

# SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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## I. *EX PARTE* COMMUNICATION WITH JUDICIAL OFFICERS

The practice of communicating with judges and other judicial officers in the absence of the opposing party or their representative has long been forbidden in the practice. The rationale should be obvious. Such communication abrogates any semblance of fairness in the adjudicative process. In Indiana, the practice is prohibited by Indiana Professional Conduct Rule 3.5(b).<sup>1</sup> The whole rule provides:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person except as permitted by law;
- or
- (c) engage in conduct intended to disrupt a tribunal.<sup>2</sup>

When read in its entirety, this rule is intended to prevent lawyers from committing misconduct in the course of litigation. Viewed from another perspective, the rule's intent is to force lawyers to assist judges in maintaining an orderly administration of their courtrooms and the cases pending therein. The rule's associated comment gives slight guidance on the finer points of the law.

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is not justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.<sup>3</sup>

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1. IND. PROFESSIONAL CONDUCT RULE 3.5(b).
2. *Id.*
3. *Id.*

A review of the comment highlights two key concepts within the rule. First, the rule concerns itself with the advocate's exertion of improper influence on a tribunal. Second (and more dominant) is the drafters' concern with lawyers' disruption of courtroom proceedings through the use of "belligerence or theatrics."<sup>4</sup> Looking at these concerns in reverse order as they appear in the rule, it should be readily apparent that intentionally disrupting a tribunal is, under most definitions, behavior that should be discouraged and prevented if possible. Take, for example, the Indiana case of *In re Ortiz*.<sup>5</sup> In *Ortiz*, the respondent lawyer had to be physically restrained by court personnel because of his antics.<sup>6</sup> The lawyer's behavior began as the result of what he perceived to be an incorrect evidentiary ruling by a trial judge in a criminal case.<sup>7</sup> In an attempt to derail the case, the lawyer also attempted to get the client to fire him and thereby prevent further proceedings in the case until a new lawyer could be appointed. Although the criminal defendant attempted to terminate the lawyer's services, the judge refused to allow the switch late in the proceedings.<sup>8</sup> The lawyer was jailed to assure his appearance for the remainder of the case.<sup>9</sup> *Ortiz* seems to be exactly the case contemplated by the drafters of Indiana Professional Conduct Rule 3.5(c). The situation is one where the lawyer's histrionics are calculated to override the judge's control over the proceedings in his or her own courtroom. Obviously, there are any number of reasons why lawyers (and litigants too, for that matter) should be prevented from wresting control of the courtroom from the presiding judge. One of the interesting analytical features of this rule is that it exists in addition to the trial court's inherent authority to punish those before it for contempt. As the rule points out, conduct intended to disrupt a tribunal can subject the offending lawyer to disciplinary action.<sup>10</sup> In other words, the lawyer can face serious career consequences *in addition to* the opprobrium from the trial court as punishment immediately imposed as its remedy for contempt.<sup>11</sup> This prohibition exists as sort of super-sanctioned conduct that must be avoided by the bar.<sup>12</sup>

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4. *Id.*

5. 604 N.E.2d 602 (Ind. 1992).

6. *Id.* at 603.

7. *Id.*

8. *Id.* at 604.

9. *Id.*

10. PROF. COND. R. 3.5(c).

11. This is not a terribly uncommon occurrence. In *In re Gemmer*, 679 N.E.2d 1313 (Ind. 1997), the respondent lawyer converted several thousand dollars from a fraternal organization in which he was treasurer. His law license was suspended for one year after his criminal conviction for conversion. Note also that the lawyer's misconduct was not the byproduct of an attorney-client relationship, but in his role as an officer of the fraternal organization.

12. Obviously, not every contempt citation results in disciplinary action against a lawyer. The conduct in *Ortiz* involved a physical altercation in the courtroom. Certainly serious misconduct on that order warrants more than the imposition of only a citation, which the lawyer can purge in

The first aspect of the rule proscribes conduct that undermines the fundamental fairness of the process generally.<sup>13</sup> Subsection (a) prohibits improper influence by communicating with jurors, prospective jurors, and judicial officers, presumably because they will be the finders of ultimate fact in adjudicating the underlying dispute. Subsection (b) prohibits the specific practice of communicating *ex parte* with the ultimate fact finder. This prohibition is based on the potential exertion of undue or improper influence in the absence of the opposing party or their representative. Although this practice has long been forbidden under Indiana law,<sup>14</sup> it remains a problem for insuring the fair adjudication of cases in Indiana courts. During the survey period, the Indiana Supreme Court and its Commission on Judicial Qualifications have had occasion to reflect on the problems created by lawyers when they give evidence to Indiana trial courts without the benefit of the opposing view by opposing counsel. Specifically, the reader would be well advised to examine the case of *In re Warrum*.<sup>15</sup> *Warrum* presents a recurring and troubling situation in Indiana courts. In this case, the respondent lawyer represented a client in a family law matter. Specifically, the client and her ex-husband were divorced in Utah.<sup>16</sup> The Utah court also retained jurisdiction over the issues of child support and visitation. *Warrum*'s client sought to increase the child support awarded in the Utah order.<sup>17</sup> She had a petition to modify on file in Utah contesting the Utah order, but retained the respondent lawyer here in Indiana where she and the child were living and directed him to initiate proceedings to increase her child support payments even though the dissolution case had no connection to an Indiana court.<sup>18</sup> Needless to say, the respondent lawyer not only undertook the representation, but was able to obtain an order for the relief his client sought. This occurred even though she had initiated similar proceedings before the Utah court.<sup>19</sup> The lawyer's petition to the Indiana court was utterly inadequate to even remotely inform the court of the true circumstances of the requested relief and, in fact, the entire petition is set out in the supreme court's disciplinary action.<sup>20</sup> As a result of the lawyer's efforts, the client did obtain an order increasing the child support. The ex-husband's tax refunds were intercepted but the resultant controversy did not bode well for the judge, the system, the client or, in the end, the lawyer.<sup>21</sup> Before the dust settled, the governors' offices of both states were

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short order.

