

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

YOU SAY YOU WANT AN EVOLUTION?: AN OVERVIEW OF THE ETHICS 2000 AMENDMENTS TO THE INDIANA RULES OF PROFESSIONAL CONDUCT

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INTRODUCTION¹

The Indiana Supreme Court rarely makes sweeping changes to the rules governing professional conduct by lawyers. Indiana's original Code of Professional Responsibility became effective in 1971 and was based on the ABA Model Code of Professional Responsibility. Sixteen years later the Code was revised again. Modeled on the ABA Model Rules of Professional Conduct, the Indiana Rules of Professional Conduct went into effect on January 1, 1987. Again drawing on an ABA-created template, the Indiana Supreme Court, based in large part on the sweeping work of the Indiana Ethics 2000 Task Force, amended the Rules of Professional Conduct, effective January 1, 2005. The amended rules are available on-line² and in the 2005 *Indiana Rules of Court*.³ The amended rules are also available showing changes to the rules, but not the comments, in redlined format.⁴ The new rules present lawyers with a third set of significant changes within a period of approximately thirty-five years.

The new rules affect virtually every Indiana lawyer in every law practice setting, and so it is prudent for all lawyers to have a keen understanding of these changes. Where it might be useful to the reader in understanding the significance of the Indiana rules, this article will discuss differences between the Indiana Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. Where pertinent, it will also track the evolution of changes throughout both the ABA and Indiana Ethics 2000 processes.

I. BACKGROUND

In the spring of 1997, ABA leadership created the Commission on the

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2. See http://www.in.gov/judiciary/rules/prof_conduct/index.html (last visited Apr. 7, 2005)

3. 2005 INDIANA RULES OF COURT (Thomson West 2005).

4. Order Amending Rules of Professional Conduct (Sept. 2004), available at <http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf>.

Evaluation of the Rules of Professional Conduct, dubbed the "Ethics 2000 Commission" in recognition of the anticipated completion of its work near the turn of the millennium. Its mission was to conduct a comprehensive evaluation of the ABA Model Rules in light of developments since their original adoption in 1983.⁵ After several years of study and taking testimony at hearings held throughout the United States, the Commission made a final report to the ABA House of Delegates in August 2001.⁶ After partial consideration of and action on the Commission's report that summer, the House approved changes to the ABA Model Rules in February 2002, and, with a few exceptions, adopted the Commission's proposals.⁷

Partially paralleling the Ethics 2000 process and responding to recent corporate finance scandals, the ABA president in the spring of 2002 appointed a Taskforce on Corporate Responsibility. Part of the charge to the Taskforce was to examine the ethical principles governing lawyers for corporate and other organizational clients.⁸ On March 31, 2002, the taskforce issued its final report, which included recommendations to the House of Delegates to amend ABA Model Rules of Professional Conduct 1.6, dealing with client confidentiality, and 1.13, dealing with organizational clients.⁹ Similar amendments to Rule 1.6 had originally been proposed to the ABA House of Delegates by the Ethics 2000 Commission, but rejected by the House.¹⁰ At its August 2003 meeting, the ABA House of Delegates approved the Corporate Responsibility Taskforce's amendments to Rules 1.6 and 1.13.¹¹

On August 16, 2002, shortly after the ABA House of Delegates' final action on the Ethics 2000 Commission report, Indiana Chief Justice Randall T. Shepard wrote to then-ISBA president, Kristin Fruehwald, urging the state bar to study the results of the Ethics 2000 process and make its recommendations to the Indiana Supreme Court.¹² President Fruehwald appointed Carol Adanamis, chair of the state bar Legal Ethics Committee, to chair an Ethics 2000 Taskforce charged with reviewing the Indiana Rules of Professional Conduct in light of the amendments to the ABA Model Rules. The Indiana Taskforce's five committees were each

5. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441-42 (2002). Materials related to the work of the Ethics 2000 Commission are available on the website of the ABA Center for Professional Responsibility at: <http://www.abanet.org/cpr/ethics2k.html>.

6. Love, *supra* note 5, at 443.

7. *Id.*

8. Report of the American Bar Association Task Force on Corporate Responsibility 2 (Mar. 31, 2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf [hereinafter ABA Task Force Report].

9. *Id.* at 77.

10. Love, *supra* note 5, at 443.

11. American Bar Ass'n House of Delegates Daily Journal, 2003 Annual Meeting 12 (Aug. 11-12, 2003), available at <http://www.abanet.org/leadership/2003/2003journal.pdf>.

12. Letter from Chief Justice Randall T. Shepard to Kristin G. Fruehwald, President, Indiana State Bar Association (Aug. 16, 2002) (copy on file with the author).

assigned to examine different parts of the ABA Model Rules.¹³ The further changes to the ABA Model Rules prompted by the ABA Taskforce on Corporate Responsibility were also incorporated into the Indiana project. Following publication of the Indiana Taskforce's draft recommendations, the state bar hosted five roundtable discussions throughout the state. After taking account of written and oral comments, the Indiana Taskforce submitted its report and recommendations to the ISBA House of Delegates. On October 23, 2003, the House of Delegates adopted the taskforce recommendations with a few exceptions that will be noted later in this Article. The ISBA formally transmitted its proposal to Chief Justice Shepard on December 2, 2003. On February 25, 2004, the supreme court published the state bar's proposed amendments on its website and invited comments. Seven months later, on September 30, 2004, the supreme court issued an order amending the Indiana Rules of Professional Conduct, effective January 1, 2005.

II. THE PREAMBLE AND SCOPE

A. Civility Concerns

The supreme court made a number of changes to the introductory portions of the Indiana Rules of Professional Conduct, the Preamble and Scope, that are worthy of discussion. In these sections, the court departed from the ABA Model Rules in ways suggesting that it is quite serious about incorporating notions of professionalism and civility into the Indiana Rules. The first indicator is found in new language in paragraph [1] of the Indiana Preamble, which does not appear in either the ABA Model Rules or the old Indiana or ABA rules: "Whether or not engaging in the practice of law, lawyers should conduct themselves honorably." Another iteration of this theme is found in paragraph [8] of the Indiana Preamble, where our supreme court replaced the word "zealous" that appeared in the previous version of the Preamble, and that still appears in the Preamble to the ABA Model Rules, with the word "effective."¹⁴ This theme appears again in the supreme court's redaction of the word "zealously" from Preamble paragraph [9].¹⁵ Thematically related to these Indiana variations, in Comment [1] to Indiana

13. The coverage of the five committees and their chairs were:

- Preamble, Scope, Rules 1.0-1.5, 1.15-1.17, 2 and 9; chair, Robert Clemens of Indianapolis
- Rules 5 and 6; chair, John Conlon of Indianapolis
- Rules 1.6, 1.18 and 4; chair, Douglas Cressler, formerly of Indianapolis, now of Denver, Colorado
- Rules 3, 7 and 8; chair, Patricia McKinnon, of Indianapolis
- Rules 1.7-1.14; chair, Ted Waggoner, of Rochester, Indiana.

14. The applicable sentence, showing the change from the current and previous ABA versions and previous Indiana version, reads: "Thus, when an opposing party is well represented, a lawyer can be an effective ~~zealous~~ advocate on behalf of a client and at the same time assume that justice is being done."

15. The following language was incorporated intact into the Indiana Preamble from the ABA

Rule 1.3, the supreme court redacted language that appears in the corresponding ABA comment that refers to "zeal in advocacy."¹⁶

B. Retention of Intermediary Rule

The ABA Model Rules eliminated old Model Rule 2.2, dealing with the lawyer as an intermediary, in favor of addressing that role as a type of multiple client representation covered by Model Rule 1.7. But the Indiana Supreme Court retained old Rule 2.2, which was identical to now-defunct ABA Model Rule 2.2. Indiana's different approach is foreshadowed by the retention of language in Preamble paragraph [2], now missing from the ABA rules, that refers to the lawyer's role as an intermediary between or among clients.¹⁷ The possible significance of Indiana's retention of Rule 2.2 will be covered, *infra*, in the discussion of that rule.

C. Lawyers As Neutrals

Paragraph [3] of the Indiana and ABA Preambles is new language recognizing that lawyers often function as third-party neutrals in alternative dispute resolution proceedings. It points out that certain rules have a direct bearing on third party neutrals, including amended Rule 1.12, which now applies the same conflict of interest standard to former third-party neutrals as it does to former judges, and new Rule 2.4, which establishes certain ethical standards for lawyers who function as third-party neutrals. This paragraph also explicitly states that which has always been understood: that some of the rules, preeminently Rule 8.4, govern the conduct of lawyers even when they are not representing clients.

D. Public Service Responsibilities

Language added to paragraph [6] of the Indiana and ABA Preambles urges lawyers to "further the public's understanding of and confidence in the rule of

Preamble, save the word "zealously," which is shown here as stricken-through: "These principles include the lawyer's obligation ~~zealously~~ to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." IND. PROF. COND. R. pmbl.

16. The Indiana version of Comment [1] to Rule 1.3 differs from the corresponding ABA comment in the following respect, with the Indiana redactions stricken-through: "A lawyer must also act with commitment and dedication to the interests of the client ~~and with zeal in advocacy upon the client's behalf.~~" Continuing in the same comment, both the Indiana and ABA versions emphasize that the lawyer has discretion to place limits on how far he or she is willing to go as an advocate: "A lawyer is not bound, however, to press for every advantage that might be realized for a client." IND. PROF. COND. R. 1.3 cmt. 1.

17. The retained language states: "As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client." IND. PROF. COND. R. pmbl.

law and the justice system,” and expands somewhat upon the rationale for and reach of pro bono responsibilities by stating that lawyers “should” ensure equal access to justice for those who are hampered by economic or social barriers.¹⁸

E. Application of the Rules in Other Settings

Paragraph [20] of the Scope portion of the Preamble has been reworked somewhat (generally consistent with the ABA model) to emphasize two points. First, new language points out that violation of a rule does not necessarily mean that another non-disciplinary remedy is appropriate.¹⁹ Also, in acquiescence to the growing body of authority that looks to the Rules of Professional Conduct as articulating duties and responsibilities relevant to the question of whether a lawyer has violated the applicable standard of care for civil liability purposes, the supreme court deleted language intended to preclude such use, and instead added the following language: “[These rules] are not designed to be a basis for civil liability, but these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client.^[20] . . . Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”²¹

Old Preamble paragraphs [19] and [20] were removed in both the Indiana and ABA versions. Old paragraph [19] was largely a restatement of the truism that the rules pertaining to client confidentiality and the law governing attorney-client and work product privileges are separate, albeit interactive, matters. Thus, commentary about the attorney-client privilege was not seen as germane to the Rules of Professional Conduct. Old paragraph [20] stated: “The lawyer’s

18. In a related development, the supreme court also amended the Oath of Attorneys on September 30, 2004, to add the following new language, effective January 1, 2005: “I will never reject, from any consideration personal to myself, the cause of . . . those who cannot afford adequate legal assistance.” IND. ADMIS. DISC. R. 22 (2005).

19. Indeed, we have recently seen this point illustrated in Indiana, where the Indiana Court of Appeals in *Gerald v. Turnock Plumbing, Heating and Cooling, LLC*, 768 N.E.2d 498 (Ind. Ct. App. 2002) stated that a law firm can avoid disqualification by erecting timely institutional protections to screen off a laterally hired lawyer from involvement with a matter concerning which the lateral hire has a disqualifying conflict of interest. This was at the time, of course, not an accurate statement of the applicable Rule of Professional Conduct Rule 1.10(b). This perceived disconnect between the law of lawyer discipline and the law of disqualification has now been resolved by the Indiana Supreme Court’s adoption of a rule allowing timely screening under these circumstances. See IND. PROF. COND. R. 1.10(c) and cmt. 6 thereto.

20. This sentence in Indiana Preamble paragraph [20] differs in emphasis, if not in substance, from the parallel ABA Preamble paragraph [20], which reads: “[These rules] are not designed to be a basis for civil liability, but reference to these Rules as evidence of the applicable standard of care is not prohibited.” The Indiana Supreme Court appears to have affirmatively approved the use of the Rules of Professional Conduct as one source of evidence of the standard of care in legal malpractice cases. The source of this different language was the ISBA proposal.

21. IND. PROF. COND. R. pmb1.

exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." The significance of the elimination of this language is lost on this author. The reference to Rule 1.6 clearly signifies that lawyers should not be second-guessed about when to exercise discretion to reveal client confidences when permitted under the exceptions found in Rule 1.6(b). While this is true to the extent that the rule itself makes that decision discretionary, it is also possible that other law, particularly in a corporate regulatory environment, might impose a duty to disclose when the rules give discretion.

F. Definitions Relocated

A final change to the Preamble was the relocation of the definitions of key terms from the Preamble to a new Rule 1.0. In a sense, the creation of a rule that does nothing but define terms is illogical. On balance, however, the elevation of these important definitions to rule status will remove them from their historical hiding place in the Preamble and put them in a location where they are more prominent.

III. TERMINOLOGY—RULE 1.0

In all respects but one, the definitions of key terms used throughout the new Indiana rules are identical to the definitions in the ABA rules. Except for their relocation from the Preamble to Rule 1.0, some definitions remain the same as the old rules, and there is no need to comment further. The definitions of certain now-defunct terms were eliminated. Other definitions were amended, and additional definitions were included to define terminology new to the rules.

A. Client Consent and Related Documentation

The nomenclature of the old rules, when referring mostly to client consent to a lawyer's actions, was to require "consent after consultation." Therefore, the old definition of "consult" or "consultation" has been eliminated. It was abandoned in favor of the new concept of "informed consent," defined in Rule 1.0(e). The notion of informed consent finds its way into the rules at many points, often in the context of conflict of interest waivers.²² Because it is a new definition, it has new comments as well which are found in Comments [6] and [7].

22. A non-exhaustive list of rules where the notion of informed consent appears includes: Rules 1.2(c) (limitations on the scope of representation), 1.6(a) (revelation of otherwise confidential client information), 1.7(b)(4) (waivers of concurrent conflicts of interest), 1.8(a) (financial transactions between lawyer and client), 1.8(b) (use of information to client's disadvantage), 1.8(f) (accepting compensation from a third party), Rule 1.8(g) (aggregate settlements), 1.9 (former client conflicts of interest), and 1.18(d) (representation adverse to a former prospective client).

Informed consent is defined to denote, “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”²³ While this definitional shift might not signify much substantive change, the point of emphasis has evolved from mere process (“consultation”) to result (“informed”). The comments highlight this point:

The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.²⁴

There are several other new definitions related to the concept of informed consent. The rules make varying demands upon lawyers relative to the type of documentation required to manifest an act of consent. The least demanding level of documentation is none at all—oral consent is sufficient. With some notable exceptions, the minimum level of documentation required by the rules is “confirmation in writing,” a newly defined concept.

