

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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I. RE-EXAMINATION OF REGULATED ATTORNEY'S FEES

In this past year, the Indiana Supreme Court reconsidered its analysis of attorney's fees in medical malpractice cases in *In re Stephens*.¹ Prior to this reconsideration, the court looked at the issue in a 2006 decision that stated that the lawyer in *Stephens* took an unreasonable fee in a medical malpractice case.² After the court made its decision in *Stephens I*, the Indiana Trial Lawyers Association ("ITLA") asked the court to reconsider its decision in a motion for leave to intervene, which the court granted. ITLA's motion to intervene led to the court's 2007 decision in *Stephens*.³

The issue that ITLA wanted the court to reconsider in *Stephens II* is whether a lawyer representing a client in a medical malpractice case is permitted to use a sliding-scale method of calculating fees without violating the Indiana Rules of Professional Conduct ("Rule" or "Rules"). The Indiana Medical Malpractice Act⁴ ("Medical Malpractice Act"), which applies to acts of malpractice that did not occur before July 1, 1975,⁵ limits a plaintiff's recovery to \$1,250,000 for an occurrence of malpractice after June 30, 1999.⁶ A qualified health care provider's liability under the Medical Malpractice Act is limited to the amount of \$250,000.⁷ If the plaintiff receives a judgment or settlement in excess of the limitation on a qualified health care provider's liability, the plaintiff can recover the excess amount from the Patient Compensation Fund ("Fund").⁸ Because of the limitations on the plaintiff's recovery, the Medical Malpractice Act limits attorney's fees for a recovery from the Fund to 15%.⁹ However, the Medical Malpractice Act does not put a limitation on attorney's fees from the portion of recovery from the qualified health care provider.¹⁰

After the Indiana legislature adopted the Medical Malpractice Act, many medical malpractice lawyers began using a sliding-scale method of calculating their fees so that they could receive a combined fee from both the health care

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1. 867 N.E.2d 148 (Ind. 2007).

2. 851 N.E.2d 1256 (Ind. 2006) (*Stephens I*).

3. 867 N.E.2d 148 (Ind. 2007) (*Stephens II*).

4. See IND. CODE §§ 34-18-1-1 to -10-10 (2004).

5. *Id.* § 34-18-1-1.

6. *Id.* § 34-18-14-3(a)(3). Before July 1, 1999, the plaintiff's recovery was limited to \$750,000. *Id.*

7. *Id.* § 34-18-14-3(b). Before July 1, 1999, a qualified health care provider's liability was limited to \$100,000. *Id.*

8. *Id.* § 34-18-14-3(c).

9. *Id.* § 34-18-18-1.

10. See also *In re Stephens (Stephens I)*, 851 N.E.2d 1256, 1257 (Ind. 2006).

provider's portion of recovery and the Fund that would result in a 35% total fee. Medical malpractice lawyers calculated this sliding-scale fee by taking 15% from the Fund portion of recovery and a percentage from the health care provider portion, which could potentially include 100% of the health care provider portion, to make the total fee equal to 35%.¹¹ In *Stephens*, the Commission took the position that this type of sliding scale fee arrangement violated Rule 1.5(a)¹² because the Commission argued that the fee on the recovery from the health care provider should be limited to a reasonable fee.¹³

As it began, the *Stephens* case was a non-descript fee case in which the respondent was charged with various violations of the Rules for his fee arrangement in a medical malpractice case.¹⁴ In May 2001, the respondent entered into a fee agreement with his client, in which they agreed that the respondent's fees would be calculated using a sliding-scale fee arrangement:

The law limits the Attorneys' fees to 15% of all sums recovered from the Patient Compensation Fund, though it does not restrict the amount of fees taken from the first \$100,000 of any recovery from the health care providers. The Client(s) agree to pay to the attorneys as much of the first \$100,000 obtained from the health care providers as is necessary to equal one-third of the total recovery.¹⁵

In *Stephens I*, the court held that the respondent violated Rule 1.5(a) by attempting to circumvent the Medical Malpractice Act's limitation on attorney's

11. *In re Stephens (Stephens II)*, 867 N.E.2d 148, 154 (Ind. 2007).

12. IND. PROF. CONDUCT R. 1.5(a) provides:

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

13. *Stephens II*, 867 N.E.2d at 151-52.

14. *Stephens I*, 851 N.E.2d at 1257-58. The court in *Stephens I* found two violations of Rule 1.5(a) by the respondent by attempting to circumvent the Medical Malpractice Act's limitation on attorney fees and by having a non-refundable retainer provision in his contract with his client. *Id.* at 1258. The court in *Stephens I* also found the respondent violated Rule 1.8(a) by renegotiating his fee agreement with his client in an improper manner. *Id.*

15. *Id.* at 1257.

fees from the Fund.¹⁶ The court reasoned:

As noted in respondent's fee agreement, the medical malpractice statutes of this state limit a plaintiff's attorney's fees to fifteen percent (15%) of any recovery from the Patient Compensation Fund. Respondent's fee agreement also suggested that there was no restriction on the amount of fees taken from the first \$100,000 recovered from a health care provider. ([Indiana Code section] 34-18-14-3 limited the liability of qualified healthcare providers to \$100,000. This limitation has now been increased to \$250,000). To avoid the 15% cap on recoveries over \$100,000, respondent's agreement required that he receive from the first \$100,000 recovered a fee equal to one-third of the total recovery (healthcare provider contribution plus Patient Compensation Fund contribution). This had the potential of resulting in the entire first \$100,000 recovered going to respondent.

While the medical malpractice statutes do not restrict the amount of attorney fees taken from the first \$100,000 recovered, our Rules of Professional Conduct do set standards for attorney fees. Respondent's agreement violated Ind[iana] Professional Conduct Rule 1.5(a), which requires that a lawyer's fee shall be reasonable. An attempt to circumvent the statute limiting the recovery allowed from the Fund is not proper. The limitation on fees imposed by [Indiana Code section] 34-18-18-1 cannot be overcome by merely manipulating the source of the fees. Regardless of the source of the fee, an attorney's compensation must still meet the reasonableness requirements of [Rule] 1.5(a) and the 15% limitation of [Indiana Code section] 34-18-18-1.¹⁷

The court concluded in *Stephens I* that fees in medical malpractice cases must meet the reasonableness requirements of Rule 1.5(a) and the 15% limitation under the Medical Malpractice Act.¹⁸ This conclusion is consistent with its other decisions involving reasonable fees when the fees are regulated by statute.¹⁹

The *Stephens I* court looked to its reasoning in *In re Benjamin*²⁰ as support for its opinion that the sliding-scale fee arrangement is unreasonable under Rule 1.5(a). In *Benjamin*, the lawyer represented a client in a medical malpractice case. The lawyer inherited this medical malpractice case from a former partner of his firm and, along with the case, inherited the fee agreement.²¹ This written fee agreement called for the lawyer to receive "40% of total recovery not to

16. *Id.* at 1257-58.

17. *Id.* (citations omitted).