13. PROF. COND. R. 3.5.

14. Disciplinary Rule 7-110(B) of Indiana's former *Code of Professional Responsibility* (1971). In California, meanwhile, the prohibition on *ex parte* communication was formally made law in 1928 as former Rule 16 of California Rules of Professional Conduct.

15. 724 N.E.2d 1097 (Ind. 2000).

16. *Id.* at 1098.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1098 n.1.

21. *Id.* at 1099.

involved and a mediation session was held in Chicago in an attempt to resolve the dispute between the states.<sup>22</sup> In sum, the lawyer's efforts on behalf of one client resulted in a major disruption of an already existing system to provide for the orderly adjudication of such post-dissolution cases. Had the lawyer given the Indiana judge adequate facts in order to make an informed decision, it is certainly possible that the case could have been transferred to Indiana and the client could have received the relief she had been seeking.<sup>23</sup> In the alternative, the Utah court would have retained jurisdiction and the petition the ex-wife had filed in the court would have been adjudicated in due course. Instead, the lawyer's short cutting of the process resulted in professional disciplinary action against him.<sup>24</sup> Against this backdrop, it is easier to see why the practice of communicating *ex parte* with officials in the adjudicatory process is forbidden unless adequate notice and an opportunity to be heard is also provided to the opposing parties.<sup>25</sup>

The prohibition against *ex parte* communication is fairly broad in scope as well. In fact, it might fairly be said to have both a horizontal and vertical component. *Warrum*, it could be argued, represents the horizontal component of the analysis in that it makes clear that the prohibition against *ex parte* communication applies to all communications in the traditional litigation environment. Lawyers owe all the judges in Indiana courts a duty in addition to the duties that they owe their clients.<sup>26</sup> The duty encompasses good faith, fair dealing and honesty because the judges must rely on the trustworthiness of the representations of the lawyers appearing before them.<sup>27</sup>

The vertical component of this analysis is represented by the case of *In re LaCava*.<sup>28</sup> In *LaCava*, the respondent lawyer communicated with one of the members of the medical review panel evaluating his client's medical malpractice claim.<sup>29</sup> The communication caused the panel member to change its opinion in a manner favorable to his client.<sup>30</sup> For purposes of this work, however, it is significant to note that in imposing disciplinary action on the lawyer in *LaCava*, the supreme court recognized that the medical review panel, clearly not traditionally thought of as a tribunal, is certainly regarded as one for purposes of analyzing the lawyer's conduct under Indiana Professional Conduct Rule 3.5.<sup>31</sup> The "verticality" of the rule implies that the lawyer's obligation not to communicate *ex parte* with a judicial officer applies more generally to any

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22. *Id.*

23. *Id.* at 1100.

24. *Id.*

25. See, for example, Rule 65 of the Indiana Rules of Trial Procedure governing the notice requirements attendant to the issuance of temporary restraining orders without notice. IND. TRIAL RULE 65(B).

26. See *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999).

27. *Id.*

28. 615 N.E.2d 93 (Ind. 1993).

29. *Id.* at 94.

30. *Id.*

31. *Id.* at 95.

factfinder. Presumably, the rule also applies to adjudications pending before administrative agencies with equal force to that shown in *LaCava*. The rule would presumably apply with equal force to professional neutrals under the alternative dispute resolution rules.<sup>32</sup> In other words, lawyers must not address the facts of their causes with the factfinders in their cases without notice and an opportunity to be heard by the opposing party or their representative.

There are circumstances in which lawyers need to obtain emergency relief, without notice, in order to preserve their client's interests. For those circumstances, the provisions of Indiana Trial Rule 65 exist to govern *ex parte* proceedings. The Supreme Court's Commission on Judicial Qualifications, in an effort to advise and assist Indiana judges on the dangers of *ex parte* communication issued its opinion #1-01. A copy of the full text of the opinion follows this article as Appendix "A." The opinion primarily stresses to sitting judges the need to stick strictly with the provisions of Indiana Trial Rule 65 in dealing with requests for relief wherein one of the opposing parties is not before the tribunal to present their side of the dispute in the quest for relief. The advisory opinion points out that the Commission has reviewed a number of grievances in which one litigant has advanced their interests through the use of improper *ex parte* communication.<sup>33</sup> The problem had reached such a frequency that they felt compelled to directly express their concern to judges that such communications must stop, unless the judge carefully considers the process in light of the provisions of Indiana Trial Rule 65.

## II. PRIVILEGE AND CONFIDENTIALITY

One of the key features of the attorney-client relationship is the level of trust attendant in the lawyer's ability to keep the client's secrets in confidence. Through the existence of such a "confidential" relationship, the client feels comfortable giving the lawyer sufficient information in order to best pursue the client's interests. Violating the client's trust by revealing their secrets is, at least on an emotional level, one of the most devastating blows to the confidence the client has in the lawyer. Such was the case of *In re Harshey*.<sup>34</sup> In that case, the respondent lawyer was hired on a contingency fee basis by the president of a closely held corporation to represent its corporate interests in a suit against another corporation.<sup>35</sup> During the course of the litigation, the president's wife filed for dissolution of the marriage, but the respondent did not represent the president in that matter.<sup>36</sup> The dissolution decree awarded the interest in the

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32. A list of "neutrals" is included in Rule 7 of Indiana's Rules for Alternative Dispute Resolution. IND. ALTERNATIVE DISPUTE RESOLUTION RULE 7.

33. In Appendix "A," the "Analysis" section notes that the Commission reviewed several such grievances and found that insufficient grounds were expressed in those grievances to warrant a change of custody on the facts provided by the lawyers.

