

SURVEY ON THE LAW OF PROFESSIONAL RESPONSIBILITY

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There were several significant disciplinary cases decided by the Indiana Supreme Court during the survey period. Most of the selected cases involve lawyers' duties to others outside the attorney-client relationship. This is a theme commented on in prior survey articles on professional responsibility.¹ It should be common knowledge among lawyers that they owe a high professional duty to their clients in carrying out representations on their behalf. The significance of the selected cases herein is their continued illumination of the broader duties as members of the bar than only as advocates on behalf of their clients. The duty to clients is, to be sure, the most important duty lawyers have. It is not, however, their only duty.²

I. THE LIMIT OF ADVOCACY

During the survey period, the supreme court addressed one case involving the subject of judicial criticism. In *In re Wilkins*,³ the court imposed a thirty-day suspension on a lawyer for violating Indiana Professional Conduct Rule 8.2(a).⁴ In *Wilkins*, the lawyer represented a client insurance company before the Indiana Court of Appeals. The case that gave rise to this disciplinary action was *Michigan Mutual Insurance Co. v. Sports, Inc.*⁵ After the court of appeals affirmed the trial court's verdict, the respondent filed a petition to transfer the case, along with a brief, in the Indiana supreme court. The court noted that some of the arguments in the brief were heavy handed, but did not constitute a violation of the Rules of Professional Conduct. Within the brief, there was a footnote that provided, "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."⁶ A majority of the supreme court found that the footnote constituted a violation

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1. See, e.g., Charles M. Kidd, *Survey on the Law of Professional Responsibility*, 34 IND. L. REV. 921 (2001).

2. See, e.g., IND. PROF'L CONDUCT R. 8.3 (describing a lawyer's duty to report misconduct involving another lawyer to the disciplinary authority).

3. 777 N.E.2d 714 (Ind. 2002).

4. The rule provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

5. 698 N.E.2d 834 (Ind. Ct. App. 1998).

6. *In re Wilkins*, 777 N.E.2d at 715-16 (quoting Brief in Support of Appellant's Petition to Transfer at 1 n.2).

of the rule as charged and noted that “[w]ithout evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission.”⁷ The court found the respondent lawyer’s conduct was aggravated due to his lack of remorse.⁸ Although he sent letters of apology to the judges affected, the court found that his apologies gave a strong indication that he was sorry only for the negative consequences he suffered because of his own actions.⁹

The opinion contained two dissenting opinions. Both Justices Sullivan and Boehm would have found no violation of the Rules of Professional Conduct. Justice Sullivan found that the respondent’s comments in the footnote constituted “rhetorical hyperbole” that was protected by the First Amendment of the United States Constitution. Justice Boehm’s dissent, meanwhile, characterized the footnote as “tasteless,” but not warranting disciplinary sanction. He noted,

I do not agree with the respondent’s contentions in the offending footnote, and I certainly do not condone the respondent’s choice of language in expressing them. Moreover, such intemperate language is very poor advocacy, distracting as it does from the points that are sought to be made. I nevertheless do not believe these opinions are sanctionable. Indeed, I would find them within a broad range of protected fair commentary on a matter of public interest.¹⁰

Post-opinion, the respondent moved for rehearing and, at the same time, sought the recusal of Justice Rucker. The motion for recusal was based upon the purportedly unnoticed fact that Justice Rucker had previously served on the court of appeals. In fact, that service included sitting as one of the judges on the *Michigan Mutual v. Sports, Inc.* case underlying this disciplinary action. Although then Judge Rucker concurred only in the result of the underlying opinion, he believed the nexus close enough to warrant his recusal from further consideration of the *Wilkins* disciplinary action. In a separate opinion issued January 3, 2003, Justice Rucker explained his decision to recuse in *In re Wilkins*.¹¹ He was firmly convinced that he dealt with the respondent’s disciplinary action in a fair and impartial manner. He also noted that he would not have been especially concerned about the respondent’s criticism of the opinion. He recognized, however, that his view of his impartiality was not the sole consideration: “Nonetheless, I acknowledge that the question is not whether I personally believe I have been impartial. Rather, it is whether a “reasonable person aware of all the circumstances” would question my impartiality.” At the time of the recusal, the case had been decided by the published opinion described above. If it was pending before the supreme court at all, it was awaiting a decision on the balance of the respondent’s petition for rehearing. From that

7. *Id.* at 717.

8. *Id.* at 718.

