

2009 SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

There were a number of disciplinary actions of interest to the Indiana bar at large during this survey period. Issues addressed by the Indiana Supreme Court included lawyer advertising and solicitation and important considerations for lawyers who choose to practice in the form of limited liability entities or who may be considering forming a law practice as a limited liability entity. Another case involved an issue the supreme court is rarely called upon to address, referred to as “imputed firm status.” Imputed firm status is the practice arrangement where lawyers practice independently but may or may not be giving a clear impression of that arrangement to members of the public. As always, neglect of client matters was another topic addressed through disciplinary action. One case in particular stands out as an example of how insidious neglect can become. First, however, is a topic of relatively recent origin in the ethics rules. It is lawyers’ use of some physical or social trait to advocate against another party. Although there are situations where legitimate advocacy may include the use of factors like race or ethnicity, there are occasions when that advocacy may cross the line and become not only improper, but may subject the lawyer to disciplinary action.

I. IMPROPER USE OF RACE, GENDER, OR NATIONAL ORIGIN

The Indiana Supreme Court imposed a public reprimand on an attorney for violating Indiana Professional Conduct Rule 8.4(g).¹ In general terms, the rule prohibits lawyers from engaging in conduct that tends to degrade or demean a person based on his or her gender or other attribute. The Indiana Supreme Court added this provision into Indiana’s rules in 2001,² and it is similar to provisions

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1. *In re Campiti*, 905 N.E.2d 408 (Ind. 2009); IND. PROF’L CONDUCT R. 8.4(g) (2009). It is professional misconduct for a lawyer to:

engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

IND. PROF’L CONDUCT R. 8.4(g).

2. Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477, 1485 (2002).

enacted into the regulation of the profession in a number of states nationwide.³ The rule, as it existed during survey period, first required the lawyer to be acting in a professional capacity. There is no associated Comment to this provision in Rule 8.4. Therefore, the term “professional capacity” as it is used in the rule’s text is not specifically defined. Next, the rule prohibits the substantive conduct of manifesting bias or prejudice based upon one of the qualities described in the rule including race and gender. Third, the rule recognizes that there are occasions when legitimate advocacy requires delving into a person’s ethnicity or other physical quality and such advocacy does not violate the rule.⁴ Finally, the rule addresses concerns about a lawyer’s exercise of peremptory juror challenges on the basis of race or other impermissible grounds.

It is against this background that the supreme court evaluated the lawyer’s conduct in the disciplinary case of *In re Campiti*.⁵ Presented to the court as a settlement, one of the agreed facts in *Campiti* was that the lawyer was representing the father in a child support modification hearing. In advocating for the father, the lawyer made pejorative references to the fact that the mother was not a U.S. citizen and was receiving her legal services at no charge. The case notes that there were facts in both aggravation and mitigation. Aggravating the sanction was that the mother believed the lawyer discriminated against her because she was a non-citizen and that he made the remarks in a public courtroom. The facts in mitigation included the lawyer’s lack of a prior disciplinary history, his cooperation with the Disciplinary Commission, his regret for “his emotional involvement in the case,” and his apology to the mother.⁶ The court imposed a public reprimand.

The case has clear parallels to an earlier case involving this rule, *In re Thomsen*.⁷ That case also involved a family law dispute in which the respondent lawyer represented the husband. During her representation of the husband, the lawyer made repeated references to the fact that the mother was associating with an African-American man.⁸ The comments were unnecessary and inappropriate in the context of the litigation.⁹ The tactic appeared to be an attempt to introduce

3. See CAL. PROF’L CONDUCT R. 2-400(B); D.C. PROF’L CONDUCT R. 9.1; MO. PROF’L CONDUCT R. 4-8.4(g); VT. PROF’L CONDUCT R. 8.4. The Iowa Supreme Court’s take on this rule at the time also contained a prohibition against sexual harassment by a lawyer. See IOWA PROF’L CONDUCT R. 32:8:4(g).

4. Developing hypothetical situations around this question should be generally easy. In a criminal prosecution, a defense lawyer might have a strategic reason for challenging an identification witness’s recollection of the specific race of physical features of an accused. In a family law case, a party’s religious or cultural qualities might be an area of legitimate inquiry for determining what are the best interests of any children from the relationship. The legitimacy of the advocacy must always be evaluated in the context in which it arises.

5. 905 N.E.2d 408, 408 (Ind. 2009).

6. *Id.*

7. 837 N.E.2d 1011 (Ind. 2005).

8. *Id.* at 1011-12.

9. *Id.* at 1012.

undue racial animus into the proceeding with the hoped-for effect of prejudicing the court in her client's favor. The end product for the lawyer was a disciplinary sanction for violating Rule 8.4(g). As with *Campiti*, the lawyer in *Thomsen* had no discernible purpose for injecting the subject of ethnicity into the dispute other than to inflame the participants. In the circumstances of these cases, there is no question whether the lawyers were acting in their professional capacities.

