The Top Ten:

A Summary of Recent Professional Liability Cases

2017 UPDATE

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Kevin McGoff is an experienced professional liability and litigation attorney. He represents attorneys and judgesin professional licensure matters, assists lawyers and law firms on issues pertaining to firm management, law firm dissolution and organization, malpractice, legal ethics and related litigation.

Kevin has more than 35 years of experience defending lawyers and other professionals in state and federal court at trials and on appeal. His practice is now focused on proactively assisting law firms with risk management and professional liability issues. Kevin draws on his experience in law firm management, as well as his role as general counsel to Bingham Greenebaum Doll, to provide clients with insight and analysis on risk management and professional liability issues.

Kevin can be your firm's resource for efficient and cost effective resolution of professional liability and ethics issues. His consultation services allow firm partners and senior lawyers to concentrate on their work by referring ethics questions posted by junior lawyers and staff to Kevin for risk management counsel. An experienced consultant creates greater efficiency for your firm and greater dependability for a proper resolution.

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INTRODUCTION

The heart of this work revolves around the ways in which lawyers get themselves disciplined. Several cases are cited wherein lawyers face civil liability and may be exposed to disciplinary action.

One important disclaimer: This work identifies our categorization of the top ten ways in which lawyers get themselves sanctioned. That does not mean these are the *only ways* lawyers get themselves sanctioned. There are, of course, other ways in which lawyers face both disciplinary action and civil liability. In fact, lawyers often find new ethical problems, either intentionally or unintentionally, that cause legal problems for them personally.

Finally, the ten categories we have identified are discussed in *reverse* order. The most fertile sources of disciplinary problems appear last in this listing. In truth, all but the last two or three statistically occur with about the same frequency. Cases involving communications and diligence occur in surprisingly greater numbers than any other type of disciplinary action. In fact, these issues also surface in conjunction with the other types of lawyer conduct discussed herein.

Number 10 DUTIES OWED TO OPPOSING OR THIRD PARTIES

In *Matter of Henderson*, 2017 WL 1161019 (Ind. Jan. 13, 2017), Respondent was the elected prosecutor for Floyd County. David Camm was a former police officer charged with murdering his wife and their two minor children. Respondent entered into an agreement with a literary agent, with the intent to write and publish a book about the Camm case. Respondent continued to represent the State in post-trial proceedings in the trial court and assisted the Attorney General during appellate proceedings. Respondent entered a publication agreement with a publisher. After the Court issued a decision reversing Camm's convictions and remanding for a third trial, Respondent wrote to the literary agent, expressing his belief that "this is now a bigger story" and asking the literary agent to seek a "pushed back time frame" for publication and "to push for something more out of the contract." The Court found there was conflict between Respondent's duties to the State and his own personal interests and the impact that conflict had upon the criminal proceedings against Camm and imposed a sanction of a public reprimand.

In *Matter of Anonymous*, 43 N.E.3d 568 (Ind. 2015), Respondent violated Indiana Professional Conduct Rule 3.5(b) by communicating *ex parte* with a judge without authorization. Respondent represented the maternal grandparents of a child. The grandparents were concerned about the child's welfare; the putative father's paternity had yet to be established, and the mother was allegedly an unemployed drug addict, threatening to take the child from the grandparents' home.

Respondent prepared an "Emergency Petition" to appoint the grandparents as the child's temporary guardians. An associate attorney of Respondent's presented the petition to the judge, who then signed it. Respondent, however, did not provide advance notice to the putative father and mother before the presentation. By failing to certify efforts to provide notice, the Respondent also was not in compliance with Trial Rule 65(b).

While noting that there will be situations where an emergency justifies a lack of notice, Respondent's actions "did not justify dispensing with the mandatory procedures designed to protect the rights of other parties with legal interests in the proceedings." As a result, Respondent received a private reprimand.

In *Matter of Fontanez*, No. 45S00-1512-DI-683, 2016 Ind. LEXIS 63 (Jan. 25, 2016), Respondent received a public reprimand. Respondent represented Client in a tort action against the City of Hammond. After the case was removed from state to federal court, Respondent failed: (1) to serve initial disclosures as required under federal rules of procedure; (2) to respond to discovery requests; (3) to respond to an order compelling discovery; (4) to pay attorney fees awarded to the defendants; (5) to respond to the defendant's motion for sanctions; (6) and to appear at the hearing on the motion for sanctions. The federal court granted the defendant's motion for sanctions and dismissed the tort action with prejudice. Respondent also failed to apprise Client of the status of the case or respond to Client's requests for information.

The Court imposed a public reprimand, citing mitigating circumstances: (1) Respondent has no prior discipline; (2) Respondent has been cooperative with the Commission and has been remorseful; (3) during the period of misconduct, Respondent was in the midst of a prolonged custody dispute; (4) Respondent has reached out to Client and encouraged him to consult with an attorney regarding a malpractice action against Respondent, and is willing to pay any malpractice judgment that might be entered; and (5) Respondent attended CLE programs and consulted with other practitioners in an effort to improve his practice management and skills.

In *Matter of Drendall*, No. 71S00-1502-DI-70, 2015 WL 10844351 (Ind. Nov. 4, 2015), Respondent violated Indiana Professional Conduct Rules 3.5(b), 8.4(d), and 8.4(f). Respondent represented the maternal grandparents in a custodial action of their grandson; the child's mother had just died and the child's father was in arrears on support. Respondent filed a motion seeking leave for the grandparents to intervene and for the court to award custody to the grandparents.

A hearing was held, but Respondent did not provide the father notice of the hearing. Further, Respondent did not allege an emergency as Trial Rule 65(B) requires. After the court awarded custody to the grandparents, the father filed a motion to correct error. At the following hearing, the court awarded custody to the father. Respondent consented to discipline and was subject to public reprimand.

Although one of the more important cases decided on the issue of the lawyer's duties to an opponent, *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999) is no longer a recent case, its concepts are important to continue to review. This involved the appeal of a default judgment in a medical malpractice case. In *Smith*, the plaintiff's lawyer fought her case through the medical review panel and got a decision in her client's favor. She then made a demand on the defendant's lawyers. Although a negative response to the demand was eventually made, the plaintiff's lawyer filed suit in Marion Superior Court and served the defendant physician only (as permitted under the Trial Rules). The physician did not respond or notify his lawyers. About six weeks after the complaint was filed, the plaintiff's lawyer applied for a default judgment. In her affidavit in support of the default, the lawyer indicated that she had received no pleading from the physician, "nor has any attorney contacted the undersigned regarding entering their appearance on behalf of Defendant in

this case since the filing of this cause." The default was granted and the plaintiff took a judgment for $750,000. When served with the judgment, the defendants' lawyers appeared and filed a motion to set aside the default under Trial Rule 60(B)(1) [excusable neglect] and (3) [fraud or misrepresentation by an opponent.] The Supreme Court rejected the excusable neglect argument, but set aside the default on the basis of Rule 60(B)(3) because of the misconduct on the part of the plaintiff's lawyer. The Court held,

> "[W]e conclude that the overriding considerations of confidence in our judicial system and the interest of resolving disputes on their merits preclude an attorney from inviting a default judgment without notice to an opposing attorney where the opposing party has advised the attorney in writing of the representation in the matter. Accordingly, we hold that a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter."

As if the Court's displeasure with this default case wasn't clear enough, the Court also spoke directly to lawyers about their ethical duties. The plaintiff's lawyer in this case argued that, if the Court adopted the defendant's arguments, it would become harder for a lawyer to take a default judgment against a health care provider. In response, the Court shot back,

> "We hope so. A default judgment against a health care provider or any other party is an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants...[W]e reject the gaming view of the legal system..."

The point is clear: the lawyer's duties to the client are pre-eminent, but there are duties owed to others as well. In *Smith*, the lawyer failed in her duties to the opposing party, his counsel and the judicial system. In its simplest form, the message is: fair play matters.