34. 740 N.E.2d 851 (Ind. 2001).

35. *Id.* at 852.

36. *Id.*

corporation to the president, but awarded the wife forty-five percent of the net proceeds of the still-pending corporate litigation.<sup>37</sup> Shortly thereafter, the defendant in the corporate litigation offered to settle by paying \$125,000 and the respondent advised the corporation, through its president, to accept the offer. The president refused the offer of settlement.<sup>38</sup> Disagreeing with the prudence of the president's rejection of the offer, the respondent did not notify the defendant-wife that the settlement offer was rejected, but instead, just prior to the expiration of the offer, he contacted the divorce judge and informed him of the settlement offer in the corporate litigation.<sup>39</sup> The divorce judge set an emergency hearing and notified the attorney for the wife. At the hearing, wife's counsel subpoenaed the respondent to testify to the terms of the still-not-rejected offer.<sup>40</sup> The president directed the respondent to not appear and testify, but the respondent insisted that he was required to do so by the subpoena and asserted to the president that he now represented the court-appointed commissioners in the divorce case and that only they or the judge could fire him.<sup>41</sup> At a meeting in chambers with the divorce judge and wife's counsel that took place the day before the emergency hearing, the respondent asked the judge to authorize him to accept the still-pending offer subject to a formal entry being made at the emergency hearing the next day. The divorce judge gave the respondent that authority.<sup>42</sup> Meanwhile, the president attempted unsuccessfully to get the emergency hearing continued, and it was held as scheduled without the president's presence. At the emergency hearing, the respondent testified to the terms of the settlement offer and opined that it was a reasonable offer.<sup>43</sup> At that hearing, the judge ordered the divorce commissioners to accept the settlement offer. The president also objected in the corporate litigation to the settlement of the matter by the divorce commissioners, but the judge in the corporate litigation approved the settlement over the president's objection.<sup>44</sup>

These facts supported conclusions that the respondent violated two rules of professional conduct. First, the respondent violated Indiana Professional Conduct Rule 1.2(a) when he disregarded his own client's instructions concerning the objectives of the corporate litigation and caused the case to be settled over his client's objections.<sup>45</sup> The respondent also violated Indiana Professional Conduct Rule 1.6 and the confidentiality that cloaked the information he obtained during the course of his representation in the corporate litigation when he made disclosures in the divorce case, without his client's consent and over his client's objections, concerning the pending settlement

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 853.

43. *Id.*

44. *Id.*

45. *Id.*

offer.<sup>46</sup>

The supreme court's discussion (including a dissent over the appropriateness of the sanction) is quite interesting, in that it addresses the fundamental role and responsibility of the lawyer as fiduciary. By ignoring "his client's clear wishes" the respondent "ceased serving as an advocate for his client and instead became an adversary, one who disclosed confidential information about the representation in order to achieve his goal of obtaining a quick recovery and its attendant legal fee."<sup>47</sup> A majority of the court reluctantly accepted the proposed consent sanction of a public reprimand.<sup>48</sup> A two-justice dissent as to sanction provided:

Mr. Harshey's stunning treatment of his client is remarkably simple to describe.

After the client decided to turn down the defendant corporation's offer of settlement, Harshey decided not to act on the client's decision and set about finding some way to make the client accept it anyway.

He started off with an *ex parte* communication to the judge who had presided in the client's divorce, a venue in which Harshey had no status at all. In the course of this communication, he violated his duty to preserve the confidences of his client by revealing the status of the settlement negotiations.

When the client got wind of what Harshey was up to and asked him to stop, Harshey lied to the client, claiming he was now representing the lawyers who had litigated the divorce and could be fired only by them.

Fearful that his client might find a way to stop him, Harshey decided to meet with the dissolution judge and the dissolution lawyers a day in advance of the scheduled court hearing—to ask for permission to inform the defendant corporation that its settlement would be accepted. In effect, he assured that even if the client showed up at the hearing to stand on his rights, it would be too late. It was too late.

The client who wanted to go to trial—and whose trial was just a few weeks off—never got his day in court. He was thwarted by the active and willful effort of his lawyer, who refused the client's proper instructions, breached his confidences, lied to him, and *ex parte*'d the judge.

Our disciplinary system should not treat such behavior as a matter for mere reprimand.<sup>49</sup>

Finally, this case subtly makes another point that is worth highlighting. The court noted as a mitigating factor that the president had himself revealed the terms of the proposed settlement in the corporate litigation to third parties before

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46. *Id.*

47. *Id.* at 853, 854.

48. *Id.* at 854.

49. *Id.* at 854-55.

the respondent revealed the terms to the divorce judge.<sup>50</sup> Note, however, that this was merely a mitigating factor and not a defense to the charge that the respondent violated Indiana Professional Conduct Rule 1.6(a) by revealing client confidences without client consent. This illustrated the fact that revelation of information by the client to a third party may defeat the privileged nature of that information, but it does not give free reign to the lawyer to breach his obligation to hold all relevant information related to the representation confidential, even when the client has chosen to reveal it to others.