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.²⁵

This definition is clearly met by a writing generated or signed by the person giving consent, but it is also satisfied by the unilateral act of the lawyer delivering a confirming writing to the person who gave consent. What constitutes a writing is defined as follows: “‘Writing’ or ‘written’ denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording or e-mail.”²⁶ Thus, the definition of a writing is very broad and takes into account evolving technologies for documenting agreements.

In a few instances, the rules require an enhanced degree of documentation—some consents must be documented in the form of a writing

23. IND. PROF. COND. R. 1.0(e).

24. IND. PROF. COND. R. 1.0 cmt. 6.

25. IND. PROF. COND. R. 1.0(b).

26. IND. PROF. COND. R. 1.0(n).

“signed by the client.”²⁷ The earlier-mentioned definition of a writing applies equally in these circumstances, as well, and a definition is also provided for what constitutes a signature. “A ‘signed’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”²⁸ Like the definition of a writing, this definition is quite flexible in its recognition that virtually any reliable means of authenticating that the writing was made or adopted by the consenting person will suffice.²⁹

In many instances, the new rules require documentation of consent that is facially more demanding than under the old regime. But the definitions of what constitutes a writing, and where applicable, what constitutes a signature, are so forgiving and flexible that these changes should not be viewed as casting an unworkable burden on the bar, especially when prudent law practice management argues in favor of requirements at least as strict.

B. Law Firms And Partners

The definition of a “firm” or a “law firm” has been modified to take into account the evolution of various forms of law practice in contemporary use and expansively incorporates all forms of law practice entities, including law partnerships, professional corporations, sole proprietorships, corporate law departments, legal aid organizations, and any other associations authorized to practice law.³⁰ In a related change, the definition of “partner” now includes “a member of an association authorized to practice law.”³¹ This broader definition becomes relevant when considering the special duties and responsibilities of supervisory lawyers under Rules 5.1, dealing with supervision of other lawyers, and 5.3, dealing with supervision of non-lawyers.

27. *Id.* Rule 1.5(c) (contingent fee agreements); Rule 1.8(a) (business transactions with clients); and Rule 1.8(g) (aggregate settlements).

28. IND. PROF. COND. R. 1.10(n).

29. For a more detailed explanation of these concepts and a criticism of the ABA Model Rules of Professional Conduct for not being sufficiently rigorous in imposing documentation requirements, see Donald R. Lundberg, *Documenting Client Decisions: A Critique of the Model Rules Post-Ethics 2000*, PROFESSIONAL LAW., Summer 2003, at 2.

30. IND. PROF. COND. R. 1.0(c). The supreme court rejected an ISBA recommendation that would have somewhat softened the definition of a law firm by stating that the term “may include” any of the entities among those listed. The final definition lists those entities as being law firms without qualification. Nonetheless, comment [4] to Rule 1.0 asserts that in some cases the structure of a legal aid organization may result in it being treated as a single law firm or separate firms depending on organizational structure. Moreover, comment [3] points out that even though a corporate or governmental legal department is undoubtedly a law firm, there is sometimes a question of fact concerning the identity of the client, particularly as it pertains to corporate subsidiaries or affiliates.

31. IND. PROF. COND. R. 1.0(g).

C. *Fraud*

The definition of “fraud” or “fraudulent” has been amended (consistent with the ABA definition) to incorporate that which is fraudulent under other applicable substantive or procedural law and “has a purpose to deceive.”³² Previously, the definition included any conduct that had a “purpose to deceive” but was not merely negligent or passive conduct.³³

D. *Conflict of Interest Screening*

In several instances under the rules, conflicts of interest imputed to law firms that arise because of the migration of lawyers (or in some instances, non-lawyer staff) from old law firms, including government employment, to new law firms may be avoided if the personally conflicted lawyer or non-lawyer staff member is “screened” from the matter at the new firm. Even though the concept of screening pre-dates the most recent amendments to the rules, for the first time we now have a definition of screening. “‘Screened’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”³⁴

E. *Tribunal Defined*

The only instance in which the Indiana Supreme Court took a definitional approach different from the ABA is with the definition of “tribunal.” The ABA defines the term broadly to include, in addition to a court, any arbitration body, administrative agency or legislative body that renders binding legal judgments after hearing evidence and argument from parties.³⁵ By contrast, Indiana’s definition, taken from the ISBA proposal, states, “‘Tribunal’ denotes a court, an arbitrator, or any other neutral body or neutral individual making a decision,

32. IND. PROF. COND. R. 1.0(d).

33. The supreme court rejected an ISBA recommendation that the definition of fraud mean, “fraud or constructive fraud as defined under Indiana law.” One difference between the ISBA proposal and the court’s version is that the court’s approach anticipates that some fraudulent conduct by lawyers may occur in other jurisdictions where the local law of fraud may differ from Indiana’s. The court’s inclusion of the qualifying clause, “and has a purpose to deceive,” raises the question whether constructive fraud will be treated as fraudulent conduct for purposes of the rules. The answer is not clear. *Compare* Sanders v. Townsend, 582 N.E.2d 355, 358 (Ind. 1991) (“Intent to deceive is not an element of constructive fraud; instead, the law infers fraud from the relationship of the parties and the circumstances which surround them.”), *with* Rice v. Struck, 670 N.E.2d 1280, 1284 (Ind. 1996) (“The elements of constructive fraud are: . . . (ii) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists . . .”). *See also* Matter of Scahill, 767 N.E.2d 976, 979 (Ind. 2002).

34. IND. PROF. COND. R. 1.0(k).

35. MODEL RULES OF PROF’L CONDUCT R. 1.0(m) (2000).

based on evidence presented and the law applicable to that evidence, which decision is binding on the parties."³⁶ The difference appears to be more stylistic than substantive.

IV. CONFLICTS OF INTEREST

A. Rule 1.7 Conflict of Interest: Current Clients

Rule 1.7 governs concurrent conflicts of interest, including conflicts between multiple clients who are represented by the same lawyer, conflicts between current clients and third parties, and conflicts between current clients and the lawyer's personal interests. The Indiana Supreme Court followed ABA Model Rule 1.7 with minor exceptions. Rule 1.7 has been restructured for clarity so that paragraph (a) states the general rule presumptively prohibiting all concurrent conflicts of interest, and paragraph (b) sets forth the circumstances under which representation is permitted notwithstanding a presumptive conflict of interest. To the extent there was any question in the past about whether a lawyer could obtain client consent to represent one client directly adverse to another client in the same matter in litigation, Rule 1.7(b)(3) now states that client consent may be sought only if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."³⁷ This language seems to definitively preclude, for example, simultaneous representation of husband and wife in a dissolution of marriage proceeding.³⁸ The other change of significance in the black-letter rule is that all conflict waivers must be confirmed in writing.³⁹ Thus, even though prudence dictates that the affected client or clients should sign a written consent, the lawyer's written confirmation is sufficient. This represents an enhanced obligation to document conflict of interest waivers that, previously, were not required to be in writing.

The more noteworthy changes in Rule 1.7 appear in the commentary. Those changes are not substantive, but they do give lawyers a great deal more guidance in working through conflict of interest questions. Indeed, the comments will be quite helpful to the practitioner in that they address the resolution of many conflict of interest problems that frequently arise in specific law practice settings.

Here are some of the highlights. New Comment [3] emphasizes the importance of creating institutional mechanisms for identifying and avoiding conflicts of interest by asserting that ignorance of conflicts will not excuse a violation of the rule. There is a helpful new Comment [5] addressing conflicts of interest that arise due to party realignment or changes in a client's organizational structure through, for example, acquisition or merger. Comment [11] addresses conflicts of interest arising when one lawyer handles a matter

36. IND. PROF. COND. R. 1.0(m).

37. IND. PROF. COND. R. 1.7(b)(3).

38. IND. PROF. COND. R. 1.7 cmt. 17.

39. IND. PROF. COND. R. 1.7(b)(4).

adverse to another lawyer who is a spouse or stands in some other close family relationship. This is in substance the standard of old Rule 1.8(i), which was eliminated in favor of this comment. There are new comments addressing when consent to a conflict of interest may no longer be operative upon a material change in circumstances⁴⁰ and the limited circumstances under which client consent to a future conflict will be effective.⁴¹ There is a new comment dealing with conflict questions arising in representation of class members in class action litigation, with particular reference to unnamed class members.⁴² The comment on positional conflicts of interest, old Comment [9], has been redrafted and now appears as Comment [24]. Expansive new commentary gives greater guidance in the analysis of potential conflicts arising from representing multiple clients in the same matter.⁴³ Old Comment [8], dealing with conflicts involving organizational affiliates, such as corporate subsidiaries, has been completely redrafted and repositioned as Comment [34].

B. Rule 1.8 Specific Rules Governing Current Client Conflicts

Rule 1.8 chronicles a variety of specific situations out of which conflicts of interest arise. There are several noteworthy changes.

1. *Rule 1.8(a) Transactions Between Lawyer and Client.*—Rule 1.8(a) governs transactions between lawyers and clients when their interests are adverse. In this circumstance, new language in Rule 1.8(a)(2) requires that the client be affirmatively advised in writing of the desirability of seeking the advice of independent legal counsel in the transaction. Whereas previously only the client's consent to such a transaction had to be in a writing, new language in Rule 1.8(a)(3) outlines the essential content of the writing and requires that it be signed by the client. Comment [1] to Indiana Rule 1.8 includes cautionary language that does not appear in the corresponding ABA Model Rule: "Paragraph (a) applies when a lawyer seeks to renegotiate the terms of the fee arrangement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement."⁴⁴ Comments [1] through [4] represent a significant expansion in the helpful commentary on business transactions with clients. While it is generally understood that an initial fee contract between lawyer and client does not implicate Rule 1.8(a), new language in Comment [1] cautions that the rule's "requirements must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee."⁴⁵

2. *Rule 1.8(c) Gifts From Clients.*—Rule 1.8(c), governing gifts from clients, has been expanded to also prohibit the solicitation of any substantial gift

40. IND. PROF. COND. R. 1.7 cmt. 21.

41. IND. PROF. COND. R. 1.7 cmt. 22.

42. IND. PROF. COND. R. 1.7 cmt. 25.

43. IND. PROF. COND. R. 1.7 cmts. 29-33.

44. IND. PROF. COND. R. 1.8 cmt. 1.

45. *Id.*

from a client. New language in Comment [6], former Comment [2], notes that there is no ethical prohibition against accepting an unsolicited gift, even a substantial one, from a client, but that other legal doctrines may make such a gift vulnerable to future attack. New Comment [8] indicates that there is no per se prohibition against drafting a will or other legal document that designates the lawyer as a personal representative or other fiduciary, but notes that circumstances may exist that make such a transaction one that could be considered a potential conflict of interest under Rule 1.7.

3.. *Rule 1.8(g) Aggregate Settlements.*—The danger of aggregate settlements, governed by Rule 1.8(g), is that they potentially place the lawyer in the middle of a conflict between clients over how much each should benefit from a fixed pot of money or how much each should contribute to a total settlement offer. As between the co-clients, every dollar of benefit to one client represents a corresponding loss to the other; hence, the need for informed consent. As before, the lawyer must disclose to all co-clients all terms of the settlement and the respective participation of each client in the settlement. But now, new language in Rule 1.8(g) requires the lawyer to document informed consent by a writing signed by the clients. It remains unclear whether the required disclosures must be in writing, but the prudent lawyer will want to make sure that they are. Comment [14] on aggregate settlements has been added where none existed in the past.

4.. *Rule 1.8(h) Limiting Liability and Settling Malpractice Claims.*—Organizationally, Rule 1.8(h) has been restructured for clarity into two subparts, the first deals with prospective limitations on malpractice liability, and the second deals with settling actual or potential liability claims by unrepresented current or former clients. Also, Rule 1.8(h)(2), dealing with settlement of claims, now clearly states that written notice of advisability that the client or former client be represented by counsel must be provided far enough before any settlement to allow a reasonable opportunity to seek advice of counsel. New Comments [14] and [15] have been added to expand upon the black-letter rule. Comment [14] provides that this rule does not preclude the use of an arbitration clause in an attorney-client contract provided it is legally enforceable and “the client is fully informed of the scope and effect of the agreement.”⁴⁶

5. *Rule 1.8(j) Lawyer-Client Sexual Relationships.*—New Rule 1.8(j) generally codifies in rule form a prohibition against sexual relationships with clients that has already been established by Indiana case law.⁴⁷ It states: “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”⁴⁸ New related commentary, Comments [17] through [19], includes a test for identifying which constituents of an organizational client are off limits for sexual relationships: anyone “who supervises, directs or regularly consults

46. IND. PROF. COND. R. 1.8(h) cmt. 14.

47. See, e.g., *In re Lesley*, 820 N.E.2d 142 (Ind. 2005); *In re Grimm*, 674 N.E.2d 551 (Ind. 1996).

48. IND. PROF. COND. R. 1.8(j).

with that lawyer concerning the organization's legal matters."⁴⁹

6. *Rule 1.8(k) Imputation of Prohibitions.*—While the imputation of conflicts of interest are generally governed by Rule 1.10, Rule 1.8 prohibitions are governed by a separate, and new, provision. All Rule 1.8 prohibitions are imputed to other members of the directly implicated lawyer's firm, with the exception of the prohibition on sexual relationships with clients found in Rule 1.8(j), which is personal in nature and not imputed.⁵⁰

Previously, imputation of Rule 1.8 prohibitions was governed by Rule 1.10. Old Rule 1.10 applied the imputation doctrine only to the prohibitions of subparts (c) (gifts from clients) and (k) (part-time prosecutors) of Rule 1.8. Thus, new Rule 1.8(k) represents a significant expansion in the application of imputation principles to Rule 1.8 prohibitions.

C. *Rule 1.9 Duties to Former Clients*

Rule 1.9, governing conflicts of interest with former clients and protection of information related to the representation of former clients, remains substantially the same. However, waivers of conflicts involving former clients must now be confirmed in writing.⁵¹

The content of old Rule 1.10(b) has now been incorporated into Rule 1.9 as Rule 1.9(b), and old Rule 1.9(b) has been re-numbered Rule 1.9(c).⁵² Thus, it is now in Rule 1.9(b) that we find the general prohibition against a lawyer who changes firms from representing a new-firm client adverse to an old-firm client about whom the lawyer acquired information protected by Rule 1.6.

As with Rule 1.7, the commentary to Rule 1.9 has been expanded to provide better guidance and to address its application to commonly occurring situations.