18. *Id.*

19. See *In re Geller*, 777 N.E.2d 1099, 1099 (Ind. 2002) (holding that attorney's fees are unreasonable when the fees exceed the amount permitted under the regulations of the worker's compensation act); *In re Maley*, 674 N.E.2d 544, 546 (Ind. 1996) (same).

20. 718 N.E.2d 1111 (Ind. 1999), overruled by *In re Stephens (Stephens II)*, 867 N.E.2d 148 (Ind. 2007).

21. *Id.* at 1112.

exceed attorney fee of 200,00 (sic).”²² In the summer of 1995, the client settled with the medical provider wherein the medical provider would pay its maximum liability of \$100,000 under the Medical Malpractice Act in a structured settlement with an initial payment of \$50,000 and the remaining \$50,000 to be paid over a period of years.²³ The lawyer in *Benjamin* took 40% from the gross settlement of \$100,000 when he received payment of the \$50,000 from the medical provider.²⁴

After settling with the medical provider for the full amount of the medical provider’s liability under the Medical Malpractice Act, the client in *Benjamin* was then allowed to file a petition with the Fund to recover damages in excess of those for which the medical provider was liable.²⁵ In January 1996, the client settled with the Fund for the amount of \$335,000.²⁶ After he received the settlement check, the lawyer in *Benjamin* retained 40% of the recovery from the Fund as his fee.²⁷ Under the 15% fee limitation for lawyers under the Medical Malpractice Act, the lawyer was entitled to a fee of \$50,250.²⁸

The client in *Benjamin* challenged the lawyer’s fee of 40% of the recovery from the Fund and requested that the lawyer retain only 15% of the Fund portion.²⁹ The lawyer in *Benjamin* proposed to reduce his fee by using a sliding-scale fee arrangement set out by the former partner under which the lawyer would receive 100% of the medical provider’s portion of the settlement and 15% of the Fund portion.³⁰ Under the sliding-scale fee calculation, the lawyer in *Benjamin* would have received a total of \$150,250 as his total fee or 34.5% of the total recovery.³¹ The client rejected the lawyer’s offer to reduce the fee in this manner.³²

Citing *In re Maley*,³³ the *Benjamin* court held that the lawyer’s fee agreement, which called for fees in excess of the limits on lawyer’s fees regulated by other law, was unreasonable under Rule 1.5(a).³⁴ Beyond its narrow

22. *Id.*

23. *Id.*

24. *Id.* The court in the *Benjamin* case found that the respondent violated Rule 1.5(a) by retaining his full fee of forty percent (40%) of the gross settlement of \$100,000 from the first payment of \$50,000 from the medical provider. *Id.* at 1113.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* The court held that the lawyer in *Benjamin* violated Rule 1.5(a) by charging an unreasonable fee in excess of the 15% limit on lawyer’s fees from the Fund under the Indiana Medical Malpractice Act. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1112.

33. 674 N.E.2d 544, 546 (Ind. 1996) (holding fees in excess of those permitted by the worker’s compensation regulations are unreasonable under Rule 1.5(a)).

34. *In re Benjamin*, 718 N.E.2d at 1112-13.

holding that attorney's fees in excess of regulated limits are unreasonable, the court took time to express its displeasure at the proposed sliding-scale method of calculating fees that the lawyer in *Benjamin* offered to his client to reduce his fees.³⁵ In dicta, the court criticized this method of calculating fees:

[T]he respondent [in *Benjamin*] attempted to retain as his fee \$100,000 of the \$100,000 settlement from the defendant hospital [medical provider], in addition to 15% of the recovery from the Indiana Patient Compensation Fund. We find that approach to be an attempt to circumvent the statute limiting the recovery allowed from the Fund. By retaining as his fee an unreasonable portion of the recovery from the settlement with the hospital [medical provider], the respondent would have effectively offset the 15% limitation on his fee from the Fund recovery.³⁶

In *Maley*, the respondent represented a client in a worker's compensation case.³⁷ Attorney's fees in worker's compensation cases, like medical malpractice cases, are regulated.³⁸ However, in worker's compensation cases, the lawyer's fees are regulated, not by statute, but by the Indiana Administrative Code.³⁹ The Worker's Compensation Board, at the time that the lawyer in *Maley* entered into his contract with his client, limited lawyer's fees in worker's compensation cases to the following schedule:

A minimum of \$100.00 and upon the first \$10,000.00 of the recovery, 20%; on the second \$10,000.00 of the recovery, 15%; and 10% upon all recovery in excess of \$20,000.00. Provided, however, the board maintains continuing jurisdiction over all attorney fees in cases before the board and the board may order a different attorney fee schedule or allowance in a proper case.⁴⁰

The respondent negotiated a contract with his client in her worker's compensation case in which she agreed to pay:

a sum of money equal to thirty-three and one-third percent (33 1/3%) prior to filing suit of all sums received; forty percent (40%) of all sums so received after suit is filed; and fifty percent (50%) of all sums so received if a change of venue is taken after suit. In the event an appeal is necessary, the parties will negotiate an additional agreement based on such matters as the size of the judgment, interest payable on it, etc.

It is presently contemplated by the parties that this matter will be

35. *Id.* at 1113.

36. *Id.* at 1113 n.2.

37. 674 N.E.2d 544 (Ind. 1996).

38. IND. CODE § 22-3-4-12 (2007).

39. 631 IND. ADMIN. CODE 1-1-25 (West 2006).

40. 631 IND. ADMIN. CODE 1-1-24 (1996), *expired*, IND. CODE § 4-22-2.5 (2005).

disposed of through the offices of the Workman's Compensation Act and if such is the case, the [client] agreed to pay the [respondent] as attorney's fees [an amount] equal to thirty-three and one-third percent (33 1/3%) of the amounts so recovered through a Board hearing, forty percent (40%) if the matter is appealed to the Court of Appeals, and fifty percent (50%) if the matter is then appealed to the Indiana Supreme Court. This agreement is made in recognition of the fact that the case is extremely complicated and involves necessary attorney time in excess of the typical case.⁴¹

After a hearing before a single member of the Worker's Compensation Board, the client was awarded a recovery of \$89,000, and the lawyer in *Maley* was awarded a fee based on the regulations of the Worker's Compensation Board in the amount of \$10,500.⁴² The lawyer in *Maley* filed a petition for fees with the full board in which he requested fees in the amount of 33 1/3% of the recovery.⁴³ The full board denied the lawyer's request and upheld the fee awarded by the single hearing member. When the lawyer in *Maley* received a check for his client in the amount of \$34,354, the lawyer kept \$27,000 as his fee for his work on his client's worker's compensation case.⁴⁴

The court in *Maley* held that the lawyer's fee was excessive and violated Rule 1.5(a) by exceeding the presumptive limits for attorney's fees under the regulations of the Worker's Compensation Board.⁴⁵ The court cited civil cases from Indiana as well as other states to support its position:

This Court has held that agreements calling for attorney fees beyond the schedule set by the Industrial Board are void or unenforceable. Other jurisdictions have found professional misconduct where lawyers charge fees in excess of that allowed under comparable worker's compensation awards or schedules

In the present case, the respondent elected to retain attorney fees in excess of the presumptive limits contained in 631 I.A.C. 1-1-24. He did so without advising the client the fee agreement was unenforceable under governing precedents. Although the Worker's Compensation Board is empowered to consider applications for additional attorney fees, no such application was granted to the respondent. In fact, the respondent retained a fee substantially in excess of the presumptive limits despite the full board's express upholding of the single hearing member's initial fee award pursuant to the applicable limits. Further, he did so despite his client's unwillingness to pursue modification of the fee award. We therefore conclude that the respondent's fee was

41. *In re Maley*, 674 N.E.2d at 545.

