

# 2010 SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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## INTRODUCTION

During this survey period, a very diverse collection of subjects merited attention and review. Notably, a number of the cases decided by the supreme court were styled as “Anonymous” opinions. Opinions carrying the “Anonymous” caption can (and as will be seen) have wide application within the Indiana bar. Most people will immediately appreciate that disciplinary cases resulting in a lawyer’s permanent disbarment from the practice of law are not usually the result of a single bad act, but rather, the end product of a long series of actions that usually harm both the public and the bar at large. One example is *Matter of Perrello*,<sup>1</sup> wherein the lawyer had a long and troubling history of misconduct, including a lengthy prior suspension and a criminal contempt action before his disbarment. In isolation, a particular sanction in one case is not indicative of a trend or change in legal philosophy, and nothing in this Article suggests that such a momentous event is occurring. As a general matter however, “Anonymous” opinions indicate that the respondent lawyer who is the actual subject of the disciplinary action has committed some misconduct warranting sanction. In these instances, the lawyers received one of the lowest levels of rebuke, the private reprimand.<sup>2</sup> Something about the misconduct involved, however, is of sufficient note to warrant publication of the facts and the supreme court’s analysis for the broader benefit of the bar and public. Hopefully, through the review in this Article, the reader will develop some appreciation for the significant ethical lesson to be drawn from the disciplinary actions reviewed.

## I. WHAT’S THE PLURAL OF ANONYMOUS?

In August 2010, the Indiana Supreme Court handed down its opinion in the case identified as *In re Anonymous*.<sup>3</sup> In that case, a woman identified as “AB” had consulted with the respondent lawyer about difficulties she was having in her marriage.<sup>4</sup> The respondent lawyer represented an organization at which AB was

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1. 394 N.E.2d 127 (Ind. 1979) (ordering disbarment for the attorney). In a subsequent case, *Matter of Perrello*, 386 N.E.2d 174 (Ind. 1979), Perrello was incarcerated for contempt of the supreme court for continuing to practice law while he was suspended. *Id.* at 179-80.

2. IND. ADMISSION & DISCIPLINE R. 23, § 3(a). This provision recites the list of possible sanctions that can be imposed by the Indiana Supreme Court for professional misconduct by a lawyer.

3. 932 N.E.2d 671 (Ind. 2010).

4. *Id.* at 672.

an employee, which is presumably how their acquaintance began.<sup>5</sup> AB confided in the respondent that she and her husband had been involved in a domestic dispute in which the police were called to intervene; she further confided that her husband was prepared to accuse AB of threatening to harm him.<sup>6</sup> The respondent referred AB to a lawyer in her law firm to represent her in a marriage dissolution action. AB hired the referral lawyer and began a marriage dissolution action. Shortly thereafter, AB and her husband reconciled, and the marriage dissolution case was dismissed.<sup>7</sup> Some weeks later, the respondent was socializing with two friends—one of whom was a mutual friend of AB's—and the respondent lawyer discussed AB's situation in the conversation. The respondent asked the friend to have AB contact her to discuss her situation.<sup>8</sup> Upon learning of the respondent's out-of-office revelation of AB's prior communications, AB became upset and filed a grievance with the Indiana Supreme Court Disciplinary Commission. This disciplinary action ensued, and the respondent lawyer was charged with a violation of rule 1.9(c)(2)<sup>9</sup> of the Indiana Rules of Professional Conduct.<sup>10</sup>

The case was tried to a hearing officer, and the respondent was found to have violated the rule as charged.<sup>11</sup> In its discussion, the supreme court noted that this rule and other rules of professional conduct were interrelated.<sup>12</sup> Specifically, the court looked to rule 1.6, which governs a lawyer's duties regarding the confidentiality of information as it relates to current clients.<sup>13</sup> The primary provision is in subsection (a), which states that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."<sup>14</sup> The court also discussed the applicability of rule 1.18, which governs a lawyer's duties to prospective clients. There, "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."<sup>15</sup> Furthermore, "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 673.

9. Rule 1.9(c)(2) provides, in pertinent part, that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client." IND. PROF'L CONDUCT R. 1.9(c)(2).

10. *Anonymous*, 932 N.E.2d at 673.

11. *Id.*

12. *Id.*

13. *See* IND. PROF'L CONDUCT R. 1.6.

14. IND. PROF'L CONDUCT R. 1.6(a). Paragraph (b) allows disclosure under certain specified conditions, none of which were present in this case.