D. *Rule 1.10 Imputation of Conflicts of Interest: General Rule*

For the most part, the principles governing the imputation of conflicts of interest from the directly affected lawyer to other lawyers in the same firm are found in Rule 1.10. The general imputation rule is stated in Rule 1.10(a), but the supreme court, following the ABA, has now grafted on an exception to imputation when "the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."⁵³ An example of the application of this exception is set forth in new Comment [3]: "Where one lawyer in a firm could not effectively represent a given client because of strong

49. IND. PROF. COND. R. 1.8(j) cmt. 19.

50. IND. PROF. COND. R. 1.8(k) & cmt. 20.

51. IND. PROF. COND. R. 1.9(a).

52. The shift of Rule 1.10(b) to Rule 1.9 occurred within the ABA Model Rules in 1989. Indiana did not make a corresponding amendment at that time. Thus, this change in Indiana does not reflect the Ethics 2000 deliberations so much as it attends to unfinished business from 1989.

53. IND. PROF. COND. R. 1.10(a).

political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.”⁵⁴

Clearly, the most significant amendment to Rule 1.10 is found in new Rule 1.10(c). This provision addresses the potential conflict of interest problems that arise when lawyers change law firms. Historically, when a lawyer left a firm, having been exposed to disqualifying information about a client while at the old firm, and joined a new firm, the migrating lawyer’s disqualification from representing a new-firm client against an old-firm client in the same or a substantially related matter was imputed to the entire new firm. Screening⁵⁵ (sometimes called a “Chinese wall”) was not a permissible method of defeating imputation of the migrating lawyer’s disqualification to the new law firm.⁵⁶ This has now changed in Indiana.⁵⁷ New Rule 1.10(c) permits timely screening to defeat imputation of a conflict imported via a migrating lawyer under three conditions. First, the personally disqualified lawyer must not have had primary responsibility for the matter at the old firm.⁵⁸ Second, the personally disqualified lawyer must be timely screened from any participation, including no apportionment of any part of the fee from the matter.⁵⁹ And third, there must be

54. IND. PROF. COND. R. 1.10 cmt. 3.

55. Screening is defined in IND. PROF. COND. R. 1.0(k).

56. The unavailability of screening to defeat imputation was clearly the case for purposes of lawyer discipline. Much less clear was whether timely screening could be used to defeat a disqualification motion in a matter in litigation. Most prominently, the Indiana Court of Appeals in *Gerald v. Turnock Plumbing, Heating and Cooling, LLC*, 768 N.E.2d 498 (Ind. Ct. App. 2002) opined that timely screening would defeat disqualification. That opinion was unfortunately ambiguous about whether it was addressing only disqualification proceedings or interpreting the Rules of Professional Conduct. To the extent *Gerald* could be read as interpreting the old Rules of Professional Conduct to permit the use of screening as a disciplinary standard, it was wrong. One could convincingly argue that a disconnect between the disqualification standard and the discipline standard is an undesirable situation. A salutary effect of new Rule 1.10(c) is to bring those two standards into synch.

57. The ABA Ethics 2000 Commission recommended the adoption of a screening provision in Model Rule 1.10. The ABA House of Delegates rejected that recommendation. In Indiana, the state bar association Ethics 2000 Taskforce followed the final ABA version and did not recommend the inclusion of a screening provision in Rule 1.10. The ISBA House of Delegates accepted the recommendation without change. Thus, the incorporation of a screening provision in Rule 1.10 to defeat imputation represents an independent decision of the Indiana Supreme Court, prompted by neither the ABA Model Rules nor the ISBA recommendations.

58. The requirement in Indiana Rule 1.10(c)(1) that screening is only permitted in cases where the personally disqualified lawyer did not have primary responsibility for the disqualifying matter was not an element of the screening provision that the ABA Ethics 2000 Commission recommended.

59. New Comment [6] to Indiana Rule 1.10 provides that the prohibition on sharing fees with the screened lawyer “does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation

prompt written notice to the affected former client. The purpose of notice is to allow the former client to monitor the integrity of the screen. Most of the old commentary to Rule 1.10 regarding the definition of a law firm has now been incorporated into new Rule 1.0(c) and related comments.

To screen or not to screen has been a matter of considerable controversy nationally. By allow screening in the context of migrating private practice lawyers, Indiana is now aligned with a minority of eight jurisdictions⁶⁰ and the position of the Restatement of the Law Governing Lawyers.⁶¹

E. Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Conflict of interest standards for lawyers migrating into and out of government employment have always been, and continue to be, different, and somewhat less rigorous, than the standard for lawyers who change firms in a private law practice environment. A policy motivation behind this differentiation is to blunt some of the disincentives to rendering service in government employment. To this extent, Rule 1.11 has not been materially changed. However, consistent with conflict of interest waivers throughout the new rules, conflict waivers in this setting must now be confirmed in writing.⁶²

Rule 1.11(a) has been amended to clarify a previously ambiguous point: former client conflicts of interest for lawyers who migrate to and from government employment are solely governed by Rule 1.11(b), not Rule 1.9(a). The applicable standard of disqualification—that the migrating lawyer must have participated personally and substantially in the putatively disqualifying matter while in government service—remains the same. However, the amended rule also clarifies that under these circumstances, the former government lawyer is obliged to protect the confidences of his former government client consistent with the standard of Rule 1.9(c). Deletion of the word “private” from old Rule 1.11(a)(2) also conveys an intent to apply this same standard to lawyers moving from one government employer to another.

New Rule 1.11(b), formerly incorporated into Rule 1.11(a), continues to allow screening of lawyers who leave government employment. With the advent of screening in Rule 1.10, the availability of screening for former government lawyers should now be viewed, not as an exception to the general rule, but merely as one application of screening in a different law practice setting.

Amended Rule 1.11(d) (formerly Rule 1.11(e)) clarifies that current government lawyers are governed by Rules 1.7, and 1.9. So for example, a lawyer who goes into government service from private practice will be prohibited from having any involvement in a matter on behalf of his or her government

directly related to the matter in which the lawyer is disqualified.” IND. PROF. COND. R. 1.10.

60. THOMAS D. MORGAN & RONALD D. ROTUNDA, *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY*, app. B at 154 (2005).

61. RESTATEMENT (THIRD), *THE LAW GOVERNING LAWYERS* § 124(2) (1998).

62. IND. PROF. COND. R. 1.11(a)(2) & 1.11(d)(2)(i).

employer that is adverse to a former private practice client in a matter that is the same or substantially related to the private practice representation. However, the usual imputation principles of Rule 1.10 do not apply so that the personally disqualified lawyer's conflict will not be imputed to other lawyers representing the government agency, even in the absence of a screen, although screening is advised.⁶³

F. Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Rule 1.12, previously dealing with conflicts of interest involving former judicial officers, has been expanded to apply the same conflict of interest standard to mediators and other third-party neutrals. As with all conflict of interest waivers under the new rules, conflicts falling within this rule are waivable only upon informed consent confirmed in writing.⁶⁴ Application of the waiver provision to third-party neutrals creates an apparent conflict between Rule 1.12 and Rule 7.6(B) of the Indiana Rules for Alternative Dispute Resolution, which provides: "[A] neutral shall decline to act in any capacity except as a neutral unless the subsequent association is clearly distinct from the issues involved in the alternative dispute resolution process."⁶⁵ Waivers are not contemplated by the ADR rule.

Rule 1.12(b) has been the standard for governing the negotiation for employment by law clerks of judicial officers, and it has now been expanded to apply identically to law clerks of mediators and third-party neutrals. In this regard, new Indiana Rule 1.12(b) differs from ABA Model Rule 1.12(b), which excluded clerks for mediators or third party neutrals from the Rule 1.12(b) employment-negotiation standard.

G. Rule 1.18 Duties to Prospective Clients

Rule 1.18 is an entirely new rule designed to address confidentiality and conflict of interest issues that arise from initial consultations with prospective clients that do not ripen into full lawyer-client relationships. The Indiana Supreme Court adopted ABA Model Rule 1.18 with some modifications. Rule 1.18 sets standards for protection of information disclosed by the prospective client, and addresses the conditions under which the consulted lawyer and the lawyer's firm will be disqualified as a consequence of having been exposed to such information.

Rule 1.18(a) defines a "prospective client" as "[a] person⁶⁶ who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect

63. IND. PROF. COND. R. 1.11 cmt.2.

64. IND. PROF. COND. R. 1.12(a).

65. IND. A.D.R. R. 7.6(b).

66. "Person" is not defined. Presumably it applies equally to organizations, acting through constituents, as it does to natural human beings.

to a matter.”⁶⁷ Rule 1.18(b) states the general prohibition that the use or revelation of information learned in the consultation is prohibited unless otherwise allowed by Rule 1.9, dealing with protection of information related to representation of former clients.

Rule 1.18(c) states the general conflict of interest standard. It essentially incorporates the Rule 1.9 former client/substantial relationship standard, but only if the lawyer received information from the prospective client that would be “significantly harmful” to the prospective client in the matter. Also, Rule 1.18(c) includes an imputation standard that disqualifies all lawyers in the same firm as the consulting lawyer who was exposed to significantly harmful information.

Rule 1.18(d) carves out exceptions to the disqualification and imputation tests of Rule 1.18(c). First, as in most conflicts situations, both the would-be current client who will now be adverse to the prospective client and the prospective client may waive by giving informed consent, confirmed in writing.⁶⁸ Second, if the consulting lawyer who was exposed to significantly harmful information “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” other lawyers in the same firm may take on a client adverse to the prospective client so long as the consulting lawyer is timely screened and the prospective client is given written notice that a screen has been employed.⁶⁹

Related comments expand upon the new rule. Of special note are: Comment [2], providing that unilateral, unsolicited imposition of information upon a lawyer will not generally cloak the communicator with the protections of the prospective client rule; and Comment [5], suggesting that a consulting lawyer may solicit an advance agreement from a prospective client that no disclosed information will prohibit the lawyer from representing another client. Surprisingly, Comment [5] to ABA Model Rule 1.18 goes on to suggest that such an agreement may also provide for the use of any information disclosed to the prospective client’s disadvantage. Acting on the recommendation of the state bar association, the Indiana Supreme Court wisely rejected that provision.

Indiana Rule 1.18 includes an additional comment that was recommended by the state bar association and does not appear in the corresponding ABA Model Rule. Indiana Comment [10] provides that other lawyers in the consulting lawyer’s firm will be similarly disqualified to the extent the consulting lawyer shares disqualifying information with them.

Lawyers should be aware that Rule 1.18, while helpful, is not a panacea for avoiding disqualifications caused by exposure to prospective client information. As noted above, the consulting lawyer may take reasonable steps to limit the acquisition of information to that reasonably necessary to determine whether to represent the client. Comment [4] suggests that this would generally pertain to information necessary to screen for conflicts of interest. This will be of limited benefit in most cases, where it is not the prospective client that presents the

67. IND. PROF. COND. R. 1.18(a).

68. IND. PROF. COND. R. 1.18(d)(1).

69. IND. PROF. COND. R. 1.18(d)(2).

conflicting representation, but the *next* prospective client who wants the firm to handle a substantially related matter adverse to the earlier prospective client. When consulting with the first prospective client, the consulting lawyer cannot be reasonably expected to know that, (1) the firm will not be hired, and (2) an adverse party will later try to hire the firm. It is true that Comment [5] suggests that a conflict waiver may be demanded from the prospective client as a condition to the initial interview, but lawyers will often have legitimate business reasons to avoid employing such adversarial tools with potential new clients.

H. Rule 2.2 Intermediary

The ABA eliminated Model Rule 2.2, dealing with the subject matter of lawyers who act in an intermediary capacity between multiple clients wishing to resolve a matter in dispute, in favor of considering such matters as an aspect of multiple client representation governed by Model Rule 1.7. By contrast, the Indiana Supreme Court retained Rule 2.2 and related commentary without change, even though the state bar association had recommended that Indiana follow the ABA and eliminate Rule 2.2. In addition to Rule 2.2, Comment [28] to Indiana Rule 1.7 addresses the role of the lawyer as intermediary. As a practical matter, Rule 2.2 adds nothing of substance to the application of Rule 1.7; but it might provide some additional guidance to lawyers who choose to accept the role of intermediating disputes between multiple clients. Undoubtedly as an artifact of retaining Rule 2.2, Indiana Rule 2.2 still contains the outmoded notion of consent after consultation, rather than the new nomenclature of informed consent, and it does not stipulate that client consent must be confirmed in writing. However, because Rule 2.2 describes a sub-set of Rule 1.7 conflicts of interest, the confirmation in writing requirement in Rule 1.7 should trump Rule 2.2's failure to mention it.

I. Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

Hidden in new Rule 6.5⁷⁰ is a set of standards governing conflict of interest analysis for limited legal services programs provided to the public under the auspices of nonprofit organizations, frequently bar associations, and the courts. The rule generally allows lawyers to cooperate with such programs that provide short-term, limited legal services to clients without being burdened by a full-blown application of conflict of interest principles. The rule blunts some disincentives for lawyers to participate in such programs, which are generally targeted at clients from traditionally underserved populations. These representations are true attorney-client relationships, albeit ones that are limited in time and scope, and not prospective client matters governed by Rule 1.18.

This rule has no application to lawyers who choose to provide short-term, limited legal services to clients in their own law practices. Limitations on the scope of those representations will be governed by Rule 1.2(c) and the ordinary

70. Old Rule 6.5 contained Indiana's voluntary pro bono plan. Those provisions have been transferred unchanged into a new rule, Rule 6.6.

conflict of interest standards of Rules 1.7, 1.9, and 1.10.

Rules 6.5(a)(1) and (2) provide that a lawyer is disqualified from giving brief service under a qualifying program only for conflicts of interest under Rules 1.7 and 1.9(a), or imputed under Rule 1.10, that the lawyer actually knows about. In effect, this means that the lawyer is free to provide the service even though a check of the lawyer's firm conflicts system would reveal a disqualifying conflict about which the lawyer was not actually aware. Also, Rule 6.5(b) provides that the imputation rules of Rule 1.10 are not otherwise applicable, meaning that a brief consultation with a limited legal services client will not be imputed to the consulting lawyer's law firm. Comment [2], though, cautions that the information gleaned by the lawyer during the course of rendering limited legal services is information that must be maintained confidential under the provisions of Rules 1.6 and 1.9(c).