42. *Id.* at 545-46.

43. *Id.*

44. *Id.*

45. *Id.*

unreasonable and thus that he violated [Rule] 1.5(a).⁴⁶

The *Maley* court found that a lawyer could not substitute his own fee structure for the regulated structure without running afoul of his ethical duties under the Rules to refrain from charging unreasonable fees.⁴⁷

Under the precedents of *Maley* and *Benjamin*, the *Stephens I* court had found that lawyer's fees in excess of regulated limitations were unreasonable fees in violation of Rule 1.5(a).⁴⁸ Furthermore, the court has also criticized the sliding-scale method of calculating fees in medical malpractice cases, viewing it as an "attempt to circumvent" the statutory scheme limiting lawyer's fees from the Fund to 15%.⁴⁹ Although this criticism of the sliding-scale method of calculating fees was dicta, it still provided guidance to lawyers who practiced in the area of medical malpractice.

Based on the court's decisions in *Maley* and *Benjamin*, the result in *Stephens I* was not unexpected. Yet, *Stephens I* took ITLA by surprise. ITLA disagreed with the issue of whether the sliding-scale fee agreements were unreasonable fees under Rule 1.5(a) in medical malpractice cases.⁵⁰ After the *Stephens I* opinion was handed down in August 2006, ITLA "moved to intervene and [sought a] rehearing" of the court's decision in *Stephens I*.⁵¹ In its briefs, ITLA argued that, until *Stephens I*, the court had not made clear its view that the Medical Malpractice Act placed a 15% limit on a lawyer's fees from the Fund and that Rule 1.5(a) placed an ethical limit on a lawyer's fees for the portion of recovery from the medical provider.⁵² This ethical limit was based on the court's interpretation of the mandate under Rule 1.5(a) that a lawyer's fee must be reasonable.⁵³ In short, ITLA urged the court "to reconsider its conclusion [in *Stephens I*] that Respondent had improperly attempted to circumvent the limitation on attorney fees recoverable from the Fund."⁵⁴

In its argument, ITLA relied upon a 1980 decision in *Johnson v. St. Vincent Hospital, Inc.*⁵⁵ In *Johnson*, the court addressed the constitutionality of several aspects of the Medical Malpractice Act after it was enacted by the state legislature in 1975.⁵⁶ Among these challenges was a challenge to the limitation

46. *Id.* at 546 (citations omitted).

47. *Id.*; see also *In re Geller*, 777 N.E.2d 1099, 1099 (Ind. 2002) (continuing to follow the *Maley* reasoning as it pertains to fee structures in worker's compensation cases).

48. *In re Stephens (Stephens I)*, 851 N.E.2d 1256, 1257 (Ind. 2006).

49. *In re Benjamin*, 718 N.E.2d 1111, 1113 n.2 (Ind. 1999), overruled by *In re Stephens (Stephens II)*, 867 N.E.2d 148 (Ind. 2007).

50. *Stephens II*, 867 N.E.2d at 154.

51. *Id.* at 153.

52. *Id.* at 151-53.

53. *Id.* at 150.

54. *Id.*

55. *Id.* at 155.

56. *Johnson v. St. Vincent Hosp. Inc.*, 404 N.E.2d 585, 589 (Ind. 1980), overruled by *In re Stephens (Stephens II)*, 867 N.E.2d 148 (Ind. 2007).

on lawyer's fees from the Fund.⁵⁷ The constitutional issue in *Johnson* on a lawyer's fees was that "it interfere[d] with the individual's right to contract and to earn a living and [had] no rational basis in violation of due process and equal protection."⁵⁸ The *Johnson* court held, however, that the Medical Malpractice Act did not improperly infringe upon the right of the injured parties or lawyers to enter into contracts in medical malpractice cases.⁵⁹ The court reasoned:

In this case we examine the limitation imposed upon attorney fees for constitutional purposes alone. We find that there is a direct relationship between the limitation upon recovery and the limitation on attorney fees. The total amount recoverable by the injured patient was limited. The limitation on attorney fees follows naturally as a means of protecting the already diminished compensation due claimants from further erosion due to improvident or unreasonable contracts for legal services.

The specific limitation implanted by the Legislature does not seem to be one which will seriously impede the ability of the injured patient to employ effective counsel. It does not effect [sic] at all the enforceability of contracts made regarding fees to be paid from the first \$100,000 of recovery, as that amount is not received from the compensation fund. However, contracts providing for fees in excess of the limitation on awards from the compensation fund are not enforceable. The limitation will in practice result in legal fees ranging between about 20% to 35% of the total recovery. As a general proposition fees at this level are commonly considered reasonable in tort litigation.⁶⁰

ITLA used the "total recovery" language from *Johnson* and argued that sliding-scale fee arrangements in medical malpractice cases should be permissible as long as the attorney's fee from the total recovery is in the range of 20% to 35%.⁶¹ The *Stephens II* court characterized ITLA's argument as:

57. *Id.* at 602. The limitation on lawyer's fees in the Medical Malpractice Act is currently codified at Indiana Code section 34-18-18-1. It provides: "When a plaintiff is represented by an attorney in the prosecution of the plaintiff's claim, the plaintiff's attorney's fees from any award made from the patient's compensation fund may not exceed fifteen percent (15%) of any recovery from the fund." IND. CODE § 34-18-18-1 (2004). Additionally, Indiana Code section 34-18-18-2 provides: "A patient has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment." *Id.* § 34-18-18-2.

58. *Johnson*, 404 N.E.2d at 602.

59. *Id.* at 602-03.

60. *Id.*

61. *Stephens II*, 867 N.E.2d at 154.