II. LAWYER ADVERTISING: THE "ATTORNEYS OF ABOITE," ADVERTISING PAST SUCCESSES, AND ADVERTISING AS A LIMITED LIABILITY ENTITY

The Indiana Supreme Court also imposed sanctions of public reprimand of three lawyers in an advertising case. In *In re Loomis*,¹⁰ three lawyers practiced under the name "Attorneys of Aboite, LLC"¹¹ in Allen County. Specifically, the lawyers were practicing in a form where each of the lawyers represented clients individually and not in the form of limited liability entity.¹² In the major feature of the case, the lawyers had professional documents, telephone directory listings, advertisements, an Internet website, and other items all denominated with the name of "Attorneys of Aboite." The case was presented to the court on an agreed resolution and the respondent lawyers received credit for having no prior disciplinary history and cooperating with the Disciplinary Commission's investigation. The agreed violations include violations of Rules 7.2(b),¹³ 7.5(a),¹⁴ and 7.5(b).¹⁵ In its Published Order Approving Statements of Circumstances and Conditional Agreements for Discipline, the court pointed out that the use of the identifier "Attorneys of Aboite" and its variations constituted practicing under a trade name and constituted a violation of the rules.¹⁶ In support of its orders, the court observed, "[t]he impropriety 'Attorneys of Aboite' should have been apparent from *In re Miller*."¹⁷ In *Miller*, a one-year suspension from the practice of law sanction was imposed on the lawyer for practicing under the name "Area Attorneys."¹⁸ Thus, the inclusion of a geographic identifier in the name of the

10. 905 N.E.2d 406 (Ind. 2009).

11. Aboite is a township on the west side of Fort Wayne.

12. *In re Loomis*, 905 N.E.2d at 407.

13. IND. PROF'L CONDUCT R. 7.2(a). Indiana rules prohibit the use of, any form of a public communication (advertisement) containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim. *Id.*

14. IND. PROF'L CONDUCT R. 7.5(a). Indiana rules prohibit the use of professional cards or other professional documents containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim. *Id.*

15. IND. PROF'L CONDUCT R. 7.5(b). Indiana rules prohibit the "practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair" which includes practicing "under a trade name." *Id.*

16. *In re Loomis*, 905 N.E.2d at 407 (citing *In re Miller*, 462 N.E.2d 76 (Ind. 1984)).

17. *Id.*

18. *In re Miller*, 462 N.E.2d at 78.

law practice was by itself sufficient to constitute practicing under a trade name. The agreed to violations also made plain that practicing under a trade name constituted advertising that was false, misleading or deceptive under the rules.¹⁹

There is a second issue in the case with the potential for having a broader application for the bar at large. The court's order notes that the use of the LLC designation was an indication to the public that the lawyers practiced together in the form of a limited liability company and not simply practicing as space sharers.²⁰ It was important in the court's analysis that the respondent lawyers implied to the public that these lawyers had complied with the requirements of Admission and Discipline Rule 27.²¹ Compliance with this rule is not pro forma but has real and identifiable consequences for the law firm. "These requirements include that the LLC maintain adequate professional liability insurance or other form of adequate financial responsibility for the protection of clients and that the State Board of Law Examiners investigated the LLC members and certified the LLC."²²

Mere compliance with Indiana's corporations act²³ is insufficient for law firms to pass muster as limited liability entities. Lawyers seeking to practice in firms—or, as here, advertise that they are practicing in limited liability entities—must pay scrupulous attention to the requirements of Admission and Discipline Rule 27 and comply with them. As the court noted in the *Loomis* order, these benefits include protection for clients in the form of adequate professional liability insurance.²⁴ The *Loomis* disciplinary order makes clear that the court views this as a technical or ministerial violation but an act of false and

19. *In re Loomis*, 905 N.E.2d at 407.

20. *Id.*

21. IND. ADMISSION & DISCIPLINE R. 27 provides, in pertinent part:

Section 1. General Provisions. One or more lawyers may form a professional corporation, limited liability company or a limited liability partnership for the practice of law under Indiana Code 23-1.5-1, IC 23-18-1 and IC 23-4-1, respectively.

(a) The name of the professional corporation, limited liability company or limited liability partnership shall contain the surnames of some of its members, partners or other equity owners followed by the words "Professional Corporation," "PC," "P.C.," "Limited Liability Company," "L.L.C.," "LLC," "Limited Liability Partnership," "L.L.P.," or "LLP," as appropriate. Such a professional corporation, limited liability company, or limited liability partnership shall be permitted to use as its name the name or names of one or more deceased or retired members of a predecessor law firm in a continuing line of succession, subject to Rule of Professional Conduct 7.2.

22. *In re Loomis*, 905 N.E.2d at 407.