Number 9 CRIMINAL CONDUCT

In *Matter of Johnson IIII*, 74 N.E.3d 550 (Ind. 2017), Respondent, who was the chief public defender in Adams County, had an affair with a woman ("Jane Doe") who had a conviction for operating while intoxicated. Shortly after Respondent's wife left him, Respondent began harassing Jane Doe by phone and Facebook, including a phone call where Respondent was crying and shooting a gun during the phone call. Eventually, a protective order was issued, but was thereafter violated. The Court held that a suspension for a period of not less than one year, without automatic reinstatement, was warranted for Respondent's pattern of harassment of Jane Doe.

In *Matter of Jun*, 2017 WL 1161018 (Ind. March 28, 2017), Respondent was hired by a United States citizen to assist his wife, a citizen and resident of South Korea, in immigrating to the United States to live permanently. Respondent proposed that the client's wife to enter the United States on a non-immigrant visa or visa waiver, and then seek a permanent residency status. Respondent knew that to obtain the non-immigrant visa or visa waiver, his client's wife would have to state falsely on her application that she intended to leave at the expiration of her non-immigrant visa period, fail to reveal her marital status to a United States citizen, or make other false or misleading statements. When the client's wife arrived in the United States, she was denied entry based on false statements to customs officials and forced to take the next return flight to South Korea. The Court found that Respondent counseled or assisted his client to engage in conduct he knew to be criminal or fraudulent and imposed a public reprimand on Respondent.

Obviously, lawyers are like any other segment of the population when it comes to criminal misconduct. Lawyers have been convicted of crimes ranging from alcohol problems (*Matter of Spencer*, 863 N.E.2d 1299 (Ind. 2007) to murder (*Matter of Angleton*, 638 N.E.2d 1257 (Ind. 1994). Some examples of the types of criminal conduct for which lawyers have been disciplined follow.

In *Matter of Robertson*, 2016 WL 8609498 (Ind. 2016), Respondent drove while intoxicated (BAC .15) to the Shelby County Courthouse for a scheduled small claims hearing where

Respondent repeatedly made advances on the court's receptionist. Security was summoned and the hearing had to be rescheduled. The Court held that a one year suspension, including 90 days actively served and the remainder stayed subject to completion of at least two years of probation, was warranted for the Respondent's misconduct.

In *Matter of Keaton*, 29 N.E.3d 103 (Ind. 2015), Respondent was a married attorney who began an intimate relationship with his daughter's college roommate ("JD"). The Respondent and JD maintained a long-distance relationship for three years. JD permanently ended the relationship in March 2008. During the ensuing months, Respondent left numerous threatening, vulgar, manipulative and abusive voicemails for JD. At least 90 of the voicemails were saved by JD. Additionally, Respondent sent at least 7,199 emails to JD, mostly consisting of expletives and threats. On numerous occasions Respondent threatened to harm JD and himself if she did not reply to his voicemails or emails. In order to solicit a response from JD, Respondent hosted and maintained a sexually explicit website containing intimate images of JD that were obtained during their relationship. Respondent would routinely travel from Fort Wayne to Bloomington to stalk and confront JD at her law school. In 2009, the associate dean for students at JD's law school contacted Respondent in an attempt to stop the stalking and harassment. In his response, Respondent claimed that he wasn't violating any laws or ethical rules and was thus "blameless in this matter," and that JD was "happily engaged in" the communications. Thereafter, JD sought help from the Indiana University Police Department ("IUPD"). In August 2009, a detective from IUPD phoned Respondent and advised Respondent to stop contacting JD. Respondent's response to the detective was similar to his response to the associate dean. Following the phone call, Respondent sent a series of threatening emails to JD, warning her against seeking a protective order. In April 2010, JD received an *ex parte* protective order against Respondent in response to the stalking and threats. In May 2010, Respondent was arrested and criminally charged in Monroe County with felony stalking. The

> *"Lawyers have been convicted of crimes from alcohol problems to murder."*

criminal case was dismissed by the State in April 2011 based on personal privacy concerns raised by JD. After the dismissal, Respondent continually attempted to contact JD in 2011 both by phone and by email. JD did not reply.

In February 2012, the Commission notified Respondent that it was investigating his conduct involving JD. Ten days later, Respondent, *pro se*, filed a civil complaint in state court against JD alleging malicious prosecution and abuse of process. In May 2012, Respondent, *pro se*, filed a second complaint in federal court against JD, and others, alleging unlawful arrest. Throughout the disciplinary proceedings, Respondent made contradictory and false statements to the Commission alleging that JD had been less than truthful with the various law enforcement officers and attorneys with whom she had communicated with. Among other things, the Commission found that Respondent violated Prof. Cond. R. 8.4(b)-(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentations and for committing criminal acts (stalking, harassment and intimidation) that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. In a stern opinion, the Court concluded that Respondent should be disbarred because:

> "In short, Respondent's repugnant pattern of behavior and utter lack of remorse with respect to the events involving JD, his deceitful responses and lack of candor toward the Commission...his inability or unwillingness to appreciate the wrongfulness of his misconduct, and his propensity to shift blame to others and see himself as the victim, all lead us unhesitatingly to conclude that disbarment is warranted and that Respondent's privilege to practice law should be permanently revoked."

In *Matter of Philpot*, 31 N.E.3d 468 (Ind. 2015), Respondent was convicted of two counts of mail fraud and one count of theft from a federally-funded program - all felonies. The convictions resulted from his use of federal funds to pay himself impressible bonuses in connection with work that he performed in his capacity as the elected Clerk of Lake County, Indiana. Respondent had no prior criminal record and repaid with interest the monies in question. The parties agreed that Respondent violated Prof. Cond. R. 8.4(b), by committing criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer. The Court suspended Respondent from practicing law for four years for his misconduct.

In *Matter of Knight*, 2015 Ind. LEXIS 474 (Ind. 2015), Respondent was found guilty of domestic battery, a Class A misdemeanor. He received a suspended sentence with probation that included drug and alcohol monitoring. Respondent had no prior discipline and promptly reported his conviction to the Commission. Along with voluntarily going to counseling, Respondent was successfully discharged from JLAP and showed great remorse for his actions. The parties agreed that Respondent violated Prof. Cond. R. 8.4(b) by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. After considering the submission of the parties, the Court imposed a public reprimand for Respondent's misconduct.

Number 8 CONFLICTS OF INTEREST

This is one of the areas of ethics that concerns practicing lawyers the most, but appears to be one of the least well understood by the bar. In essence, the conflict of interest rules govern different aspects of the lawyer's duty of loyalty to the client. Some rules act to protect the client from conflicts with other clients, other rules act to protect the client from their own lawyer and still others act to protect *former* clients from some of the dangers of conflicting interests after the representation is over.

Cases are legion which explore all the contours of this area of ethics. Certainly any written work exploring this subject would be a respectable tome. In the final analysis, these cases revolve around the question: "to whom does the lawyer's loyalty run?" If the answer isn't unequivocally, "the client," then a conflict of interest almost undoubtedly exists. One case illustrates the extent to which conflict questions can be simultaneously complex and very apparent. In *Matter of Watson*, 733 N.E.2d 934 (Ind. 2000), Respondent wrote a will for an 85-year-old man who was the largest single shareholder in an Indiana telephone company. The Respondent's mother was the second largest shareholder in the company. Subsequently, Respondent prepared for the testator a codicil which granted an option to the company, upon the testator's death, to purchase these shares at a price reflecting the stated book value. After the testator died, the board of directors elected to exercise the option to purchase the estate's shares at the listed book value. About two years later, Respondent, his mother, and the company's remaining shareholders sold all of the company's stock, realizing an amount per share in excess of two times that paid to the testator's estate for the shares. The Supreme Court found that the Respondent knew or should have known that the option for the company to buy the shares at book value was setting a price which could be substantially less than fair market value. Respondent was found to have violated Prof. Cond. R. 1.8(c) because he drafted the codicils when it was reasonably foreseeable that the instruments had the potential for providing a substantial gift to him and his mother. As a result, Respondent was suspended from the practice of law for sixty days.