ITLA states many past and current medical malpractice fee agreements, including the one initially employed by Respondent [(the lawyer in the *Stephens* cases)] in the current case, have been based on this sliding scale concept, often providing for a 35% overall fee, accomplished by a 15% fee from the Fund recovery plus an amount from the \$100,000 non-Fund recovery needed to make the total fee equal to 35% of the total recovery (“Sliding Scale Fee Arrangement”). ITLA argues, backed by affidavits of medical malpractice lawyers, that a Sliding Scale Fee Arrangement is reasonable in light of the expense, time, and risk attendant to representing medical malpractice plaintiffs. It seeks assurance that the Rules of Professional Conduct are not violated by a fee arrangement that produces a total fee of 20% to 35% of the total recovery.⁶²

The court answered ITLA’s argument by holding that “these rules [(Rules 1.5(a) and 1.5(c))], coupled with *Johnson*, mean an attorney may ethically charge a reasonable percentage of the client’s non-Fund recovery in order to recover a reasonable total fee.”⁶³ In short, the *Stephens II* court adopted a reasonable total fee theory and allowed the sliding-scale fee arrangement as proposed by ITLA. The court concluded, “[W]e cannot say the employment of the Sliding Scale Fee Arrangement to yield a contingent fee in the 32-35% range is unreasonable in all medical malpractice cases. To the extent *Johnson*, *Benjamin*, or *Stephens I* suggests otherwise, they are overruled.”⁶⁴ Thus, medical malpractice lawyers are permitted to use the sliding-scale method of calculating fees as long as the total fee is reasonable. The *Stephens II* court’s analysis allows lawyers in medical malpractice cases to take up to 100% of the health care provider’s portion of the recovery as long as the total fee is reasonable.⁶⁵ The *Stephens II* court explained that it was not able to clearly define a reasonable total fee:

62. *Id.*

63. *Id.* at 152. IND. PROF. COND. R. 1.5(c) provides:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

64. *Stephens II*, 867 N.E.2d at 156.

65. *Id.* at 155.

Although a numerical answer to the question of reasonableness might have some utility, it is simply not possible to put a number on the ethical requirement that attorney fees be reasonable. Likewise, there can be no “safe harbor” range of permissible fees. Each case is unique and must be evaluated on its own terms, considering such factors as the complexity of the medical issues, the risk of a finding of no liability, the degree of dispute over damages, whether the case is fully tried, the anticipated litigation expenses, etc.⁶⁶

The *Stephens II* court, however, gave some general guidance for lawyers to determine whether their sliding-scale fees are reasonable in medical malpractice cases.

The court relied on five principles to explain what factors the legal practitioner should consider when determining whether a legal fee is reasonable.⁶⁷ First, the court inquired whether the limitation of the lawyer’s fee from the Fund “seriously impede[s] the ability of the injured patient to employ effective counsel.”⁶⁸ Second, the court pointed out that the limit on attorney fees in medical malpractice cases acts as an “effective cap on the total fee” for a lawyer, even if the attorney fees include 100% of the non-Fund portion of the recovery.⁶⁹ Third, the court pointed out that practitioners may look to the common custom for contingent fees in tort litigation to determine whether a fee is reasonable, and the court found that common custom in tort litigation included fees up to 35%, which are considered reasonable.⁷⁰ Fourth, the court emphasized that lawyers are required to put contingent fees in writing and that medical malpractice clients should be protected by lawyers providing a clear explanation of the sliding-scale method of calculating their fees in these written agreements.⁷¹ The fifth and final factor suggested by the court was the difficulty of each particular case.⁷² The court suggested that in some less difficult cases it might be more appropriate for lawyers to have fees from the lower end of “[t]he 20 to 35% range mentioned in *Johnson*.”⁷³

One commentator noted that one of the arguments that helped to carry the day for ITLA’s position was “that the Fund’s fee cap, unless offset by higher-than-normal fees on provider recoveries, will push plaintiffs with difficult liability facts and smaller financial losses out of that compensation system

66. *Id.*

67. *Id.*

68. *Id.* (quoting *Johnson v. St. Vincent Hosp. Inc.*, 404 N.E.2d 585, 589 (Ind. 1980), overruled by *Stephens II*, 867 N.E.2d 148).

69. *Id.*

70. *Id.* at 156.

71. *Id.*; see IND. PROF. COND. R. 1.5(c) (requiring contingent fees to be written).

72. *Stephens II*, 867 N.E.2d at 156.

73. *Id.*; see *Johnson*, 404 N.E.2d at 603 (discussing the range of permissible fees of 20 to 35%).

altogether.”⁷⁴ This commentator concluded:

A question for the future is whether the plaintiffs’ med mal bar will back up its public policy argument by continuing to extend effective representation to plaintiffs who would have been marginalized out of the system under the *Stephens I* regime or, instead, cherry-pick cases using *Stephens II* as just an opportunity to enhance the bottom line.⁷⁵

The *Stephens II* case offers a few lessons for lawyers who do not practice in the area of medical malpractice. As one may readily surmise, the *Stephens II* case was not a typical disciplinary case. In a separate concurring opinion, Chief Justice Shepard criticized the per curiam’s process to determine whether the sliding-scale fee arrangement violated the Rules:

It is far from clear that today’s per curiam represents the best policy for determining reasonable fees at the intersection of Rule 1.5 and the medical malpractice statute. This process has morphed from an agreed-sanction disciplinary case into something that looks much like rule-making, except that it has lacked many of the steps thought useful for good rule-making. Partly for this reason, it does not answer a good many questions important to the topic.⁷⁶

Although Chief Justice Shepard is uncomfortable with the process in the *Stephens II* case, the Indiana Constitution gives the Indiana Supreme Court the full authority to regulate the practice of law in the State of Indiana.⁷⁷ The court could have decided *Stephens II* by the rule-making process as suggested by Chief Justice Shepard. However, *Stephens II* demonstrates how broad the supreme court’s power is in matters related to the practice of law.⁷⁸

The narrow holding of *Stephens II* is that lawyers may use a sliding-scale fee arrangement to calculate their fees in medical malpractice cases without running afoul of their ethical duties under the Rules. However, the court in *Stephens II* suggested a few principles that lawyers should keep in mind when determining the reasonableness of their fees. Specifically, the court suggested that any contingency fee in excess of 50% is not reasonable.⁷⁹ The court even went further and suggested that a contingency fee of 40% is ordinarily the maximum contingency fee in any tort litigation.⁸⁰

A final question is whether the court’s holding in *Stephens II* might cause the court to reconsider its holding in *Maley*. Both *Stephens II* and *Maley* were concerned with attorney’s fees that were regulated by other law. It appears that

74. Donald R. Lundberg, *Making the World Safe for Medical Malpractice Cases*, RES GESTAE, July/Aug. 2007, at 22, 24.

75. *Id.*

76. *Stephens II*, 867 N.E.2d at 157 (Shepard, C. J., concurring).

77. IND. CONST. art. VII, § 4.

78. *See Stephens II*, 867 N.E.2d 148.

79. *Id.* at 155.

80. *Id.* at 156.

the court is treating the regulated fees under the Medical Malpractice Act in *Stephens II* differently than the regulated fees under the Worker's Compensation Act in *Maley*.⁸¹ However, *Stephens II* is distinguishable from the *Maley* case. The Medical Malpractice Act has two sources of recovery: the health care provider and the Fund.⁸² By contrast, the Worker's Compensation Act only has one source of recovery.⁸³ Because the lawyer's fees are derived from one source, the regulated fees in the worker's compensation cases are not open to the total fee theory under *Stephens II*.