23. Indiana Code sections 23-1.5-1-1 to 5-2 (2007 & 2009 Supp.) covers the formation of Professional Corporations in the Indiana Code. Indiana Code sections 23-18-1-1 to -13-1 (2007 & Supp. 2009) covers the formation of limited liability companies in the Indiana Code.

24. Indiana Rule for Admission and the Discipline of Attorneys 27 section 1(g)(1) sets the specific terms of coverage for professional liability for firms practicing as P.C.'s, L.L.P.'s and L.L.C.'s.

misleading advertising.²⁵ By identifying itself as a limited liability entity, a law firm (of any size) warrants to the public that the firm protects clients' interests when in fact those interests are not protected. This failure to complete registration through the Board of Law Examiners can presumably stand as misconduct and its own.

The opinion also referenced a disciplinary cases involving lawyer advertising from just before the survey period. In another case involving more than one lawyer, *In re Benkie*,²⁶ the respondent lawyers and the Disciplinary Commission presented their case to the court on stipulated facts and exhibits. The case involved two brochures that lawyers used to solicit clients to the firm.²⁷ The brochures were entitled "When You Need A Lawyer" and "We Work For You."²⁸ The firm sent the first brochure to the Commission in 1996 with a letter seeking approval. The Disciplinary Commission responded that it did not render advisory opinions on the propriety of targeted solicitations and simply filed the brochure.²⁹ The firm sent the "We Work For You" brochure in 2001 and revised versions of both were filed in 2003 and 2004.³⁰ The Disciplinary Commission occasionally sent letters to lawyers advising them that they should change the language of their submissions to comply with the rules. These respondents did not receive any such advisement.³¹ The respondent lawyers were charged with violating Indiana Professional Conduct Rules 7.2(b),³² 7.2(c)(3),³³ 7.2(d)(2),³⁴ and 7.3(c).³⁵

In a per curiam opinion, the court went through each of the challenged statements and delineated why each statement either breached the rule or was permissible.

A. "Commitment to Obtaining the Best Possible Settlement"

The Disciplinary Commission charged the respondents with a violation of the rules believing this statement was akin to one from a 2000 disciplinary action.³⁶

25. *In re Loomis*, 905 N.E.2d at 407.

26. 892 N.E.2d 1237 (Ind. 2008).

27. *Id.* at 1239.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. IND. PROF'L CONDUCT R. 7.2(b).

33. IND. PROF'L CONDUCT R. 7.2(c)(3) (prohibiting the use of a statement that "is intended is likely to create an unjustified expectation").

34. IND. PROF'L CONDUCT R. 7.2(d)(2) (prohibiting the use of a public communication that "contains statistical data or other information based on past performance or prediction of future success").

35. IND. PROF'L CONDUCT R. 7.3(c) (prohibiting sending a solicitation without displaying "the words 'Advertising Material'").

36. *In re Wamsley*, 725 N.E.2d 75, 77 (Ind. 2000). The respondent lawyer had advertised using the statement "Best possible settlement . . . Least amount of time." *Id.* at 76. That was found

The respondent lawyers in *Benkie* argued that it was not a violation to make a commitment to clients to obtain the best possible settlement for clients and the supreme court agreed.³⁷ The court noted that the use of the term “commitment” was what every client had a right to expect and did not, therefore, constitute a violation of the rules.³⁸

B. Descriptions of Prior Representations

The Commission charged the respondents with violating Rule 7.2(d)(2)³⁹ for listing short descriptions of prior successful representations in their brochures. The respondent lawyers argued that the descriptions had been excerpted from newspaper articles and were thus already before the public.⁴⁰ The court pointed out that there was no exception in the text of the rule and the “selective use and editing” could be misleading, might be inaccurate and could lead to unjustified expectations by potential clients.⁴¹

C. “Legal Advertisement”

Under Rule 7.3(c), lawyers who use targeted solicitations like those at issue in this case are required to display the words “Advertising Material” conspicuously on the face of the solicitation and on the outside of any envelope containing the solicitation.⁴² The respondent lawyers admitted that this was a violation of the rules, but noted that it was merely technical and inadvertent. The supreme court took exception to this characterization and noted, “[u]se of the phrase ‘Legal Advertisement’ may create the impression that the Commission or some other body had reviewed it and found it to be ‘legal.’”⁴³ Put another way, the language of the rule, viz. “Advertising Material,” has a relatively plain meaning when compared to phrases like “Legal Advertisement” or “Lawful Advertisement” or “Legal Solicitation” that have double meanings that could confuse potential clients, either inadvertently or intentionally, into believing that the solicitation has somehow passed someone’s official muster. It is a fair

to violate the rules.

37. *In re Benkie*, 892 N.E.2d 1237, 1240 (Ind. 2008).

38. *Id.*

39. IND. PROF’L CONDUCT R. 7.6(d)(2).

40. *In re Benkie*, 892 N.E.2d at 1240.

41. *Id.*

42. IND. PROF’L CONDUCT R. 7.3(c) provides in pertinent part:

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words “Advertising Material” conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded communication.

