celina;
- (4) Celina is engaged in the practice of law.<sup>234</sup>

After working through the syllogism the trial court concluded "that Celina's practice of law was unauthorized because Indiana's professional corporation statute implicitly prohibits general business corporations and insurance companies from practicing law."<sup>235</sup>

The Indiana Supreme Court, by way of analogy, concluded that the trial court's logic was erroneous.<sup>236</sup> The supreme court agreed that a legal entity

COND. R. 7.2.

230. *See Wills*, 717 N.E.2d at 154. Article 7, section 4 of the Indiana Constitution provides in part:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction . . . .

IND. CONST. art. VII, § 4.

231. *See Wills*, 717 N.E.2d at 154.

232. *See id.*

233. *See id.*

234. *Id.* at 156.

235. *Id.*

236. *See id.* at 159-60.

could be responsible for the professional actions of its partners, employees, and agents under the doctrine of respondeat superior.<sup>237</sup> The court determined, however, that this fact alone did not demonstrate that Celina was engaged in an unlawful practice.<sup>238</sup> The court held that the practice of law requires a license, and, when licenses are required, agency law permits an unlicensed legal entity to utilize the services of licensed agents.<sup>239</sup> The court ultimately concluded that the mere fact that a lawyer was an insurance company's employee was no bar to the concurrent representation of the employer and someone else.<sup>240</sup> In other words, the situation itself was not inherently problematic.<sup>241</sup>

### C. *The Inherent Conflict of Interest Issue*

The Indiana Supreme Court acknowledged the growing body of professional literature concerning the issue of whom the lawyer owed his duty of loyalty in the situation where the attorney is an employee of the insurer and is doing work historically done by outside counsel.<sup>242</sup> The court found it "unrealistic" to analyze the arrangement without recognizing the lawyer's client relationship that exists with both the insurer and the insured.<sup>243</sup> The opinion describes two situations where the interests of the two clients are in conflict: the situation where confidences of the two clients are exchanged and the situation where the insured provides confidential information affecting coverage that puts the two parties at odds.<sup>244</sup> The existence of a conflict, however, is not the end of the analysis. Using the Indiana Professional Conduct Rules, the court noted that many conflicts can be waived by the parties and, in fact, the rules contemplate that such waivers will take place.<sup>245</sup> The existence of a problematic conflict of

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237. *See id.* at 159.

238. *See id.* at 159-60.

239. *See id.* at 160 (citing RESTATEMENT (SECOND) OF AGENCY § 19, cmt. d (1958)).

240. *See id.*

241. *See id.*

242. *See id.* at 161.

243. *Id.*

244. *See id.*

245. *See id.* In particular, the court reviewed the Indiana Professional Conduct Rule 1.7 which provides,

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person,



interest will clearly be the exception, rather than the rule:

If a conflict arises, it will have to be handled, and there are a variety of means to do that. But a vast number of claims have been and presumably will be handled with no significant issue between the insurer and the policyholder. Interests of economy and simplicity dictate that this be permitted to continue. Any abuses can be handled on a case-by-case basis rather than by adoption of the broad prohibition the Wills seek. Although issues may arise in dual representation, none are apparent in this case.<sup>246</sup>

The supreme court analyzed the appropriate statutes and provisions in the Indiana Professional Conduct Rules and concluded that the plaintiff failed to present evidence that specifically condemned Faber's conduct.<sup>247</sup> In the end, the court concluded that its analysis of a specific situation would depend on the commonality of interests of the jointly represented clients.<sup>248</sup> Even then, the court added,

As demonstrated by this case, free access to the market of legal services and the protection of the public is a delicate balance with results that are not always predictable. As noted in [its analysis under Indiana's Rules of Professional Conduct], in the realm of insurance defense, the public may ultimately reap the benefits of better service at lower cost through the use of house counsel. Although we find no inherent detriment to the general public in the defense of insurance claims by house counsel, we reiterate the fact that the Rules of Professional Conduct, the disciplinary procedures, and other civil remedies exist for the protection of all clients, whether the attorney is house counsel, a sole practitioner, affiliated with a traditional law partnership, or anything else.<sup>249</sup>

#### *D. The Use of the Name "Berlon & Timmel"*

The trial court found that the use of the name Berlon & Timmel by Cincinnati Insurance Company's employee lawyers violated Indiana Professional

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or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

IND. PROF. COND. R. 1.7.