In *Matter of Henderson*, 2017 WL 1161019 (Ind. Jan. 13, 2017), Respondent was the elected prosecutor for Floyd County. David Camm was a former police officer charged with murdering his wife and two minor children. Respondent entered into an agreement with a literary agent,

with the intent to write and publish a book about the Camm case. Respondent continued to represent the State in post-trial proceedings in the trial court and assisted the Attorney General during appellate proceedings. Respondent entered a publication agreement with a publisher. After the Court issued a decision reversing Camm's convictions and remanding for a third trial, Respondent wrote to the literary agent, expressing his belief that "this is now a bigger story" and asking the literary agent to seek a "pushed back time frame" for publication and "to push for something more out of the contract." The Court found there was conflict between Respondent's duties to the State and his own personal interests and the impact that conflict had upon the criminal proceedings against Camm and imposed a sanction of a public reprimand.

In *Matter of Hatcher,* 2015 Ind. LEXIS 505 (Ind. 2015), the personal representative of an estate ("F.G.") hired an attorney ("Attorney") to supervise matters related to the deceased's estate. Believing the deceased might still be owed wages, Attorney filed suit on the estate's behalf against the former employer. Respondent appeared in the wage suit on behalf of the former employer. Soon thereafter, F.G. began demanding the wage suit be dismissed. Attorney gave F.G. ten days' notice that she intended to withdraw her appearance on behalf of the estate. Before Attorney withdrew, F.G. approached Respondent and engaged in discussions about the supervised estate and the aforementioned wage suit. F.G. also told Respondent that Attorney was no longer representing him, but Respondent failed to independently confirm this. After Attorney withdrew, Respondent appeared on the estate's behalf in the supervised estate. At this point, Respondent was representing both the estate and the deceased's former employer, who were direct adversaries in the same related litigation. The parties agreed that Respondent violated Prof. Cond. R. 1.7 and 4.2, for representing a client when the representation is directly adverse to another client, and improperly communicating with a person the lawyer knows to be represented by another lawyer in the matter. The Court publicly reprimanded Respondent for his misconduct.

In *Matter of Hanley II*, 19 N.E.3d 756 (Ind. 2014), Respondent hired an attorney ("Associate") to work in his law office pursuant to an employment agreement in 2006. Respondent's law practice focuses primarily on Social Security disability law. The employment agreement included a non-compete provision that prohibited Associate from practicing Social Security disability law for two years in the event his employment with Respondent was terminated. In 2013, Respondent fired the Associate. Thereafter, Respondent sent letters to Associate's clients stating he no longer worked at the firm and that Respondent would be taking over their representation. Additionally, in those letters Respondent included Appointment of Representative forms for the clients to complete in order for Respondent to replace Associate as the clients' representative before the Social Security Administration.

Associate continued to practice Social Security disability law after leaving the firm, and at least two of Associate's existing clients chose to keep Associate as their lawyer. Respondent did not attempt to enforce the non-compete provision and provided Associate with files for Associate's clients after disciplinary grievances were filed against him. The parties agreed that Respondent violated Prof. Cond. R. 1.4(b), for failure to explain a matter to the extent

reasonably necessary to permit a client to make informed decisions regarding the representation, and 5.6(a) for making an employment agreement that restricts the rights of a lawyer to practice after termination of the relationship. The Court imposed a public reprimand for Respondent's misconduct.

In *Matter of Stern*, 11 N.E.3d 917 (Ind. 2014), the Indianapolis Department of Metropolitan Development ("DMD") obtained an order to demolish an unsafe building owned by DR. DR retained Respondent to represent her in defending the order. However, Respondent's complaint for judicial review did not comply with the statutory requirement that the complaint be verified and filed within 10 days of the date the order to demolish was issued. In an apparent attempt to prevent the city from imposing liability on DR, Respondent executed a quitclaim deed on behalf of DR, which transferred the subject building to JH, a convicted murderer who began working in Respondent's law office as a "contract paralegal" after his release from prison. Respondent thereafter began representing both DR and JH in the matter. Unfortunately for Respondent, under the Indiana Code, because the quitclaim deed was executed *after* the demolishment order was issued, the only effect of the transfer was to establish joint and several liabilities between DR and JH for demolition and administrative costs. Thus, the building transfer created a conflict of interest between DR and JH. The demolishment order was ultimately affirmed, and no appeal was taken. But the shenanigans didn't stop there. JH filed a subsequent lawsuit against the city, *pro se*, alleging violations of his federal and state constitutional rights. After the lawsuit was removed to federal court, Respondent appeared on behalf of JH. The thrust of JH's claim was that he did not receive proper notice from the city that the building was scheduled to be demolished. However, DR was required by statute to provide the DMD with notice of her transfer to JH within five days of the transfer. As the Court pointed out, "If JH obtained a judgment against the DMD based on lack of notice, and that lack of notice was caused by DR's failure to inform the DMD of the transfer, DR would be liable to the DMD for the amount of the judgment… Thus, Respondent pursued a case on behalf of one client (JH) which, if successful, would make his other client (DR) liable for the judgment." In total, the Court concluded that Respondent had violated Prof. Cond. Rules 1.1, 1.6, 1.7(a), 3.1, 3.3(a)(1), 5.3, 8.1(b), and Guideline 9.1. Responded was suspended for eighteen months without automatic reinstatement.

Number 7 ATTORNEY FEES

Like conflicts of interest, lawyers often mistakenly believe that claims about unreasonable fees are a prime source of disciplinary cases. In truth, the Disciplinary Commission's annual reports traditionally show that allegations involving the lawyer's fee only account for three to five percent of the total grievances received. As a general rule, unreasonable fee cases are about just that - unreasonable fees. However, the Supreme Court has had the opportunity to interpret the reasonableness requirement under many different circumstances.

This summary is updated annually and some of the older decisions are replaced by more recent case law. However, on the topic of attorney fees, there are cases the court decided some years ago that set forth the current state of the law. These summaries continue to be published for that reason.

In *Matter of Emmons*, 68 N.E.3d 1068 (Ind. 2017), Respondent was appointed guardian of an 88-year old incapacitated woman where his duties included being a signatory on her bank accounts. Respondent wrote three checks to himself from the PTSB account, totaling $20,000, indicating that they were for legal fees. The Court ordered Respondent to file accounting records and appear before the court, which Respondent failed to do. The Court held that first, Respondent was under an indefinite suspension due to his noncooperation with the Commission's investigation, and second, a suspension of not less than three years was warranted for Respondent's misconduct regarding converting guardianship funds.

In *Matter of Peters*, 23 N.E.3d 660 (Ind. 2014), Respondent represented a client on a contingency basis in a civil action brought against the client's landlord. A trial resulted in judgment for the client for over $46,000. A dispute between the client and Respondent arose after the judgment because Respondent had failed to provide the contingent fee agreement in writing. The parties agree Respondent's lack of a written contingency agreement was an oversight and did not stem from a dishonest or selfish motive. Additionally, the parties agreed that Respondent violated Prof. Cond. R. 1.5(c), which requires contingent fee agreements to be in writing and signed by the client. The Court issued a public reprimand for Respondent's misconduct.

In *Matter of Corcella*, 994 N.E.2d 1127 (Ind. 2013), Respondent filed suit in federal court on behalf of a client against several defendants. Summary judgment was eventually entered in favor of the defendants in 2011. The parties' fee agreement called for a billing rate of $175 an hour. However, Respondent billed the client for more than 60 hours of work at $200 an hour, which was her usual hourly billing rate at the time. After the client filed a grievance, Respondent refunded the $1,580 overcharge to the client. In July 2009, Respondent and her client changed the fee agreement to provide for a contingent fee. In December 2009, they again changed the fee agreement to provide for a blended hourly and contingent fee. One or both of the changes resulted in a fee agreement that was more advantageous to Respondent than the previous agreement. Respondent did not advise the client in writing of the desirability of seeking the advice of independent counsel before agreeing to the changes. Respondent was publicly reprimanded for her actions.