### III. RULE AMENDMENTS OF NOTE

The mechanics of actually running the bar of the Indiana Supreme Court are governed under Indiana's Rules for the Admission to the Bar and the Discipline of Attorneys. These rules govern, for example, admission of lawyers to the bar *pro hac vice*<sup>51</sup> and the procedures by which Indiana's bar examination is given.<sup>52</sup> Additions and amendments to the admission and discipline rules can often have the effect of making profound changes in the day-to-day practice of law in Indiana. During the survey period, the supreme court made a number of amendments to the rule governing the procedures by which disciplinary action is prosecuted against attorneys.<sup>53</sup> Most of these changes can be fairly described as cleaning up grammatical and other comparatively cosmetic problems in the rules which are, by now, more than thirty years old.<sup>54</sup>

One important change this year is that for the first time, the supreme court is now imposing a fee on lawyers who place their licenses on "inactive" status.<sup>55</sup> Since the practice of pilaging licenses on "inactive" status first started, lawyers have been able to take advantage of this provision of the rule without charge. This practice is attractive to lawyers who were, by way of example, engaged in corporate or government work not requiring them to actually practice law. It is also attractive to lawyers engaged in careers outside Indiana that do not require them to actually practice law and for those lawyers both inside and outside Indiana who were not in active practice. Going "inactive" requires the lawyer to represent to the supreme court that the lawyer will not engage in the practice of law during the time their license is on "inactive" status. Lawyers who wish to avail themselves of the privilege of going "inactive" must be in good standing at the time they make the election and pay one-half of the amount charged to lawyers who maintain their licenses in active status. "Inactive" lawyers need not obtain the requisite continuing legal education during the time their licenses are on "inactive" status. The holder of an "inactive" license must not, however, do

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50. *Id.* at 854.

51. IND. ADMISSION AND DISCIPLINE RULE 3.

52. ADMIS. DISC. R. 17.

53. ADMIS. DISC. R. 23.

54. *Id.* The rule was originally adopted in 1967 and has been amended in both substantive and ministerial aspects on an almost annual basis ever since.

55. ADMIS. DISC. R. 23, § 21(a)-(i).

any act that could be construed as being in the active practice of law. The supreme court takes this feature of the rule quite seriously and, in the past, lawyers have faced disciplinary action for continuing to deliver legal services to clients *after* declaring that their licenses were on inactive status.<sup>56</sup> Those lawyers who have placed their licenses on “inactive” status will receive fee notices from the Clerk of the Supreme Court for one-half of the amount paid by lawyers with current licenses.

Another important rule change is to the substantive law governing lawyers, the Indiana Professional Conduct Rules. The supreme court has added a provision to Indiana Professional Conduct Rule 8.4. The new subsection, subsection (g), prohibits a lawyer, while acting in his professional capacity from engaging in conduct disparaging any member of one of the enumerated groups in the rule. The full text of the rule provides:

#### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection.<sup>57</sup>

The new section of the rule is the first major addition to the form of this rule in many years. The preexisting subsections, (a) through (f), have remained essentially unchanged since they were originally included in the former Code of Professional Responsibility as Disciplinary Rule 1-102.<sup>58</sup> New provisions with this kind of regulatory language are showing up, in one form or another, in the rules governing lawyer conduct all across the nation. For example, the 2001 amendment to Iowa’s Disciplinary Rule 1-102 from its Code of Professional Responsibility provides: “(A) A lawyer shall not: . . . (7) Engage in sexual

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56. *In re Baars*, 542 N.E.2d 558 (Ind. 1989). The lawyer continued to practice law despite having elected to place his license on “inactive” status.

57. IND. PROF. COND. R. 8.4.

58. The rule became effective in 1972.

harassment or other unlawful discrimination on the basis of sex, race, national origin, or ethnicity in the practice of law or knowingly permit staff and agents subject to the lawyer's direction and control to do so."<sup>59</sup> The law in New York was similarly amended in 2001 to include language of this type. Disciplinary Rule 1-102 of the New York Code of Professional Responsibility provides:

A. A lawyer or law firm shall not:

(6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.<sup>60</sup>

Similar such provisions were created in California, the District of Columbia, Missouri, and Vermont.<sup>61</sup> All the provisions prohibit discrimination based on race, sex, age and sexual orientation. Although they vary slightly in the prohibited conduct described and in procedural detail, all these provisions are quite similar. Despite the widespread adoption of these rules, none of the jurisdictions referred to herein has a reported case putting a gloss on the rule. The lack of reported decisions could be a byproduct of the relatively recent creation of these provisions.

Is this development in the law simply an application of the notion of political correctness? Perhaps there is an argument to be made in support of such a claim. Examining the trends in lawyer discipline, however, these rules can be viewed as the next logical step in the progression of a movement towards civility going back more than a decade.<sup>62</sup> Since the adoption of 1908 Canons of the American Bar Association, lawyers have sworn an oath to avoid engaging in offensive personality as members of the bar.<sup>63</sup> There are many cases using this provision in the oath of attorneys to impose disciplinary sanctions on lawyers for engaging

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59. IOWA BAR RULES OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 1-102.

60. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 1-102.

61. CAL. RULES OF PROFESSIONAL CONDUCT 2-400(B); D.C. RULES OF PROFESSIONAL CONDUCT 9.1; MO. RULES OF PROFESSIONAL CONDUCT 4-8.4(g); VT. RULES OF PROFESSIONAL CONDUCT 9.1.

62. Standards for Prof'l Conduct Within the Seventh Federal Judicial Circuit, <http://www.ca7.uscourts.gov>, contains the standards for professional conduct expected of members of the bars of the federal courts within the Seventh Federal Circuit.

63. ABA Canons on Professional Ethics, Oath of Admission (1908).

in misconduct.<sup>64</sup> Several cases in recent years have sanctioned lawyers for engaging in unwanted sexually explicit and suggestive language toward their clients.<sup>65</sup> In addition, lawyers have been exhorted to engage in more civil behavior in their day-to-day practices. Several years ago, the Seventh Circuit of Appeals developed a series of guidelines on civility for members of the bar and the judiciary in the Seventh Federal Judicial Circuit.<sup>66</sup> Notions of civility, however expressed, have tended to relate only to specified relationships within the litigation process. Lawyers are instructed to treat other lawyers with civility and respect.<sup>67</sup> Lawyers have long been admonished to treat judges and other judicial officers with respect and that lawyers can achieve their clients' ends through patient firmness as much or more effectively than through belligerence or theatrics.<sup>68</sup> Such attempts to regulate or impose civility, however, have tended to limit their application and exclude the lawyer's relationships with opposing parties and even witnesses.<sup>69</sup> In a way, the advent of Indiana Professional Conduct Rule 8.4(g) imposes a blanket minimum standard of conduct on lawyers in all their interactions with others while serving in their professional capacity.