9. *Id.*

10. *Id.* at 720.

11. 780 N.E.2d 842 (Ind. 2003).

perspective, had a majority (or an even split of the remaining four justices) of the court decided to deny the petition for rehearing, the previously decided opinion would stand as the final decision in the case.

The supreme court, however, granted rehearing in the published opinion in *In re Wilkins*.¹² This opinion on rehearing was decided by a four member supreme court due to the loss of Justice Rucker on Wilkins' successful motion for recusal. In this latest opinion from the court, the remaining four justices split as they had in the original opinion with two of the justices believing that the language of the offending footnote was worthy of sanction under Indiana's Rules of Professional Conduct. Those justices, however, relented from their belief that the respondent should be suspended for thirty days and instead wished to impose a public reprimand to conclude the matter. The compromise on sanction, however, did not lessen their belief in the overall rightness of their decision.

His petition requests reconsideration of (1) the application of the First Amendment protection to the offending remarks, and (2) the appropriate sanction to be imposed.

We dispose of these requests largely on the difference between sound advocacy and defamation. Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity.¹³

The court's composition, however, presented an interesting procedural dilemma. Because of Justice Rucker's recusal, two of the justices believed Wilkins violated the rule and two did not believe his conduct to be a violation. The will was present to reduce Wilkins' sanction from a suspension to a public reprimand, but the prior voting alignment on the court now made it impossible to change the court's October 29, 2002, order. In a separate opinion, Justice Boehm elected to concur in the result only in order to reduce the penalty imposed. He explained his decision to concur in the sanction only,

The votes of the Chief Justice and Justice Dickson are to grant rehearing as to the sanction only, and to impose a public reprimand. Justice Sullivan and I would vote for no sanction at all. But if neither of us joins in the result reached by Justice Dickson and the Chief Justice, we have no majority to grant rehearing as to any aspect of the original opinion and Wilkins' thirty-day suspension stands. Lewis Carroll would love that result: half the Court believes no sanction is appropriate, and half would impose a small sanction, so the result is a major penalty. Only those who love the law could explain that to their children. To free parents everywhere from that burden, I concur in the result of granting rehearing as to the sanction and reducing it to a public reprimand.¹⁴

12. 782 N.E.2d 985 (Ind. 2003).

13. *Id.* at 986.

14. *Id.* at 988.

The final result in the Indiana Supreme Court, therefore, is the imposition of a public reprimand. As of this writing, the case was pending on a writ of certiorari to the Supreme Court. The primary issue for seeking *certiorari* is the possibly impermissible restriction on expression by Indiana Professional Conduct Rule 8.2(a). The U.S. Supreme Court has not previously reviewed this kind of restriction on lawyer speech despite the existence of this type of regulation for many years. Indeed, many state high courts and federal courts have passed upon Rule 8.2(a) or its counterpart in various jurisdictions, but the topic has not been addressed by the U.S. Supreme Court.

II. FORBIDDEN COMMUNICATION BY LAWYERS

Lawyers are forbidden from communicating with certain individuals involved in the legal system at certain times. Judges, opposing parties and, in some cases, witnesses¹⁵ are protected from communications by lawyers who are acting in a representative capacity in certain matters. At least as far back as Indiana's Code of Professional Responsibility, lawyers have been forbidden from contacting an opposing party that was represented by counsel. Since the Indiana Supreme Court adopted the Rules of Professional Conduct in January 1987, the prohibition on contacting a represented party (or, in the vernacular, "bypassing" opposing counsel) has been found in Indiana Professional Conduct Rule 4.2. Indiana's formulation of the rule is identical to that originally proposed in the ABA's Model Rules of Professional Conduct. In essence, the rule prohibits one lawyer from contacting a represented party without the second lawyer's express permission. Over the years, lawyers have been the subjects of disciplinary action for violating this provision. Those disciplinary actions have generally been for conduct that was not merely negligent contact (where, for example, a lawyer might contact a defendant at the early stages of litigation before receiving any information that the party was represented), but rather for conduct that was either knowing or intentional.

It was under these circumstances that the disciplinary action of *In re Baker*¹⁶ began. There, the respondent lawyer represented the principal in a pool construction and supply business that was contemplating reorganization. During the reorganization, the construction business was split apart from the pool supply business and the new entities' principal was the former business partner of Baker's client. The former partner was represented by another lawyer, Deckard, who also represented Baker's client in certain personal matters unrelated to the division of the pool business. During the reorganization, Baker's client believed that Deckard represented his interests with respect to indemnities, guaranties and liabilities to both principals under the bonding arrangements.