In *Matter of Weldy,* 991 N.E.2d (Ind. 2013), includes six grievances from six different clients for various reasons, including lack of communication, issues involving attorney's fees, and making false assertions to the court. One client retained Respondent to represent her in an employment discrimination action. Upon settlement, Respondent failed to explain the advantages and disadvantages of the fee designation. Respondent explained to another client that his fee would be a percentage of the amount recovered, including statutory attorney fees, but failed to send a written fee agreement. Respondent claimed forty percent of the total awarded, and later refunded $911.68 to the client.

Respondent represented another client with no written fee agreement. When this second matter settled, $2,500 was designated as statutory attorney fees. Respondent asked the client to sign an agreement that would have entitled him to $2,938.50 in fees. When the client declined, Respondent refused to communicate with him for three months. When settlor sent Respondent the check for the agreed upon settlement, Respondent kept the check in a drawer and filed a small claims action against the client. The court eventually awarded Respondent $1,012.50. For Respondent's professional misconduct, the Court suspended Respondent from the practice of law for a period of 180 days, beginning August 9, 2013, with 90 days actively served and the remainder stayed subject to completion of at least one year probation with a practice monitor.

In *Matter of Snulligan*, 987 N.E.2d 1065 (Ind. 2013), Respondent was hired to represent a client charged with Dealing Cocaine, a class A felony, and Possession of Cocaine, a class C felony. The Respondent quoted a flat fee of $12,000 for the case, and the parties agreed that $6,000 should be paid in advance. A month later, the family sent Respondent a letter terminating her services, requesting an itemization of services already performed, and requesting a refund of the unused fees paid in advance. Respondent did not keep ongoing records of the work she did on the case, and she sent a response to the family purporting a billing rate of $175 per hour for 37.8 hours. The hearing officer found Respondent's attempt to reconstruct time records unreliable, and found she did little actual work to move the case forward. Respondent was ordered to refund $5,000. For this misconduct, Respondent was suspended from the practice of law for not less than thirty days, without automatic reinstatement.

In *Matter of Canada*, 986 N.E.2d 254 (Ind. 2013), Respondent represented a client who was accused of Conspiracy to Commit Dealing in Methamphetamine, a class A felony. The client made it clear to Respondent he wanted to resolve the case through a plea agreement. Respondent entered into a flat fee agreement with the client for $10,000, to be paid from the cash bond posted by the client's father. The agreement stated that, barring a failure to perform the agreed legal services, the fee was non-refundable because of the possibility of preclusion of other representation and to guarantee priority of access. The hearing officer found the fee was reasonable on its face for someone of Respondent's skill and experience. After Respondent procured a plea offer, the client stated he was going to hire a different lawyer to see if he could get a better deal. Respondent estimated he had spent about twenty hours working on the client's case. Client was eventually sentenced similarly to the offer Respondent procured, and the $10,000 bond was released to Respondent for his fee. The court examined whether Respondent improperly collected and failed to refund an unearned portion of the flat fee.

The Court discussed the fact that the client was free to discharge Respondent at any time and retain a different attorney. The Court examined whether any portion of the $10,000 fee was unearned in this instance. Herein, the client retained the Respondent to negotiate a plea agreement. Respondent spent time on the case and negotiated an agreement with the prosecutor, to which the client initially agreed. The court determined the Commission did not prove by clear and convincing evidence that the Respondent did not fully earn his flat fee, and entered judgment for Respondent.

In *Matter of O'Farrell*, 942 N.E.2d 799 (Ind. 2011), the law office Respondent works in uses an "Hourly Fee Contract" or a "Flat Fee Contract" in most cases when it represents a party in a family law matter. Both types of contract contain a provision for a nonrefundable "engagement fee." The law office charged a "client 1" a $3,000 engagement fee for the cases, plus $131 for filing fees, which the client 1 paid. On November 28, 2006, Respondent filed motions to withdraw as the client's attorney in the divorce case and in the PO Case. Both cases eventually were dismissed. The law office refused to refund any part of the $3,000 the client had paid, saying that the fee was earned upon receipt pursuant to the Flat Fee Contract.

Another client agreed to pay an "engagement fee" of $1,500 and signed the law office's Hourly Fee Contract. Due to the client's unwillingness to pay any additional fees for further services rendered, Respondent and the law office ended their representation of the client and withdrew as her attorney. The law office refused to refund any part of the fee paid by the client, saying that all fees were earned upon receipt and nonrefundable. The Court concluded that in charging nonrefundable flat fees, Respondent violated Prof. Cond. R.1.5(a) by making agreements for and charging unreasonable fees. For Respondent's professional misconduct, the Court imposed a public reprimand.

An important case was decided in *Matter of Stephens,* 851 N.E.2d 1256 (Ind. 2006). Therein, Respondent entered into a medical malpractice employment agreement with a client, which provided that the client agree to pay Respondent as much of the first $100,000 obtained

from the health care providers as is necessary to equal one-third of the total recovery. The client then agreed to pay a non-refundable retainer of $10,000 in addition to the contingency fee. The client paid Respondent $10,000, but about 18 months later, the client demanded the return of her file and accused Respondent of breaching their contract. The client sought a refund of the $10,000, but Respondent declined to refund the money because it was "non-refundable." After the commencement of disciplinary proceedings, Respondent refunded the full $10,000 to the client.

The medical malpractice statutes of Indiana limit a plaintiff's attorney's fees to fifteen percent (15%) of any recovery from the Patient Compensation Fund. While the medical malpractice statutes do not restrict the amount of attorney fees taken from the first $100,000 recovered, the Court stated that the Indiana Rules of Professional Conduct do set standards for attorney fees and held that Respondent's agreement violated Prof. Cond. R. 1.5(a), which requires that a lawyer's fee be reasonable. Regardless of the source of the fee, an attorney's compensation must still meet the reasonableness requirements of Prof. Cond. R. 1.5(a) and the 15% limitation of I.C. 34-18-18-1.

The Court also held that the nonrefundable retainer provision of Respondent's agreement violated Prof. Cond. R. 1.5(a), saying "[b]y locking a client to a lawyer with a non-refundable retainer, the lawyer chills the client's right to terminate the representation." Finally, the Respondent's second fee agreement, which gave Respondent a pecuniary interest adverse to the client, was obtained without a separate written consent from the client, which violated Prof. Cond. R. 1.8(a). The Court held that a public reprimand was appropriate.

The Indiana Trial Lawyers Association intervened following this decision and asked that the Court reconsider its conclusion that the respondent had improperly attempted to circumvent the limitations on attorney fees recoverable under the malpractice act. The Supreme Court issued a subsequent opinion, *Matter of Stephens*, 867 N.E. 2d 148 (Ind.2007). The Court acknowledged that each case is unique and must be evaluated on its own merit. Those plaintiffs lawyers engaged in medical malpractice cases are given guidance as to what is a reasonable total fee in those cases.

The Court recognized that the legislature only limited attorney fees from those monies recovered from the fund. The reasonableness of the total fee is for the Supreme Court to determine, using the Rules of Professional Conduct. It recognized attorney fees of up to 35% are commonly considered reasonable in tort litigation and at times higher percentages are not out of line. Additionally, parties are free to enter into contracts of their own making.

The Court recognized that limiting plaintiff's attorneys to fees of 15% of the fund recovery plus no more than the customary percentage from the provider, would result in fees that may be too low for lawyers to consider taking medical malpractice cases. The consumers of legal services could be negatively affected.