Although defining notions of what constitutes the professional versus the personal capacities of lawyers may present some interesting cases in the future, the rule seems bent on mandating a particular standard of conduct for lawyers moving through the workday world. In the final analysis, then, the creation and adoption of Indiana Professional Conduct Rule 8.4(g) may someday become quite an important part of the regulation of lawyer conduct by the Indiana Supreme Court.

#### IV. THE JUDGES AND LAWYERS ASSISTANCE PROGRAM

Beginning in 1997, the Indiana Supreme Court established the Judges and Lawyers Assistance Program (JLAP) with the creation of the Judges and Lawyers Assistance Committee.<sup>70</sup> With a broad scope, JLAP has the mission of assisting members of the Indiana bar with a wide range of problems including the traditional ills of alcoholism and chemical dependency. Moreover, the program

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64. The oath of attorneys has been almost universally accepted among the states and has served as the basis for disciplinary action for more than fifty years. In one early Wisconsin case, the Wisconsin Supreme Court found that Judge Joseph R. McCarthy did not violate that state's oath when he refused to resign his judgeship while running for the U.S. Senate. *State v. McCarthy*, 38 N.W.2d 679 (Wis. 1949).

65. See, e.g., *In re Coons*, 751 N.E.2d 678 (Ind. 2001).

66. See *supra* note 62.

67. See, e.g., ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 1 (1923) (admonishing lawyers to speak guardedly when speaking about judges in part because judges are peculiarly unable to defend themselves).

68. See *supra* note 3 and accompanying text.

69. There is no provision for treating parties and witnesses civilly contained in the Seventh Circuit standards. See *supra* note 62.

70. ADMIS. DISC. R. 31. Hereinafter the program will be referred to as JLAP.

is aimed at helping lawyers with problems associated with physical or mental disabilities, health problems, or age that impair their ability to practice the profession.<sup>71</sup> During this survey period, significant changes were made to JLAP's operating rules. For example, under section 9 of the prior rule, the confidentiality of information provided to JLAP officials was required by rule, "except as otherwise provided by these rules, or by order of (or as otherwise authorized by) the Supreme Court of Indiana."<sup>72</sup> In the recently amended rule, the autonomy of the JLAP program functions is restated in a somewhat more formal fashion and a "distancing" of the lawyer assistance function from the supreme court's disciplinary function is stated more clearly.<sup>73</sup> Pertinent portions of the augmented rule are attached to this article as Appendix "B."

### CONCLUSION

Important developments in the law of professional responsibility occurred this year on a variety of fronts. Enhanced enforcement and attention to the dangers associated with *ex parte* communication were of significant concern to the supreme court and its disciplinary authorities. Lawyers would also be well advised to maintain inviolate their clients' confidences as the relevant case law is described herein. As always, rule amendments governing the operation of Indiana's bar are significant because they have both a powerful and subtle impact on the long range course taken by the courts and lawyers in this state.

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71. *Id.* § 2.

72. *Id.* § 9.

73. *Id.* (amended 2002).

## APPENDIX "A"

## ADVISORY OPINION

## Code of Judicial Conduct #1-01

## Canon 3

*Ex Parte* Custody Orders

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

## ISSUE

The issue in this Advisory Opinion is the appropriate judicial response to an *ex parte* child custody request in which a party seeks a temporary custody order without prior notice or an opportunity for a hearing afforded any other party with a legal interest. It focuses on the application of Trial Rule 65(B), governing temporary restraining orders, and its pertinence in the contexts of legal separations, dissolutions, post-dissolutions, guardianships, or adoptions, when a party requests a custody order without notice or a hearing.<sup>1</sup> The Commission concludes that a judge must follow T.R. 65(B) when petitioned for an *ex parte* temporary custody order; otherwise, the judge violates Canon 3B(8) of the Code of Judicial Conduct prohibiting improper *ex parte* contacts, as well as Canons 1 and 2 of the Code, which require judges to uphold the integrity and independence of the judiciary, to respect and comply with the law, and to act at all times in a manner which promotes the public's confidence in the integrity of the court. Lawyers seeking this relief without adherence to the rules may violate Rule 3.5(b) of the Rules of Professional Conduct, which prohibits improper *ex parte* communications by lawyers. *See Matter of Anonymous*, 729 E.2d 566 (Ind. 2000).

## ANALYSIS

This opinion does not represent a change or evolution in the Commission's views or in its interpretation of the relevant sections of the Code of Judicial Conduct.

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1. This opinion does not directly apply to proceedings which may involve custody issues but which properly are *ex parte*, such as protective order cases, or other matters which operate pursuant to their own statutory provisions, such as juvenile detention or CHINS placement proceedings. Generally, it does apply to any petition for a temporary restraining order under T.R. 65(B), whether or not custody issues are involved. *See Matter of Jacobi*, 715 N.E.2d 873 (Ind. 1999).

Rather, the opinion is generated by a substantial number of ethics complaints reviewed by the Commission in which judges have granted *ex parte* temporary child custody petitions which may state insufficient grounds for extraordinary relief or, in any case, where the judge does not adequately ensure the fairness of the proceedings, which is accomplished by careful adherence to T.R. 65(B).<sup>2</sup> *Id.*

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2. Black's Law Dictionary describes a temporary restraining order as "an emergency remedy of short duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence, as the circumstances require . . . A temporary restraining order may be granted without written or oral notice to the adverse party or attorney only if . . . it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition."