43. *In re Benkie*, 892 N.E.2d at 1240.

reading of the court's opinion in this case to conclude that the court mandates strict compliance with the language of rule 7.3(c).

D. Lack of Warning or Assistance from the Commission

The respondent lawyers in this case complained to the Indiana Supreme Court that they had discovered that a staff attorney for the Commission had informally approved a solicitation letter submitted by another law firm. The court noted that the propriety of the other letter was not before them and would not change the court's determination of these lawyers' violations of the rules.⁴⁴ The court returned to this subject later in their opinion⁴⁵ and noted that Rule 7.3(c) required the filing of targeted solicitations with the Disciplinary Commission, but it did not require the Commission to review such submissions and pass upon their compliance with the rule.⁴⁶ In the court's view, one of the benefits of requiring that these solicitations be filed with the Disciplinary Commission was that it encouraged self-policing by the profession. It also afforded the staff of the Disciplinary Commission to occasionally detect problematic solicitations and warn those of the need to correct their solicitations.⁴⁷ "We do not wish to discourage this service to the bar and to the public, even though it cannot extend to every lawyer communication filed with the Commission."⁴⁸ In the end, each of these lawyers received public reprimand as a sanction for their misconduct.

III. CRIMINAL CONDUCT

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

44. *Id.*

45. *Id.* at 1241.

46. IND. PROF'L CONDUCT R. 7.3(c) provides in pertinent part,

A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars (\$50.00) payable to the "Supreme Court Disciplinary Commission Fund" shall accompany each such filing. In the event a written, recorded or electronic communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

47. *In re Benkie*, 892 N.E.2d at 1241.

48. *Id.*

in other respects.”⁴⁹ This is the full text of the rule as it existed during the survey period. The simple and understandable statement is present in a similar form in every U.S. jurisdiction’s law of professional regulation for lawyers. One’s first thought in considering this rule would be the impropriety of having a member of the bar that committed theft or perhaps a crime of violence. Certainly those types of criminal acts occur from time to time, and during the survey period in Indiana (and perhaps a little bit before) there have been a number of lawyers who have been the subjects of disciplinary action under this rule for a similar kind of misconduct. Consider the cases of *In re Toland*,⁵⁰ *In re Collins*,⁵¹ *In re Followell*,⁵² *In re Tolliver*,⁵³ *In re Butsch*,⁵⁴ *In re Woods*,⁵⁵ *In re Felts*,⁵⁶ and *In re Katic*.⁵⁷ All of these 2009 disciplinary actions involved lawyers who were the subject of criminal cases involving some form of intoxicant.

Although the sanctions in these cases ranged from a public reprimand in one case⁵⁸ to a stayed suspension with three years of subsequent probation in others,⁵⁹ the point is that this is a noteworthy number of cases of this type. In resolving these cases, the terms of final probation commonly include evaluation and treatment by appropriate professionals and a period of reporting to the court as to their progress.⁶⁰ Indiana has a sophisticated system for aiding members of the bench and bar in dealing with these problems through the Judges and Lawyers Assistance Program (JLAP).⁶¹ This confidential program is provided through the auspices of the supreme court and details and contact information are available through the court’s website.⁶²

IV. “COMMON” PRACTICE

During the survey period, the Indiana Supreme Court addressed an issue that it is only rarely called upon to address: when lawyers practice together, under

49. IND. PROF’L CONDUCT R. 8.4(b).

50. 907 N.E.2d 997 (Ind. 2009) (possession of marijuana).

51. 904 N.E.2d 660 (Ind. 2009) (operating a vehicle while intoxicated).

52. 905 N.E.2d 370 (Ind. 2009) (operating a vehicle with a BAC of .08 or more).

53. 907 N.E.2d 967 (Ind. 2009) (operating while intoxicated).

54. 899 N.E.2d 647 (Ind. 2009) (operating a vehicle with a BAC or .15 or more).

55. 899 N.E.2d 646 (Ind. 2009) (operating while intoxicated and public intoxication).

56. 902 N.E.2d 255 (Ind. 2009) (operating a vehicle with a BAC of .15 or more).

57. 899 N.E.2d 648 (Ind. 2009) (public intoxication by appearing in court with a BAC of .201).

58. *In re Toland*, 907 N.E.2d 997 (Ind. 2009).

59. *In re Butsch*, 899 N.E.2d 647 (Ind. 2009).

60. *E.g.*, *In re Felts*, 902 N.E.2d 255.

61. *See* Judges and Lawyers Assistance Program (JLAP), <http://www.in.gov/judiciary/ijlap> (last visited May 22, 2010).