The sliding scale fee agreement concept, where a lawyer might receive 100% of the non-fund recovery is acceptable. The key is to be certain the lawyer's fee agreement results in a total

fee within the typically acceptable range in tort litigation. If you practice in this area of the law you should read the second *Stephens* opinion.

In another case relating to attorney's fees, the lawyer required certain clients to pre-pay a portion of his fees before he performed any services. *Matter of Kendall*, 804 N.E.2d 1152 (Ind. 2004). These arrangements were set forth in contracts and specified that the advanced fee payments were "non-refundable." Notwithstanding this provision, it was Kendall's practice to refund any unearned portion of the fees. In the interim, the advance fees were deposited into Kendall's operating account. Subsequently, Kendall's firm was placed into bankruptcy, and he was unable to refund the unearned portions of the fees. Two issues were addressed in the case: (1) were the fees required to be segregated until earned?; and (2) were the fees reasonable? The Supreme Court took the opportunity to clarify the difference between advance fee payments and flat fees. The Court defined a "flat fee" as a "fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services." Furthermore, the Court described an advance fee as "a partial initial payment to be applied to fees for future legal services."

The Court then determined that Prof. Cond. R. 1.15(a) generally requires the segregation of advance payments of attorney fees until actually earned. However, the segregation and accounting requirements are not applicable to flat fees, as discussed in *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). In determining whether the fee was reasonable, the Court relied on *Matter of Thonert*, 682 N.E.2d 522 (Ind. 1997). In *Thonert*, the Court noted that nonrefundable retainers are not per se unreasonable, but that one should be justified by value received by the client or detriment incurred by the attorney. When such justification exists, the Court emphasized that it should be included in the fee agreement. Thus, the Court held that an assertion that an advance payment is nonrefundable violates the requirement in Rule 1.5(a) that a fee be reasonable. In the case of a flat fee, the agreement should reflect the fact that such a flat fee is nonrefundable except for failure to perform the agreed legal services.

In August of 2003, the Supreme Court held, as a matter of first impression, an attorney's recovery of a contingency fee on settlement funds that were not to be received until the future, without discounting future settlement payments to present value, amounted to collection of an unreasonable fee. *Matter of Hailey*, 792 N.E.2d 851 (Ind. 2003). The Court reasoned that the fee agreement must be based on the value to the client, unless some other method is clearly spelled out. Here, the agreement called for 40% of the settlement, so the attorney was entitled to 40% of the present value. The Court noted that there is nothing wrong with a lawyer receiving the full amount of his fee in current dollars and the client receiving payment in future dollars, so long as the relationship between the present value of the two is in proportion to the percentage of the lawyer's fee agreed to in the fee agreement. The attorney in this case received a public reprimand for this and other fee-related violations.

The amount and computation of the lawyer's fee is a subject about which lawyers give considerable thought. These cases show, however, that communicating the fee and the method by which it is calculated is equally important for the client to understand. Lawyers

who do not commonly give detailed explanations of the fee deals with their clients would be well advised to do so.

The Indiana Supreme Court's most significant pronouncement in this area came in the case of *Galanis v. Lyons & Truitt*, 15 N.E.2d 858 (Ind. 1999), not a recent case, but certainly an important decision. Although somewhat dated, it is still worth reading. In *Galanis*, the lawyer entered into an attorney client relationship with the plaintiff to represent her in a personal injury case. The lawyer undertook the matter on a contingency fee basis. After doing some work on the case, the lawyer was discharged and the plaintiff hired a second lawyer who brought the case to a conclusion. Ultimately, a declaratory judgment action was filed and the case eventually made its way to the Supreme Court. Among other issues, the Court addressed the method of determining the reasonableness of the lawyer's fees and the use of the equitable doctrine of *quantum meruit*:

> The trial court in this case held that the reasonable value of Lyons' work should be determined commensurate with the hourly rate of a community attorney charging for similar services. Judge Staton, dissenting in the Court of Appeals in this case, read this as requiring a fee equal [to] 'the hourly rate of a community attorney...' [citation omitted]. The parties apparently make the same assumption. Lyons challenges this method of calculating the reasonable value of the firm's work. If a fee agreement provides for an hourly rate in the event of a pre-contingency termination, it is presumptively enforceable, subject to the ordinary requirement of reasonableness. See Indiana Professional Conduct Rule 1.5. We agree with Lyons that, in the absence of such an agreement, the value of a discharged lawyer's work on a case is not always equal to a standard rate multiplied by the numbers of hours of work on the case. Where the lawyers have agreed to work on contingent fees and there is no contractual provision governing payment in the event of discharge, compensating the predecessor lawyer on a standard hourly fee could produce either too little or too much, depending on how the total hourly efforts of all lawyers compare to the contingent fee.

One of the most important features of this analysis is the duty of courts that are faced with fights like this to make not only a quantitative evaluation of the lawyer's time, but a qualitative evaluation of the lawyer's efficiency and productivity for the client.

The Indiana Supreme Court reiterated the *Galanis* standard in its opinion in *Cohen & Malad LLP v. John P. Daly, Jr. and Golitko Legal Group PC*, 27 N.E.3d 1084 (Ind. 2015) (Mem.). Therein the Court quoted from *Galanis*, stating that "a lawyer retained under a contingent fee contract is discharged prior to the contingency is entitled to recover the value of services rendered if there is a subsequent settlement or award[,]" and in that case, "the fee is to be measured by the proportion of the total fee equal to the contribution of the discharged lawyer's efforts to the ultimate result[.]"

Number 6 MALPRACTICE

Most lawyer malpractice cases do not end in disciplinary action. That fact does not make them significantly more popular for the defendant lawyer, however. Some cases are worthy of note.

In *Matter of Straw*, 68 N.E.3d 1070 (Ind. 2017), Respondent advanced a series of frivolous claims and arguments in four lawsuits, three of which were filed on his own behalf. The first suit was a defamation suit where opposing counsel sought information from Respondent and in response, Respondent sued opposing counsel in federal court, alleging racketeering activity and seeking $15,000,000 in damages and injunctive relief. The second suit was in federal court against the ABA and 50 law schools, alleging violations of the Americans with Disabilities Act ("ADA"), which was dismissed for lack of standing. Respondent lost the third suit, an employment discrimination claim, because he let the statute of limitations lapse without filing. The fourth case was a post-dissolution proceeding where Respondent filed suit alleging defendants had violated the ADA by discriminating against the former husband, which was dismissed. The Court held that a suspension for a period of 180 days, without automatic reinstatement, was warranted for Respondent's misconduct.

Number 5 SOLICITATION OF BUSINESS

This is another area of the law of ethics that is confusing and generally not well understood by lawyers. In a nutshell, truthful lawyer advertising is protected speech under the first amendment of the U.S. Constitution. The states are free to regulate lawyer advertising if the speech is "false, fraudulent, misleading, deceptive, self-laudatory or unfair." This term is found in Rule 7.1(b) of Indiana's Rules of Professional Conduct. It is further defined in subsections (c) and (d) of the Rule to include prohibitions on the use of statistics, opinions about the quality of the legal services and testimonials. Rules 7.2 through 7.4 further regulate lawyer solicitations with Rules regarding letterhead, in-person solicitation and advertising of "specialty" practices.

In *Matter of Westerfield*, 64 N.E.3d 218 (Ind. 2016), Respondent, who was licensed to practice law in Indiana but not in Florida, was hired by a non-lawyer marketing representative to quite title actions for homeowners. Thereafter, Respondent accepted flat fees for representation, but did not complete any quite title actions or fully refund her clients. In May of 2015, the Indiana Commission filed a four-count complaint against Respondent for improperly soliciting clients, failing to refund unearned fees, and engaging in the unauthorized practice of law in another state (Florida). The Court also found that Respondent had a "lengthy disciplinary history" and was "disingenuous and evasive" about her relationship with the marketing representative. The Court held that an eighteen-month suspension, without automatic reinstatement, was an appropriate sanction for Respondent's misconduct.