Trial Rule 65(B),(C), (D), and (E) provide as follows:

**(B) Temporary restraining order – Notice – Hearing – Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
- (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

**(C) Security.** No restraining order or preliminary injunction shall issue except upon the giving of

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security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

**(D) Form and scope of injunction or restraining order.** Every order granting temporary injunction and every restraining order shall include or be accompanied by findings as required by Rule 52; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

**(E) Temporary Restraining Orders – Domestic Relations Cases.** Subject to the provision set forth in this paragraph, in an action for dissolution of marriage, separation, or child support, the court may issue a Temporary Restraining Order, without hearing or security, if either party files a verified petition alleging an injury would result to the moving party if no immediate order were issued.

(1) *Joint Order.* If the court finds that an order shall be entered under this paragraph, the court may enjoin both parties from:

(a) transferring, encumbering, concealing, selling or otherwise disposing of any joint property of the parties or asset of the marriage except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court; and/or

(b) removing any child of the parties then residing in the State of Indiana from the State with the intent to deprive the court of jurisdiction over such child without the prior written consent of all parties or the permission of the court.

(2) *Separate Order Required.* In the event a party seeks to enjoin the non-moving party from abusing, harassing, disturbing the peace, or committing a battery on the petitioning party or any child or step-child of the parties, or exclude the non-moving party from the family dwelling, the dwelling of the non-moving party, or any other place, and the court determines that an order shall be issued, such order shall be addressed to one person. A joint or mutual restraining or protective order shall not be issued. If both parties allege injury, they shall do so by separate petitions. The trial court shall review each petition separately and grant or deny each petition on its individual merits. In the event the trial court finds cause to grant both petitions, it shall do so by separate orders.

(3) *Effect of Order.* An order entered under this paragraph is automatically effective

Trial Rule 65(B) protects against abuses by requiring the petitioner to state by affidavit specific facts showing that immediate and irreparable injury, loss, or damage will result before an adverse party may be heard in opposition, and by requiring the petitioner to certify in writing any efforts made to give notice and the reasons supporting the claim that notice should not be required. It calls for security in a sum deemed appropriate by the court for the payment of costs and damages which may be incurred by a party wrongfully enjoined or restrained. It requires the judge to define the injury in the order, and to state why it is irreparable and why the order was granted without notice. When a temporary restraining order is granted without notice, the court must set it for a hearing at the earliest possible time, giving precedence to it above all other matters.

The cases the Commission has scrutinized indicate a lack of mindfulness that *ex parte* requests and resultant orders affecting custodial rights are extraordinary, and that the relief depends upon the existence of exigent circumstances—irreparable injury, loss, or damage without immediate relief. A request for emergency relief should not supplant what in reality constitutes a standard invocation of the court's powers through the trial rules, which rules generally are premised on the notion that a fair proceeding involves the commencement of a proceeding, reasonable notice, and a chance to be heard on the merits by any party with a legal interest before judicial action occurs. Judges and lawyers should proceed with meticulous attention to T.R. 65(B) whenever emergency custody is requested, whether upon the commencement of an adoption proceeding, a guardianship of a child, a legal separation or divorce, or a post-dissolution modification. Inattention to the extraordinary nature of the relief, and to the procedural demands the rules impose, undermines judicial fairness and integrity, and the public's trust.

The circumstances leading to the ethics inquiries reviewed by the Commission sometimes involve a noncustodial parent who, instead of returning a child after a visitation period, determines he or she wants custody—a modification—and files for, and obtains, immediate custody. The custodial parent, perhaps out-of-state, discovers only after the fact that an Indiana court has suspended the parent's custodial rights to their children. The parent then is compelled to make arrangements to obtain counsel, travel to Indiana for an immediate hearing, if the

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upon service. Such orders are enforceable by all remedies provided by law including contempt. Once issued, such orders remain in effect until the entry of a decree or final order or until modified or dissolved by the court.

**(F) Statutory Provision Unaffected by this Rule.** Nothing in this rule shall affect provisions of statutes extending or limiting the power of a court to grant injunctions. By way of example and not by way of limitation, this rule shall not affect the provisions of 1967 Indiana Acts, ch. 357, § § 1-8, IC 34-4-17-1 to 34-4-17-8, relating to public lawsuits, and Indiana Acts, ch. 7, § § 1-15, IC 34-4-18-1 to 34-4-18-13 (repealed), providing for removal of injunctive and mandamus actions to the Court of Appeals of Indiana, and Indiana Acts, ch. 12 (1933), IC 22-6-1-1 to 22-6-1-12.

judge has expedited the case as required, and, if not, or if a continuance is needed for preparation, the custodial rights are suspended even longer. Of course, many are without the resources to defend the action at all.

Sometimes all the parties are local residents, and, perhaps, both have attorneys. The proceeding may be a new dissolution, or a guardianship or adoption. What is wrong is when an *ex parte* custody decision is made absent truly emergency circumstances and without regard to the details of T.R. 65(B). When this occurs, the perception is that custodial rights have been affected based only upon whether the petitioner has won a "race to the courthouse."

The Commission's intention is not to curtail the proper exercise of broad judicial discretion, nor do the members intend to substitute their judgments for that of a judge who finds on some rational basis that circumstances warrant emergency relief. The Commission members hope to improve and promote the integrity of our judiciary, and to help promote the public's confidence in the judiciary, by alerting judges, and lawyers, to the stringent and imposing ethical duties judicial officers undertake when considering whether to affect custodial rights *ex parte*. In considering a request for emergency custody of a child, or any other request under T.R. 65(B), a judge should be as cautious with the rights of the opposing party as with scrutinizing the merits of the petition.

A petitioner for a temporary restraining order under T.R. 65(B) must establish not only the potential for irreparable harm, but that the harm will occur before an adverse party may be heard; the petitioner must certify also what efforts at notice have been made and why notice is not required. A judge should carefully determine whether these elements are established. While the Commission hesitates to suggest a list of circumstances which the members would not favor, some examples may be helpful.