After the reorganization, the construction business filed suit against a school

15. The Comment to Indiana Professional Conduct Rule 4.2 makes clear that when a party is an organization (like a corporation) there are restrictions on the people within that organization whom the lawyer can talk to about the matter under investigation.

16. 758 N.E.2d 56 (Ind. 2001).

corporation for a pool project and also sued the bonding company on the job. Deckard entered his appearance for the bonding company. Baker believed that Deckard had a conflict of interest in representing the bonding company based upon Deckard's prior dealing with Baker's client. Baker wrote to Deckard and explained the conduct and why he believed that Deckard should be disqualified from the representation of the bonding company. Without Deckard's consent, Baker sent a copy of the letter directly to the bonding company. He also sent a second letter to the bonding company in which he set out his client's legal position on the indemnification agreements, discussed his perception that Deckard had a conflict of interest and *demand*ed that the bonding company terminate their attorney-client relationship with Deckard. Baker did not notify Deckard of this second letter and did not provide him with a copy.

The respondent lawyer and the Disciplinary Commission agreed that the supreme court should dispose of the case on the basis of a public reprimand. The court assented and did so on the basis of prior precedent in this area.

Past violations of Prof.Cond.R. 4.2 or its predecessor have resulted in public admonishment. [See, e.g., *Matter of Syfert*, 550 N.E.2d 1306 (Ind. 1990)] (communicating with represented opposing party in legal dispute without other lawyer's knowledge and consent, and circumventing negotiations with opposing lawyer in order to pressure opposing party to settle on terms less favorable than those previously negotiated by party's lawyer); [*Matter of Mahoney*, 437 N.E.2d 49 (Ind. 1982)] (intentionally and knowingly disregarding expressed wishes of another attorney in conversing with that attorney's client on subject matter which affected other attorney's client's vital interest violated DR 1-102(A)(5), DR 7-104(A)(1)). In light of precedent and the parties' present agreement, we find that a public reprimand is appropriate in this case.¹⁷

As noted earlier, the court focused on the mental element associated with the misconduct. The fact that the respondent lawyer engaged in the conduct in a knowing or intentional manner was an important part of the court's analysis in imposing discipline on the lawyer. Observe also that the court did not automatically accept the sanction tendered just because the respondent lawyer and the Disciplinary Commission agreed to it. The court found Baker's conduct to be mitigated by the fact that he was remorseful for contacting the other lawyer's client. Certainly remorse is a well-recognized fact in mitigation in disciplinary action generally. In fact, it is one of the required elements that suspended lawyers must demonstrate when they go through the reinstatement process. The court's consideration of remorse was tempered by their consideration of the offered fact in aggravation that Baker engaged in the misconduct and sought to gain an unfair advantage in the litigation through his letter to the opposing party. As mentioned earlier, the mental state of the respondent lawyer when engaging in the misconduct is an important factor in evaluating the severity of the sanction.

17. *Id.* at 58.

Also during the survey period, the court imposed a public reprimand in its decision in *In re Capper*.¹⁸ The lawyer in *Capper* faced a series of circumstances that seems, at first blush, to be somewhat expected in domestic relations representations. In the first count, the respondent lawyer was a partner in a firm in which one of the associates represented the wife in a dissolution case. After a short time, she terminated the associate's representation and hired another lawyer outside the firm. Two years after the final decree was entered, the wife initiated a contempt action against her former husband for failing to pay child support. The husband consulted with the respondent lawyer who, in turn, notified the wife's new lawyer that he was representing her ex-husband. The respondent did not obtain the wife's consent to represent her ex-husband. This was a necessary step because of the firm's prior representation of the wife. The respondent's misconduct fell under the rarely used rule imputing a conflict of interest where one member of a law firm represents a client, no one else in the law firm may represent an adverse party without the consent of the first client.¹⁹ Said another way, because the firm's associate could not represent an adverse party, no one else in the firm could represent the adverse client either.