V. OTHER RULES GOVERNING THE LAWYER-CLIENT RELATIONSHIP

A. *Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer*

Section (a) of Rule 1.2 deals with the allocation of authority between client and lawyer. Little of substance has changed, in that the rule still assigns to the client the authority to determine the objectives of representation, and to the lawyer, in consultation with the client, the authority to determine the means used to achieve those objectives. The court amended this section to include an explicit cross-reference to Rule 1.4, thereby emphasizing that consultation about means to be used is an aspect of client communications governed by the standards of Rule 1.4.

The court added a new sentence to Rule 1.2(a): "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."⁷¹ This is not a significant change inasmuch as lawyers previously had, and still have, authority under Rule 1.6(a) to reveal client confidences to the extent impliedly authorized to carry out the representation. Thus, the rule recognizes that in many situations the means to be used by the lawyer are self-evident given the nature of the representation, and no specific consultation is necessary. New Comment [2] discusses the circumstance when the lawyer and client are at odds over the means to be employed. It suggests that, in the final analysis, either the lawyer may be required to withdraw from the representation as contemplated by Rule 1.16(b)(4), or the client may force withdrawal by discharging the lawyer.⁷² Also, new Comment [3] contemplates that the lawyer and client may agree about the choice of means at the outset of representation and need not revisit the matter unless circumstances change in a material way.

Rule 1.2(a) previously allocated to the client the decision to "accept an offer

71. IND. PROF. COND. R. 1.12(a).

72. IND. PROF. COND. R. 1.16(a)(3).

of settlement.”⁷³ The new formulation of the rule allocates to the client the decision to “settle.”⁷⁴ The intent of this change is to clarify that the client has authority over decisions both to accept settlement offers and to make them.

ABA Model Rule 1.2(c) provides that a lawyer may limit the “objectives” of the representation “if the limitation is reasonable under the circumstances and the client gives informed consent.”⁷⁵ The ABA substituted the word “objectives” for the previous term “scope.” The Indiana Supreme Court’s version of Rule 1.2(c) retains the word “scope” but adds “and objectives.”⁷⁶ The meaning of our supreme court’s retention of the word “scope” is unclear, in part because it offered no comment on the point. Rule 1.5(b), dealing with attorney fees, provides that the scope of representation and the basis for or rate of the fee must be communicated to the client, “preferably in writing.” Thus, one might think of “objectives” as defining the end goals of the client in a particular representation, whereas “scope” defines the general subject matter of the representation. For example, a lawyer might accept a domestic relations matter and consider the decision to seek child custody an objective of that representation. Whereas, the fact that the lawyer is handling the domestic relations matter for a client and not the client’s claim for personal injuries arising from a recent automobile accident might be thought of as a limitation on the scope of representation.

Rule 1.2(c) also includes a new qualification on limiting the objectives and scope of representation—that any such limitation must be reasonable under the circumstances and the client must give informed consent. New Comment [7] expands upon such agreements, warning that, “an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation.”⁷⁷

Old Rule 1.2(e), dealing with the duty of the lawyer to counsel the client about any ethical limitations on the representation, has been relocated to the rule dealing with client communications and now appears as Rule 1.4(a)(5).

B. Rule 1.3 Diligence

There were no changes to the black-letter rule requiring lawyers to act with reasonable diligence and promptness in representing clients. New commentary has been added that is consistent with the supreme court’s express interest in discouraging discourteous conduct as a method of client advocacy. Comment [1] now states that the duty of diligence “does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”⁷⁸ And Comment [3] specifically states that a lawyer is not

73. IND. PROF. COND. R. 1.2(a) (1983).

74. IND. PROF. COND. R. 1.1(a) (2005).

75. MODEL RULES OF PROF’L COND. 1.2(c).

76. IND. PROF. COND. R. 1.2(c).

77. IND. PROF. COND. R. 1.2 cmt. 7.

78. IND. PROF. COND. R. 1.3 cmt. 1. *See also* Tim A. Baker, *A Survey of Professionalism and*

precluded from “agreeing to a reasonable request for a postponement that will not prejudice” the client.⁷⁹

Additional new commentary urges that lawyers control their workload so as not to compromise their obligations to existing clients.⁸⁰ Also, new Comment [5] urges sole practitioners to have a plan in place to take care of the needs of their clients in the event of the lawyer’s death or disability.⁸¹

C. Rule 1.4 Communication

Rule 1.4(a), dealing with client communications, has been expanded to include more detail about the components of keeping a client reasonably informed. The subsidiary parts include: promptly advising the client of any matter requiring the client’s informed consent; reasonably consulting with the client about the means to be employed to achieve the clients’ objectives; keeping the client reasonably informed about status; responding promptly to reasonable requests for information; and consulting with the client about ethical or legal limits on what the lawyer can do for the client. The commentary to Rule 1.4 has been expanded significantly to provide lawyers greater guidance in the area of client communications.

D. Rule 1.5 Fees

Previously, the general rule on fees required only that a lawyer’s fee be reasonable. As amended, Rule 1.5(a) now provides that, “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount of expenses.”⁸² The non-exclusive list of factors bearing on reasonableness remains the same as before, but it is now clear that a reasonableness analysis applies to expenses as well as to fees.⁸³

Whereas, Rule 1.5(b) previously required only that the basis or rate of fee be communicated to the client, amended Rule 1.5(b) also requires communication of the scope of the representation and the terms related to charging expenses to the client. As before, with the exception of contingency fees, written fee agreements are preferred, but not required. New language goes on to state explicitly that, “[a]ny changes in the basis or rate of the fee or expenses shall also be communicated to the client.”⁸⁴

Civility, 38 IND. L. REV. 1305 (2005).

79. IND. PROF. COND. R. 1.3 cmt. 3.

80. IND. PROF. COND. R. 1.3 cmt. 2.

81. The Indianapolis Bar Association has published a helpful booklet entitled, “Planning Ahead: A Plan for Protecting Your Clients in the Event of Your Disability or Death,” available at http://www.indybar.org/files/PlanningAhead2004_FINAL.pdf.

82. IND. PROF. COND. R. 1.5(a).

83. The list of factors bearing upon reasonableness are more fee than expense-focused. For some guidance on the reasonableness of expenses of representation, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-373 (1993).

84. IND. PROF. COND. R. 1.5(b). A provision in Comment [1] to Rule 1.8 that is unique to

In the past, contingency fees have been treated exceptionally in that a written fee agreement was required. Amended Rule 1.5(c) enhances the written documentation requirement for contingency fees by requiring that the written fee agreement be signed by the client. Moreover, the written contingency fee agreement must clearly advise the client of the way expenses for the matter will be handled whether or not the client prevails.

Rule 1.5(d)(1), dealing with the general prohibition against charging contingency fees in domestic relations cases, remains substantially the same. Indiana continues to depart from ABA Model Rule 1.5(d)(1) in that it expressly prohibits charging a fee that is contingent on obtaining child custody. The genesis of this provision was the ISBA's recommendation to the court. The court also retained language from old Rule 1.5(d) that recognizes the propriety of charging a contingency fee in a post-decree support collection action, so long as the client is informed in writing of alternative methods of collecting support, including, presumably, the services of county prosecutor's child support offices. Curiously, this same principle is recognized in Comment [6] to ABA Model Rule 1.5, but similar commentary does not appear in Comment [6] to Indiana Rule 1.5.

Amended Rule 1.5(e), dealing with division of fees between lawyers not in the same firm, tightens up the client consent elements. Whether a fee is to be divided proportionately to lawyer involvement or merely on the basis that the referring lawyer has agreed to assume joint responsibility for the representation, there must be a confirming writing directed to the client that documents the client's agreement to the arrangement, "including the share each lawyer will receive."⁸⁵ Previously, a written agreement was only required in cases where the division of fee was not in proportion to each lawyer's services. Also, the client did not necessarily have to be informed of the specifics of the fee division and did not need to explicitly agree. Rather, the client's consent could be inferred from failure to object. A new clarification in Comment [8] explains that the limits on fee splitting are not meant to apply when lawyers previously associated in the same firm agree to divide fees to be received in the future for work done before they disassociated.

There is added commentary that expands on the new provisions of Rule 1.5.

E. Rule 1.6 Confidentiality of Information

Historically, of all of the ABA Model Rules, Rule 1.6, governing the lawyer's obligation to keep client information confidential and exceptions thereto, probably enjoyed the fewest adherents among the states. In addition to the general review of the Rules of Professional Conduct prompted by the Ethics 2000 process, other factors came into play to prompt the ABA to re-draft much

Indiana states: "Paragraph [1.8](a) [dealing with business transactions between lawyers and clients] applies when a lawyer seeks to renegotiate the terms of the fee arrangement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the initial fee arrangement." IND. PROF. COND. R. 1.8 cmt. 1.

85. IND. PROF. COND. R. 1.5(e).

of Rule 1.6, including most prominently, the corporate finance scandals of the recent years and the enactment by Congress of the Sarbanes-Oxley Act of 2002.⁸⁶

The Indiana Supreme Court's promulgation of Rule 1.6 in a form identical to ABA Model Rule 1.6 could be a harbinger of a new role for Model Rule 1.6 as a statement of true national consensus. The supreme court's new take on the duty of client confidentiality represents its most radical departure from the recommendations of the ISBA. The ISBA's proposal to the court was that Rule 1.6 in its present form should be retained without modification.⁸⁷

The basic rule of client confidentiality, stated in Rule 1.6(a), remains substantively the same: all information from whatever source related to the representation of the client is confidential unless disclosure is impliedly authorized in order to carry out the representation or unless there is informed client consent. The exceptions in Rule 1.6(b) to the duty to honor client confidentiality are largely new material. The exceptions grant the lawyer discretion to reveal otherwise-confidential client information, but in no event is the lawyer compelled by the rule to reveal information.⁸⁸ Also, the exercise of discretion to reveal a client confidence must be, as in the past, supported by the lawyer's reasonable belief that it is necessary.

Indiana Rule 1.6(b)(1) previously permitted lawyers to reveal client information to prevent the client from committing any criminal act.⁸⁹ Under amended Rule 1.6(b)(1), the lawyer may reveal client information in order "to prevent reasonably certain death or substantial bodily harm."⁹⁰ This exception simultaneously excludes circumstances where revelation was previously permitted, and includes circumstances where revelation was previously prohibited. Whereas, in the past a lawyer was permitted to reveal client information to prevent even minor crimes, now the act to be prevented must be death or serious injury. In the past, non-criminal conduct that was likely to cause death or serious injury could not be revealed; now, it can. Previously, the lawyer could only reveal information to prevent the client from engaging in a criminal act; now the lawyer may reveal in order to prevent death or serious injury caused by the acts of anyone, including non-clients.

Old Indiana Rule 1.6(b)(2), the lawyer self-defense exception, was relocated to Rule 1.6(b)(5), but otherwise remains the same.

Two new, and related, confidentiality exceptions now appear in Rules

86. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

87. The ISBA Ethics 2000 Taksforce's recommendation to the House of Delegates was to accept ABA Model Rule 1.6 in full. That recommendation was defeated by a vote of the House of Delegates, the result of which was to propose retaining Indiana Rule 1.6 as is.

88. Under circumstances where an exception applies and a lawyer has discretion to reveal client confidences, other law (e.g., child abuse reporting statutes) or other Rules of Professional Conduct may apply to transform discretion into an obligation.

89. The old ABA formulation of the Rule 1.6(b)(1) was that revelation of client information must be to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm.

90. IND. PROF. COND. R. 1.6(b)(1).

1.6(b)(2) and (3). Rule 1.6(b)(2) permits a lawyer to reveal client information to prevent the client from committing a crime or fraud reasonably certain to result in substantial injury to another's financial interests or property "in furtherance of which the client has used or is using the lawyer's services."⁹¹ Rule 1.6(b)(3), in addition, permits a lawyer to reveal in order to mitigate or rectify such injury that has already resulted from use of the lawyer's services.⁹² Under the old Indiana regime, a lawyer would have had discretion to reveal confidences under these circumstances only if the client's future conduct was reasonably believed to be criminal in nature, and only to prevent the conduct, regardless of whether the lawyer's services were implicated in the crime. The circumstances under which Indiana lawyers may reveal are now expanded to include fraudulent, but non-criminal conduct, and also for the purpose of mitigating or rectifying completed client-caused harm, rather than merely to prevent it, but only so long as the lawyer's services were used by the client in furtherance of the crime or fraud.⁹³

Another new exception found in Rule 1.6(b)(4) to the duty to maintain confidences permits a lawyer to reveal client information to another lawyer in order to "secure legal advice about the lawyer's compliance with these Rules."⁹⁴ This is a relatively uncontroversial provision that liberates lawyers from the previous charade of seeking advice in purely hypothetical terms. As a policy matter, this exception is sound because it encourages lawyers to seek guidance in the increasingly complex areas of legal ethics and professional responsibility, to the benefit of clients, the bench, and the bar.

A final new exception in the black-letter rule appears in Rule 1.6(b)(6), permitting a lawyer to disclose client information "to comply with other law or a court order."⁹⁵ This is not, in substance, a new exception, inasmuch as the commentary to old Rule 1.6 described the circumstances under which a lawyer might be obligated to comply with a court order or legal obligation to reveal client information.⁹⁶ Revealing confidential client information under these

91. IND. PROF. COND. R. 1.6(b)(2).

92. Both of these provisions had their origin in the original recommendations of the ABA Ethics 2000 Commission, but in August 2002 the ABA House of Delegates rejected them. They were resubmitted to the ABA House by the Taskforce on Corporate Responsibility, and in February 2003, the House adopted them.

93. It is unstated here, but certainly the case, that the lawyer's services must have been unwittingly exploited by the client for fraudulent or criminal purposes. Rule 1.2(d) prohibits a lawyer from counseling or assisting a client in criminal or fraudulent conduct, so the lawyer must refuse. IND. PROF. COND. R. 1.6 cmt. 7; MODEL RULES OF PROF'L COND. 1.6 cmt. 7.

94. IND. PROF. COND. R. 1.6(b)(4).

95. IND. PROF. COND. R. 1.6(b)(6).

96. Comments [20] and [21] to old Rule 1.6 stated:

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

circumstances, especially when it is non-privileged, is probably best not described as discretionary. Once the client has declined to pursue or has exhausted any remedies for testing the limits of evidentiary privilege, the lawyer is legally obligated to reveal the client information. Thus, it is discretionary only in the theoretical sense that the lawyer could decline and risk going to jail for contempt. The old, related commentary has been replaced with a new Comment [13] that does not differ in substance from the old comment, but emphasizes the importance of the lawyer consulting with the client about the appropriateness of appealing from any order or otherwise challenging any legal obligation to reveal client information.

New Comments [16] and [18] emphasize the lawyer's responsibility to act competently to safeguard client information, including employing appropriate law office procedures to guard against inadvertent disclosures of information related to client representation. Otherwise, the commentary to Rule 1.6, while expanded to cover new exceptions and modified for clarity, does not create any material substantive changes.