246. *Wills*, 717 N.E.2d at 161.

247. *See id.* at 162.

248. *See id.* at 163.

249. *Id.* at 163-64.

Conduct Rule 7.2 because the name gave the appearance of independence.<sup>250</sup> The Indiana Supreme noted that the letterhead bore the following language: "Berlon & Timmel is an unincorporated association, not a partnership, of individual licensed attorneys employed by The Cincinnati Insurance Company for the exclusive purpose of representing the Cincinnati Insurance Companies and their policyholders."<sup>251</sup> The supreme court agreed with the trial court's analysis the use of this name was misleading to the public.<sup>252</sup> The court held that the disclosure language was not sufficient to put Cincinnati's insureds on notice of the actual status of the lawyers who were representing them.<sup>253</sup> Then, offhandedly, the court noted that perhaps, "the name was adopted without much reflection."<sup>254</sup> In the end, the court resolved this issue by ordering Cincinnati's lawyers to cease using the Berlon & Timmel firm name. In sum, house counsel was permitted to continue to operate as they had been doing, but could not practice under a misleading entity name.<sup>255</sup>

#### V. THE VIEW IN OTHER STATES

The Indiana Supreme Court opinion in *Wills* epitomizes the view held by a majority of the courts nationwide who have confronted the issue either through judicial decision or bar association ethics opinions.<sup>256</sup> Note that, in *Wills*, the case came to the Indiana Supreme Court through the plaintiff's motion to disqualify opposing counsel at the trial court level.<sup>257</sup> This is a procedurally irregular path to the court and, strictly speaking, not an "original action" under the court's constitutional grant or its own "original action" rules.<sup>258</sup>

The analysis in the *Wills* opinion is very similar to the approach taken by the Tennessee Supreme Court in the case of *Petition of Youngblood*.<sup>259</sup> Like the lawyers in *Wills*, the petitioning lawyers in *Youngblood* were all employees of various liability insurers.<sup>260</sup> The petitioners contested an ethics opinion issued by the Board of Professional Responsibility that stated:

1. It is improper for in-house attorney employees of an insurance

250. *See id.* at 164. Rule 7.2(b) provides in pertinent part, "A lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair . . ." IND. PRO. COND. R. 7.2(b).

251. *Wills*, 717 N.E.2d at 164.

252. *See id.*

253. *See id.*

254. *Id.* at 165.

255. *See id.*

256. *See id.* at 155 nn.4-5.

257. *See id.* at 153-54.

258. *See generally* Indiana's Rules of Procedure for Original Actions, Writs of Mandate and Prohibition (1980).

259. 895 S.W.2d 322 (Tenn. 1995).

260. *See id.* at 325.

company to represent individual insureds in legal matters arising under that company's policy.

2. Such an arrangement constitutes a lay corporation practicing law.
3. The holding out of an in-house attorney employee as a separate and independent law firm constitutes an unethical and deceptive practice.<sup>261</sup>

The petitioners argued that the Board's construction of the disciplinary rules is subject to review by the court, that the determinations made in the opinion were neither required nor permitted by the rules and that the opinion should be invalidated.<sup>262</sup> Like the lawyers in *Wills*, the petitioners were faced with the desire to have their concerns heard by the state's high court but without a clear procedural mechanism to give vent to their problem.

The Board of Professional Responsibility insisted that its opinion accurately resolved the ethical issues presented and asked the court to appoint a special master to make findings on the matter.<sup>263</sup> The Chattanooga Bar Association, meanwhile, filed an amicus curiae brief that argued that the court did not have jurisdiction to review a formal ethics opinion issued by the Board.<sup>264</sup> The court concluded that a special master could not develop determinative findings more instructive than the court's review of three findings already made by the Committee.<sup>265</sup> The Tennessee Supreme Court further found that because the court, 1) established the Board of Professional Responsibility by court rule, 2) provided its operating rules, and 3) named it the "Board of Professional Responsibility of the Supreme Court of Tennessee" that their claim to jurisdiction over that entity's actions was pretty well beyond dispute.<sup>266</sup>

The Chattanooga Bar Association, one of twenty-two amici involved in the case,<sup>267</sup> also argued that the petitioners had no standing to file an original petition with the court.<sup>268</sup> The court disagreed and held:

In this case, the formal ethics opinion finds that petitioners' employment constitutes unethical conduct for which they are at risk of being sanctioned and, therefore, effectively prohibits their continued employment. No other authority may revise the rules of the Court; consequently, under these circumstances, the petitioners have standing to file an original petition in this Court seeking review of the opinion.<sup>269</sup>

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261. *Id.* at 324 (citation omitted).