Many times, of course, these petitions present compelling reasons for an eventual custody order; yet, if the pleading really is a request for custodial rights, whether or not captioned as an emergency, it should not be treated as an emergency. An *ex parte* custody order is not properly a means to initiate a modification proceeding or to obtain an advantage in a subsequent petition on the merits of modification or other custody issue. Again, the custody request may be in the context of an adoption or guardianship, and not necessarily a dispute between two parents. Those proceedings, like modifications, presumably are not adjudicated without first providing any interested party the right to be heard, including on an interim custody issue. In those cases, too, petitioners for *ex parte* relief must set out a verified claim that irreparable injury will result without the emergency relief.

A claim that the custodial parent has violated an existing order, perhaps concerning visitation, should not alone justify emergency custodial relief. Those issues are addressed through the contempt process, or by injunction pursuant to I.C. 31-14-5-1. Similarly, a claim that the custodial parent has decided to move

out of state, or that the child has expressed a desire to reside with the petitioner, does not justify emergency relief. These are issues for a modification hearing and for the application of the appropriate standard supporting a modification order.

Also, for example, the desire to enroll a child in school, if it requires custodial rights, does not in the Commission's view, *in itself*, justify a temporary modification of custody before the parent who currently has the custodial rights to make those arrangements has been heard. The petitioner may allege that harm will result if he or she cannot enroll the child, but the requisite potential harm cannot be only a personal or strategic disadvantage or the fact that existing orders keep the party from his or her objectives. Again, the standard is *irreparable harm or injury*. Some real emergency must exist which changes the complexion of the case from one which simply involves a parent who desires a modification and custodial rights, to one possibly warranting emergency action in the petitioner's favor. Even then, T.R. 65(B) must guide the process, providing the safeguards of the affidavit, detailed findings, and an immediate hearing.

Concerning the absence of notice and a hearing in these proceedings, the rule similarly provides safeguards against abuse. The rule requires a showing that irreparable harm will occur before notice may be given or before an adverse party may be heard. It can mean only that, where those representations indicate that notice and a hearing could be accomplished without harm, they should occur. A judge should insist on notice and a hearing if it is feasible and would not result in the alleged irreparable harm. In other words, there may be no good reason, even under the petitioner's claim, why notice should not be given and a hearing held before a ruling. A simple telephone call to opposing counsel, or to the other parent, and an offer to schedule a hearing before ruling, only promotes the integrity of the process.

In assessing both the sworn statements of the alleged irreparable harm which could result without the order, and the written certifications about notice or reasons for not providing it, if the judge does not insist on an abundance of facts in the pleadings, the judge should be prepared to actively question the petitioner or the petitioner's attorney about these claims. The key inquiries pertain to why the petition is submitted *ex parte*. Where is the other party? What notice has been accomplished? Why should this matter be heard without the opposing party's participation? What exactly is the *irreparable harm* which would result if the case simply is set for a hearing after notice is made? No such potential harm was indicated in the instances investigated by the Commission.

Some judges insist that counsel bring in the petitioner to discuss these aspects of the petition. Other judges have expressed concern that these recommended discussions themselves constitute improper *ex parte* contacts. These concerns are misplaced. After all, the judge properly has entered into an *ex parte* proceeding if T.R. 65(B) is followed. To gather information which helps the judge determine whether the extraordinary relief is warranted only bolsters the

fairness of the *ex parte* process which is underway. Nonetheless, the judge should not entertain discussions which go beyond what he or she believes is necessary to adequately entertain the petition. Ideally, the conversation will be recorded.

Surely, many petitions for emergency custody raise issues which appear to require immediate action. Judges often are faced with real emergencies, and they may deem a situation an emergency where other reasonable people would differ. But even in those cases, consideration of the opposing party's rights is required. Again, T.R. 65(B) provides this underpinning of fairness. Of course, judges should be able to trust in the veracity of a sworn petition alleging that harm will result without an *ex parte* order. In reality, some are less than truthful, for which the judge is not accountable. However, T.R. 65(B) imposes important burdens on the petitioner, which likely will reduce the instances of false or unfounded petitions.

The Commission calls on the profession to eliminate the seemingly wide-spread practice in Indiana where lawyers seek, and judges provide, *ex parte* emergency custody where no irreparable harm or injury reasonably is foreseen without notice and a hearing – the fundamentals of our adversarial process. T.R. 65(B) provides the framework for fairness; judges and lawyers must make genuine assessments about whether the circumstances really invoke the rule at all. When this occurs, the Commission expects to review fewer citizen complaints about a lax and unfair procedure which adversely affects their most precious rights.<sup>3</sup>

### CONCLUSION

*Ex parte* emergency custody orders in dissolution, post-dissolution, guardianship, and adoption proceedings must be considered the rare exceptions to the general premise that a fair proceeding includes reasonable notice and an opportunity to be heard. When the circumstances do warrant emergency *ex parte* relief, petitioners and judges must follow T.R. 65(B).

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3. The Commission, clearly, cannot contemplate all the potential circumstances which may arise. Judges may find themselves faced with truly unusual or unexpected sets of facts, and they must be able to proceed within their sound discretion. Nonetheless, these are not the circumstances which inspired this opinion.

**APPENDIX "B"****PROGRAM GUIDELINES****Judges and Lawyers Assistance Program****Section 2. Purpose of JLAP**

Pursuant to Admis.Disc.R. 31 §2, JLAP was established to assist impaired members in recovery; to educate the bench and bar; and to reduce the potential harm caused by impairment to the individual, the public, the profession, and the legal system.

These guidelines have been adopted with these purposes in mind. The work of JLAP is designed to be educational, confidential, and responsive to the special situations faced by impaired members of the legal profession.