II. JUDGES AND ALCOHOL-RELATED CRIMES

In 2007, the Indiana Supreme Court handled a rare case of judicial misconduct in *In re Hanley*.⁸⁴ The judge in *Hanley* pled guilty to "operating a motor vehicle with an alcohol concentration equivalent of at least .15 gram of alcohol per either 100 milliliters of the person's blood or 210 liters of the person's breath," which was a class A misdemeanor in violation of Indiana Code section 9-30-5-1(b).⁸⁵ The court and the Indiana Judicial Qualifications Commission agreed that the judge's conduct violated Indiana Judicial Conduct Canons 1(A)⁸⁶ and 2(A).⁸⁷ The judge and the Commission also agreed that the appropriate sanction for this type of judicial misconduct was a public reprimand.⁸⁸ The court found this sanction appropriate and reprimanded the judge for his criminal conduct.⁸⁹

While lawyers often are not disciplined for one instance of an alcohol-related offense,⁹⁰ prosecutors and judges are held to a higher standard.⁹¹ Prosecutors and

81. *Id.* at 148.

82. *See generally* IND. CODE § 34-18-15-3 (2004).

83. *See id.* § 22-3-2-2.

84. 867 N.E.2d 157 (Ind. 2007).

85. *Id.* at 158. IND. CODE § 9-30-5-1(b) (2004) provides: "(b) A person who operates a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per: (1) one hundred (100) milliliters of the person's blood; or (2) two hundred ten (210) liters of the person's breath; commits a Class A misdemeanor."

86. IND. CODE OF JUD. COND. Canon 1(A) provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards in order to preserve the integrity and independence of the judiciary. The provisions of this Code are to be construed and applied to further that objective.

87. IND. CODE OF JUD. COND. Canon 2(A) provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

88. *In re Hanley*, 867 N.E.2d at 158.

89. *Id.* at 157-58.

90. *See In re Seat*, 588 N.E.2d 1262, 1264 (Ind. 1992) (holding that a lawyer has not violated rule prohibiting lawyers from committing criminal acts when the lawyer was arrested on an isolated

judges are held to a higher standard than lawyers who do not enforce the law because prosecutors and judges have special responsibilities to the judicial system and duties to enforce the law.

III. SANCTIONS FOR CRIMINAL CONDUCT OF ATTORNEYS

At first glance, the sanctions for cases involving lawyers who commit criminal acts⁹² from 2007 appear to vary from case to case. One explanation for this range in sanctions could be caused by the fact that certain crimes are more serious than others. However, another explanation for this range in sanctions is that the Indiana Supreme Court has found that seeking professional help before being sanctioned is a mitigator for the professional misconduct of the lawyer. This mitigation is particularly helpful for lawyers who commit alcohol-related crimes or commit crimes while under the influence of alcohol. However, even alcohol-related crimes merit stiff sanctions from the court when the lawyer has a history of such offenses.

In a serious alcohol-related crime, the court found that the period of suspension from the practice of law for a lawyer sentenced to prison should not be less than the period the lawyer was incarcerated in *In re Beerbower*.⁹³ The respondent had an extensive history of alcohol-related convictions and “pled guilty to Operating a Vehicle While Intoxicated Causing Serious Bodily Injury, a Class C Felony.”⁹⁴ On April 23, 2007, the lawyer was sentenced to four years in prison for his crime.⁹⁵ The Disciplinary Commission and the lawyer in *Beerbower* came to an agreement, which was accepted by the court, that the

driving while intoxicated charge and has never been alcohol dependent nor has a history of alcohol related offenses); *In re Oliver*, 493 N.E.2d 1237, 1241 (Ind. 1986) (same). Cf. *In re Haith*, 742 N.E.2d 940, 941-42 (Ind. 2001) (holding that a lawyer violated rule prohibiting lawyers from committing criminal acts that reflect adversely on the lawyer’s fitness when the lawyer had three convictions for operating a vehicle while intoxicated).

91. *In re Hanley*, 867 N.E.2d at 157. See *In re Oliver*, 493 N.E.2d at 1242 (holding that a special prosecutor engaged in conduct prejudicial to the administration of justice by operating a vehicle while intoxicated and reasoning that prosecutors and judges have additional ethical responsibilities to not harm the public esteem of the judicial system by violating the criminal law); see also *In re Brinley*, 785 N.E.2d 1099, 1100 (Ind. 2003) (holding deputy prosecutor’s guilty plea to public intoxication was prejudicial to the administration of justice); *In re McFadden*, 729 N.E.2d 137, 138 (Ind. 2000) (holding that deputy prosecutor’s conviction for public intoxication was prejudicial to the administration of justice); *In re Sims*, 665 N.E.2d 584, 585 (Ind. 1996) (deputy prosecutor’s operating a vehicle while intoxicated was prejudicial to the administration of justice); *In re Schenk*, 612 N.E.2d 1059, 1059 (Ind. 1993) (same); *In re Seat*, 588 N.E.2d at 1264 (same).

92. IND. PROF. COND. R. 8.4(b) provides: “It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. . . .”

93. *In re Beerbower*, 873 N.E.2d 52, 52 (Ind. 2007).

94. *Id.*

95. *Id.*

lawyer should be suspended from the practice of law without automatic reinstatement for two years or as long as the lawyer was incarcerated, whichever was longer.⁹⁶ The *Beerbower* case suggests that the court considers a lawyer's prison sentence as inconsistent with having an active license to practice law.

In a case decided on the same day as *Beerbower*, *In re McClellan*,⁹⁷ the court approved a much lighter sanction for a lawyer charged with possession of cocaine as a class D felony. The lawyer in *McClellan* was charged with possession of cocaine, a class D felony, and public intoxication, a class B misdemeanor, on July 18, 2006.⁹⁸ The criminal case was still pending when the Disciplinary Commission and the lawyer in *McClellan* reached an agreement.⁹⁹ The court accepted this agreement and gave the lawyer a suspension from the practice of law for 180 days, with the first thirty days served as an active suspension and the remainder of the suspension conditionally stayed while the lawyer in *McClellan* was subject to a probationary period of two years.¹⁰⁰ The court emphasized, in accepting this agreement, that the lawyer had successfully undergone extensive treatment for his addiction and was engaged in a monitoring agreement with the Judges and Lawyers Assistance Program ("JLAP").¹⁰¹

In *In re Thompson*,¹⁰² the court also found that another lawyer's possession of cocaine should be treated in a similar manner as *McClellan*. In *In re Thompson*, the lawyer pled guilty to possession of cocaine in violation of Indiana Code section 35-48-4-6(a) as a class D felony.¹⁰³ The trial court sentenced the lawyer in *Thompson* as a class A misdemeanor, and he received a criminal sentence of one year in jail with eight days served and the rest on probation.¹⁰⁴ Noting the lawyer's long period of abstinence from illegal substances, intensive treatment, and participation in JLAP, the Indiana Supreme Court suspended the lawyer in *Thompson* for a period of six months with an active suspension of thirty days.¹⁰⁵ Like *McClellan*, the balance of the suspension was conditionally stayed while the lawyer completed one-year probation with JLAP monitoring.¹⁰⁶

Intensive treatment before the disciplinary case is resolved, along with

96. *Id.*

97. *In re McClellan*, 873 N.E.2d 57, 57 (Ind. 2007).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 866 N.E.2d 723 (Ind. 2007).