15. IND. PROF'L CONDUCT R. 1.18(a).

or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.”<sup>16</sup>

The respondent’s first argument was that AB had given her the information for the purpose of obtaining personal rather than professional help.<sup>17</sup> She argued that AB did not communicate her interest in obtaining a lawyer referral until a later telephone conversation. The second conversation, however, was not long after the first communication. The court found that AB’s status became that of prospective client (under rule 1.18) at the time of the second communication, “if not before.”<sup>18</sup> AB became a client of the firm immediately thereafter, and the information was highly relevant to the representation.<sup>19</sup> The respondent lawyer also presented evidence that AB had revealed this information to persons other than her, but the court observed that such disclosures did not relieve the respondent lawyer from her obligations under the rules of professional conduct.<sup>20</sup> Concisely, the court stated, “An attorney has a duty to prospective, current, and former clients to scrupulously avoid revelation of such information, even if, as may have been the case here, the attorney is motivated by personal concern for the client.”<sup>21</sup> The court thereafter ordered a private reprimand for this respondent.

In the next “Anonymous” opinion,<sup>22</sup> an Indiana lawyer agreed to serve as local counsel for a lawyer from Kentucky who was not properly admitted to practice in Indiana.<sup>23</sup> In the underlying litigation, a Kentucky resident was injured in a fall at an Indiana restaurant.<sup>24</sup> The injured party hired Kentucky lawyer John Redelberger to pursue the claim. Redelberger did not, however, pursue temporary admission as required by Indiana Admission and Discipline Rule 3.<sup>25</sup> Nevertheless, Redelberger appeared in the case, signed and served

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16. IND. PROF’L CONDUCT R. 1.18(b).

17. *Anonymous*, 932 N.E.2d at 674.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 675.

22. *In re Anonymous*, 932 N.E.2d 1247 (Ind. 2010) (per curiam).

23. *Id.* at 1248.

24. *Id.*

25. *Id.* Section 2(a) of Indiana Admission and Discipline Rule 3 deals with temporary admission on petition and states as follows:

(a) *Requirements for Temporary Admission on Petition.* The Supreme Court, the Court of Appeals, the Tax Court, or a trial court, in the exercise of discretion, may permit a member of the bar of another state or territory of the United States, or the District of Columbia, not admitted pursuant to Rule 21, to appear in any particular proceeding, only if the court before which the attorney wishes to appear determines that there is good cause for such appearance and that each of the following conditions is met:

(1) A member of the bar of this state has appeared and agreed to act as co-counsel.

(2) The attorney is not a resident of the state of Indiana, regularly employed in the state of Indiana, or regularly engaged in business or professional activities in the

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state of Indiana.

(3) The attorney has made payment to the Clerk of the Supreme Court an annual registration fee in the amount set forth in Admission and Discipline Rule 2(b), accompanied by a copy of the Verified Petition for Temporary Admission that the attorney intends to file pursuant to subdivision (4) below. Upon receipt of the registration fee and petition, the Clerk of the Supreme Court will issue a temporary admission attorney number and payment receipt to the attorney seeking admission. If the attorney's verified petition for temporary admission is thereafter denied, the attorney shall provide a copy of the order denying temporary admission to the Clerk of the Supreme Court, and the Clerk shall issue a refund of the registration fee.

(4) The attorney files a verified petition, co-signed by co-counsel designated pursuant to subdivision (a)(1), setting forth:

(i) The attorney's residential address, office address, office telephone number, electronic mail address, and the name and address of the attorney's law firm or employer, if applicable;

(ii) All states or territories in which the attorney has ever been licensed to practice law, including the dates of admission to practice and any attorney registration numbers;

(iii) That the attorney is currently a member in good standing in all jurisdictions listed in (ii);

(iv) That the attorney has never been suspended, disbarred or resigned as a result of a disciplinary charge, investigation, or proceeding from the practice of law in any jurisdiction; or, if the attorney has been suspended, disbarred or resigned from the practice of law, the petition shall specify the jurisdiction, the charges, the address of the court and disciplinary authority which imposed the sanction, and the reasons why the court should grant temporary admission . . . [notwithstanding] prior acts of misconduct;

(v) That no disciplinary proceeding is presently pending against the attorney in any jurisdiction; or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule shall have a continuing obligation during the period of such admission promptly to advise the court of a disposition made of pending charges or the institution of new disciplinary proceedings;

(vi) A list of all proceedings, including caption and cause number, in which either the attorney, or any member of a firm with which the attorney is currently affiliated, has appeared in any of the courts of this state during the last five years by temporary admission.