The JLAP committee and the executive director may take any other action required to fulfill, yet remains consistent with, the stated purpose.

**Section 3. Organization**

JLAP was established pursuant to Admis.Disc.R. 31. The Committee consists of fifteen (15) members appointed by the Court; seven (7) practicing attorneys, five (5) judges, one (1) law student, and two (2) judge(s), lawyer(s), or law student(s). The director operates under the direction of the committee. The clinical director, staff and volunteers operate under the direction of the director.

**Section 4. Policies**

- (a) JLAP designs and delivers programs to raise the awareness of the legal community about potential types of impairment and the identification, prevention and available resources for treatment and/or support.
- (b) JLAP works toward increasing the likelihood of recovery by encouraging early identification, referral and treatment.
- (c) Any person may report to the director, clinical director, or any member of the committee that a particular member of the bar needs the assistance of JLAP.
- (d) JLAP encourages contact by any means; responses will be prioritized as follows: walk-in, telephone call, e-mail, and written communication.
- (e) Neither JLAP, nor any representative, in their role as a volunteer, engages in the practice of law while fulfilling their JLAP responsibilities. Upon admission to inpatient or residential treatment, or with a physical disability case, JLAP may:
  - 1) work with the participant to find friends and/or colleagues to assist with the law practice,
  - 2) work with the relevant local and state bar association committees to

- assist with the practice;
- 3) should no other arrangements be possible, attempt to facilitate movement of a participant's case files to the respective clients upon receipt of written permission from the participant.

## **Section 5. Referral Procedures**

### **(a) General Procedures**

The state will be divided into geographical areas and a committee member or other designated representative shall serve as the primary contact for each area.

### **(b) Self-Referrals and Other Referrals**

- 1) When the participant is a self referral, the following procedures apply:
  - i. JLAP may conduct an initial consultation to determine the nature of the participant's impairment;
  - ii. where appropriate, JLAP may make a referral to a qualified medical and/or clinical resource for further evaluation, assessment, and/or treatment;
  - iii. if appropriate, JLAP may assist in the development of a treatment plan, which may include participation in JLAP;
  - iv. with the participant's permission, a volunteer will be appointed to provide ongoing support.
- 2) When the member is referred by a third party the following procedures apply.
  - i. JLAP will obtain detailed information from the referral source regarding the nature of the impairment, the referral source's relationship to the member, and the circumstances giving rise to the referral. The identity of the referral source shall remain confidential unless the referral source instructs otherwise.
  - ii. JLAP may conduct further investigations to verify the circumstances that led to the referral by contacting independent sources to determine whether the member may be impaired.
  - iii. Any independent sources shall be approached in a manner to preserve, as far as possible, the privacy of the member.
  - iv. If it is determined the member may be impaired, JLAP will determine how the member will be approached with special attention given to involving local volunteers and/or local members of the bar who may already be involved in the case.
  - v. If the referred member is a judge, every effort shall be made to include at least one judge as a volunteer in the case.
- 3) If the impaired member agrees to treatment, or other levels of participation in JLAP, further assistance may include:
  - i. consultation with the participant, in-house assessment/evaluation, or referral for appropriate assessment/evaluation;
  - ii. assistance in locating treatment resources; and
  - iii. assistance in development of continuing care including support and referral to JLAP.
- 4) The director may terminate JLAP's involvement in any case at any time should it be determined that the member does not comply or refuses to participate and will not likely benefit from JLAP services at that time.

(c) Official Referrals

- 1) Upon receipt of an official referral for assessment/evaluation, JLAP will:
  - i. Determine if all appropriate releases and/or authorizations have been signed and obtained.
  - ii. Determine whether the requested assessment/evaluation will be done in house, referred out or a combination.
  - iii. Contact the official referral source for background information and direction, if necessary.
  - iv. Coordinate the assessment process with selected provider, participating as deemed appropriate on a case-by-case basis.
  - v. Release information and/or the final assessment/evaluation as allowed by written release.
- 2) Upon receipt of an official referral for a monitoring agreement JLAP will:
  - i. Determine if all appropriate signed releases/authorizations have been obtained.
  - ii. Review existing assessment(s) and/or determine whether initial or additional assessment(s) are necessary.
  - iii. Develop a monitoring agreement.
  - iv. Select and provide a monitor.
  - v. Meet with the participant, his/her attorney if appropriate, and the monitor prior to execution of the agreement to explain JLAP's role and the agreement terms and conditions.
  - vi. Report to the official referral source according to the terms of the referral and the monitoring agreement.

**Section 6. Services**

- (a) Any member is eligible for assistance and participating in JLAP. JLAP services will be provided without charge for initial consultation, in house assessment, referral, peer support, and monitoring services.
- (b) Referrals for medical and/or clinical evaluations, treatment, therapy and aftercare services will be provided; engagement of, and payment for, such services is solely the responsibility of the participant.

**Section 7. Treatment—Medical Assistance**

- (a) JLAP endeavors to provide a network of therapeutic resources that includes a broad range of health care providers, therapists, and "self-help" support groups. JLAP will maintain a statewide list of available providers.
- (b) With the written consent of the participant, JLAP may maintain contact with, and receive information from the treatment provider. JLAP may remain involved in support during treatment, and shall endeavor to provide peer support and aftercare assistance in early recovery.
- (c) In cases where it is determined the participant is not in need of inpatient or residential treatment, JLAP may provide referrals to outpatient counseling resources and self-help groups such as 12-step programs.

**Section 8. Confidentiality**

- (a) JLAP and its representatives will observe anonymity and confidentiality at all times. JLAP is an autonomous program, independent from the administrative offices of the Court or any other board or disciplinary organization, agency or authority.
- (b) No disclosure of confidential information will be made by any representative except for permitted disclosures and those identified in Ind. Professional Conduct Rule 8.3.