262. *See id.* at 325.

263. *See id.*

264. *See id.*

265. *See id.*

266. *Id.*

267. *See id.* at 324 n.2.

268. *See id.* at 326.

269. *Id.*

The court also discussed the appropriateness of the petitioners' challenge in light of the practice in some states, notably Rhode Island, where an attorney is fully protected from a charge of impropriety if he or she conforms to the standards set forth in a state ethics opinion.<sup>270</sup> The Tennessee Supreme Court found these to be sufficient bases for keeping the question before them.<sup>271</sup>

The Tennessee Supreme Court analyzed the three issues presented in a manner similar to the *Wills* court. First, Board of Professional Responsibility found that it was "improper for in-house attorney employees of an insurance company to represent individual insureds in legal matters arising under that company's insurance policy."<sup>272</sup> The court discussed the issue at length. It examined those circumstances where conflicts obviously arise from the arrangement and concluded that the simple fact that the employment relationship itself did not create a conflict of interest.<sup>273</sup> The court determined that because the Board's opinion interpreted Tennessee's Code of Professional Responsibility, the appropriate method of analysis is to examine each situation on a case-by-case basis.<sup>274</sup> This is something the Board did not do.<sup>275</sup> In the end, the court determined that without a specific, problematic fact situation, there was no conflict of interest solely based on the employment arrangement.<sup>276</sup>

Because the opinion bases its finding upon the potential for conflict in the relationship of employer-employee rather than particular facts which demonstrate there is, in fact, a conflict of interest, it does not reflect a proper interpretation of the Code. The conclusion stated in the formal ethics opinion on this issue is, therefore, vacated.<sup>277</sup>

The Tennessee Supreme Court then moved on to the Board's second finding that the arrangement between salaried in-house lawyers and the insurers constituted a lay corporation engaging in the practice of law.<sup>278</sup> The court rejected the lower court's finding that this constituted fee-splitting.<sup>279</sup> Therefore, the financial arrangement between the two parties does not constitute a violation of Tennessee law.<sup>280</sup> An important feature of the court's analysis on the "corporate practice of law" issue was its use of the notion of a "commonality of interests" between the purported antagonists.<sup>281</sup>

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270. See *id.* (citing *In re Ethics Advisory Panel Opinion*, 554 A.2d 1033, 1034 (R.I. 1989)).

271. See *id.*

272. *Id.* at 329.

273. See *id.* at 329-30.

274. See *id.* at 327.

275. See *id.* at 330.

276. See *id.*

277. *Id.* at 330.

278. See *id.*

279. See *id.*

280. See *id.*

281. *Id.*

The furnishing of legal services to an insured by a liability insurance company has generally been found not to constitute the unauthorized practice of law because of the identity or community of financial interest between the insured and insurer in defending the claim and because of the insurer's contractual obligation to defend the insured at the insurer's expense.<sup>282</sup>

In other words, the duty to defend is one that applies to the insurer whether in-house lawyers are used or otherwise. In the end, the court concluded that a lawyer's salaried employment did not, a priori, compromise the lawyer's independent professional judgment.<sup>283</sup> The court again acknowledged that it would look at the specific facts of each situation before deciding whether a conflict of interest existed or not.<sup>284</sup>

Finally, the Tennessee Supreme Court addressed the issue of the name under which the salaried lawyers practiced.<sup>285</sup> Representing to the public that the lawyers practiced in some separate and independent entity other than the insurance company was found to be forbidden.<sup>286</sup> The court held,

The representation that the attorney-employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.