(vii) Absent good cause, repeated appearances by any person or by members of a single law firm pursuant to this rule shall be cause for denial of the petition. A demonstration that good cause exists for the appearance shall include at least one of the following:

(a) the cause in which the attorney seeks admission involves a complex field of law in which the attorney has special expertise,

answers to interrogatories, and took depositions of witnesses in Indiana. Redelberger also appeared in court on behalf of the client.<sup>26</sup> It was after this appearance that the presiding judge pointed out to the respondent lawyer that Redelberger had not properly been admitted in this state. After this, the respondent lawyer provided Redelberger with a copy of the Indiana rule on temporary admission, but neither the respondent or Redelberger followed up on the process.<sup>27</sup>

In its discussion, the court noted that its authority to regulate the practice of law is plenary in this state under the Indiana Constitution.<sup>28</sup> It was also necessary for the court to know who was practicing law in Indiana so that it could properly exercise that authority.<sup>29</sup> The court then discussed the procedure for obtaining temporary admission. Before an attorney can appear in an Indiana court, he or she must pay a temporary admission fee and obtain a temporary admission attorney number from the clerk of the Indiana Supreme Court.<sup>30</sup> Thereafter, the lawyer may petition for temporary admission with the court. If a lawyer fails to seek temporary admission, he or she can be automatically excluded from the practice of law from all actions in the state.<sup>31</sup> An out-of-state lawyer can also be charged with the unauthorized practice of law. The court also pointed out that the role of the Indiana attorney is not a mere matter of form, noting that

[t]he participation of Indiana co-counsel in the temporary admission

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(b) there has been an attorney-client relationship with the client for an extended period of time,

(c) there is a lack of local counsel with adequate expertise in the field involved,

(d) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(e) such other reason similar to those set forth in this subsection as would present good cause for the temporary admission.

(viii) A statement that the attorney has read and will be bound by the Rules of Professional Conduct adopted by the Supreme Court, and that the attorney consents to the jurisdiction of the State of Indiana, the Indiana Supreme Court, and the Indiana Supreme Court Disciplinary Commission to resolve any disciplinary matter that might arise as a result of the representation.

(ix) A statement that the attorney has paid the registration fee to the Clerk of the Supreme Court in compliance with subdivision (a)(3) of this rule, together with a copy of the payment receipt and temporary admission attorney number issued by the Clerk of the Supreme Court pursuant to subdivision (3).

IND. ADMISSION & DISCIPLINE R. 3, § 2(a).

26. *Anonymous*, 932 N.E.2d at 1248.

27. *Id.*

28. *Id.* (citing IND. CONST. art. VII, § 4).

29. *Id.* at 1249.

30. IND. ADMISSION & DISCIPLINE R. 3, § 2(a)(3).

31. *See id.*

process is of vital importance to this Court's ability to supervise out-of-state attorneys practicing in this state. This is no minor or perfunctory duty. Not all attorney seeking temporary admission will be granted the privilege of practicing in Indiana. Thus, an out-of-state attorney may seek temporary admission in an Indiana court only if a member of the bar of this state has appeared and agreed to act as co-counsel. Indiana co-counsel must co-sign the out-of-state attorney's petition for temporary admission, which must include the attorney's temporary admission and a receipt showing that the attorney has paid the temporary admission fee. Indiana co-counsel must also sign all briefs, papers and pleadings in the case and is jointly responsible for them. This signature constitutes a certificate that, to the best of co-counsel's knowledge, information and belief, there is good ground to support the document. Indiana co-counsel is subject to discipline if the out-of-state attorney fails to satisfy the requirements of the rule governing temporary admission.<sup>32</sup>

The court also observed that the clerk of the supreme court had issued more than six hundred notices of automatic exclusion at the time of the opinion in 2010—the point being that the need for the automatic exclusions would be nearly eliminated if Indiana co-counsel complied with their ethical duty to ensure that out-of-state lawyers complied with Indiana Admission and Discipline Rule 3.<sup>33</sup> The court then approved and accepted the proposed private reprimand offered by the parties.<sup>34</sup>