In *Matter of Wall*, 73 N.E.3d 170 (Ind. 2017), Respondent worked with a Florida corporation ("CAS") that offered legal services to consumers outside of Indiana. The typical transaction involved an intake and representation agreement with a CAS paralegal, followed by a nonrefundable fee. Respondent was paid per agreement signed where his sole role was to convince the client to undergo mortgage modification. For the most part, CAS provided the bulk of legal services and Respondent was minimally involved. The Court held that a thirty-day suspension from practice of law, with automatic reinstatement, was appropriate sanction for attorney's misconduct.

In *Matter of Fratini*, 74 N.E.3d 1210 (Ind. 2017), Respondent was affiliated with a California corporation that advertised various debt-relief services nationwide via a website and direct mail solicitation. The debtors were screened by nonlawyers who asked clients to sign nonrefundable retainer agreements. The retainer agreements contained a $399.00 fee, a legal fee equal to 18% of the total debt at issue, and monthly payments toward escrow and legal fees over a four-year span. The Respondent's only role was to review and sign the retainer agreements after they had been signed by the debtor and the USLSG nonlawyer. The Court held that a suspension for a period of not less than six months, without automatic reinstatement, was warranted for Respondent's misconduct.

In *Matter of Anonymous*, 6 N.E.3d 903 (Ind. 2014), Respondent entered into agreement with American Association of Motorcycle Lawyers ("AAML") to have them advertise for him on their website. AAML's direct phone line was connected to Respondent's so that when potential clients called the AAML they would reach Respondent. Lawyers that the AAML advertised on behalf of were referred to as "Law Tigers" on the AAML website. The AAML website contained examples of previous results obtained by "Law Tigers." A tab led to "Client Testimonials" from persons who claim to have utilized "Law Tigers" in seeking advice and/or representation regarding a motorcycle-related legal matter. None of the settlements, verdicts, or testimonials related to Respondent, but that was not disclosed on the website. The Court found these advertisements to be misleading and the Respondent was privately reprimanded.

"The states are free to regulate lawyer advertising if the speech is 'false, fraudulent, misleading, deceptive, self-laudatory or unfair.'"

Number 4 CLIENT CONFIDENCES & PRIVILEGE

In *Matter of Smith*, 991 N.E.2d 106 (Ind. 2013), Respondent engaged in attorney misconduct by, among other things, revealing confidential information relating to his representation of a former client by publishing the information in a book for personal gain. Respondent revealed that he and his former client engaged in a sexual relationship, and he also communicated that partial motivation for writing the book was to recoup legal fees he felt the former client owed him. Respondent was charged with multiple violations of the Rules of Professional Conduct.

In *Matter of Anonymous*, 932 N.E.2d 671 (Ind. 2010), Respondent represented an organization that employed "AB." AB asked Respondent for a referral to a family law attorney after an altercation with her husband. AB and her husband soon reconciled. In 2008, Respondent was socializing with two friends, one of whom was also a friend of AB. Unaware of AB's reconciliation with her husband, Respondent told her two friends about AB's filing for divorce and about the altercation. Respondent encouraged AB's friend to contact AB because the friend expressed concern for her. When AB's friend called AB and told her what Respondent had told him, AB became upset about the revelation of the information and filed a grievance against Respondent. The Court concluded Respondent violated Prof. Cond. R.1.9(c)(2) by improperly revealing information relating to the representation of a former client. For Respondent's professional misconduct, the Court imposed a private reprimand.

Number 3 MISCONDUCT INVOLVING DISHONESTY

Unfortunately, cases involving dishonest attorneys are all too common.

In *Matter of Yudkin*, 61 N.E.3d 1169 (Ind. 2016), Respondent, knowingly made several misrepresentations regarding the timeliness of a motion to correct error ("MTCE") during trial. In May of 2013, the trial court ruled in favor of the trial court, but the appellate court found that Respondent's statements were misleading. In response, Respondent filed a frivolous federal lawsuit against the opposing party, alleging defamation. Upon review, the Commission found that Respondent had "selectively quoted the language of Trial Rule 59(C) in a manner that suggested" the opposing party's MTCE would have been untimely regardless of the misrepresentation. The Court held that a suspension for a period of not less than 90 days, without automatic reinstatement, was warranted for Respondent's misconduct.

In *Matter of Mulvany*, 49S00-1610-DI-559 (Ind. May 18, 2017), Respondent represented clients in federal court seeking judicial review of Social Security claims where he applied for attorney fees that did not accurately reflect his "actual time," which was a statutory requirement. Respondent was found to have a tendency to round up to the nearest hour on each of his tasks. Upon review of the inappropriate timekeeping practices, the parties agreed that the Respondent was in violation of knowingly making a false statement of fact to a tribunal and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Court held that a public reprimand was warranted for the Respondent's misconduct.

In *Matter of Brizzi*, 71 N.E.3d 831 (Ind. 2017), Respondent was the elected Marion County Prosecutor. The Commission found that Page brought a matter directly to Respondent, who then intervened and instructed his deputies to allow Page's client to plead guilty to a lower felony charge and to return a portion of the seized cash to Page's client. The chief deputy indicated Respondent had never given him such an instruction in a narcotics case, and both deputies knew of no reason to reduce the lead charge to a class D felony or to return any of the seized funds. The Court held that attorney's conduct, as prosecutor, in negotiating plea agreement for client of business partner warranted 30-day suspension of license.

In *Matter of Fox*, 2017 WL 818574 (Ind. 2017), Respondent moved for leave to correct a one-page Table of Contents and a four-page Table of Authorities. The court granted the motion and specifically ordered Respondent not to make any substantive changes. However, when Respondent filed a corrected brief it contained a thirty-six page Table of Contents and fifty-nine additional sources. The Court held that a public reprimand was warranted for Respondent's misconduct.

In *Matter of Hollander*, 27 N.E.3d 278 (Ind. 2015), Respondent was employed as a public defender. In November 2012, Respondent came across a police report of a female who was arrested for engaging in prostitution. The report contained the female's personal phone number. The Respondent recognized the phone number from an online escort service and proceeded to send text messages to the phone number indicating that he could help with the female's situation and stated he would "work with" her regarding her attorney fees. At the time the messages were sent, the phone was in the possession of the Indiana Metropolitan Police Department ("IMPD"). An undercover IMPD police officer responded to the text messages and set up a meeting with Respondent in a hotel room. Respondent attempted to hug and kiss the officer, made statements conveying he wanted sex in return for his legal services, and began to undress. Respondent was subsequently arrested for patronizing a prostitute. The parties agree that Respondent violated Prof. Cond. R. 1.2(d), 1.5(a), 1.7(a), 1.8(j), 7.3(a), and 8.4(a)-(d). The violations stemmed from Respondent's improper attempt to charge and engage in sex for legal services, making dishonest or false representations, committing a criminal act that reflects adversely on the lawyer's honesty, and engaging in conduct prejudicial to the administration of justice. The Court suspended Respondent from practicing law for one year, without automatic reinstatement, for his misconduct.

In *Matter of Cohen*, 18 N.E.3d 996 (Ind. 2014), Respondent received a ninety-day suspension with automatic reinstatement for violating Prof. Cond. Rules 1.16(d) and 8.4(c). Respondent served as in-house counsel for Eli Lilly ("Lilly") from 1999-2009. When Respondent was preparing to leave his position at Lilly, he copied various forms and documents belonging to Lilly onto a disk. The Court found that the information on the disk was Lilly's property and was confidential. The Court held that Respondent violated Rule 8.4(c) by taking and retaining the disk knowing that he was not authorized to possess or control the information after leaving Lilly. Additionally, the Court held that Respondent violated Rule 1.16(d) by failing to protect Lilly's interests upon termination of representation.