The supreme court has retained, in slightly modified form, old Indiana Rule 1.6(c), for which there is no ABA Model Rule counterpart, providing that disclosure of client names and files may be impliedly authorized to carry out the duties of a person managing a disabled lawyer's client files.

F. Rule 1.13 Organization as Client

Rule 1.13 generally addresses the special character of the relationship between lawyer and client when the client is not a natural person. Because the organizational client, of necessity, interfaces with legal counsel exclusively through agents (known as "constituents" in the parlance of Rule 1.13), a challenge faced by the lawyer is identifying and properly acting on information demonstrating that a corporate agent is engaging in misconduct that puts the organization's interests at risk. The corporate finance crises of recent years have highlighted the role of counsel for organizational clients to protect the organization against harm from rogue corporate agents. With respect to publicly traded corporations, Congress responded in the form of the Sarbanes-Oxley Act of 2002,⁹⁷ and the Securities and Exchange Commission responded in the form of regulations governing, among other things, professional conduct standards for lawyers.⁹⁸ This background was the catalyst for several significant amendments

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See [old] Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

IND. PROF. COND. R. 1.6 cmt. 20, 21 (1987).

97. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

98. 17 C.F.R. pt. 205 (2003).

to Rule 1.13.

When an organization's lawyer becomes aware of a risk of substantial injury imposed upon the organization by the conduct or inaction of a corporate agent, the lawyer's primary responsibility is to make sure that the agent's superiors in the organizational hierarchy are aware of the situation in order to take appropriate action. This is sometimes called "going up the ladder." Previously, Rule 1.13(b) was less directive and more advisory, suggesting going up the ladder as but one of several alternatives. As amended, Rule 1.13(b) mandates reporting up the ladder, including, if necessary, to the highest organizational authority, if a constituent is

engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.⁹⁹

Amended Comment [6] (formerly Comment [5]) clarifies that in order for a lawyer's obligation to be triggered, the organizational agent's action or inaction must be related to the lawyer's representation to the organization. However, it is not necessary for the lawyer's services to have been used in furtherance of the agent's misconduct. This does not mean, of course, that the lawyer is deprived of discretion to report up the ladder with respect to agent wrongdoing that the lawyer knows about but that is not related to the representation.

Another new development gives unprecedented authority for the organization's lawyer to "report out" in order to protect the interests of the organization as an entity. If the lawyer for the organization reports up the ladder, and superior organizational agents ratify the misconduct or fail to take timely and appropriate action, the lawyer may report the misconduct outside of the organization, but only as necessary to prevent substantial injury to the organization.¹⁰⁰ Significantly, the lawyer is authorized to report out even though Rule 1.6 otherwise protects the information from disclosure.¹⁰¹ However, if the lawyer has been hired to advise the organization or constituents of the organization about or defend them against alleged violations of the law, that lawyer does not have authority to report out.¹⁰²

A final amendment to Rule 1.13 provides that if an organization's lawyer is fired for or withdraws after taking action authorized by Rule 1.13 to protect the organization, the now-former lawyer is obligated to inform the organization's highest authority of the discharge or withdrawal, presumably including the reasons for the same.

New Comment [4] and amended Comment [5] (formerly Comment [4]) to Rule 1.13 expand upon the lawyer's obligation to take protective action when the

99. IND. PROF. COND. R. 1.13(b).

100. IND. PROF. COND. R. 1.13(c).

101. IND. PROF. COND. R. 1.13(c)(2).

102. IND. PROF. COND. R. 1.13(d).

conduct of an organizational agent puts the organization's interests at risk, discussing, among other things, when actions short of going up the ladder may be sufficient. Other new and amended commentary expands upon the new obligations and authority granted by Rule 1.13. New material has been added to the comment dealing with lawyers for government agencies indicating that in light of the public interest involved, "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified."¹⁰³ But the comment does not say what that different balance might be.

G. Rule 1.14 Client With Diminished Capacity

Previously described as a rule dealing with clients "under a disability," this new rule now refers to clients "with diminished capacity."¹⁰⁴ No change in substance was intended, but the new nomenclature more appropriately focuses on impairments that cause some diminution in the client's capacity to direct or otherwise interact with counsel. Rule 1.14(b) has been amended to specify the circumstances under which a lawyer should take protective action for the client, including when the client "is at risk of substantial physical, financial or other harm."¹⁰⁵ Whereas Rule 1.14(b) previously spoke specifically only about seeking the appointment of a guardian, it now specifies other protective action, including "counseling with individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."¹⁰⁶ New Rule 1.14(c) addresses the problems of confidentiality associated with enlisting proxy decision-makers for the client by providing that revealing information about the client to obtain assistance to protect the client's interests is impliedly authorized under Rule 1.6(a) to carry out the representation. But, the lawyer is cautioned by the same provision that the lawyer's obligation to protect the confidentiality of a client with diminished capacity is not otherwise reduced. Expanded commentary gives somewhat more guidance to lawyers in this inevitably difficult situation.

H. Rule 1.15 Safekeeping Property

Rule 1.15 addresses the duty of lawyers who act as financial fiduciaries over funds and property of others. The Indiana Supreme Court largely retained its formulation in Rule 1.15(b), permitting lawyers to maintain a "nominal balance" of the lawyers' own funds in their trust accounts. This is in contrast to new ABA Rule 1.15(b), which provides somewhat more guidance to lawyers by indicating that the appropriate purpose for holding lawyer funds in the trust account is limited to paying bank services charges on the account. The ISBA recommended that Indiana adopt the ABA version. New Comment [2] emphasizes the necessity

103. IND. PROF. COND. R. 1.13 cmt. 9.

104. IND. PROF. COND. R. 1.14.

105. IND. PROF. COND. R. 1.14(b).

106. *Id.*

to maintain account records that clearly identify the portion of a trust account balance that constitutes the lawyer's own funds.

Following the ABA Model Rule, Rule 1.15(c) is a new provision stating that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."¹⁰⁷ This language, to an extent, codifies the supreme court's holding in the recent case of *In re Kendall*,¹⁰⁸ but also raises the question whether flat or fixed fees must be deposited into trust until earned by some method of measurement. In *Kendall*, the court took great pains to explain that it was not changing its historical position that flat fees are earned upon receipt and do not need to be deposited into trust.¹⁰⁹ In light of the recency of *Kendall* and the seeming strength of the court's views on the handling of flat fees set forth therein, it is the author's view that the court did not intend by the new language in Rule 1.15(c) to signal a change in its views on handling flat fees.

Rule 1.15(e), formerly 1.15(c), has been amended to clarify one point and reinforce another. First, old Rule 1.15(c) required a lawyer to retain funds in trust that were in dispute between the lawyer and another person until the dispute is resolved. New language in Rule 1.15(e) requires that the lawyer keep funds in trust that are in dispute between "two or more persons" until the dispute is resolved.¹¹⁰ Any confusion about whether this rule applies to situations where the lawyer holds funds that are claimed by both the client and a third party is now resolved in favor of its application.¹¹¹ New Rule 1.15(e) also includes new language emphasizing the lawyer's obligation to promptly disburse to their rightful owner money or property that is not in dispute, even when some portion is disputed.

On a related note, apart from the Ethics 2000 project, in late 2004, the supreme court announced a change to the Interest on Lawyers Trust Account (IOLTA) program to require that all lawyers who maintain pooled trust accounts participate in the IOLTA program.¹¹² The court followed up on February 9, 2005 by amending Indiana Rule of Professional Conduct 1.15¹¹³ and Indiana Admission and Discipline Rule 23, section 21,¹¹⁴ effective July 1, 2005, to

107. IND. PROF. COND. R. 1.15(c).

108. 804 N.E.2d 1152 (Ind. 2004).

109. *Id.* at 1157-58.

110. IND. PROF. COND. R. 1.15(e).

111. Indiana case law has previously applied old Rule 1.15(c) to situations where the lawyer is a stakeholder of funds in dispute between a client and a third party, often a medical provider of a personal injury client. *See, e.g., In re Allen*, 802 N.E.2d 922 (Ind. 2004).

112. Press Release, Indiana Supreme Court, Legal Aid to the Poor Gets Boost from Supreme Court: Court to Adopt Universal IOLTA Plan (Nov. 23, 2004), available at <http://www.in.gov/judiciary/press/2004/1123b.html>.

113. Order Amending Rules of Professional Conduct (Feb. 2005), available at <http://www.in.gov/judiciary/orders/rule-amendments/2005/prof-conduct-r1.15-020905.pdf>.

114. Order Amending Rules of Professional Conduct (Feb. 2005), available at [http://www.in.gov/judiciary/orders/rule-amendments/2005/admis-disc-r23\(21\)-020905.pdf](http://www.in.gov/judiciary/orders/rule-amendments/2005/admis-disc-r23(21)-020905.pdf).

implement mandatory IOLTA participation.

I. Rule 1.16 Declining or Terminating Representation

Former Rule 1.16(b)(3), pertaining to the grounds for permissive withdrawal from representation, allowed a lawyer to withdraw from representation if the client insisted on an “objective” that the lawyer found to be repugnant or “imprudent.” As amended in now-Rule 1.16(b)(4), the basis for withdrawal applies not to disagreement over objectives, but to disagreement over “actions” to be taken on the client’s behalf, and mere imprudence is no longer the standard, rather “fundamental disagreement” is.

Rule 1.16(c) has been amended to include new language stating what should be obvious: a withdrawing lawyer “must comply with applicable law requiring notice to and permission of a tribunal when terminating a representation.”¹¹⁵

J. Rule 1.17 Sale of Law Practice

Amendments to the rule governing sale of a law practice create new options for both sellers and buyers that did not exist before. Whereas previously the selling lawyer had to sell the entire law practice and cease privately practicing law, now the selling lawyer may sell an entire “area of practice,” and is only required to cease private practice in the law practice area that was sold and in the same “geographic area” as the practice was conducted.¹¹⁶ Moreover, instead of being required, as before, to sell the entire practice to a single lawyer or law firm, the selling lawyer may sell the entire practice or area of practice to one or more lawyers or law firms.

Old Rules 1.17(c)(2) and 1.17(e), which permitted client fees to be increased as a condition of the client agreeing to transfer of the file to the purchasing lawyer, have been amended to preclude any increase in fees by reason of the sale.

A complicated issue in the sale of a law practice has been the need to obtain client consent to transfer files to the purchasing lawyer. Without client consent, Rule 1.6 prohibits disclosure of client information to a purchasing lawyer. New Rule 1.17(c)(3) addresses this problem by providing that a client’s consent to transfer of the file will be presumed if the client takes no affirmative action within ninety days of receiving notice of the proposed transfer. New language in the rule goes on to provide that in the event of inability to give actual notice to a seller’s client, transfer of the file to the purchasing lawyer may occur only upon authorization of a court. In camera disclosure of file information to the court is authorized, but “only to the extent necessary to obtain an order authorizing the transfer of a file.”¹¹⁷

115. IND. PROF. COND. R. 1.16(c).

116. IND. PROF. COND. R. 1.17(a).

117. IND. PROF. COND. R. 1.17(c).

VI. OTHER LAWYER ROLES

A. Rule 2.1 Advisor

Rule 2.1 remains substantially the same, but an amendment to comment [5] now cautions lawyers that, "when a matter is likely to involve litigation, it might be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."¹¹⁸

B. Rule 2.3 Evaluation for Use by Third Persons

Previously, Indiana Rule 2.3 allowed a lawyer to provide an evaluation of a client's affairs for the use of a third person when the lawyer reasonably believed that doing so was compatible with other aspects of the client-lawyer relationship and the client consented. Following new ABA Model Rule 2.3, our court has added a new Rule 2.3(b) cautioning the lawyer who provides the evaluation that, "[w]hen the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent."¹¹⁹ Whereas previously, explicit client consent was required for all lawyer evaluations for a third person, now, explicit client consent (albeit not necessarily in writing) is only required when the evaluation is likely to materially and adversely affect the client's interests.¹²⁰ This is one application of new language in Rule 1.2(a) authorizing the lawyer to take action on behalf of the client as impliedly authorized to carry out the representation.

The new language, together with expanded commentary, especially in Comment [5], emphasizes that in most circumstances when a lawyer provides an evaluation for a third party, the client's interests are manifestly served. In harder cases, where the lawyer's truthfulness in the evaluation, required by Rule 4.1,¹²¹ will expose the client to materially adverse consequences, the client should be informed of the consequences of exposure and given the opportunity to abandon the project that generated the need for the evaluation.

C. Rule 2.4 Lawyer Serving as Third-Party Neutral

Rule 2.4 is an entirely new rule, identical to ABA Model Rule 2.4, addressing the special role lawyers often fulfill when they serve as third-party neutrals. This rule does not purport to create ethical standards for third-party

118. IND. PROF. COND. R. 2.1 cmt. 5.

119. IND. PROF. COND. R. 2.3(b).

120. The Indiana State Bar Association's recommendation did not include the provision that is now IND. PROF. COND. R. 2.3(b), and it also recommended that the existing client consent provision be removed. Had this curious, but unexplained, recommendation been followed, lawyers would have been exposed to client claims that they were deprived of a choice between an evaluation harmful to their interests or backing out of the deal that required the evaluation.

121. See also IND. PROF. COND. R. 2.3 cmt. 4.

neutrals, rather it addresses the potential for role confusion that might arise when a lawyer serves as a third-party neutral. Rule 2.4(a) emphasizes that the lawyer-neutral does not stand in a lawyer-client relationship with any of the parties to the matter. Rule 2.4(b) requires that the lawyer-neutral “inform unrepresented parties that the lawyer is not representing them.”¹²² It expands on this duty by requiring the lawyer to amplify the lawyer-neutral’s role when faced with a party who manifests a misunderstanding. Helpful commentary has been added, including reminders that Rule 1.12 governs conflicts of interest involving former lawyer-neutrals¹²³ and that Rules 3.1 and 4.1 govern the lawyer-neutral’s duty of candor.¹²⁴

VII. LAWYERS AS ADVOCATES

A. Rule 3.1 Meritorious Claims and Contentions

In a clarifying amendment, the supreme court added the words “in fact and law” to the Rule 3.1 requirement that there be a non-frivolous basis for the prosecution or defense of legal proceedings. Comment [2] was amended to emphasize the lawyer’s affirmative duty to become informed of the facts and applicable law so as to avoid filing factually or legally frivolous pleadings. Language in Comment [2] has been eliminated that suggested that the lawyer has an obligation to refrain from pursuing a matter on behalf of a client whose motive is primarily to harass or maliciously injure another. Thus, the standard for frivolousness is the objective validity of the client’s claim, not the purity of the client’s heart. New Comment [3] points out that constitutional considerations may obligate lawyers for criminal defendants to pursue matters that they otherwise should not pursue under this rule.