In a third “Anonymous” opinion, the court imposed a private reprimand on a lawyer who rebuffed an incarcerated client's request for materials out of his file.<sup>35</sup> In that case, a criminal defendant was charged with three counts of auto theft, and the respondent lawyer was appointed to serve as his public defender.<sup>36</sup> During the representation, the client sent the lawyer a letter asking for a copy of the State of Indiana's responses to his discovery request. The client stated a willingness to sign a plea agreement if the State would allow his sentence in the instant case to run concurrently with a sentence he was then serving.<sup>37</sup> The lawyer reviewed the discovery with the client but did not provide the client a copy.<sup>38</sup> A plea agreement was successfully consummated shortly thereafter. The client went to jail and did not pursue an appeal. The respondent argued—and the supreme court agreed—that the respondent reasonably believed that the client's prior request for a copy of these materials was no longer an issue at that point.<sup>39</sup>

Several weeks later, by letter, the client asked for a copy of the discovery

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32. *Anonymous*, 932 N.E.2d at 1249 (internal citations omitted).

33. *Id.* at 1250.

34. *Id.*

35. *In re Anonymous*, 914 N.E.2d 265, 267 (Ind. 2009).

36. *Id.* at 266.

37. *Id.*

38. *Id.*

39. *Id.*

materials and copies of “all other court documents.”<sup>40</sup> There was no other indication as to why he wanted these materials. The respondent sent a letter back to the client advising him that his representation had ended on the date of sentencing and that he felt no further professional obligation to the client. He also advised the client he was “not going to waste a lot of needless time and money sending stuff that’s irrelevant for what . . . [the client was] obviously planning to do . . . filing some sort of post-conviction relief petition and all the litigation that goes with it.”<sup>41</sup> He also sent a copy of a court of appeals decision in a post-conviction relief case and suggested that the client “read it about 14 times before . . . [filing] any sort of PCR petition.”<sup>42</sup>

After the client filed a grievance, the disciplinary commission initiated disciplinary action against the respondent and charged him with violating rule 1.16(d) of the Indiana Rules of Professional Conduct.<sup>43</sup> Essentially, the rule spells out a lawyer’s duties to a client upon the termination of the formal attorney-client relationship. The respondent lawyer and the commission tried their cases to the hearing officer, who concluded that the respondent had violated rule 1.16(d) by failing to provide copies of the discovery requests to the client.<sup>44</sup> However, the officer also concluded that the commission had failed to prove a violation of the rule regarding the other documents because the client’s request was too vague to be able to ascertain what he was seeking.<sup>45</sup> The hearing officer recommended that the respondent lawyer receive a private reprimand for this violation, and the commission petitioned the supreme court to review the decision.<sup>46</sup>

In addition to the rule violation, the court found that a provision of the Indiana Code was instructive on this subject.<sup>47</sup> The court held that “[n]either the

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40. *Id.*

41. *Id.*

42. *Id.*

43. The rule provides that

[u]pon 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.

IND. PROF’L CONDUCT R. 1.16(d).

44. *Anonymous*, 914 N.E.2d at 266.

45. *Id.*

46. *Id.*

47. *Id.* at 267. The relevant statute provides:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney’s professional’s employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to

[r]ule nor the [s]tatute requires an attorney to honor all demands from former clients for copies of everything from their files.”<sup>48</sup> In this case, the question turned on the issue of protecting the client’s interests. The client did not reveal why he wanted the material, but the respondent assumed he wanted them to file a post-conviction relief action.<sup>49</sup> As such, the respondent’s provision of these documents was “tied to protecting . . . [the client’s] legal interests”<sup>50</sup> irrespective of whether the respondent lawyer thought there was any merit to that course of action. The supreme court concluded that on these facts, the respondent had a duty to provide the information specifically requested by the client in anticipation of his filing of a future action. His intentional failure to do so warranted sanction for violating the rule as charged.<sup>51</sup> In mitigation, however, the court noted that the respondent lawyer had no prior history of disciplinary action in more than twenty-five years of practice, and the client had no real complaint about the quality of the services provided in the respondent’s underlying representation.<sup>52</sup> The court concluded, however, that a private reprimand was adequate to conclude this disciplinary action.

## II. LAWYER ADVERTISING

In October 2010, the supreme court published its order amending the Indiana Rules of Professional Conduct that revealed the court’s new version of the lawyer advertising rules contained within these rules. With a promulgation date of January 1, 2011, the rules replaced prior versions of rules 7.1 through 7.5. For the first time, the rules include commentary inserted by the drafters to give members of the bar some guidance in their interpretation of the rules when creating their advertising. The rules also include new provisions that include a ban on directing targeted communications to prospective clients in personal injury cases for thirty days after the occurrence of the injury, as well as some relaxation of the rules governing trade names for law firms. A complete recitation of the new rules is attached to this Article as “Appendix A” for ease of reference. As of the time of this Article, there are no new cases to review under the new rules, so the rules are presented without additional comment in this year’s Article.