In the second count, the respondent represented the ex-husband in post-dissolution matter centering on moving the children out of their present school district. A lawyer also represented the former wife. Although no hearing was held on the issue of moving the children, several months later, the father told the respondent lawyer that a new dispute had arisen and that he agreed with the former wife to physical custody of one of the children pending resolution of that dispute. He directed the lawyer to draft an agreement immediately so the children could be enrolled in the appropriate schools. He also advised the respondent lawyer that the ex-wife was not going to use a lawyer in order to save money. The respondent lawyer then drafted the agreement without contacting opposing counsel. Both parties signed the agreement when it was returned and thereafter filed with the court. The wife, of course, still viewed herself as represented by her own lawyer and the respondent lawyer did not investigate that circumstance before relying on his client's assertions.

In the third count of *Capper*, the respondent lawyer again represented the former husband in a dissolution matter. *Capper* was served with interrogatories and requests for production regarding the husband's financial status. The respondent lawyer did not respond to these requests and thereafter, the client and his ex-wife appeared in the respondent lawyer's office in expectation of settling the case. The ex-wife expressed her dissatisfaction with her lawyer and that she had terminated his services. Thereafter, the respondent lawyer submitted a signed settlement agreement to the court with opposing counsel's participation even though he was still counsel of record. The opponent was notified and the

18. 757 N.E.2d 138 (Ind. 2001).

19. Indiana Professional Conduct Rule 1.10 provides that "(a) While lawyers are associated in a firm, none of them shall represent a client if he knows or should know in the exercise of reasonable care and diligence that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.8(k), 1.9 or 2.2." These cited rules prohibit conflicts of interest.

agreement was eventually accepted, but the respondent lawyer was still held to have violated the rule because of his communication directly with a represented opposing party to the dissolution. The supreme court recognized that there was no harm to the parties involved, but expected their opinion in *Capper* to serve as a vivid reminder that lawyers should independently verify that opposing parties wishing to communicate directly with them are in fact not represented by counsel, especially where the lawyer knows that the party had previously been represented in the matter.

III. FEE ISSUES

Disputes over fees between lawyers and their clients are not uncommon. Those that are not resolved informally are often resolved through litigation. The Rules of Professional Conduct only require that a lawyer's fee be reasonable and provide some of the factors that go into the determination of reasonableness.²⁰ Certainly not every client complaint about a fee merits disciplinary action. That is reserved for those cases in which the lawyer's fee can be proved unreasonable by clear and convincing evidence. Such was the case in *In re Ellis*²¹ in which a client drove after consuming alcohol and seriously injured two pedestrians in a crosswalk. The client (who had a prior conviction for operating a vehicle while intoxicated) paid his lawyer, Michael T. Ellis \$25,000. In a relatively short period of time, the lawyer worked out a plea agreement wherein the client would be convicted of misdemeanor Operating a Vehicle while Intoxicated and sentenced to home detention. The client eventually sued the lawyer to return a portion of the fee and a settlement was worked out between the parties.

In keeping with a settlement worked out between the Disciplinary Commission and the respondent lawyer, the disciplinary action was settled on the basis of a public reprimand.²²

IV. MISCONDUCT PRIOR TO ADMISSION TO THE BAR

Rare indeed are cases that involved post-admission disciplinary action for misconduct that occurred pre-admission and was not reported on the lawyer's application to take the Indiana bar examination.²³ Such was the case, however,

20. Indiana Professional Conduct Rule 1.5(a) requires that "A lawyer's fee shall be reasonable." Some of the factors discussed later in the rule include the novelty of the matter for which the lawyer was hired or the time and skill required to complete the task.

21. 766 N.E.2d 350 (Ind. 2002).

22. Use of the public reprimand for disposing of cases involving primarily fee disputes is not uncommon. See, e.g., *In re Benjamin*, 718 N.E.2d 1111 (Ind. 1999). Even minor misconduct that accompanies a fee dispute can result in a significant increase in the punishment for cases that involve excessive fee claims by lawyers. See, e.g., *In re Heamon*, 622 N.E.2d 484 (Ind. 1993).

23. The few prior cases involving such conduct are: *In re Charos*, 585 N.E.2d 1334 (Ind. 1992); *In re Redding*, 672 N.E.2d 76 (Ind. 1996); *In re Lucas*, 672 N.E.2d 934 (Ind. 1996); and *In re Verma*, 691 N.E.2d 1211 (Ind. 1998). In *Verma*, the lawyer was disbarred for a pervasive deceit that included forging documents to support his claims on his application.

in *In re Rodriguez*²⁴ wherein a lawyer was suspended from the bar for ninety days. In this case, the respondent lawyer submitted an application to the Indiana Board of Law Examiners in April 1991 that was substantially incomplete. Although he disclosed that he had attended the University of Florida and Ohio Northern University on his application, he did not reveal that he had attended the University of Miami and the Nova University College of Law. He had been academically dismissed from both institutions.