62. The legal foundations for the mission and structure of JLAP are found at Indiana Admission to the Bar and Discipline of Attorneys Rule 31.

what circumstances can they be considered a law firm? In *In re Recker*,⁶³ the Disciplinary Commission charged a lawyer with violating the Rules of Professional Conduct dealing with revelations of client information and having conflicting interests.⁶⁴ Although in the end the court found in the lawyer's favor, it published a per curiam opinion to explain its view of the dispute. The primary issue was whether James Recker and another lawyer, Laura Paul, were "associated in a firm" at the time of the relevant events such that Paul's client was also deemed to be Recker's client.⁶⁵

Both lawyers were part-time public defenders in Putnam County. The Putnam Circuit Court contracted with Recker to provide indigent defense in that court and Paul had a similar contract to be the public defender in that court.⁶⁶ Both lawyers maintained their own private offices with Recker's in Indianapolis and Paul's in Terre Haute. Putnam County provided office space within its courthouse for the public defenders. Due to budget constraints, the county did not provide doors to their respective cubicles and only provided one incoming telephone line. Conversations could not normally be heard between one cubicle and the other. The county also provided stationery listing both courts with the words "Office of the Public Defender."⁶⁷ The court also provided secretarial assistance including an office manager who kept all of the public defender files in a central location and only allowed attorneys who had entered an appearance in that case to check out the case's files.

Recker was appointed to represent a criminal defendant whom the supreme court identified as "AB" who was charged with battery resulting in the death of his girlfriend's child.⁶⁸ He was also appointed to represent AB in a Child In Need Of Services (CHINS) case involving the client's own child. Thereafter, AB hired another attorney, James Holder, to represent him in his criminal case. Recker, however, continued to represent AB in his CHINS case.⁶⁹

Paul, meanwhile, was appointed to represent client XY in a criminal case in the Putnam Superior Court. AB, XY, and another defendant were housed in the same holding cell in the Putnam County jail.⁷⁰ At some point, the Putnam County Prosecutor met with Paul in the public defender office and told her that her client, XY had passed a note to the Sheriff stating that AB had told XY details of the alleged battery but XY wanted to speak with his attorney before he revealed more information. Paul believed the Prosecutor was suggesting a plea deal for XY in exchange for information about AB.⁷¹ Recker was not in the office at the time of this conversation.

63. 902 N.E.2d 225 (Ind. 2009) (per curiam).

64. *Id.* at 227.

65. *Id.* at 226.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

When Recker returned, Paul related her conversation with the Prosecutor and mentioned AB's name but not XY's. Because she had not experienced this situation before, Paul sought Recker's advice as to what she should do. Paul did not know Recker represented AB. Recker, meanwhile, believed the client Paul was representing was a private client and, therefore, not a public defender client. After his conversation with Paul, Recker telephoned Holder and told him that it appeared AB was talking about his case to his cellmates. Holder, in turn, contacted AB who then suspected the informant was XY. When the Prosecutor learned of the situation, he contacted the jail and had XY removed from the cell. Eventually, AB was charged with murder, XY testified at this trial and AB was convicted.⁷²

The Disciplinary Commission charged Recker with violations of the Rules of Professional Conduct for revealing information relating to the client's representation without the client's informed consent,⁷³ using information relating to the representation of a client to the disadvantage of the client without the client's informed consent,⁷⁴ and with violating the rule that provides that while lawyers are associated in a firm, certain prohibitions that apply to any one of them applies to all of them.⁷⁵ The key concept in the Disciplinary Commission's charging theory was that the facts supported a view that Recker and Paul, in their roles as public defenders, were practicing as a law firm. Under the rules, a "[f]irm" or "[l]aw [f]irm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation *or other organization*.⁷⁶

The supreme court examined the comment to the rule to address the issue of whether these lawyers could be said to be practicing as a firm. The determination of firm status depends on specific facts that can lead to the imputation of firm status on lawyers' practice arrangement. For example, lawyers in even occasional or incidental practice could be found to be practicing as a firm if they present themselves to the public in a way that suggests they are a firm or conduct themselves in a way that suggests they are a firm.⁷⁷ One of the facts relevant to this evaluation is the extent to which the lawyers share or otherwise have access to information about their clients.⁷⁸

This issue was first address by the Indiana Supreme Court in the case of *In*

72. *Id.* at 227.

73. IND. PROF'L CONDUCT R. 1.6.

74. IND. PROF'L CONDUCT R. 1.8(b). Note that the language of this rule and rule 1.6, does not require that the information at issue be "confidential." Lawyers often talk of "privileged" or "confidential" communications between lawyer and client. To be sure, that sort of information must be held close to the lawyer's vest. Nevertheless, these rules do not require that there be any sort of secret quality to the information disclosed in order to constitute a violation of these rules.

75. IND. PROF'L CONDUCT R. 1.8(k).

76. IND. PROF'L CONDUCT R. 1.0 (emphasis added).

77. *In re Recker*, 902 N.E.2d at 227-28.