## III. UNAUTHORIZED PRACTICE OF LAW

Perhaps the leading case in the last few years was decided recently in *State*

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*deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.*

IND. CODE § 33-43-1-9 (2011).

48. *Anonymous*, 914 N.E.2d at 267.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*



of *Indiana ex rel. Indiana State Bar Ass'n v. United Financial Systems Corp.*<sup>53</sup> This was an original action begun by the Indiana State Bar Association alleging that United Financial (“UFSC”) had engaged in the unauthorized practice of law.<sup>54</sup> After a three-day hearing, the hearing officer issued extensive findings of fact and conclusions of law finding, inter alia, that UFSC had indeed engaged in unauthorized practice.<sup>55</sup> UFSC is an insurance marketing agency that began marketing estate planning services, including wills and trusts, in the mid-1990s. Typically, a sales representative would meet with the client and gain access to his or her financial data.<sup>56</sup> The representative would then tout UFSC’s team of tax strategists and independent attorneys in selling its services to clients. In reality, UFSC had no tax strategists, and the level of independence of its attorneys was contested.<sup>57</sup> Packages that were sold were routed to UFSC’s panel attorneys. The court determined that irrespective of whether the attorneys could truly be said to be independent, the arrangement presented a troubling picture.<sup>58</sup> Notably, products were sold to clients without any prior attorney involvement, and the operation tended to emphasize sales and revenue over objective, disinterested advice. In the end, the supreme court determined that UFSC had engaged in the unauthorized practice of law.<sup>59</sup>

Of particular note in the opinion is the court’s discussion of the available remedies. Under Admission and Discipline Rule 24,<sup>60</sup> the costs and expenses associated pursuit of these unauthorized practice cases is to be borne by the losing party. The Indiana State Bar Association argued that the language of the rule also included attorneys’ fees. In its discussion, the court found that rule 24 was not so broad in scope as to permit the award of attorney fees as requested by the association.<sup>61</sup> The court, however, noted that Indiana Code section 34-52-1-1 might be used to grant an award of attorney fees in “any civil action” where a party brings a defense that is “frivolous, unreasonable, or groundless.”<sup>62</sup> In addition, the association asked that UFSC be required to disgorge the fees they were paid for services that had been determined to be the unauthorized practice of law.<sup>63</sup>

In its conclusion, the court enjoined UFSC from engaging in any of the acts

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53. 926 N.E.2d 8 (Ind. 2010) (per curiam).

54. *Id.* at 10.

55. *See id.* at 11.

56. *Id.*

57. *Id.*

58. *See id.* at 12-13.

59. *Id.* at 15.

60. The relevant portion of this rule provides, “The costs and expenses incurred by such hearing shall be borne by the losing party.” IND. ADMISSION & DISCIPLINE R. 24. This is the only such provision in the rule.

61. *See United Fin. Sys. Corp.*, 926 N.E.2d at 15.

62. *Id.* at 16.

63. *Id.*

that it determined constituted the unauthorized practice of law.<sup>64</sup> In addition, UFSC was ordered to provide a copy of the court's order to all persons who could be identified that had purchased estate plans since 1995.<sup>65</sup> The purpose of this order was to allow the purchasers to make an informed decision as to whether to keep their existing estate plan. In addition, those purchasers were to be advised of their right to a refund of all sums paid for the purchase of an estate plan. The case was also remanded for a determination as to how much of an award of attorneys' fees was appropriate as a result of UFSC's assertion of baseless arguments in the underlying case. This was also to include the reimbursement of costs.<sup>66</sup>

#### IV. ATTORNEYS' FEES

In *Matter of Lauter*,<sup>67</sup> the respondent and his law firm were hired to handle an employment discrimination claim and entered into a written agreement with the client. The agreement provided for a contingency fee based agreement on the amount recovered of one-third of the amount recovered before trial or forty percent of the amount otherwise.<sup>68</sup> The agreement also called for an engagement fee of \$750, which the client paid up front. Moreover, the agreement contained a hand written notation at the bottom of the agreement, initialed by the client, calling for "an additional retainer fee payable if the client and firm agree to file federal court litigation."<sup>69</sup> The lawyer and client had agreed to leave the amount of the additional retainer undetermined until the respondent had decided to advise the client whether or not to proceed to federal court.<sup>70</sup> The respondent lawyer testified that he believed a typical engagement fee for a case of that type was about five thousand dollars (irrespective of whether federal litigation is involved) and that he charged an initial fee of \$750 to allow a claimant whose case goes only through the Equal Employment Opportunity Commission (EEOC) proceeding to pay less than a client whose case goes on to the United States District Court.<sup>71</sup>