B. Rule 3.3 Candor Toward the Tribunal

The basic structure of Rule 3.3 remains intact, but there have been several noteworthy changes. Rule 3.3(a) previously prohibited lawyers from knowingly making false statements of material fact or law to a tribunal.¹²⁵ The court removed the materiality provision so that any knowing false statement of fact or law to a tribunal violates the rule. In addition, the court imposed an obligation on lawyers to correct prior false statements of fact or law if they were material. Inasmuch as the ethical lawyer will not knowingly make a false statement of fact or law to a tribunal in the first instance, this provision will likely have application most often to the lawyer who unwittingly makes a false statement of fact or law and later learns that it was not true when made.

Former Rule 3.3(a)(4), now Rule 3.3(a)(3), addressed the lawyer’s duties to avoid sponsoring false evidence or to remediate the submission of false evidence.

122. IND. PROF. COND. R. 2.4(b).

123. IND. PROF. COND. R. 1.12 cmt. 4.

124. IND. PROF. COND. R. 1.12 cmt. 5.

125. “Tribunal” is defined in IND. PROF. COND. R. 1.0(m).

Previously, the lawyer's duty to act arose only when the lawyer directly sponsored the false evidence. Now, the lawyer's duty to act has been expanded to also include circumstances when false evidence is elicited on cross-examination from the lawyer's client or a witness called by the lawyer.¹²⁶ When false testimony is given under these circumstances, old Rule 3.3(a)(4) required the lawyer to take "remedial measures." Drawing upon text previously found only in the commentary, amended Rule 3.3(a)(4) now includes a provision that remedial measures include "if necessary, disclosure to the tribunal."¹²⁷

The ethical prohibition against offering false testimony still applies to testimony that the lawyer "knows"¹²⁸ is false. As before, but with one caveat, the lawyer retains discretion to refuse to offer evidence the lawyer "reasonably believes"¹²⁹ is false.¹³⁰ The caveat is that the court carved out a special exception in Rule 3.3(a)(3) for criminal defense lawyers who do not have the discretion to refuse to offer the testimony of their client if the lawyer reasonably believes, but does not know, that the testimony will be false. This last point was not without controversy within the court. In a dissent, Chief Justice Shepard opined that this was a bad idea that would detract from bench and bar efforts to build "public confidence and trust in the courts and the legal profession."¹³¹ Justice Dickson joined the Chief Justice's dissent.

Additionally, a new Rule 3.3(b) was added providing that:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.¹³²

This provision broadly imposes on all counsel a duty to take action at any time the lawyer knows of criminal or fraudulent conduct that has tainted or will taint a legal proceeding.¹³³

The commentary to Rule 3.3 has been modified to a considerable extent. Comment [1] clarifies that this rule applies to proceedings ancillary to a tribunal's adjudicative function, such as depositions. Comment [5] states that it is not a violation of this rule for a lawyer to establish a fact as a predicate to thereafter proving its falsity, such as one might do prior to impeaching a witness. Comment [6] provides that a lawyer may call a witness who is inclined to testify falsely on certain matters so long as the testimony is limited to matters the lawyer

126. See IND. PROF. COND. R. 3.3 cmt. 10.

127. IND. PROF. COND. R. 3.3(a)(4).

128. "Knows" is defined in IND. PROF. COND. R. 1.0(f).

129. "Reasonably believes" is defined in IND. PROF. COND. R. 1.0(i). "Reasonably" is defined in 1.0(h), and "believes" is defined in 1.0(a).

130. IND. PROF. COND. R. 3.3(a)(3).

131. See Order Amending Rules of Professional Cond. (Sept. 2004) (Shepard, C.J., dissenting).

132. IND. PROF. COND. R. 3.3(b).

133. See IND. PROF. COND. R. 3.3 cmt. 12.

knows are not false. Comment [9] notes that the local law of some jurisdictions may permit, with judicial approval, the use of narrative testimony of a criminal defendant, even though the lawyer for that defendant knows the testimony is false.¹³⁴ Much of the old, ambivalent commentary in former Comments [7] through [10] about anticipated or completed perjury of a criminal defendant has been eliminated in favor of the rule's black letter construction requiring the lawyer to implement the criminal defendant's decision to testify in all cases except when the lawyer knows the client will testify falsely. Comment [10] addresses the lawyer's obligation to act when a client or witness called by the lawyer (including a criminal defense client) surprises the lawyer by giving testimony the lawyer knows to be false or when, before the conclusion of the proceeding, the lawyer comes to find out that a client or witness called by the lawyer gave false testimony. The comment advises that the lawyer must remonstrate with the client or witness to correct the testimony, and failing that, disclose to the tribunal, even though revelation of the information would ordinarily violate the lawyer's confidentiality duties imposed by Rule 1.6. Comment [10] goes on to caution that withdrawal from representation under these circumstances will generally be ineffective if it leaves the false testimony uncorrected. Rule 3.3(c) imposes a duty on counsel to correct known, false testimony up to the conclusion of the proceeding, and in addition to Comment [13] clarifies that the conclusion of the proceeding occurs when there is a final judgment that has not been appealed or has been affirmed on appeal. Finally, a new Comment [15] discusses when a lawyer's actions in conformity with the obligations imposed by Rule 3.3 might require that the lawyer seek leave to withdraw from representing the client.

C. Rule 3.4 Fairness to Opposing Party and Counsel

Rule 3.4 is unchanged except for additional language in Comment [3] addressing a lawyer's obligation when coming into possession of physical evidence that implicates a client in a crime. Rather than clearly articulating the lawyer's duties under that circumstance, the comment merely refers to the fact that applicable law may allow the lawyer to take control of the evidence for a reasonable period of time to conduct non-destructive testing, but may thereafter be required by applicable law to turn the evidence over to law enforcement authorities. It is probably reading too much into this comment, which follows the ABA model, to suggest that it represents an affirmative statement by the Indiana Supreme Court of law on the subject.

D. Rule 3.5 Impartiality and Decorum of the Tribunal

The general prohibition on ex parte proceedings found in Rule 3.5(b) has been amended to permit an ex parte proceeding when authorized by court order

134. While the practice in Indiana's trial courts is unknown, there is no appellate authority in this state approving the narrative testimony method of dealing with known perjury by a criminal defendant.

in addition to, as previously, when authorized by law. New language also indicates that the prohibition on ex parte communications extends throughout the duration of a legal proceeding, but not beyond. A new, related Comment [2] has been added, but contributes little of substance.

Rule 3.5(c) is entirely new material dealing with post-trial communication with jurors or prospective jurors. Such communication is ethically prohibited when prohibited by law or court order, when a juror indicates that such communications are unwelcome, or when the communication involves "misrepresentation, coercion, duress or harassment."¹³⁵ A related Comment [3] has been added.

New Comment [5] points out that the prohibition in Rule 3.5(d) against disruptive conduct before a tribunal extends, as well, to conduct during a deposition.

E. Rule 3.6 Trial Publicity

Indiana's rule governing trial publicity previously departed from ABA Model Rule 3.6 to the extent that the Indiana rule purported to apply to all lawyers, regardless of whether they were participating in the case. This broad sweep of the rule raised some interesting, but untested, questions about the constitutionality of its application to Indiana lawyers who act as media commentators on trials of great public interest. Now amended to conform to language that previously existed and still exists in ABA Model Rule 3.6, Indiana Rule 3.6 now applies only to "[a] lawyer who is participating or has participated in the investigation or litigation of a matter."¹³⁶ Another conforming amendment, necessary because of the narrower application of the amended rule, appears in Rule 3.6(e), imputing the prohibitions of Rule 3.6 to all lawyers associated in a firm or government agency with the lawyers participating directly in the case.

Previously, the rule governing trial publicity applied a "reasonable person" standard to the question of whether a lawyer should have known that a statement would be publicly disseminated, but applied an actual knowledge (subjective) and "reasonable lawyer" (objective) standard to the question of whether the public statement would have a substantial likelihood of materially prejudicing the proceeding. Rule 3.3(a) now applies the actual knowledge and "reasonable lawyer" standard to both questions.

In another amendment that represents Indiana falling into line with the pre-Ethics 2000 ABA model rules, our supreme court has added new text to Rule 3.3(c) providing that the normal limitations on trial publicity are qualified when a lawyer's client is the target of trial publicity from an outside source. Rule 3.3(c) now states:

[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's

135. IND. PROF. COND. R. 3.5(c).

136. IND. PROF. COND. R. 3.6(a).

client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.”¹³⁷

In a significant departure from ABA Model Rule 3.6, and a departure from the recommendation of the ISBA, the Indiana Supreme Court has retained as Rule 3.6(d) a list of six categories of statements that are rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding. This same list appears in Comment [5] to ABA Model Rule 3.6, but without any reference to a rebuttable presumption.

F. Rule 3.7 Lawyer as Witness

No changes of substance appear in Rule 3.7, but the commentary has been amended to add several points of emphasis. First, throughout the comments new language has been added to stress that combining the roles of advocate and witness can be prejudicial to the tribunal, as well as to the opposing party. Comment [6] has been modified and new Comment [7] added to expand on the circumstances when an advocate’s testimony as a witness may also present a disqualifying conflict of interest under Rule 1.7 or Rule 1.9, thereby triggering an imputation of the conflict of interest to the law firm that does not otherwise apply in a pure advocate-witness scenario.

G. Rule 3.8 Special Responsibilities of a Prosecutor

Two changes to Indiana Rule 3.8 bring Indiana into conformity with ABA Model Rule 3.8 as it predated the Ethics 2000 process. First, the court added Rule 3.8(e) to impose special requirements on prosecutors who seek to subpoena lawyers to testify or produce evidence before a grand jury or criminal proceeding when the evidence relates to a past or present client. The requirements are that the prosecutor must reasonably believe that the information is not privileged, the evidence is essential to the success of the matter, and there is no feasible alternative. A related Comment [4] has been added.

Second, additional language was added to Rule 3.8(f) stating that, “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”¹³⁸ A related Comment [5] has been added, including a cross-reference to the applicable provision of Rule 3.6 governing trial publicity. Also, a new Comment [6] was added to explicate the prosecutor’s special responsibility, already recognized in the black letter rule, to use reasonable measures to exercise control over the extrajudicial statements of others involved in the prosecution function, including law enforcement personnel.

137. IND. PROF. COND. R. 3.3(c).

138. IND. PROF. COND. R. 3.8(f).

In Comment [1], language was removed that previously implied that grand jury proceedings are governed by Rule 3.3(d) pertaining to ex parte proceedings. Comment [2] was amended to caution prosecutors against seeking waivers of important pretrial rights from unrepresented defendants.

H. Rule 3.9 Advocate in Nonadjudicative Proceedings

No substantive changes have been made to the text of the rule. However, the commentary has been expanded to clarify that the rule has relatively narrow application to lawyers who represent clients in official hearings or meetings, and not to representation of clients in making applications or reports to government entities or in responding to government investigations or examinations of client affairs.

VIII. LAWYER RELATIONSHIPS WITH THIRD PARTIES

A. Rule 4.1 Truthfulness in Statements to Others

Indiana's only amendment to Rule 4.1 now brings the rule into conformity with the corresponding ABA model rule as it predated the Ethics 2000 project. Rule 4.1(b) now prohibits a lawyer from knowingly "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."¹³⁹ Previously, the rule simply required disclosure of "that which is required by law to be revealed."¹⁴⁰ In both instances, the prohibitions incorporate, albeit somewhat differently, law external to the rules.

Comment [1] to Rule 4.1 has been expanded to mention that half-truths and omissions that are the equivalent of affirmative misstatements will also violate the rule requiring a lawyer to refrain from false statements of material fact or law to third persons. Comment [3], concerning the challenges faced by lawyers whose clients are engaged in criminal or fraudulent conduct, has been significantly expanded. It refers to the lawyer's duties under Rule 1.2(d) to not assist a client in criminal or fraudulent conduct, and it advises that in some circumstances, simple withdrawal from representing the client may be inadequate unless the lawyer, without violating Rule 1.6, communicates the fact of withdrawal to others and disaffirms any work product that the lawyer unwittingly supplied in furtherance of the client's crime or fraud.

B. Rule 4.2 Communication With Person Represented by Counsel

Rule 4.2, pertaining to direct communications with a represented person, has been amended in two noteworthy ways. First, the prior reference to direct communications with a represented "party" has been replaced by reference to communications with a represented "person." This incorporates into the text of

139. IND. PROF. COND. R. 4.1.

140. IND. PROF. COND. R. 4.1 (1983).

the rule a concept that previously appeared only in the commentary to the rule, and clearly extends the rule to communications with represented persons who are not formally parties to a proceeding or other matter. The ABA made this change to Model Rule 4.2 several years before the Ethics 2000 process. Second, the text of the rule, which previously allowed an exception when the communication is authorized by law, has now been expanded to include communications authorization by court order, and related Comment [6] was added.

The court made important changes to the commentary to Rule 4.2, including an articulation of the rationale for the rule in new Comment [1]. New Comment [3] addresses how a lawyer should respond when it is the represented person who initiates the contact. In that event, the lawyer is instructed to immediately terminate the contact upon learning that it is from a person who is known to be represented in connection with the matter.

Comment [4] includes clarifying language on three points: First, Rule 4.2 does not prohibit a lawyer who has no client involved in the matter in question from speaking directly with a represented person. Examples of this include when a represented client seeks a second opinion or when a represented client consults with different counsel about taking over the client's representation. Second, a lawyer may not do indirectly what the lawyer may not do directly by using an agent or other intermediary to communicate directly with a represented person. And third, in recognition of the fact that represented clients may communicate directly with each other, a lawyer is not prohibited from advising the client concerning that client's direct communications with another represented person.

Arguably, the most important change to Rule 4.2 is in Comment [7], pertaining to lawyer communications with agents of an organization known to be represented by counsel. A long-standing debate has focused on how broadly or narrowly the umbrella of organizational protection should be drawn to keep organizational agents off limits to *ex parte* contacts. Previously, organizational agents who were off limits were, "persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."¹⁴¹ A reading of the language, "whose statement may constitute an admission on the part of the organization," together with the evidence rule governing vicarious admissions by party agents, Evid. R. 801(d)(2)(D),¹⁴² led to a common understanding that the rule kept large numbers of organizational agents off limits to *ex parte* contacts. Comment [7], as amended, replaces the category of "persons having a managerial responsibility," with the category of "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has

141. IND. PROF. COND. R. 4.2 cmt. (1987).

142. IND. EVID. R. 801(d)(2)(D) states: "A statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

authority to obligate the organization with respect to the matter.”¹⁴³ And it eliminates the category of any person “whose statement may constitute an admission on the part of the organization,” thus substantially narrowing the scope of the rule’s application to represented organizations. Comment [7] also advises that consent of counsel for the organization is not required before communicating with a former organizational agent, but cautions that any authorized *ex parte* contact with a former agent must not intrude on the legal rights of the organization.