78. *Id.*

re Sexson.⁷⁹ In *Sexson*, the respondent lawyer, a lawyer named Thompson and four other lawyers maintained an office at a common location. They shared a secretary, common letterhead, three phone lines and left their office doors unlocked and the doors open. Conversations in each individual office could be heard in the common hallway. Thompson represented a couple named Zimmerman as plaintiffs in a personal injury case. During the pendency of that case, the Zimmermans filed for a marriage dissolution and Mrs. Zimmerman hired Sexson to represent her. At the conclusion of the personal injury case, Mr. Zimmerman went to Thompson's office to collect his share of the settlement and was greeted by Sexson with a restraining order in the dissolution case preventing him from spending his share of the proceeds.⁸⁰ It was reasonable, the court found, for Mr. Zimmerman to believe both that Thompson and Sexson were part of a law firm and that Sexson had engaged in an adverse representation.⁸¹

Irrespective of the common elements with *Sexson*, the facts in *Recker* were sufficiently distinguishable to prevent the finding that Recker and Paul were not practicing as a firm in the public defender office, the court held.⁸² Notably, the lawyers did not have any choice about the office arrangement or organizational structure of the office in which they practiced. They did not hold themselves out as being in practice together and only took on cases in the courts to which they were assigned. One important factual dispute in the case was the level of access each attorney had to the other's files, but the Hearing Officer who heard the case in the first instance determined that the court-provided secretary handled all the files in an appropriate fashion and the Indiana Supreme Court agreed with this finding.⁸³ The court held:

There is no uniform system of providing indigent defense in Indiana's 92 counties. For example, indigent defense in Marion County is provided by the attorneys employed by the Marion County Public Defender Agency. In some counties, attorneys providing such services may be considered to comprise one law firm. Under the Putnam County system, however, the public defenders simply share office space and support services provided for their use by the courts. They are not deemed to be members of a firm, at least for the purpose of the rule that information acquired by one lawyer in a firm is attributed to another.

Regardless of whether public defenders in a particular county are considered to be members of a firm, it is imperative that they consider the implications their relationship have on their professional duties to their clients. If the attorneys are deemed to be members of a firm, avoiding improper conflicts of interest must be given a high priority. If

79. 613 N.E.2d 841 (Ind. 1993).

80. *Id.* at 842.

81. *Id.* at 843.

82. *In re Recker*, 902 N.E.2d at 228.

83. *Id.*

the attorneys are considered to be practicing independently, they must take care not to share improperly confidential information about their clients with each other. Attorneys sharing office space, as public defenders or in other contexts, may benefit from consulting with each other about legal issues, but this can be done ethically only after first determining that the interests of both attorneys' clients are not compromised.⁸⁴

The court then determined that Paul gave Recker information from XY who was acting against Recker's client's interests.⁸⁵ Because XY was not his client, Recker did not violate the Rules of Professional Conduct by passing on the information he had received. Paul was not charged with committing misconduct and the court expressed no opinion on her actions.⁸⁶

The decision, however, was not unanimous. Justice Frank Sullivan dissented with an opinion in which he would have found the Putnam County Public Defender's Office was practicing as a law firm. Justice Sullivan wrote that he believed "that the [c]ourt employs an overly technical, indeed, near-sighted, definition of 'firm' and in doing so loses sight of the principal interest at stake . . . : the inviolability of client confidences."⁸⁷

The dissent noted that the test was whether the lawyers presented themselves to the public in a way that suggested they were practicing as a firm. Justice Sullivan posited that because the inviolability of client confidences is one of the "bedrocks of our profession," he would have applied this test from the perspective of the reasonable client and not the reasonable lawyer.⁸⁸ Analyzing the same facts as the majority, the dissent observed that the lawyers practiced in adjoining cubicles in a single office with a sign noting "Public Defender's Office."⁸⁹ There were no internal doors dividing the offices, a common workspace was present for the secretarial staff, the files of both lawyers were present together, a caller to the office would talk to the same support staff for each lawyer. Paul, he observed, must have thought they were in the same firm else she would not have consulted on such a matter with Recker.⁹⁰ Under the majority opinion, he notes, if Recker had heard a confidential communication between Paul and a client, he would have had no duty to keep confidential the information he heard.⁹¹

After reviewing the literature, Justice Sullivan observed,

Perhaps the [c]ourt is concerned that the public defender arrangement here is a common one in our state's Balkanized system of trial courts and

84. *Id.* at 229.