In its opinion in the disciplinary action, the supreme court stated unequivocally that a suspension from the bar for ninety days was the minimum sanction it would approve in future cases involving such conduct. The implication to be drawn from the opinion is the supreme court justices view admission on false or deliberately incomplete information to be especially reprehensible. A ninety-day suspension from the bar is not an inconsequential sanction and the court appears ready to use it in appropriate cases of falsity or honesty problems involving candidates to the Indiana bar.

V. CONTEMPT OF THE SUPREME COURT

It would seem, *a fortiori*, that lawyers would not engage in the practice of law after they are suspended or disbarred. This is not, however always the case. Recently, the supreme court ordered a suspended lawyer be incarcerated for fifteen days in *In re Pope*.²⁵ The sanction was imposed in *Pope* because the lawyer maintained a presence in another lawyer's office and engaged in acts that included drafting documents. Furthermore, the court considered the lawyer's acts to be openly defiant of its authority and prior suspension order.²⁶

Pope is not particularly remarkable misconduct as contempt cases go. It seems, however, that the whole genre of contempt cases are remarkable in that they involve lawyers who flout the supreme court's authority and who continue to engage in the acts that, in many cases, got them in trouble in the first place. Past cases include, *In re Crumpacker*,²⁷ *In re Baars*,²⁸ and *In re Lowry*,²⁹ among others.

VI. PERSONAL MISCONDUCT

In *In re Pacior*³⁰ the respondent lawyer received a public reprimand for engaging in conduct, *inter alia*, that constituted a conflict of interest. In this

24. 753 N.E.2d 1289 (Ind. 2001).

25. 772 N.E.2d 405 (Ind. 2002).

26. *Id.*

27. 431 N.E.2d 91 (Ind. 1982).

28. 683 N.E.2d 555 (Ind. 1997).

29. 760 N.E.2d 170 (Ind. 2001). Although the other cited cases involve lawyers who were originally suspended for disciplinary reasons, *Lowry* involves a lawyer who continued to practice after he was suspended for failing to get the requisite continuing legal education. The lawyer in *Lowry* was fined \$2500 by the supreme court.

30. 770 N.E.2d 273 (Ind. 2002).

case, the lawyer was disciplined in part for expressing a romantic interest in a client he represented a marriage dissolution and personal bankruptcy. His interest manifested itself through romantic notes and cards and, during her office visits, he verbally told her of his desire to engage in a personal relationship with her. Three times he hugged and kissed her during the pendency of her marriage dissolution and bankruptcy. The client, however, declined to enter a personal relationship with the lawyer.

The supreme court imposed a public reprimand on the lawyer for this and other misconduct. The court found that Pacior violated Indiana Professional Conduct Rule 1.7(b)³¹ by continuing to represent the client after expressing and promoting his personal and romantic interest in her. The court also found that Pacior's conduct violated Indiana Professional Conduct Rule 8.4(d) by being prejudicial to the administration of justice.³² This disciplinary action was resolved by settlement with the respondent lawyer on the basis of a public reprimand. The supreme court observed in a footnote,

In the case at bar, it was the respondent's expression of personal and romantic interest in the client that led to the respondent's conflict of interest. Had that expression been manifested in more strenuous fashion, the appropriate discipline would have been more severe. *See, e.g., In re Tsoutsouris*, 748 N.E.2d 856 (Ind. 2001) (30 day suspension for sexual contact with client.)³³

The court's footnote is borne of long experience. Cases of this kind commonly involve some sexual contact with the client: an element completely lacking in *Pacior*. This case recognizes that the lawyer's emotional commitment to a personal relationship with a client is still a violation of the Rules of Professional Conduct. Other conflict of interest cases in this area make clear that having a sexual relationship with a client undoubtedly violates the rules. Some of these other cases also make clear that the emotional aspect of a relationship can be almost completely absent.³⁴ The point being that the lawyer's emotional

31. That rule provides in pertinent part:

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, 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.

IND. PROF'L CONDUCT R. 1.7(b).

32. The full text of that rule provides that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."

33. *In re Pacior*, 770 N.E.2d at 275 n.4.