C. Rule 4.3 Dealing With Unrepresented Persons

Drawing into the text of the rule a concept that was previously found only in the comment, Rule 4.3 now provides that a lawyer must not give legal advice, other than the advice to secure counsel, to any unrepresented person whose interests are known or reasonably known to the lawyer to be in conflict with the interests of the lawyer’s client. New language in Comment [1] further provides that a lawyer dealing with an unrepresented person will usually need to identify the lawyer’s client and, when necessary to avoid misunderstanding, explain that the client’s interests are opposed to the third person’s interests. A new Comment [2] expands on the rule and explicates the distinction between dealing with neutral third persons and third persons whose interests oppose the interests of the client.

D. Rule 4.4 Respect for Rights of Third Persons

Handling receipt of misdirected, confidential communications has increasingly become a topic of contention with the development of new means of instantaneous communication technology. The precise contours of a lawyer’s ethical duties upon receiving a misdirected communication from opposing counsel have been hotly debated. Following the ABA model, the court added Rule 4.4(b) to provide that the lawyer who receives a document that is known to have been misdirected has a duty to notify the sender. New Comment [2] emphasizes that the ethical duty begins and ends with notification, and any other obligations imposed upon the receiving lawyer are questions of law, not ethics. It also notes that the term “document” includes electronic communications. New Comment [3] indicates that a lawyer’s choice to return a misdirected communication unread, while not required by the rule or law, is a decision that should be reserved to the lawyer, rather than the client, as an exercise of professional judgment.

143. IND. PROF. COND. R. 4.2 cmt. 7 (2005).

IX. THE ORGANIZATION OF THE PRACTICE OF LAW

A. Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers; Rule 5.2 Responsibilities of a Subordinate Lawyer; and Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Together, Rules 5.1 through 5.3 describe duties of lawyers who act as supervisors or who are supervised. Each of these rules has been amended to replace the narrow concept of the traditional law partnership as the paradigm for describing law firm¹⁴⁴ hierarchies with more generic language applicable, as well, to professional corporations and other limited liability entities.¹⁴⁵ Also, Comment [2] to Rule 5.1 and Comment [2] to Rule 5.3 were added to emphasize the point that lawyers who function as managers must establish internal policies for all employees designed to assure compliance with the Rules of Professional Conduct.

B. Rule 5.4 Professional Independence of a Lawyer

Rule 5.4(a)(2) previously pertained only to compensation paid to a deceased lawyer's estate by a lawyer who completes unfinished cases, allowing compensation in an amount that fairly represents the deceased lawyer's pro rata contribution to the total work on a matter. This provision has now been expanded to conform the Indiana rule to ABA model rule language predating the Ethics 2000 project. With this amendment, the rule applies to completion of the legal work of lawyers who are deceased, disabled or have disappeared, and the compensation allowed to that lawyer's representative is the purchase price negotiated pursuant to the terms of Rule 1.17, governing sale of all or part of a law practice.

ABA Model Rule 5.4(a)(4) includes a new provision authorizing a lawyer to "share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter."¹⁴⁶ The Indiana Supreme Court chose not to include that language in Indiana Rule 5.4, but did not explain the reasoning behind its rejection. The reporter's notes for the ABA Ethics 2000 Commission explained that this provision codified ABA Formal Ethics Opinion 93-374 (1993), authorizing fee sharing in certain types of pro bono litigation. However, applying as it does to any not-for-profit organization, the new language in ABA Model Rule 5.4(a)(4) creates a broader exception to the general rule against fee sharing than did that ethics opinion. The court's rejection may signal its concern that the ABA rule's exception was too

144. "Law firm" is defined in Rule 1.0(c).

145. Admission and Discipline Rule 27 regulates the use of limited liability entities by lawyers for practicing law. Similar new language was added to Rule 5.4(d)(2), the rule prohibiting non-lawyer control of law firms, to clarify that it is the concept of control that is forbidden, rather than the specific title of corporate director or officer. And Rule 5.6(a), pertaining to agreements restricting the right of a lawyer to practice law, was similarly amended to update the nomenclature.

146. MODEL RULES OF PROF'L COND. 5.4(a)(4).

broad, or perhaps that the court did not want to provide special treatment for public interest litigation. In the end, it is fruitless to speculate about the meaning of a non-event, especially when that meaning may have five different variants, one for each justice.

C. Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

Previously dealing only with the unauthorized practice of law, the ABA, and now the Indiana Supreme Court, have used Rule 5.5 and its commentary as a platform for extensive rules governing multijurisdictional practice—the practice of law by lawyers in jurisdictions where they are not regularly admitted to practice. To date, only Indiana, Arizona, Delaware, Maryland and Oregon have adopted the ABA model rule provisions on multijurisdictional practice without substantial change.¹⁴⁷

Multijurisdictional practice is a topic that is far too rich to adequately cover in a brief summary. The ABA Center for Professional Responsibility follows the issue closely and has posted much useful information on its website.¹⁴⁸ The interested reader is encouraged to visit that site for more details.

The rules governing multijurisdictional practice recognize that modern law practice often involves litigation and transactional matters implicating more than a single jurisdiction. Law practice is increasingly regional, national and even international in scope. Still, the default position of the rule remains that non-Indiana lawyers may not engage in the practice of law in Indiana unless it is authorized. This means, among other things, that, unless otherwise authorized, a non-Indiana lawyer may not “establish an office or other systematic and continuous presence” for the practice of law in Indiana.¹⁴⁹ And a non-Indiana lawyer may not hold him or herself out as being admitted to practice in Indiana.¹⁵⁰

Non-Indiana lawyers are, however, authorized to engage in certain temporary or limited activities in Indiana. Rule 5.5(c) authorizes several categories of temporary activity in Indiana. First, temporary legal services may be provided in Indiana if undertaken in association with and active participation by an Indiana lawyer.¹⁵¹ Second, a non-Indiana lawyer may provide legal services in Indiana

147. See *State Implementation of ABA Model Rules* (May 12, 2005), at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.

148. See <http://www.abanet.org/cpr/mjp-home.html> (last visited Apr. 7, 2005).

149. IND. PROF. COND. R. 5.5(b)(1). The Indiana Supreme Court added the following sentence to Comment [4] to Rule 5.5 that does not appear in the comments to Model Rule 5.5: “For example, advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as systematic and continuous presence.” IND. PROF. COND. R. 5.5 cmt. 4.

150. IND. PROF. COND. R. 5.5(b)(2).

151. IND. PROF. COND. R. 5.5(c)(1). Indiana Admission and Discipline Rule 3 requires pro hac vice admission when a matter is before a tribunal.

that are in or reasonably related to a pending or potential legal proceeding, arbitration or other alternative dispute resolution matter in Indiana or elsewhere in which the non-Indiana lawyer is authorized or reasonably expects to be authorized to appear.¹⁵² One example of the application of this provision is that a foreign lawyer may enter Indiana in order to take a deposition of an Indiana witness in connection with litigation pending in the foreign lawyer's home state, without associating with Indiana counsel. And third, a non-Indiana lawyer may generally provide temporary legal services in Indiana that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."¹⁵³

Two categories of foreign lawyers are also authorized to practice law on an indefinite, albeit limited, basis in Indiana. First, a foreign lawyer in good standing may provide legal services in Indiana to his or her employer or an organizational affiliate of his or her employer so long as the services do not pertain to a matter in a forum that requires pro hac vice admission.¹⁵⁴ Thus in-house counsel may be present in and provide legal services to an employer without being regularly admitted to practice in Indiana. Comment [17] reminds in-house counsel that Admission and Discipline Rule 6, sections 2 through 5, dealing with business counsel licensure, will apply to in-house counsel who establishes an office or other systematic presence in Indiana. Second, foreign lawyers are generally permitted to practice law in Indiana to the extent authorized by federal law or other Indiana law.¹⁵⁵ So for example, by virtue of the supremacy of federal law, a foreign lawyer may engage in an Indiana law practice that is limited to the federally preempted field of immigration and naturalization law.

Extensive new commentary explicates the multijurisdictional practice provisions.

X. PUBLIC SERVICE RESPONSIBILITIES OF LAWYERS: RULE 6.1 PRO BONO PUBLICO SERVICE

The supreme court chose to retain its existing rule on pro bono services rather than adopt ABA Model Rule 6.1. As in the past, neither rule imposes an obligation to engage in pro bono activities, although it is strongly encouraged.¹⁵⁶

152. IND. PROF. COND. R. 5.5(c)(2)-(3).

153. IND. PROF. COND. R. 5.5(c)(4).

154. IND. PROF. COND. R. 5.5(d)(1).

155. IND. PROF. COND. R. 5.5(d)(1).

156. The old rule governing Indiana's voluntary attorney pro bono plan, Rule 6.5, remains the same, but has been renumbered as Rule 6.6.

XI. INFORMATION ABOUT LEGAL SERVICES: RULE 7.2 PUBLICITY AND ADVERTISING; RULE 7.3 RECOMMENDATION OR SOLICITATION OF PROFESSIONAL EMPLOYMENT; RULE 7.4 COMMUNICATION OF SPECIALTY PRACTICE; AND RULE 7.5 PROFESSIONAL NOTICES, LETTERHEADS, OFFICES, AND LAW LISTS

Notwithstanding the supreme court's inclination to follow the ABA model rules, in the area of publicity, advertising, and solicitation, the court rejected the corresponding ABA model rules and chose to retain its existing rules with minor modifications. Aside from renumbering the applicable rules,¹⁵⁷ the amendments largely take account of new communications technologies that did not exist or were not in common use when the Indiana Rules of Professional Conduct were first promulgated. Thus, Rule 7.3(a), prohibiting in-person solicitation, now includes "real-time electronic contact" as a prohibited method of direct solicitation; and Rule 7.3(c), governing targeted solicitations, includes electronic communications among the methods of communication regulated by that provision.

Another change to the rules on lawyer publicity includes a new exception in Rule 7.3(a) allowing in-person solicitation when the solicited person has a "family or prior professional relationship with the lawyer."¹⁵⁸ As in the past, targeted solicitation communications must be filed with the Disciplinary Commission at or prior to dissemination. But at the Commission's urging, the court included a fifty-dollar filing fee for each filing with the Commission. Because the use of targeted solicitations is pure economic activity, the filing fee was added in order to impose the Commission's administrative costs on the lawyers who choose to engage in that activity rather than have non-users subsidize those costs through their annual registration fees.

Rule 7.4 generally restricts the ability of lawyers to publicize that they specialize in a particular field of law unless they are certified as specialists under Indiana Admission and Discipline Rule 30. The court included an exception for lawyers admitted to practice before the United States Patent and Trademark Office and lawyers engaged in admiralty practice.¹⁵⁹

XII. PROFESSIONAL INTEGRITY

A. Rule 8.3 Reporting Professional Misconduct

Rule 8.3, governing the duty to report known, serious misconduct of another lawyer, remains substantially the same, with one exception. Unlike ABA Model Rule 8.3, Indiana Rule 8.3(c) now contains a reporting exemption for lawyers who obtain information about the misconduct "while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association

157. Former Rule 7.1 became Rule 7.2, former Rule 7.2 became new Rule 7.5, and Rule 7.1 was reserved for future use.

158. IND. PROF. COND. R. 7.3(a).

159. IND. PROF. COND. R. 7.4(c).

committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.”¹⁶⁰

B. Rule 8.4 Misconduct

Following the ABA model rule, the court amended Rule 8.4(e) by adding to the prohibition against stating or implying an ability to improperly influence a public agency or official an additional prohibition against stating or implying an ability to achieve results by illegal means or means that violate the Rules of Professional Conduct.

Indiana Rule 8.4(g) prohibits lawyers from engaging in conduct as lawyers that manifests bias or prejudice. This provision, which pre-dates Ethics 2000, was based on an ABA provision that appears in the comments to ABA Model Rule 8.4, not in its black-letter text. Comment [3] to ABA Model Rule 8.4 also provided that, “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.”¹⁶¹ Amended Indiana Rule 8.4(g) now includes this identical language in the text of the rule.

C. Rule 8.5 Disciplinary Authority; Choice of Law

The same influences that prompted the multijurisdictional practice amendments to Rule 5.5 were also the catalyst for amendments to Rule 8.5, establishing criteria for determining when and to whom Indiana’s disciplinary rules will apply. Rule 8.5(a) describes the scope of the court’s disciplinary jurisdiction, and includes any lawyer admitted to practice in Indiana, no matter where the conduct occurs, as well as any non-Indiana lawyer providing or offering to provide legal services in Indiana. The rule notes that application of this principal might simultaneously subject a lawyer to disciplinary authority in more than one jurisdiction.

Rule 8.5(b) establishes choice of law standards. If the conduct in question is in connection with a proceeding before a tribunal, the rules of the jurisdiction where the tribunal sits will apply.¹⁶² For conduct that is not in connection with such a proceeding, the rules of the jurisdiction where the conduct occurred or where the conduct has predominant effect will apply.¹⁶³ Indiana Rule 8.5(b)(2) differs from ABA Model Rule 8.5(b)(2) in that the ABA model rule includes the following safe harbor, whereas the Indiana rule does not: “A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”¹⁶⁴ Indiana’s commentary to Rule 8.5 deviates from the commentary to ABA Model Rule 8.5 in parallel with this difference, all the

160. IND. PROF. COND. R. 8.3(c).

161. IND. PROF. COND. R. 8.4 cmt. 3.

162. IND. PROF. COND. R. 8.5(b)(1).

163. IND. PROF. COND. R. 8.5(b)(2).

164. MODEL RULES OF PROF’L COND. 8.5(b)(2).

more reason for the states to have professional conduct rules that are as similar as possible.

XIII. SUMMARY

The amended Indiana Rules of Professional Conduct contain new provisions that will, to some degree, affect the professional life of every Indiana lawyer. Most of the changes are subtle, with the foundations and most of the superstructure of the old rules intact. The end result reflects the time, energy, and thoughtfulness of thousands of lawyers and judges nationally and in Indiana. While a point here or there might be debatable, the final product is clearly an improvement over that which came before—which was the goal when the ABA initiated the Ethics 2000 project in 1997.