103. *Id.* at 724. IND. CODE § 35-48-4-6(a) (2004) provides:

A person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesses cocaine (pure or adulterated) or a narcotic drug (pure or adulterated) classified in schedule I or II, commits possession of cocaine or a narcotic drug, a Class D felony, except as provided in subsection (b).

104. *In re Thompson*, 866 N.E.2d at 724.

105. *Id.*

106. *Id.*

continued participation in JLAP, have been effective mitigators in criminal cases involving alcohol abuse and/or drug use.¹⁰⁷ This trend to use treatment and JLAP participation as a mitigator is beginning to find its way into cases where the misconduct is not a criminal conviction for alcohol-related or drug offenses. In *In re Renz*,¹⁰⁸ the court found that the lawyer's treatment and participation in JLAP were mitigators that influenced the court to impose a stayed suspension in a case where an "executed suspension time would be appropriate."¹⁰⁹ The lawyer in *Renz* engaged in a sexual act with a client he represented in a divorce.¹¹⁰ The court's order in *Renz* does not spell out the type of treatment the lawyer received, nor does the court outline the terms of the lawyer's participation in JLAP.

Finally, the court found in *In re Raquet*,¹¹¹ in which the lawyer was charged with possession of child pornography as a class A misdemeanor, sufficient mitigation based on the lawyer seeking professional help that he received a suspension of thirty days with automatic reinstatement.¹¹² In 2001, the lawyer viewed child pornography for a period of about three months. As the court put it: "Respondent viewed child pornography on the internet, printed some of the photographs, and paid some unknown on-line provider for the material. There is no evidence that he downloaded any photos."¹¹³ In December 2002, the respondent began to receive counseling and continued through the time of his disciplinary hearing. In March 2004, the attorney was "charged in state court with possession of child pornography, a Class A Misdemeanor."¹¹⁴ The respondent entered into a "pretrial diversion agreement" with the prosecutor's office, and the charges were dismissed after he completed the terms of the diversion program in June 2005.¹¹⁵ In March 2006, the Disciplinary Commission filed a verified complaint against the respondent based on his criminal conduct. The Commission tried the case before a hearing officer, and the hearing officer

107. See *In re Gosnell*, 864 N.E.2d 1020, 1021 (Ind. 2007) (finding treatment and continued JLAP participation as mitigation for lawyer convicted of operating while intoxicated); *In re Spencer*, 863 N.E.2d 299, 299 (Ind. 2007) (finding continued JLAP participation as mitigation for lawyer convicted of operating a vehicle while intoxicated).

108. 856 N.E.2d 706 (Ind. 2006).

109. *Id.*

110. The court found that the lawyer in *Renz* violated . . . Rule 1.7(b)(2) . . . , which prohibits a lawyer from representing a client where the representation may be materially limited by the lawyer's own interests unless the client consents after consultation; and, [Rule] 1.8(j) . . . , which prohibits a lawyer from engaging in a sexual relationship with a client unless a consensual sexual relationship existed when the client-lawyer relationship commenced.

Id.

111. 870 N.E.2d 1048 (Ind. 2007).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

recommended that the respondent be given a private reprimand.¹¹⁶ The court found that the respondent violated Rule 8.4(b) by engaging in criminal conduct.¹¹⁷

The court held that the respondent's conduct, which "furthers the sexual exploitation of children" called "for sterner discipline than a reprimand."¹¹⁸ The court cited to the case *In re Conn*¹¹⁹ as support for its holding that the respondent in *Raquet* should be given sterner discipline.¹²⁰ The lawyer in *Conn* received a "two-year suspension for receiving and transmitting child pornography over the internet and for failing to disclose . . . [the] federal investigation of his criminal conduct" on his bar application.¹²¹ In holding that the respondent in *Raquet* be suspended from the practice of law for thirty days, the court found significant mitigating factors:

Respondent's encounter with child pornography was brief and it occurred six years ago. Respondent has taken responsibility for his actions by seeking professional help, cooperating with all investigations of his actions, and admitting his misconduct. He is remorseful and this misconduct is the only blot on his legal career since he was admitted to practice in 1983.¹²²

It is clear from the above cases that the court is persuaded by a lawyer's participation in JLAP or a lawyer's seeking of professional help as a source of significant mitigation. The court is influenced by this sort of mitigation to the extent that a lawyer might be able to avoid a long-term suspension without automatic reinstatement if the lawyer participates in JLAP or seeks other professional help before the lawyer is sanctioned by the court.

IV. IMPROPER TRIAL STRATEGIES

During this reporting period, the court has looked at various cases in which lawyers used improper trial strategies in their representation of clients. Generally, these duties have to do with not being candid to the tribunal,¹²³ using improper influence with the courts,¹²⁴ improperly using the court procedures to harass another,¹²⁵ and improperly delaying the opposing party's good faith case against the lawyer's client.¹²⁶

116. *Id.*

117. *Id.*

118. *Id.*

119. *In re Conn*, 715 N.E.2d 379 (Ind. 1999).

120. *In re Raquet*, 870 N.E.2d at 1048.

121. *Id.* (citing *In re Conn*, 715 N.E.2d at 382).

122. *Id.*

123. See IND. PROF. COND. R. 3.3.

124. See IND. PROF. COND. R. 3.5.

125. See IND. PROF. COND. R. 3.1.

126. See IND. PROF. COND. R. 3.2.

One case during 2007 is *In re Coleman*.¹²⁷ At first blush, *Coleman* looks like a typical neglect case, except the lawyer's neglect in this case interfered with the judicial process and with the opposing party's good faith litigation of a case against his client.¹²⁸ In *Coleman*, the lawyer represented a client in an employment discrimination claim and a worker's compensation claim.¹²⁹ The lawyer filed the employment discrimination claim in federal court in December 2001 and filed a claim for his client with the Worker's Compensation Board in November 2001.¹³⁰ However, the lawyer did little to advance either of the client's claims.¹³¹

In the employment discrimination case, the trial court ordered the lawyer in *Coleman* to file preliminary witness and exhibit lists, a statement of special damages, a settlement demand, and a confidential settlement statement.¹³² The lawyer failed to do so.¹³³ Also, the lawyer failed to respond to discovery requests of the opposing party, although the client had signed interrogatories and given these interrogatories to the lawyer.¹³⁴ As a result of the lawyer's failure to respond to the discovery requests, the opposing party moved the trial court to order compliance.¹³⁵ The trial court issued an order for the lawyer in *Coleman* to comply with the opposing party's discovery requests.¹³⁶ The lawyer in *Coleman* eventually responded to the discovery requests, but the responses were inadequate.¹³⁷

In May 2003, opposing counsel filed a motion for summary judgment. The lawyer failed to respond to it on behalf of his client.¹³⁸ The trial court granted the motion for summary judgment and dismissed the case.¹³⁹ The opposing counsel filed a petition for costs, which the court granted.¹⁴⁰ The lawyer failed to inform his client that the employment discrimination case had been dismissed and costs had been assessed against the client.¹⁴¹ After the client learned from the clerk of the court that the employment discrimination case had been dismissed, the client asked the lawyer for her file.¹⁴² The lawyer gave his client part of her file.¹⁴³

127. 867 N.E.2d 132 (Ind. 2007).