The petitioners admit that the practice they advocate gives the public the impression that they are engaged in the general practice of law as partners or as sole practitioners. However, they would justify the misrepresentation on the ground that general identification of the attorney-employee with the insurer-employer must be avoided and, public disclosure of the real relationship between the insurer and the attorney would serve no useful purpose. The prohibition contained in the Code is not limited to false, misleading, fraudulent, and deceptive representations which are demonstrated to be harmful, nor will the Code be construed so narrowly on this important principle. And further, false, misleading, fraudulent, and deceptive representation are by their very nature harmful to the profession, whose credibility is dependent upon its integrity.<sup>287</sup>

The Tennessee Supreme Court, following precedent from the New Jersey Supreme Court,<sup>288</sup> outlawed the use of a law firm name or any designation which

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282. *Id.* at 330-31.

283. *See id.* at 331.

284. *See id.*

285. *See id.* at 331-32.

286. *See id.* at 331.

287. *Id.* at 331-32.

288. *See id.* (citing *In re Weiss, Healey & Rea*, 536 A.2d 266 (N.J. 1988)).

made the lawyers appear to be independent of the insurance company that paid them.<sup>289</sup> The Indiana Supreme Court in *Wills* has taken a similar course in condemning the use of a law firm name by in-house counsel on the basis that it misled the insureds who would be the clients whom the lawyers would represent.<sup>290</sup>

#### *F. Indiana's Opposing View*

The opposition to house-counsel practice found a strong voice in the dissenting opinion authored by Associate Justice Brent Dickson.<sup>291</sup> Justice Dickson's opinion discussed at length the Indiana Supreme Court's long line of decisions discussing the privilege to practice law and identifying numerous acts found in the past to constitute the practice of law.<sup>292</sup> The dissent also recognizes the absence of laws either promulgated by the supreme court or enacted by the General Assembly to prohibit the specific wrong alleged by the plaintiffs in the instant case.<sup>293</sup> Observing that the practice of law is limited to natural persons, Justice Dickson would have ruled that the use of in-house counsel did, in fact, constitute the corporate practice of law and was, therefore, a relationship which violated both Indiana's Rules of Professional Conduct and Indiana's criminal statute forbidding the unauthorized practice of law:

It has been recognized that "[c]onflicts of interest potentially affecting the quality of the representation are inherent in situations in which an insurance carrier has agreed to provide a defense for its insured." Whether the situation is analyzed as one in which the attorney provides dual representation to both insurer and insured or as one in which the attorney represents the insured alone but the legal fees are paid by the third-party insurer, the essential issues are the same: are any material limitations placed on the representation; is there interference with the attorney's independence of professional judgment; or is there interference with the client-lawyer relationship? In this "triangle," the attorney faces conflicting interests—loyalty to the insurer-client or loyalty to the insured-client. Understandably, both insurers and insureds have a common interest in defending against claims brought by plaintiffs. However, they often have different interests in terms of indemnification, confidentiality, trial tactics, willingness and ability to settle, coverage issues, excess liability exposure, etc. These problems are only exacerbated when house counsel represents insureds.

While most members of the bar earnestly endeavor to fulfill their obligations under the Rules of Professional Conduct, I believe that the

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289. See *id.* at 332.

290. See *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 164-65 (Ind. 1999).

291. See *id.* at 165 (Dickson, J., dissenting).

292. See *id.* at 165-83.

293. See *id.* at 176-77.

use of insurer-employed staff attorneys to represent insureds is inherently problematic. This situation present conflicts of interest so inherent in the representation and so serious that the attorney-client relationship and the quality of the representation are at risk, despite the possible absence of substantive impropriety in a majority of individual cases. This practice is so fraught with danger that a *per se* rule of disqualification should be imposed. A prophylactic ban is justified because our interest in maintaining public confidence in the legal system outweighs the interest of individual lawyers and individual clients in freely contracting with each other.<sup>294</sup>

The opinion challenges the majority view that, in essence, the plaintiff and defense bar will have to “duke out” this dispute in the marketplace.<sup>295</sup> The dissent exhorts the majority to, “not abandon to the marketplace our duty and responsibility to regulate the practice of law.”<sup>296</sup>

#### CONCLUSION

The most remarkable developments in professional responsibility have, most recently, been associated with questions of substantive law. As cases like *Smith v. Johnston* and *Cincinnati Insurance v. Wills* should hopefully demonstrate, the lawyer’s ethical duties are not a separate and distinct part of his or her life. Duty, integrity, and honesty are part and parcel to the lawyer’s day to day practice and the Indiana Supreme Court expects those qualities from all members of its bar.

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294. *Id.* at 181 (citations omitted).

295. *Id.* at 183.

296. *Id.*