In *Matter of Ogden*, 10 N.E.3d 499 (Ind. 2014), Respondent made several allegations about a judge in order to have him removed from a case involving the administration of an estate. He alleged that the judge committed malfeasance in the initial stages of the administration of the Estate by allowing it to be opened as an unsupervised estate, by appointing a personal representative with a conflict of interest, and by not requiring the posting of a bond. He also alleged that the judge allowed the personal representative to engage in misconduct over the course of the administration. The court found that the Commission met its burden of proof in proving that Respondent had violated Rule 8.2(a) which provides that "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." The judge had not actually

presided over the administration of the estate during the time that the personal representative was involved. The court found that Respondent could have easily acquired this information prior to making the allegations, which represented to them that Respondent made the statement without any reasonable basis for believing it to be true, and suspended him from the practice of law for 30 days.

In *Matter of Alexander*, 10 N.E.3d 1241 (Ind. 2014), Respondent, in one case, hired a former attorney who had resigned from the bar and allowed him to perform law-related tasks such as legal research, client interviews, and assisting Respondent at counsel table during trial.

In a second matter, Respondent was involved in a case where a driver had left a steakhouse intoxicated and was then involved in an accident that injured Respondent's clients. Respondent's clients' argued that the driver was visibly intoxicated and the steakhouse served him anyway. A waitress at the steakhouse was willing to testify that this was true, but eventually contacted Respondent to let him know that she had changed her mind and that she had lied initially when she spoke with him. As part of the discovery process, the restaurant served interrogatories to Respondent's clients. The Respondent did not include the waitress's name in the appropriate part of the response to interrogatories, although he disclosed the name in another part of the discovery. Respondent was found to be in violation of Indiana Trial Rule 26(E)(2)(b) which provides that, "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which . . . he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Respondent was suspended from the practice of law for 60 days.

In *Matter of Greene*, 6 N.E.3d 947 (Ind. 2014), Respondent, who was licensed to practice law in Illinois but not in Indiana, was hired by an Indiana hospital to assist in obtaining payment for medical care provided to patients who had been injured in accidents. When a patient involved in an accident was released from the hospital, the hospital would provide them with a form on Respondent's letterhead seemingly offering his legal services on behalf of the patient in recovering funds from insurance companies. The letters created the impression that Respondent was operating on behalf of the patients and not the hospital, which was not true. Respondent was barred from the practice of law in the state of Indiana.

In *Matter of Montgomery*, 2 N.E.3d 1261 (Ind. 2014), Respondent committed several different violations of the Rules of Professional Conduct. The first violation involved him buying a former client, who was a felon, a handgun.

Respondent was hired by a creditor to pursue collection of a debt from a person who filed for bankruptcy relief. Respondent falsely informed the creditor that he had filed an adversary proceeding related to the debt in the bankruptcy. As a result, the debt was discharged and the creditor was left with no recourse against the debtor.

In the third matter, Respondent agreed to represent a client in a foreclosure action. He took no action, however, and falsely told the client that the mortgagor had agreed to hold the

mortgage proceeding in abeyance. In reliance, the client invested money in the property, which was later sold at a sheriff's sale.

Also, the Respondent was hired to defend a client against federal criminal charges. At the request of the client, Respondent allowed an acquaintance of the client's, who was a former federal convict, unsupervised access to Respondent's office and the client's files. Respondent presented his law partners a fee agreement purportedly signed by the client, but the signature was actually forged by the acquaintance. The acquaintance was later convicted of forgery and fraud in connection with the handling of the client's business and personal affairs.

Finally, Respondent falsely told his law partners and the chief public defender, who employed him part-time, that he had a life-threatening brain tumor. Respondent's law partners sent a letter to local trial court judges reporting this information. Respondent reviewed and approved the letter before it was sent, knowing that it misrepresented his medical condition. Respondent was suspended from the practice of law for not less than one year.

In *Matter of Usher*, IV, 987 N.E.2d 1080 (Ind. 2013), Respondent was a partner at a law firm, and pursued a consistently unrequited relationship with a summer intern. Their previous friendship declined because of his insistent pursuit of a romantic relationship. Respondent received a movie clip featuring the Intern in a state of undress. After Respondent communicated his possession of the clip to the Intern, she ended their friendship. Respondent then began efforts to humiliate Intern and to interfere with her employment. Respondent sent the clip to attorneys at the firm where she had accepted a job offer in an effort to adversely affect her employment. Respondent sent Intern an email accusing her of lying and misleading him, and Respondent drafted a fictitious email thread entitled "Bose means Snuff Porn Film Business" w/ addition of [Jane Doe], and suggested the Intern was a danger to female professionals.

Respondent recruited a paralegal to disseminate the email with directions on how to avoid having the e-mail linked back to them. Respondent was out of town when the email was sent. Thereafter, the Intern served him with a protective order with the email attached. Respondent's firm demanded he resign, and he complied. The hearing officer found the email was a "vindictive attempt to embarrass and harm [Intern] both personally and professionally." The court found that Respondent violated Professional Conduct Rule 3.3(a)(1) by knowingly submitting false responses to RFAs in defense of Intern's civil action against him. Respondent admitted to originally misrepresenting his involvement with the email.

The Court concluded that Respondent violated the Indiana Professional Conduct Rules 3.3(a)(1), 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(d), by, among other things, engaging in a pervasive pattern of conduct involving dishonesty and misrepresentation that was prejudicial to the administration of justice. For Respondent's misconduct, the Court suspends Respondent from the practice of law in the state for not less than three years, without automatic reinstatement.

Number 2 TRUST ACCOUNTS

Misconduct involving the funds of clients and third parties is one of the most serious acts of misconduct a lawyer can commit. As a result, the sanctions for misconduct in these cases are equally serious. What follows are highlights of recent cases provided for a flavor of the kind of sanctions the Supreme Court metes out for violations in this area.

In *Matter of Mercho*, 2017 WL 1162401 (Ind. March 29, 2017), Respondent misappropriated funds from his attorney trust account over a period of several years, making dozens of disbursements of client funds for purely personal purposes. At least two of these instances involved disbursement of funds Respondent was holding in trust for another attorney and that attorney's client. During the Commission's investigation, Respondent made numerous false statements, and submitted a client ledger containing false entries, in an attempt to extricate himself from the disciplinary process. The Court held that a suspension for a period of 180 days, with 90 days actively served and the remainder stayed subject to completion of at least one year of probation was warranted for Respondent's misconduct.

In *Matter of James*, 70 N.E.3d 346, 347 (Ind. 2017), Respondent significantly overdrew his trust account, mismanaged his trust account, converted client funds, made unauthorized withdrawals, and failed to cooperate with the Disciplinary Commission. During this case, Respondent was already under suspension in two other cases for failure to cooperate with the Commission. The Court held that a disbarring Respondent from the practice of law was warranted for Respondent's misconduct.

In *Matter of Ulrich*, WL 818575 (Ind. 2017), Respondent represented his client in a personal injury lawsuit where the settlement was $100,000. The settlement was deposited into Respondent's trust account where he held the client's funds while Respondent sued the client's insurer. The client was only able to obtain its settlement claim after bringing suit under new legal representation. During this time, Respondent failed to keep individual client ledgers, withdrawal fees earned, and unauthorized withdrawals. The Court held that a suspension for a period of six months, all stayed subject to completion of at least two years of probation, was warranted for Respondent's misconduct.

“The parties agreed that Respondent violated Prof. Cond. R. 1.15(a), for failing to maintain and preserve complete records of client trust account funds.”