XIV. CASE UPDATE

A. Attorney Fees

As noted in prior surveys on professional responsibility, the Indiana Supreme Court has been very active over the past several years in developing a body of cases that address a wide variety of ethical problems surrounding the charging and collection of legal fees. Recent cases include *In re Hefron*,¹⁶⁵ *In re Hailey*,¹⁶⁶ and *In re Kendall*.¹⁶⁷ Not long after *Kendall*, the supreme court decided another disciplinary action covering an important fee-related issue for the practicing bar: renegotiating the fee mid-representation. In *In re Breunig*,¹⁶⁸ the court was presented with a settlement proposal between the respondent lawyer and the Disciplinary Commission that resolved the case with a sixty-day suspension from the practice of law.¹⁶⁹ The first count of misconduct presented by the Disciplinary Commission involved the respondent's conflict of interest in protecting his fee claim against the client. Although the violation agreed to sounds in conflict of interest analysis, the facts grow out of the respondent's actions involving his fee.

In *Breunig*, the lawyer represented a client in connection with a marriage dissolution matter that took a considerable amount of time and involved litigation in both the states of Indiana and Florida. After about two years, the lawyer sent the client a bill for approximately \$385,000 for almost 2,000 hours of work and extensive expenses that included paying for the lawyers in Florida. Thereafter, the client paid about \$150,000 or about thirty-seven percent of the bill. At a later meeting, the lawyer obtained the client's signature on a promissory note for the

165. 771 N.E.2d 1157 (Ind. 2002).

166. 792 N.E.2d 851 (Ind. 2003).

167. 804 N.E.2d 1152 (Ind. 2004).

168. 810 N.E.2d 716 (Ind. 2004).

169. Count II of *Breunig* involved the lawyer's short-term romantic and sexual relationship with his client. This is, of course, serious misconduct in its own right but not the focus of consideration for this survey.

outstanding balance of the bill with the note's maturity date being the time of a property distribution and the accrual of eight percent interest on the outstanding balance. The respondent lawyer also obtained the client's signature on a writing termed an "assignment" that would assign to the respondent any outstanding balance from any property division settlement. In engaging in this negotiated resolution of his fee claim, he did not provide the client with a written disclosure of the terms of the transaction, tell the client to seek the advice of independent counsel or obtain her written consent.¹⁷⁰ All of these are terms required under Rule 1.8(a).¹⁷¹

Rule 1.8 is entitled, "Conflict of Interest: Prohibited Transactions"¹⁷² and the explanatory Comment for subdivision (a) is entitled "Transactions Between Client and Lawyer." Like the rest of the conflict of interest rules, this provision is clearly intended to protect the client from overreaching by the lawyer. The lawyer must explain the transaction in writing in a manner in which the client can understand what is being done. The client's consent must be obtained in writing as well. Under the 2005 version of the rule, the client's consent must be "informed consent." The Comment generally makes clear that this rule does not apply to ordinary transactions between the lawyer and the client where, for example, the lawyer uses the client's services for health care or real estate transfers. In those circumstances, the lawyer does not have any advantage over the client or other consumers of the client's products or services. The Comment to the revised rule also makes it plain that this rule does not necessarily apply to the lawyer's fee agreement with the client in the first instance. Hence, the problem in *Breunig* is highlighted. There is nothing in the disciplinary case to suggest that there was any problem with the fee agreement as it began and existed for at least a couple of years during the representation. The problematic transaction for the lawyer occurred when he took a promissory note from the client that was not contemplated by the original fee deal with the client. The promissory note was at interest and thereby increased the lawyer's compensation overall. One could argue that the client got a benefit from the deal as well: she did not have to make full payment immediately and did not have to find a new

170. *In re Breunig*, 810 N.E.2d at 716-17.

171. IND. PROF. COND. R. 1.8(a) provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

172. The Ethics 2000 amendments described earlier in this article changed the rule's title to "Conflict of Interest: Current Clients: Specific Rules" and the title to the Comment to "Business Transactions Between Client and Lawyer."

lawyer due to the respondent lawyer's withdrawal for the non-payment of his fee. These are true and valid observations that show that benefits inured to both sides of this transaction. The problem, despite the apparent fairness of the deal, is that the lawyer had an obligation to refer the client to independent counsel, which he did not do.¹⁷³ The Restatement gives a clear explanation of the rationale for the specific requirements for engaging in this conduct. One of the dangers is that the lawyer's skill and training will be used to arrange the form of the transaction such that his deeds and advice might work to the lawyer's interests rather than advancing those of the client. Proving such overreaching can be difficult so the law does not require such a showing on the part of the client.¹⁷⁴ Although all of this sounds in conflict of interest analysis, the focus is again on the calculation of fee charged and the means by which the lawyer tries to collect it. A clearer example of this overreaching is found in the *Hefron*¹⁷⁵ case mentioned earlier. For this and other misconduct, the lawyer in *Breunig* received a sixty-day suspension from the practice.¹⁷⁶

B. Misconduct by Prosecutors

Disciplinary action against a prosecuting attorney or a deputy prosecutor is generally quite rare. This is true even though prosecutors are held to a higher ethical standard than other members of the bar.¹⁷⁷ Most commonly, these kinds of cases involve some kind of alcohol related incident.¹⁷⁸ Occasionally, however, the misconduct is more significant. In one fairly recent case, an elected prosecutor was disbarred for deliberate and ongoing misconduct.¹⁷⁹ Conduct that aberrant, of course, is the exception rather than the rule.

During the relevant period to this work, the respondent lawyer in *In re Ryan*,¹⁸⁰ served as a part-time deputy prosecuting attorney in the Goshen City

173. RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS (2000), §126, cmt. (a) notes that in civil actions and disciplinary actions involving this rule, the lawyer has the burden of persuading the tribunal that the transaction was fair and reasonable and that the client was adequately informed.

174. *Id.* cmt. (b).

175. *Hefron*, 771 N.E.2d at 1162-63.

176. *In re Breunig*, 810 N.E.2d at 717.

177. See *In re Oliver*, 493 N.E.2d 1237 (Ind. 1986). The respondent lawyer was involved in a one-car crash and was charged with driving while intoxicated. At the time of his arrest, he was a special prosecutor in one case. In imposing a public reprimand on the lawyer, the supreme court noted, "[a]s officers charged with administration of the law, their own behavior has the capacity to bolster or damage public esteem for the system different than that of attorneys otherwise in practice." *Id.* at 1242.

178. See, e.g., *In re Schenk*, 612 N.E.2d 1059 (Ind. 1993); *In re Seat*, 588 N.E.2d 1262 (Ind. 1992).

179. *In re Riddle*, 700 N.E.2d 788 (Ind. 1998) (Extensive misconduct, including the sham hiring of a deputy prosecutor employed only to run his private practice law office, warranted disbarment.).

180. 824 N.E.2d 687 (Ind. 2005).

Court.¹⁸¹ Based on his work as a prosecutor, he observed that many Latino motorists were being charged in his court with driving without licenses¹⁸² or driving without a license in possession.¹⁸³ The court generally permitted the state to reduce the original charge to a lesser charge or an ordinance violation if the defendant provided proof of a valid driver's license.¹⁸⁴ The lawyer and his wife started a business called Legal Licensing Limited, hereinafter referred to as LLL. The respondent lawyer's wife was the only employee of LLL and for \$275, LLL would obtain international driver's licenses for their customers. The city court's Spanish language interpreter received \$20 for each customer she referred to LLL.¹⁸⁵ The interpreter would deliver the customer's initial \$100 payment to the lawyer, often near the court. Once the driver's license was obtained, it was exchanged with the defendant for the balance of the fee. The defendant would then present the license to the respondent lawyer in open court and, in return, the lawyer would amend the initial charge to a lesser charge. He collected over \$20,000 in fees from about 150 customers during the 14 months or so that the business operated. In early 2002 he met with the elected prosecutor about his involvement in LLL and resigned his position immediately thereafter.¹⁸⁶

The supreme court found that the respondent lawyer violated one of the conflict of interest rules, Rule 1.7(b).¹⁸⁷ It held that the lawyer's own interest in operating and profiting from LLL was in direct conflict with the lawyer's duties as a deputy prosecutor.¹⁸⁸ When applied to the terms of the rule, it is evident that the State of Indiana's interests were coming in second place to the lawyer's interest in keeping his sideline going. In its opinion, the court dwelt on the lawyer's failure to not just do his duty of loyalty to the State of Indiana, but his failure to even recognize what that duty was. The court used the opinion to remind lawyers in general and prosecutors in particular that deputy prosecutors serve a public trust to enforce the law and the state is entitled to that lawyer's undivided loyalty. Conduct like that at issue in this case breeds mistrust and lack

181. Goshen is in Elkhart County in northern Indiana.

182. A class "C" misdemeanor.

183. A class "C" infraction.

184. 824 N.E.2d at 688.

185. *Id* at 689.

186. *Id*.

187. The rule in effect at the time provided:

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

188. *Ryan*, 824 N.E.2d at 689.

of confidence in the judicial system.

He used his position as a deputy prosecutor to obtain a significant financial windfall for himself. By serving both as prosecutor and as intermediary for those seeking a favorable plea agreement, respondent gave the impression that justice could be bought.¹⁸⁹

The court acknowledged that the lawyer had admitted all the requisite facts, but expressed some level of dismay at his perceived "failure to grasp the magnitude of his misconduct."¹⁹⁰ He attached a paper to his affidavit consenting to discipline that spoke to the validity of the international driver's licenses and their propriety in the context of plea bargaining cases. The court thereafter pointed out to him that a lawyer cannot ethically prosecute a criminal defendant while simultaneously privately providing that defendant with a business service to help him obtain a more favorable result in his criminal case.¹⁹¹ For that misconduct, the lawyer received a nine month suspension from the practice of law with the opportunity to petition for reinstatement to the bar thereafter.¹⁹²

Use of the governmental office of prosecutor to facilitate a lawyer's private endeavor is, indeed, rare conduct. The last such case was *In re Riddle*¹⁹³ in 1998.

The message that should be obvious from this case is that prosecutors (and, in particular, part-time prosecutors and deputies) can have business endeavors outside their role as State officials, but those endeavors must not permit them to profit at the expense of the State's interests. The closer these outside business endeavors are to the heart of the prosecutor's work in the criminal justice system, the stronger the inference that the conduct might be problematic as being in conflict with the lawyer's oath to the State of Indiana. Again, this kind of conduct is rare, but not unheard of.

C. Judicial Misconduct

In a judicial discipline case, the supreme court removed a sitting Lake Superior Court judge from the bench for misconduct that included, inter alia, harming litigants in her court by failing to issue timely orders in their cases. In *In re Kouros*,¹⁹⁴ the judge had been appointed to the bench in 1997. Between 1999 and 2001, she had pronounced sentence orally in at least thirty-five felony cases in which she failed to issue written sentencing orders promptly thereafter.¹⁹⁵ In five cases she delayed the orders by five to six months. In one

189. *Id.*

190. *Id.*

191. *Id.* at 690.

192. IND. ADMIS. DISC. R. 23, § 3(a) provides, in essence, that any lawyer suspended for six months or more must petition the supreme court and demonstrate their fitness to return to the practice of law.

193. 700 N.E.2d 788 (Ind. 1998).

194. 816 N.E.2d 21 (Ind. 2004).

195. *Id.* at 23.

case, she delayed by ten months. In three cases, she delayed the orders by fourteen or fifteen months and in one case, she delayed the order by twenty-seven months!¹⁹⁶ In 2001, the supreme court directed the other Lake County judges to review the delays and ascertain the scope of the problem. If they determined that a real problem existed, they were to issue a plan to correct it.¹⁹⁷ The reviewing judges reported that there were 330 files in the respondent Judge's office awaiting orders and subsequent return to the clerk's office. Those judges concluded that the respondent judge had initiated a new method for transcribing and processing docket entries contemporaneously with the making of the entries in open court and the backlog should not occur in future cases. Such transcription equipment was not installed until almost two years later.¹⁹⁸ Despite repeated communications from the counsel for the Commission on Judicial Qualifications, the respondent judge did not correct the problems and in October 2002, the supreme court issued an order instructing the Director of Indiana's Division of State Court Administration ("DCSA") to monitor the respondent judge's case processing.¹⁹⁹ Needless to say, the situation continued unabated and, in April 2003, DCSA staff visited the respondent's office and discovered 171 one cases checked out from the clerk's office and languishing in the respondent's judge's office. The judge was temporarily removed from office and a judge pro tempore was appointed to serve in her stead.²⁰⁰ A formal judicial disciplinary proceeding was begun shortly thereafter charging the respondent judge with more than seventy counts of misconduct under the Code of Judicial Conduct.²⁰¹ The matter was heard by three Masters in April 2004 and the supreme court's opinion removing the judge from office was entered October 12, 2004.

In its opinion, the supreme court acknowledged that the respondent judge did not involve any issues of moral turpitude or misuse of her judicial power for personal gain. The court also examined her extensive physical problems and noted she was also remorseful and apologized.²⁰² The court gave long consideration to the factors that weighed against the judge, however. She was no novice to the bench and had been given opportunity after opportunity to correct the problem and improve her methods of judicial administration. These included repeated warnings about the problems she was causing.²⁰³ In the end, the supreme court was cautious to express that judicial disciplinary proceedings are not designed merely to punish wrongdoing, but they ensure judges are fit for judicial duty, maintain public confidence in the administration of justice and preserve the integrity and independence of the judiciary. In ordering her removal

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 24.

200. *Id.* at 26.

201. *Id.* at 282-9.

202. *Id.* at 30.

203. *Id.*

from office, the court postponed the effective date of the removal to permit her to receive judicial pension benefits when she reaches the appropriate age.²⁰⁴

Features of particular note in this case unrelated to the attention-getting nature of the misconduct overall include the court's Job-like efforts to patiently permit this particular court the opportunity to get itself back on track. The use of other local Lake County judges to monitor and assist the respondent judge to develop methods for ensuring the proper administration of cases moving through the court including repeated admonitions from the Commission on Judicial Qualifications.²⁰⁵ Even after a temporary suspension, the judge was permitted back on the bench for a final try and getting the management issue right. Despite what appeared to be profound problems with the court's file administration system, the supreme court went to remarkable lengths to reduce the disruption within the county's judicial system.

204. *Id.* at 31.

205. *Id.* at 23. One letter advised her that although the Commission's inquiry had been closed without prejudice, it would be reopened if her organizational problems recurred and she should, "maintain scrupulous attention to the processing of cases and . . . not allow your office to appear to be in disarray." Such disarray, she was warned, left the impression that the court's docket is in a similar state.