34. *In re Manson*, 676 N.E.2d 347 (Ind. 1997) (lawyer suspended 6 months for one-time sexual encounter with a domestic relations client); *In re Grimm*, 674 N.E.2d 551 (Ind. 1996) (lengthy sexual relationship with domestic relations client apparently in exchange for legal fees).

involvement in *Pacior* was sufficiently profound to markedly effect the operation of the attorney-client professional relationship. Once that lack of professional detachment is lost, the lawyer has created conflict-of-interest and must discontinue the professional relationship³⁵ or face disciplinary action.

VII. CANDOR TO THE TRIBUNAL

Lawyers understand that their primary professional obligation is to their client, but as the relationship with that client changes, the obligation to the client can become at odds with the lawyer's duties to those outside the attorney-client relationship. Specifically, the duty of candor can really test a lawyer's ethical commitment. Recently, the supreme court has had occasion to opine in two disciplinary cases on lawyers who failed to be candid and truthful to the tribunals before whom they practiced.

In *In re Scahill*,³⁶ the respondent lawyer represented the husband in a marriage dissolution action in which the husband's individual retirement account (IRA) was one of the major assets of the marital estate. The IRA was listed on the client's Financial Declaration at a value of \$72,500 and grew steadily during the pendency of the dissolution case.³⁷ The division of the marital property was contested throughout the course of the proceeding. Without his wife's knowledge, the respondent's client withdrew the IRA in cash. The client told the lawyer that he went to an Indianapolis fast food restaurant with the \$80,500 in cash, fell asleep in the men's restroom and awoke without the money.³⁸ The lawyer did not reveal the loss to the dissolution court and the court awarded the wife a percentage of the sale of the marital residence and almost \$41,000 from the IRA.³⁹ The respondent lawyer, knowing the IRA proceeds no longer existed but still not revealing that fact to the court, successfully argued to reduce the percentage the wife was to receive from the IRA. The trial court reduced the amount to about \$21,000 and ordered the amount paid to the wife within sixty days.⁴⁰

The client, of course, failed to pay the cash to his ex-wife and sought to discharge the obligation by filing a bankruptcy petition. The dissolution court

35. Indiana Professional Conduct Rule 1.16(a) provides in pertinent part that, a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or

(3) the lawyer is discharged.

36. 767 N.E.2d 976 (Ind. 2002).

37. *Id.* at 978.

38. *Id.* at 979.

39. *Id.*

40. *Id.*

held a hearing on the matter where the client disclosed to the court for the first time that the money had been lost at a fast food restaurant and that he could not pay the money as ordered. Disciplinary charges were thereafter filed against the lawyer and, during the trial phase of the disciplinary case, the hearing officer found that the respondent lawyer had no duty to disclose his client's dissipation of the IRA to the court or his opponent and, therefore, no fraudulent concealment of the asset had occurred. The supreme court reversed that determination, however, and found that the client had committed constructive fraud on the dissolution court.⁴¹ The court made that determination based on a local Marion County court rule that requires a party who files a Financial Declaration form in a dissolution action has an affirmative duty to supplement the form when required. That duty included the duty to reveal that the asset no longer existed.⁴² In other words, the client's failure to amend the Financial Declaration amounted to a knowing concealment under the circumstances of the case. By failing to amend the form, the trial court could not fulfill its duty to divide the marital property in a just and reasonable manner. The respondent lawyer assisted in the act by maintaining a knowing silence, introducing evidence, and making argument to reduce the amount of the IRA award, thereby violating the Rules of Professional Conduct.⁴³ For this misconduct, the lawyer received a public reprimand from the court but it is easy to imagine that under slightly different circumstances, a suspension from the practice of law might be warranted.

In *In re Page*,⁴⁴ the respondent lawyer represented an individual in two matters involving the client's driving privileges. In the first matter, the client was charged in Shelby County with driving while his license was suspended for ten years. In that case, the respondent believed (correctly as it turned out) that Indiana's Bureau of Motor Vehicles records failed to show that the client had received notice of the suspension as required by law.⁴⁵ Meanwhile, the respondent filed a petition for a probationary license in Marion County that recited, among other things, that the client had not violated the terms of his suspension by operating a vehicle.⁴⁶ In response to a direct question from the court commissioner considering the petition, the respondent's client denied that he had driven a vehicle within the preceding nine years. Although the client's answer was untrue and the respondent lawyer knew the answer to be untrue, he did nothing to convince the client to correct his answer and did not disclose the client's deception to the court. The client was later acquitted of the violation in the Shelby County case on the basis that the Bureau of Motor Vehicles notice

41. *Id.*

42. *Id.* at 980.