85. *Id.*

86. *Id.*

87. *Id.* at 230 (Sullivan, J., dissenting).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

that holding it to be a firm would have negative consequences. If so, I do not understand the argument. Even if the two lawyers here are not a "firm," either one is likely to have conflicts of interest in particular criminal cases from time to time that require the appointment of other counsel. Viewed from the perspective of a large county with a public defender office that is undeniably a "firm," lawyers in such an office are clearly prohibited from representing clients with inconsistent defenses, regularly requiring other counsel to be secured. While the necessity of securing "conflict" counsel presents some negative fiscal and other consequences in counties large and small, they are part of the price that our legal system has long paid to maintain the inviolability of client confidences in criminal cases. They do not justify a deviation from that principle in the case of this particular public defender's office.⁹²

The dissent concluded that the facts as adduced in this case supported the conclusion that the office in question constituted a law firm and that the respondent lawyer had violated the rules as alleged by the Disciplinary Commission.⁹³

The case is important for its examination of some of the key ethical dilemmas in the delivery of legal services to indigent criminal defendants. The opinions, both the majority and the dissent, highlight some of the important elements for consideration on each side. Justice Sullivan's dissent makes the point that if a lawyer in one firm sends a fax containing confidential client information to a lawyer in another firm, the public would not normally be misled into believing that these two lawyers were practicing as a law firm.⁹⁴ In this case, the lawyers shared adjacent cubicles without doors. Extending that logic, a reasonable inference could be made that their practice arrangement was such that the duty of confidentiality applied to both lawyers. Also, it was important in this case that the secretarial staff was careful to only share files with lawyers who had appeared for the defendant.⁹⁵ This step helped insulate the lawyers from imputed firm status and the majority carefully examined these procedures before reaching that conclusion.

Even a casual reading of the case leaves the impression that, in future cases, it would not take large variations from the fact pattern presented in *Recker* to result in a finding of misconduct for the lawyers involved. Note also that both opinions are conscious of the lack of uniformity in the way indigent criminal

92. *Id.* at 231.

93. *Id.*

94. *Id.* at 230.

95. *Id.* at 226. There are legitimate reasons for using the support staff as gatekeepers in this fashion. If, hypothetically, a witness in a criminal prosecution had been previously represented by the public defender's office in an unrelated criminal prosecution, a lawyer might be tempted to investigate the prior representation for information that might impeach the witness's credibility or character. That would clearly be a misuse of client information. Using a secretary to screen access to files could be an important safeguard for client information.

defense services are provided throughout Indiana.⁹⁶ There does not appear to be any suggestion in *Recker* of a specific solution from the supreme court for resolving situations like this that may arise throughout the state.

V. ALAS NEGLECT: IT IS ALWAYS WITH US

A comment to Rule 1.3, suggest that “[p]erhaps no professional shortcoming is more widely resented than procrastination.”⁹⁷ Thus reads one of the best know observations made in the Rules of Professional Conduct to Rule 1.3 which imposes a duty on all lawyers to be diligent in the handling of entrusted matters.⁹⁸ As noted in prior survey articles on professional responsibility, neglect of client matters is one of the most pernicious and pervasive of all misconduct by attorneys resulting in disciplinary action.⁹⁹ One case, *In re Maldonado-Rosales*,¹⁰⁰ is noteworthy due to the pattern of neglect and related misconduct associated with the attorney’s actions. In this four count disciplinary matter, the respondent lawyer engaged in serious misconduct in connection with several clients.¹⁰¹

In Count I, the respondent represented a client on a contingency fee basis as a plaintiff in a personal injury case. In May 2005, she received a settlement check for nearly \$4,400.¹⁰² She properly deposited the funds in her trust account but later withdrew \$4,300 and put the money in her firm’s operating account (a violation of the rules) and spent the money for personal purchases.¹⁰³ She overdrew both accounts and, in June 2005, issued a check for about \$2,900 to her client, which, of course, bounced.¹⁰⁴ She then lied to her client and to the Disciplinary Commission about her delay in disbursing the settlement money, claiming she was waiting on the underlying check to clear.¹⁰⁵

The Disciplinary Commission charged the respondent with violating the

96. *Id.* at 229 (majority) and 231 (Sullivan, J., dissenting).

97. IND. PROF’L CONDUCT R. 1.3, cmt. 3.

98. IND. PROF’L CONDUCT R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

99. Charles M. Kidd & Dennis K. McKinney, *Survey of 1996 Developments in the Law of Professional Responsibility*, 30 IND. L. REV. 1251, 1252-55 (1997).

100. 904 N.E.2d 209 (Ind. 2009).

101. *Id.* at 209-10.

102. *Id.*

103. Indiana Rule of Professional Conduct 1.15(a) provides:

A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

104. *Maldonado-Rosales*, 904 N.E.2d at 209.

105. *Id.*

Rules of Professional Conduct 1.5(c),¹⁰⁶ 1.15(a),¹⁰⁷ 8.1(a),¹⁰⁸ 8.1(b),¹⁰⁹ 8.4(b),¹¹⁰ and 8.4(c).¹¹¹ Standing by itself, Count I of the disciplinary action constitutes a serious breach of professional ethics and would result in a significant sanction in its own right. There were, however, three additional counts in the case.