The lawyer later charged the client and received a payment of \$4400 that included a \$150 filing fee, after having determining that the client's case had enough merit for formal filing in the federal court.<sup>72</sup> Ultimately, the client recovered \$75,000 from the discrimination defendant, and the respondent lawyer's fee from that amount was \$30,000. This amount included the \$750 engagement fee, the \$4250 additional retainer and a one-third contingent fee of

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64. *Id.* at 19.

65. *Id.*

66. *Id.* at 20.

67. 933 N.E.2d 1258 (Ind. 2010) (*per curiam*).

68. *Id.* at 1260.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

\$25,000.<sup>73</sup>

The respondent lawyer was charged with violating rules 1.5(b), 1.5(c),<sup>74</sup> and 1.8(a)<sup>75</sup> in relation to his fee arrangement with the client. In essence, the lawyer is required to communicate the basis or rate of the fee to the client before the representation starts or within a reasonable time thereafter.<sup>76</sup> The respondent testified that at the outset of the representation, he does not normally know enough about the merits of the case to make a specific fee agreement until he has conducted some investigation of the claim and its merits.<sup>77</sup> He testified that after many years of practice in this area, that he believed the “industry standard” fee

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73. *Id.* at 1261.

74. Rule 1.5 provides in relevant part:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) 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.

IND. PROF'L CONDUCT R. 1.5(b)-(c).

75. Rule 1.8(a) provides,

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

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

IND. PROF'L CONDUCT R. 1.8(a).

76. *See* IND. PROF'L CONDUCT R. 1.5(b).

77. *Lauter*, 933 N.E.2d at 1261.

was about \$5000 if the case was not resolved before taking it to federal court.<sup>78</sup>

In its discussion, the court noted that the lawyer had decades of experience in pricing these matters, a skill that most clients would lack.<sup>79</sup> The court found that

[i]n such circumstances, when a fee agreement gives no disclosure or guidance as to how an initially unspecific fee component will be set, the danger of client confusion and lawyer overreaching is apparent. We do not suggest that [the] [r]espondent is guilty of overreaching in his dealings with his clients. . . . The problem in this case is that [the] [r]espondent gave no indication to the client of what the additional retainer would be or how it would be determined.<sup>80</sup>

The court provided guidance to the bar by noting that this respondent could have complied with the rule by: “(1) stating the amount of the additional retainer the client would owe if the case went to court; (2) disclosing a range for the additional retainer with an upper limit; or (3) providing a method by which the additional retainer would be calculated.”<sup>81</sup>

Because of this failure, the respondent was found to have violated rule 1.5(b). Furthermore, the commission alleged—and the court found—that this violation led to a derivative violation of rule 1.5(c), which requires contingent fee agreements to be in writing.<sup>82</sup> The requirement of the writing serves a valuable purpose of protecting the public, and the court reasoned that the respondent’s fee agreement with this client would have benefitted from formal memorialization. The court noted that

[t]he term “retainer” might imply to a lawyer that it is to be in addition to the contingent fee, and this is the way [the] [r]espondent treated it. But one purpose of this rule is to protect the lay client who is unfamiliar with the legalese and industry standards regarding attorney fees. Because the [c]ontract fails to disclose adequately the method by which the contingent fee was to be calculated, we conclude that respondent violated Rule 1.5(c).<sup>83</sup>

In this way, the consumer protection aspects of the attorney discipline system operate to protect clients, irrespective of their level of sophistication.

Finally, the court turned to the question of whether the respondent had violated rule 1.8(a). The court noted that it had previously found lawyers to have violated this rule where they changed the terms of a fee agreement to be more financially advantageous to the lawyer.<sup>84</sup> Although the court recognized that the

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78. *Id.*

79. *Id.*

80. *Id.* at 1261-62.

81. *Id.* at 1262.