43. Indiana Professional Conduct Rule 3.3(a)(2) provides that, "[a] lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act against a client by a tribunal."

44. 774 N.E.2d 49 (Ind. 2002).

45. *Id.*

46. *Id.* at 50.

was, in fact deficient.⁴⁷

In his disciplinary action, the supreme court found the lawyer violated Indiana Professional Conduct Rule 3.3(a)(2)⁴⁸ by remaining silent and taking no action in the Marion County case when he knew the client had given false evidence to the commissioner. Citing the *Scahill* case, the supreme court acknowledged there was a tension between the lawyer's duties to maintain client confidences and the lawyer's obligations to be truthful to a tribunal. The court held, however, that doing nothing in the face of this dilemma was not an acceptable option.⁴⁹ The court then imposed a public reprimand on the lawyer.⁵⁰

VIII. UNAUTHORIZED PRACTICE OF LAW

The supreme court was recently called upon to examine the question of what constitutes the unauthorized practice of law (UPL) before the State Board of Tax Commissioners (the Board) in the case of *State ex rel. Indiana State Bar Association v. M. Drew Miller*.⁵¹ In that case, the State Bar Association sought an injunction to prevent Miller from engaging in what it perceived as the unauthorized practice of law before the State Board of Tax Commissioners. During the pendency of the case, the Board promulgated rules to distinguish between the roles of a "tax representative" and an attorney.⁵²

Miller owned a company called Landmark Appraisals, Inc. In essence, Miller would enter into contracts with property owners to examine their property tax assessments to determine whether, in his opinion, the appraised value was excessive and then work with the Board to get the appraisals lowered. In the specific case challenged by the State Bar Association, Miller had raised issues involving the constitutionality of certain assessment statutes and worked to preserve issues for appeal. There, the supreme court agreed that Miller was engaging in acts constituting the practice of law.⁵³ The court determined, however, that Miller's use of court opinions to answer questions about obsolescence or depreciation constituted the practice of law and noted that many non-lawyers may have a greater understanding of those concepts than practicing attorneys.⁵⁴ After reviewing the facts and the statutory scheme created by the Board, the supreme court determined that the Commissioners had created sufficient law to address the concerns that led the State Bar Association to complain in the first place. The court refused to assume that Miller would not comply with the Board's rules and believed that the Board would enforce their

47. *Id.*

48. *Supra* note 40.

49. *In re Page*, 774 N.E.2d at 50.

50. *Id.* at 51.

51. 770 N.E.2d 328 (Ind. 2002).

52. The current version of these rules is found in Indiana Administrative Code tit. 50, 4.15-5-2 (2001).

53. *Miller*, 770 N.E.2d at 330.

54. *Id.*

rules as written. Although the court agreed that some of Miller's past actions had constituted the unauthorized practice of law, the did not believe it was appropriate to issue an injunction to Miller not to practice before the Board.⁵⁵ The case was dismissed with prejudice.

Chief Justice Randall Shepard, however, dissented from the dismissal. The Chief Justice found that Miller had attempted to use all the tools of the legal profession to represent a client before a state adjudicative body. He also found that Miller's offense was not a victimless crime. By the time one of Miller's client's cases reached the Indiana Tax Court, the client's interests had been damaged because Miller had failed to do the things a lawyer would have done. The Chief Justice did not share the majority's confidence that Miller would abide by the new regulations in light of his prior UPL activities. He observed, "Someone who refuses to recognize his violation is not a plausible risk for future compliance, especially when he has been prosecuted once before, found guilty, and let off scot-free."⁵⁶

CONCLUSION

There were many cases during this survey period over a wide range of topics that were deserving of review by the practicing bar. These cases, many of which are discussed herein, further delineate lawyers' ethical obligation in relative common factual settings. As noted herein, there is a tension between the interests of clients and the lawyer's duties to third parties who are outside the attorney-client relationship. Familiarity with Indiana's Rules of Professional Conduct is certainly a good starting point for lawyers, but it is equally important to have some familiarity with the Indiana Supreme Court cases interpreting those rules. This was not an exhaustive work on cases with professional responsibility issues during the survey period, but it highlights decisions that give important signals to the bar in common representations about the lawyer's duty to practice ethically.

55. *Id.* at 331.

56. *Id.*