128. *Id.* at 133-34.

129. *Id.* at 132.

130. *Id.* at 133.

131. *Id.* at 132-33.

132. *Id.* at 132.

133. *Id.*

134. *Id.*

135. *Id.* at 132-33.

136. *Id.* at 133.

137. *Id.* at 133-34.

138. *Id.* at 133.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

In the worker's compensation case, the opposing party requested three times that the lawyer provide information to substantiate the claim of the lawyer's client and a settlement demand.¹⁴⁴ The lawyer failed to respond to the opposing party's requests in a timely manner, so the opposing party filed a motion to dismiss the worker's compensation claim for lack of prosecution or, in the alternative, to compel discovery.¹⁴⁵ The Worker's Compensation Board gave the lawyer a deadline to comply with discovery.¹⁴⁶ The lawyer eventually supplied the opposing party with some discovery responses, but did not supply a settlement demand.¹⁴⁷ On December 22, 2003, the lawyer received a settlement offer for his client in the worker's compensation case.¹⁴⁸ The lawyer failed to inform his client that he received this settlement offer. This settlement offer was communicated to the lawyer about two months after the client retrieved her file from her lawyer.¹⁴⁹ In June 2004, the client settled her worker's compensation claim on her own.¹⁵⁰

In addition to the typical neglect-type charges,¹⁵¹ the court found that the lawyer's neglect in *Coleman* caused him to violate his duties to the trial court and to the opposing party.¹⁵² The court held that the lawyer in *Coleman* violated his duty to the trial court by knowingly disobeying his obligations under the rules of a tribunal.¹⁵³ The court also held that the neglect of the lawyer in *Coleman* caused the lawyer to violate his duties to the opposing party by failing to make

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. The Indiana Supreme Court found that the lawyer's neglect of his duties to his client amounted to violations of the following Rules:

1.2(a): failure to abide by his client's decisions concerning the objectives of the representation;

1.3: failure to act with reasonable diligence and promptness;

1.4(a): failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information;

1.4(b): failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions; [and]

1.16(d): failure to surrender papers and property to which the client was entitled, and failure to take reasonable steps to protect client's interest upon termination or representation.

Id. at 134.

152. *Id.*

153. *Id.* IND. PROF. COND. R. 3.4(c) provides: "A lawyer shall not: . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. . . ."

reasonable efforts to comply with legally proper discovery requests.¹⁵⁴

Another more pernicious form of interference with the judicial process occurred in *In re Lehman*.¹⁵⁵ While the lawyer was representing his client in a personal injury claim, the lawyer in *Lehman* learned that the opposing party's lawyer had served as a judge *pro tem* in the trial court where his client's case was pending.¹⁵⁶ The opposing counsel had served as a judge *pro tem* on two occasions after the client's litigation began, but the opposing counsel did not take any action on the personal injury case while acting as judge *pro tem*.¹⁵⁷ The lawyer in *Lehman* attempted to have any judge from the trial court disqualified from hearing the personal injury case and have the case transferred to another court.¹⁵⁸ However, the motion to disqualify was denied.¹⁵⁹ Then the lawyer in *Lehman* filed a motion to continue the trial date.¹⁶⁰ After he filed the motion to continue, the lawyer in *Lehman* told the lawyer for the opposing party that his client wanted to file a complaint against the opposing counsel with the Indiana Judicial Qualifications Commission.¹⁶¹ The respondent also told the opposing counsel that he would attempt to dissuade his client from filing a complaint with the Indiana Judicial Qualifications Commission in exchange for the opposing counsel's agreement to continue the trial date.¹⁶² However, the opposing counsel refused to consent to the continuance, and the trial court denied the motion to continue the trial date.¹⁶³ Eventually, the personal injury case settled without a trial.¹⁶⁴ The court held that the lawyer in *Lehman* violated Rule 8.4(d)¹⁶⁵ by "communicating to opposing counsel a willingness to attempt to dissuade his clients from filing a complaint against opposing counsel as a *quid pro quo* for opposing counsel's agreement to a continuance."¹⁶⁶ The lesson in *Lehman* is that

154. *In re Coleman*, 867 N.E.2d at 134. IND. PROF. COND. R. 3.4(d) provides: "A lawyer shall not: . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. . . ."

155. 861 N.E.2d 708 (Ind. 2007).

156. *Id.* at 709.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. IND. PROF. COND. R. 8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . ."

166. *In re Lehman*, 861 N.E.2d at 708. *Cf. In re Freeman*, 835 N.E.2d 494, 498 (Ind. 2005) (holding that a lawyer's threat to "make trouble" for an incarcerated former client while he was "locked up" if the former client sent another letter to the lawyer violated Rule 8.4(d)); *In re Whitney*, 820 N.E.2d 143, 143 (Ind. 2005) (holding that a lawyer's threat to file a defamation suit against a client if she filed a grievance with the Disciplinary Commission against the lawyer violated Rule 8.4(d)); *In re Cartmel*, 676 N.E.2d 1047, 1050 (Ind. 1997) (holding that a lawyer's

a lawyer should not leverage his client's desire to file a grievance against the opposing counsel to attempt to gain an advantage in the litigation of his client's case.

In *In re James*,¹⁶⁷ the lawyer used deception in his attempt to persuade the trial court to rule favorably for his client. The lawyer in *James* represented a client charged with operating while intoxicated ("OWI") as a class D felony.¹⁶⁸ The client was charged with a class D felony rather than a misdemeanor because the client had prior convictions in Kentucky for similar crimes.¹⁶⁹ The client pled guilty to the OWI charge.¹⁷⁰ The lawyer falsely told the judge at the sentencing hearing that five of his client's convictions in Kentucky had been expunged or vacated.¹⁷¹ The lawyer told the judge this false information as an attempt to avoid a statutory limitation on the judge's ability to suspend his client's sentence.¹⁷² The judge asked the lawyer in *James* to produce documents to support his false assertion, and the lawyer was unable to do so.¹⁷³ The Indiana Supreme Court held that the lawyer in *James* made a false statement of fact to the

agreement with client calling for dismissal of grievance filed with the Disciplinary Commission against the lawyer violated Rule 8.4(d)); *In re Blackwelder*, 615 N.E.2d 106, 108 (Ind. 1993) (holding that a procuring a promise from a client not to file a grievance with the Disciplinary Commission violated Rule 8.4(d)).