82. *See id.*

83. *Id.*

84. *Id.* at 1263. The court cited the noteworthy case of *Matter of Hebron*, 771 N.E.2d 1157

respondent did not follow the safeguards attendant to the rule, it held that the violation of rule 1.5(b) covered the actual misconduct by the respondent and declined to find that the lawyer also engaged in a conflict of interest (as alleged by the commission). For this misconduct, the respondent received a public reprimand.<sup>85</sup>

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(Ind. 2002) (per curiam), where a lawyer initially charged a client an hourly fee until he recognized that a substantial amount of cash was involved. *Id.* at 1158. He then insisted that the client pay him a contingent fee. The lawyer received a lengthy suspension for his misconduct. *Id.* at 1163.

85. *Lauter*, 933 N.E.2d at 1263.

## Appendix A: Lawyer Advertising Rules (as amended 2011)

Rule 7.1: Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

## Commentary

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. In the absence of special circumstances that serve to protect the probable targets of a communication from being misled or deceived, a communication will violate Rule 7.1 if it:

- (1) is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
- (2) contains statistical data or other information based on past performance or an express or implied prediction of future success;
- (3) contains a claim about a lawyer, made by a third party, that the lawyer could not personally make consistent with the requirements of this rule;
- (4) appeals primarily to a lay person's fear, greed, or desire for revenge;
- (5) compares the services provided by the lawyer or a law firm with other lawyers' services, unless the comparison can be factually substantiated;
- (6) contains any reference to results obtained that may reasonably create an expectation of similar results in future matters;
- (7) contains a dramatization or re-creation of events unless the advertising clearly and conspicuously discloses that a dramatization or re-creation is being presented;
- (8) contains a representation, testimonial, or endorsement of a lawyer or other statement that, in light of all the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights;
- (9) states or implies that a lawyer is a certified or recognized specialist other than as permitted by Rule 7.4;
- (10) is prohibited by Rule 7.3.

[3] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2: Advertising

(a) Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term “advertise” as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely intended or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services.

(b) A lawyer shall not give anything of value to a person for recommending or advertising the lawyer’s services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service described in Rule 7.3(d);

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication subject to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content. The lawyer or law firm responsible for the content of any communication subject to this rule shall keep a copy or recording of each such communication for six years after its dissemination.

#### Commentary

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising.

[2] Provided that the advertising otherwise complies with the requirements of the Rules of Professional Conduct, permissible subjects of advertising include:

(1) name and contact information, including the name and contact information for an attorney, a law firm, and professional associates;

(2) one or more fields of law in which the lawyer or law firm practices, using commonly accepted and understood definitions and designations;

(3) date and place of birth;

(4) date and place of admission to the bar of state and federal courts;

(5) schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) academic, public or quasi-public, military, or professional

positions held;

(7) military service;

(8) legal authorship;

(9) legal teaching position;

(10) memberships, offices, and committee assignments, in bar professional, scientific, or technical associations or societies;

(11) memberships and offices in legal fraternities and legal societies;

(12) technical and professional licenses;

(13) memberships in scientific, technical, and professional associations and societies;

(14) foreign language ability;

(15) names and addresses of bank references;

(16) professional liability insurance coverage;

(17) prepaid or group legal services programs in which the lawyer participates as allowed by Rule 7.3(d);

(18) whether credit cards or other credit arrangements are accepted;

(19) office and telephone answering service hours; and

(20) fees charged and other terms of service pursuant to which an attorney is willing to provide legal or law-related services.

[3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[4] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of non-lawyers who prepare marketing materials for them.

### Rule 7.3: Direct Contact with Prospective Clients

(a) A lawyer (including the lawyer's employee or agent) shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by in-person or by written, recorded, audio, video, or electronic communication, including the Internet, if:

(1) the prospective client has made known to the lawyer a desire not to



be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment;

(3) the solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the solicitation is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the initiation of the solicitation;

(4) the solicitation concerns a specific matter and the lawyer knows, or reasonably should know, that the person to whom the solicitation is directed is represented by a lawyer in the matter; or

(5) the lawyer knows, or reasonably should know, that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(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 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 or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). 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.