In Count II, the respondent lawyer was again hired to represent a client in a personal injury case.¹¹² In pursuing the case, she made a settlement demand without the client's knowledge or consent. She also had the client deliver a check for \$107 to her office for a filing fee for his case. But she failed to file the complaint before the statute of limitations ran.¹¹³ She then wrote to the client returning his check and falsely stated that she had not received either his filing fee or sufficient information about the case in time to allow her to file a timely complaint.¹¹⁴

In Count III, the respondent charged a client a flat fee of \$500 to represent him in a civil collection action wherein the client was seeking about \$8,000 in damages.¹¹⁵ She failed to respond to a discovery request, failed to respond to a motion for summary judgment and failed to notify the client when summary judgment was entered against him. Then, she failed to notify the client of a hearing on proceedings supplemental and failed to appear at the hearing. She

106. IND. PROF'L CONDUCT R. 1.5(c) ("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.").

107. IND. PROF'L CONDUCT R. 1.15(a):

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

108. IND. PROF'L CONDUCT R. 8.1(a) ("An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact.").

109. IND. PROF'L CONDUCT R. 8.1(b):

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

110. IND. PROF'L CONDUCT R. 8.4(b) ("It is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.").

111. IND. PROF'L CONDUCT R. 8.4(c) ("It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

112. *In re Maldonado-Rosales*, 904 N.E.2d 209 (Ind. 2009).

113. *Id.*

114. *Id.*

115. *Id.*

finally charged the client an additional \$500 to represent him in “an unsuccessful motion to set aside the judgment.”¹¹⁶

In Count IV, the client entered into a contract with a wedding photographer who subsequently failed to show up and photograph the wedding.¹¹⁷ In January 2006, she hired the respondent for a flat fee of \$1,500 to sue the photographer. The respondent told the client she could recover eighty percent of the \$25,000 cost of her wedding. The defendant photographer did not file an answer to the complaint but the respondent did not take any further action to pursue the claim.¹¹⁸ The client eventually fired the respondent and demanded return of her \$1,500. Her case was dismissed in July 2008 for failing to prosecute the claim. The respondent failed to refund any part of the fee.¹¹⁹

For her misconduct in Counts II, III, and IV, the respondent was charged with violating Rules 1.1,¹²⁰ 1.3,¹²¹ 1.4(a)(1),(3) and (4),¹²² 1.4(b),¹²³ 1.5(a),¹²⁴ and 1.16(d).¹²⁵ In a nutshell, this combination of rule violations charges the lawyer with incompetent representation, failing to communicate with clients, failing to respond to requests for information from clients, charging an unreasonable fee, and failing to either preserve the client’s interests or refund unused fees upon the

116. *Id.*

117. *Id.* at 209-10.

118. *Id.*

119. *Id.*

120. IND. PROF’L CONDUCT R. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

121. IND. PROF’L CONDUCT R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

122. IND. PROF’L CONDUCT R. 1.4(a):

A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information.

123. IND. PROF’L CONDUCT R. 1.4(b) (“(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

124. IND. PROF’L CONDUCT R. 1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”).

125. IND. PROF’L CONDUCT R. 1.16(d) provides,

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

termination of the representation. Neglecting client matters and failing to communicate with clients are relatively common violations in disciplinary actions but the conduct in this case constituted seriously aggravated misconduct on the part of the lawyer. The respondent and the Disciplinary Commission agreed to settle the case based on a two-year suspension from the practice of law.¹²⁶ At the end of that period, the respondent lawyer can petition the Indiana Supreme Court for reinstatement to the practice of law.¹²⁷

This case represents, in a microcosm, a life cycle of neglected matters. Note throughout the development of the case that the respondent lawyer had neglected the matters long before identifiable negative consequences actually befell their cases. Also this case was brought on multiple client matters. One of the facts stipulated by the respondent and the Disciplinary Commission was that the respondent had substantial personal and emotional problems at the time she practiced law.¹²⁸ Clearly, there was a problem internal to her law practice that was contributing to the problems that resulted in this disciplinary action. Neglect turned into lost claims. The situation then led to the respondent's deceitful conduct. The client's claims were lost or irreparably damaged. The end result was loss of the respondent's ability to practice law. This exposition represents a good roadmap of the journey neglected matters take. This is not a desirable end for either the client or the lawyer under any circumstance.

CONCLUSION

This is certainly not a comprehensive list of the disciplinary matters or other lawyer cases decided during the survey period. As of the publication of this Article, there are already cases fit for consideration in the area of professional responsibility for next year. There is enough herein that should cause many prudent lawyers to evaluate how they are practicing law, e.g., the form of the practice and compliance with the procedures of the Board of Law Examiners, the presentation of the firm to the public, and the truthfulness needed for the daily practice of law. Staying current on ethical considerations for practicing lawyers should be something that gets attention periodically throughout the year and not just a matter for one's occasional continuing legal education commitment.

126. *In re Maldonado-Rosales*, 904 N.E.2d 209, 209-10 (Ind. 2009).

127. *Id.* at 210-11.

128. *Id.* at 210.