167. 861 N.E.2d 703 (Ind. 2007).

168. *Id.* IND. CODE § 9-30-5-1 (2004) provides, in part:

(a) A person who operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol per:

- (1) one hundred (100) milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath;

commits a Class C misdemeanor.

(b) A person who operates a vehicle with an alcohol concentration equivalent to at least fifteen hundredths (0.15) gram of alcohol per:

- (1) one hundred (100) milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath;

commits a Class A misdemeanor.

IND. CODE § 9-30-5-3 (2004) provides, in part:

A person who violates section 1 or 2 of this chapter commits a Class D felony if:

- (1) the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter

169. *In re James*, 861 N.E.2d at 703.

170. *Id.*

171. *Id.*

172. *Id.*; see IND. CODE § 35-50-2-2(b) (2004) (providing that a trial court may suspend any part of a sentence for a felony unless the crime committed was a class D felony and less than three years have elapsed between the date the person was discharged from probation, imprisonment, or parole).

173. *In re James*, 861 N.E.2d at 703.

trial court in violation of Rule 3.3(a)(1).¹⁷⁴

In this reporting period, the court addressed, again, the lawyer's duty to not engage in ex parte communication with judges in *In re Robison*.¹⁷⁵ The lawyer in *Robison* represented the husband in a divorce. The couple separated in February 2005, and the wife remained in the house.¹⁷⁶ On February 14, 2005, the husband's lawyer filed the petition for dissolution of marriage and a motion for a restraining order.¹⁷⁷ In this motion, the lawyer alleged that the house belonged to the husband and sought to have the wife removed from the property. The wife was not represented.¹⁷⁸ The motion for a restraining order was not verified, and the husband's lawyer did not certify to the court the efforts he had made to notify the wife of this motion or why notice should not be given.¹⁷⁹ However, the judge signed the restraining order, and the sheriff removed the wife from the home.¹⁸⁰ The court held that the lawyer in *Robison* violated Rule 3.5(b)¹⁸¹ by engaging in ex parte communication with the judge and sanctioned the lawyer with a public reprimand.¹⁸²

V. JUSTICE DELAYED

Finally in 2007, the court found that a judge's neglect of his duties brought "discredit on him and the Indiana judicial system" in *In re Newman*.¹⁸³ In October 2000, the trial court judge presided over a probation violation matter and

174. *Id.* IND. PROF. COND. R. 3.3(a)(1) provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . ."

175. 856 N.E.2d 1202 (Ind. 2006); see *In re Ettl*, 851 N.E.2d 1258, 1260 (Ind. 2006) (holding ex parte communication with judge violates Rule 3.5(b)); *In re Anonymous*, 786 N.E.2d 1185, 1189 (Ind. 2003) (same); *In re Wilder*, 764 N.E.2d 617, 621 (Ind. 2002) (same).

176. *In re Robison*, 856 N.E.2d at 1203.

177. *Id.*

178. *Id.*

179. *Id.* IND. TRIAL R. 65(b) provides, in part:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

180. *In re Robison*, 856 N.E.2d at 1203.

181. IND. PROF. COND. R. 3.5(b) provides: "A lawyer shall not: . . . communicate ex parte with such a person [(judge, juror, prospective juror or other official)] during the proceeding unless authorized to do so by law or court order. . . ."

182. *In re Robison*, 856 N.E.2d at 1203.

183. 858 N.E.2d 632, 635 (Ind. 2006).

found the defendant had violated his probation.¹⁸⁴ The judge sentenced the defendant to serve the duration of his original six-year term in the Department of Correction (“DOC”).¹⁸⁵ The defendant appealed the trial judge’s decision.¹⁸⁶

On July 18, 2001, the Indiana Court of Appeals issued an opinion concluding that the judge erred in revoking the defendant’s probation and in sentencing the defendant to the DOC.¹⁸⁷ The court of appeals remanded the case to the trial court for proceedings consistent with its opinion.¹⁸⁸ Judge Carr Darden, an appellate court judge, wrote a concurring opinion that agreed with the majority’s opinion, but Judge Darden said he “would order immediate release and discharge in this matter.”¹⁸⁹ The court of appeals sent a copy of the opinion to the judge by facsimile on the same day it issued its opinion.¹⁹⁰ When he received it, the judge instructed his court reporter to arrange for the defendant’s release from the DOC.¹⁹¹ However, the judge did not instruct his court reporter to prepare an order for the release of the defendant.¹⁹²

Then, the court reporter prepared an entry for the court’s chronological case summary (“CCS”):

Opinion—for publication handed down by the Indiana Court of Appeals concluding that trial court improperly revoked defendant’s probation and remands for further proceedings . . . Further, Judge Darden . . . [finds] that there is no evidence that supports further delay by the State for keeping the defendant locked up and would order immediate release and discharge in this matter. Judge Newman agrees and orders defendant released from DOC.¹⁹³

This CCS entry was not sent to the DOC.¹⁹⁴ However, it was sent to the State, the defendant’s appellate lawyer, and to the probation authorities.¹⁹⁵ In short, the defendant was not released from the DOC until he had served the full term of his original sentence with adjustments for credit time.¹⁹⁶ The defendant was released from the custody of the DOC on September 6, 2002.¹⁹⁷

The Indiana Supreme Court found that the judge in *Newman* violated Canon

184. *Id.* at 633-34.

185. *Id.* at 634.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

1A,¹⁹⁸ Canon 2A,¹⁹⁹ Canon 3B(9),²⁰⁰ and Canon 3C(2)²⁰¹ of the Indiana Code of Judicial Conduct.²⁰² The Indiana Supreme Court concluded that the judge in *Newman* should receive a public reprimand for his neglect of this case.²⁰³ The court reasoned:

It goes without saying that a trial court judge is duty-bound to carry out the orders of a reviewing appellate tribunal. That duty is at its highest when an appellate remand order affects the substantial rights and interests of a party under the trial court's control. When a trial court judge fails in this duty, the appellate relief secured by the party evaporates. Dawson [the defendant] can never regain the time and freedom that the [c]ourt of [a]ppeals' [s] opinion granted him.²⁰⁴

The judge's failure to order the defendant's release from the DOC as the court of appeals instructed in its opinion caused the defendant to lose his liberty rights.²⁰⁵ Thus, the judge's neglect of his duties had significant consequences for an individual under his control as the trial court judge.²⁰⁶

198. IND. CODE OF JUD. COND. Canon 1A provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards in order to preserve the integrity and independence of the judiciary. The provisions of this Code are to be construed and applied to further that objective.

199. IND. CODE OF JUD. COND. Canon 2A provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

200. IND. CODE OF JUD. COND. Canon 3B(9) provides: "A judge shall dispose of all judicial matters fairly, promptly, and efficiently."

201. IND. CODE OF JUD. COND. Canon 3C(2) provides: "A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties."

202. *In re Newman*, 858 N.E.2d at 635.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