(d) A lawyer shall not accept referrals from, make referrals to, or solicit clients on behalf of any lawyer referral service unless such service falls within clauses (1)-(4) below. A lawyer or any other lawyer affiliated with the lawyer or the lawyer's law firm may be recommended, employed, or paid by, or cooperate with, one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's firm, if there is no interference with the exercise of independent professional judgment on behalf of a client of the lawyer or the lawyer's firm:

(1) A legal office or public defender office:

(A) operated or sponsored on a not-for-profit basis by a law school accredited by the American Bar Association Section on Legal Education and Admissions to the Bar;

- (B) operated or sponsored on a not-for-profit basis by a bona fide non-profit community organization;
  - (C) operated or sponsored on a not-for-profit basis by a governmental agency;
  - (D) operated, sponsored, or approved in writing by the Indiana State Bar Association, the Indiana Trial Lawyers Association, the Defense Trial Counsel of Indiana, any bona fide county or city bar association within the State of Indiana, or any other bar association whose lawyer referral service has been sanctioned for operation in Indiana by the Indiana Disciplinary Commission; and
  - (E) operated by a Circuit or Superior Court within the State of Indiana.
- (2) A military legal assistance office;
  - (3) A lawyer referral service operated, sponsored, or approved by any organization listed in clause (1)(D); or
  - (4) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only if the following conditions are met:
    - (A) the primary purposes of such organization do not include the rendition of legal services;
    - (B) the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;
    - (C) such organization does not derive a financial benefit from the rendition of legal services by the lawyer; and
    - (D) the member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.
- (e) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communication permitted by Rule 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service falling within the provisions of paragraph (d) above.
- (f) A lawyer shall not accept employment when the lawyer knows, or reasonably should know, that the person who seeks the lawyer's services does so as a result of lawyer conduct prohibited under this Rule 7.3.

#### Commentary

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it

difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives

no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule allows targeted solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if such solicitation is initiated no less than 30 days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown exist in this type of solicitation.

#### Rule 7.4: Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that the lawyer is a specialist in a particular field of law, unless:

(1) The lawyer has been certified as a specialist by an Independent Certifying Organization accredited by the Indiana Commission for Continuing Legal Education pursuant to Admission and Discipline Rule 30; and,

(2) The certifying organization is identified in the communication.

(e) Pursuant to rule-making powers inherent in its ability and authority to police and regulate the practice of law by attorneys admitted to practice law in the State of Indiana, the Indiana Supreme Court hereby vests exclusive authority for accreditation of Independent Certifying Organizations that certify specialists in legal practice areas and fields in the Indiana Commission for Continuing Legal Education. The Commission shall be the exclusive accrediting body in Indiana, for purposes of Rule 7.4(d)(1), above; and shall promulgate rules and guidelines for accrediting Independent Certifying Organizations that certify specialists in legal practice areas and fields. The rules and guidelines shall include requirements of practice experience, continuing legal education, objective examination; and, peer review and evaluation, with the purpose of providing assurance to the consumers of legal services that the attorneys attaining certification within areas of specialization have demonstrated extraordinary proficiency within those areas of specialization. The Supreme Court shall retain review oversight with respect to the Commission, its requirements, and its rules and guidelines. The Supreme Court retains the power to alter or amend such requirements, rules and guidelines; and, to review the actions of the Commission in respect to this Rule 7.4.

### Commentary

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

### Rule 7.5: Firm Names and Letterheads

(a) Firm names, letterheads, and other professional designations are subject to the following requirements:

(1) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.

(2) The name of a professional corporation, professional association, limited liability partnership, or limited liability company may contain, "P.C.," "P.A.," "LLP," or "LLC" or similar symbols indicating the nature of the organization.

(3) If otherwise lawful a firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. See Admission & Discipline Rule 27.

(4) A trade name may be used by a lawyer in private practice subject to the following requirements:

(i) the name shall not imply a connection with a government agency or with a public or charitable legal services organization and shall not otherwise violate Rule 7.1.

(ii) the name shall include the name of a lawyer (or the name of a deceased or retired member of the firm, or of a predecessor firm in a manner that complies with subparagraph (2) above).

(iii) the name shall not include words other than words that comply with clause (ii) above and words that:

(A) identify the field of law in which the firm concentrates its work,  
or

(B) describe the geographic location of its offices, or

(C) indicate a language fluency.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in Indiana if the name or other designation does not violate paragraph (a) and the identification of the lawyers in an office of the firm indicates the jurisdictional limitations on those not licensed to practice in Indiana.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm. A

member of a part-time legislative body such as the General Assembly, a county or city council, or a school board is not subject to this rule.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when they in fact do so.

#### Commentary

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name that complies with the requirements of the Rules of Professional Conduct. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The use of a trade name in law practice is acceptable so long as it is not misleading and otherwise complies with the requirements of paragraph (a)(4). A firm name that includes the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.