In *Matter of Safrin*, 24 N.E.3d 417 (Ind. 2015), Respondent maintained two attorney/client trust accounts (“Trust Accounts”), neither of which were registered as an Interest on Lawyers Trust Account (“IOLTA). Respondent did not notify the banks that the Trust Accounts were subject to overdraft reporting to the Commission. On his Attorney Annual Registration Statements from 2008 through 2011, Respondent falsely stated that he was exempt from maintaining an IOLTA. Over several years, Respondent shared signatory authority for the Trust Accounts with another lawyer, who stole money from the Trust Accounts. This resulted in overdrafts, which were not reported to the Commission because the accounts were not registered as IOLTA accounts. Additionally, Respondent falsely claimed to the Commission that his fee arrangements never contained a nonrefundable fee provision. The parties agree that Respondent violated Prof. Cond. R. 1.5(a), 1.15(g), 8.1(a)-(b) and 8.4(c). The violations stemmed from Respondent falsely certifying he was exempt from holding an IOLTA trust account, making an agreement for an unreasonable fee, providing false statements to the Commission, and engaging in dishonesty and deceit. The Court suspended Respondent from practicing law for six months, without automatic restatement for his misconduct.

In *Matter of Thomas*, 30 N.E.3d 704 (Ind. 2015), Respondent initially employed various experienced persons to manage his law office and attorney trust account. However, at some point between 2002 and 2004, Respondent’s wife took over management of Respondent’s trust account. The wife had no prior experience with trust accounts or fiduciary accounting. Beginning in 2004 or 2005, Respondent gave control of his trust account to his wife and did not adequately supervise her. In 2006, Respondent became aware that his trust account was in poor shape and needed to be “untangled.” Despite knowing his wife’s accounting was incorrect, during the next several years Respondent failed

to take appropriate measures to supervise his wife or reconcile his trust account issues. Throughout 2009 and 2010, Respondent's wife signed Respondent's name to the drawer's line on trust account checks and opened trust account bank statements received in the mail prior to giving them to Respondent. Monies from Respondent's trust account and operating account would routinely intermix. In 2009, Respondent filed for bankruptcy but failed to list his attorney trust account in his Statement of Financial Affairs. The Court concluded that Respondent violated Prof. Cond. R. 1.1, 1.15(a), 3.3(a)(1), 5.3(a)-(c), 8.4(a)-(b), for failing to diligently supervise his wife, commingling client and attorney funds, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Court suspended Respondent from practicing law for eight months for his misconduct.

In *Matter of Munson*, 2015 Ind. LEXIS 432 (Ind. 2015), Respondent did not keep accurate and contemporaneous records of his attorney trust account, and his internal records did not reconcile with the bank statements of the trust account. The Commission launched an investigation into Respondent's activities after receiving an overdraft notice from his attorney trust account. The investigation revealed that Respondent had substantial experience in the practice of law and had no established means of accurately maintaining his attorney trust account. There were no allegations that client funds were actually missing from Respondent's trust account. The parties agreed that Respondent violated Prof. Cond. R. 1.15(a), for failing to maintain and preserve complete records of client trust account funds. The Court suspended Respondent from practicing law for six months and placed him on two years of probation for his misconduct.

Number 1 NEGLECT & LACK OF COMMUNICATION

By far and away, year after year, this is the most common complaint grievants make about their lawyers...or former lawyers. Almost invariably, the reported decisions involving this form of misconduct are multiple count matters which result in the lawyer's suspension or disbarment. For illustration, what follows is a partial list of recent disciplinary actions involving these elements which resulted in public discipline.

In *Matter of Cooper*, 2017 WL 1101120 (Ind. March 24, 2017), Respondent was one of the deputy prosecutors involved with a murder case at the trial and sentencing phases before Judge Cynthia Emkes. After a post-conviction relief was filed, Judge Emkes filed a notice of recusal, and the Court appointed Judge Jane Woodward Miller as special judge to hear the case. Judge Miller granted the petition for post-conviction relief. Respondent then provided a statement to the Indianapolis Star for public dissemination, indicating he was "suspicious" of the transfer of the case to Judge Miller and then offered as purported support for that suspicion additional commentary that was false, misleading, and inflammatory in nature. Court imposed a public reprimand for Respondent's misconduct.

In *Matter of Coleman*, 67 N.E.3d 629 (Ind. 2017), Respondent falsely represented he was associated with a law firm while soliciting employment with a client. During the representation, the client had difficulty communicating with Respondent, and Respondent failed to keep Client informed about events in the case, made decisions about the case without consulting the client, and failed to appear at a pretrial conference. Despite the client's prior instructions that he did not want to enter a plea agreement, Respondent negotiated a plea agreement without consulting the client. The client then fired Respondent and hired new counsel. Respondent did not withdraw his representation or forward a copy of the client's file to new counsel until after a show cause proceeding was initiated against him. Respondent also struck his wife in the presence of four children. The Court held that a two-year suspension, with conductions for reinstatement, was warranted for Respondent's misconduct.

In *Matter of Staples*, 66 N.E.3d 939 (Ind. 2017), Respondent appeared as successor counsel for a criminal defendant. Respondent did not appear for a pretrial conference and did not

timely respond to inquiries from court staff regarding his absence. When the client was unable to appear at a hearing due to his hospitalization, Respondent did not file a motion to continue although ordered to do so, and failed to appear during the show cause proceedings that ensued. Respondent was found in contempt, and failed to appear for a sanctions hearing. Respondent was ordered to appear with the client at a hearing; the client appeared, but Respondent did not. The trial court again found Respondent in contempt. The Court imposed a public reprimand for Respondent's misconduct.

In *Matter of Jackson*, 24 N.E.3d 419 (Ind. 2015), Respondent signed an agreement with Consumer Attorney Services ("CAS"), a Florida firm, to be "of counsel" and to provide services to CAS's Indiana loan modification and foreclosure defense clients. CAS paid Respondent $50 (later raised to $75) for every Indiana loan modification client and $200 for each foreclosure client assigned to him. Non-lawyer employees of CAS performed all intake work for clients assigned to Respondent and drafted pleadings to review and file.

An Indiana resident hired CAS and was assigned to Respondent. The client was not informed that Respondent's role in his representation would be limited, nor was he informed about how fees would be shared between CAS and Respondent. The fee agreement called for an initial nonrefundable retainer followed by monthly payments for the duration of the representation. Other than making an initial brief phone call to the client and signing the fee agreement on behalf of CAS, Respondent had no involvement in attempting to obtain a loan modification from the client's lender. The client was eventually served a complaint for foreclosure. Following the foreclosure notice, a non-lawyer at CAS sent the client a "retainer modification agreement," which increased the client's monthly payments for continued representation. The lender of the home mortgage sought summary judgment, and Respondent filed a response on the client's behalf that was initially drafted by a non-lawyer at CAS. Throughout the proceedings, Respondent did not keep the client informed about the status of the litigation, did not consult with the client about the availability of a court-ordered settlement conference, and did not raise any substantive defenses. The client eventually terminated his relationship with CAS. CAS did not notify Respondent of the termination, and Respondent did not withdraw his appearance from the foreclosure action. The client eventually obtained a loan modification by directly negotiation with his lender. In response to his experience, the client sought a refund of unearned fees held by CAS but was unsuccessful.

The parties agreed that Respondent violated the following Rules of Professional Conduct: 1.4(a)(1)-(3),(5), 1.4(b), 1.5(e), 5.3(b), 5.4(c), 5.5(a), 8.4(a),(c)-(d). Among other things, Respondent failed to reasonably communicate and keep his client informed about the status of a matter, failed to obtain a client's required approval of a fee division, and knowingly assisted another to violate the Rules of Professional Conduct and engaged in deceitful misrepresentations. The Court suspended Respondent from practicing law for four months for his misconduct.

This has been an exposition of ten of the most common sources of disciplinary action and personal liability for lawyers. Although the list covers most of the territory, it is by no means an exclusive listing. There are new and different forms of misconduct appearing regularly for lawyers.

One purpose of this work is (hopefully) to cause lawyers to re-examine their practices and, where problems exist, formulate a plan for preventing or correcting some of the problems described herein.

These materials were originally prepared by Charles M. Kidd and Kevin McGoff near the dawn of interest and offering of CLE's in the field of legal ethics.

They were updated in August 2017 by Kevin McGoff and Max Hsu of Bingham Greenebaum Doll LLP.

Notes

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