

**INDIANA CONTINUING LEGAL EDUCATION FORUM
CURRENT ETHICS ISSUES AND CASES**

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Presumably, you are all aware that the Indiana Supreme Court adopted changes to the Indiana Rules of Professional Conduct effective January 1, 2005. The changes can be found in the Indiana Supreme Court website.

I. INFORMED CONSENT AND FEE NEGOTIATIONS

Rule 1.0 (e) provides:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Paragraph (b) of Rule 1.0 states:

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

“Reasonable” is defined at (h) of Rule 1.0 as:

“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

Donald R. Lundberg, Executive Secretary, Indiana Supreme Court Disciplinary Commission, in an article entitled “Documenting Client Decisions: A Critique of The Model Rules Post-Ethics 2000,” 14 The Professional Lawyer, No. 4, (ABA Center for Professional Responsibility 2004), writes the Rules are silent about the application of the informed consent standard to negotiations with a prospective client about fee arrangements.

Rule 1.5 (b) requires only that the basis or rate of the fee and expenses for which the client will be responsible be communicated to the client, “preferably in writing,” before or within a reasonable time after the representation has commenced. Obviously, the lawyer is also obligated to communicate any change in the basis or rate of the fee or expenses.

Mr. Lundberg opines in his article that the requirement in Rule 1.2(c) that a lawyer obtain the informed consent of the client to limitations on the scope of representation suggests that the standard for fee arrangements also ought to be one of informed consent, because like fee arrangements, scope limitations are generally a part of the negotiations leading up to the creation of the client-lawyer relationship, not a condition imposed upon a relationship after it is established. Mr. Lundberg concludes that if informed consent is the standard for scope limitations, it must also be the standard for initial fee arrangements.

II. PROSPECTIVE CLIENTS

Rule 1.18 “Duties to Prospective Clients.” Mr. Lundberg, in an article, “An Update on Rules Governing Conflicts of Interest,” prepared for an ICLEF Seminar, “Conflicts In The Practice,” October 19, 2004, summarizes the form and substance of this Rule thusly:

VIII. Rule 1.18: Duties to Prospective Clients.

- a. This is a new rule. It largely incorporates principles developed by case law and articulated in the Restatement (Third) of the Law Governing Lawyers.
- b. Uses the term “prospective client” to describe “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” Rule 1.18(a).
- c. Regardless of whether a formal client-lawyer relationship arises from the discussion, the consulted lawyer must not use or reveal information disclosed unless it could be used or disclosed in relationship to a former client under Rule 1.9(c). Rule 1.18(b).
- d. The consulted lawyer may not represent another client under the same test as would apply to a former client under Rule 1.9(a) if the consulted lawyer has received information from the prospective client “that could be significantly harmful to that person in the matter.” The consulted lawyer’s conflict will be imputed to the lawyer’s firm. Rule 1.18(c).
- e. However, absent the informed consent confirmed in writing of both the prospective client and the current client, the consulted lawyer’s firm will be able to avoid imputation and handle a matter adverse to the prospective client if the consulted lawyer took “reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” the consulted lawyer is timely screened, and the prospective client is given written notice.
- f. Commentary has also been included with the rule to expand on its content.

- i. A comment notes that under the circumstances, a prospective client is entitled to some, but not all, of the protections afforded full clients. Comment [1].
- ii. The unilateral, unsolicited imposition of information upon a lawyer will, absent a reasonable expectation that the client might potentially employ the lawyer, not cloak the communicator with the status of a prospective client. Comment [2].
- iii. A comment cautions lawyers to limit acquisitions of information in advance of the creation of a full-blown lawyer-client relationship to that which is reasonably relevant to the hiring decision, such as information pertaining to conflicts of interest. Comment [4].
- iv. A comment suggests that a lawyer may solicit an advance agreement from a prospective client that no disclosed information will prohibit the lawyer from representing another client, and may even include an agreement for the prospective client's consent to use of any information received. Comment [5].
- v. A comment expands on the content of notice to the prospective client in the event the conditions are met for imputation by screening the prohibited lawyer. Comment [8].
- vi. A comment takes note of the obligation of the consulted lawyer to display competence with respect to any advice rendered and to safeguard any property entrusted to the lawyer by the prospective client. Comment [9].
- vii. Indiana Rule 1.18 includes an additional comment (Comment [10] that does not appear in the corresponding ABA Model Rule. This comment states: "Paragraph (d) also applies to other lawyers in the firm with whom the receiving lawyer actually shared disqualifying information." Even in the absence of this comment, it is probably the case that other lawyers would be equally affected by failure to satisfy the requirement that a screen be timely. However, it raises the question of whether in Indiana, unlike under the ABA rule, a failure of a screen to be timely imposed might still allow the firm to handle the matter in question by simply screening off other exposed lawyers.

Current Ethics Cases

Some of the most recent reported ethics cases involving Indiana attorneys in family law matters are:

In Re Bash, 813 NE2d 777, (Ind. 2004). On August 23, 2004, an attorney was publicly reprimanded for a.) advising his client not to permit visitation with a child after the Court denied

a Motion to Suspend Visitation; b.) initiating an unauthorized ex parte communication with the judge who denied the Motion to Suspend Visitation; and c.) contracting a custodial parent in a disputed custody matter to make arrangements for the transfer of custody of the child to his client based upon his knowledge that the Court was going to order a transfer of custody, although at the time the Order had not been signed.

The lawyer was reprimanded for violating Ind. R. Prof. Conduct 1.2 (d) 3.5 (b), 4.1 (b), and 4.4.

In Bash, the Indiana Supreme Court Disciplinary Commission and the Respondent submitted a Stipulation of Proposed Discipline and Agreed Facts pursuant to Ind. Admission and Discipline Rule 53, Section 11. By Stipulation, the parties agreed that the client hired the lawyer to represent her in connection with visitation issues arising from a move out of state with the child. The lawyer filed a Notice of Intent to Move and included a request for an emergency hearing alleging sexual misconduct by the father and granting suspension of visitation. On the basis of the Affidavits, the Court issued an Order denying suspension of visitation. The lawyer, once he learned of the Court's Order, left a message at opposing counsel's office stating he had advised his client to deny visitation. The lawyer also called the judge and stated his client would not comply with the Order. The judge advised the lawyer that the call constituted an unauthorized ex parte communication and suggesting opposing counsel be included in the call. The lawyer declined. The call was terminated.

In a separate Count, the parties agreed that the lawyer was engaged by the non-custodial parent in a paternity matter to obtain custody of the child. The lawyer filed a Verified Motion for Emergency Modification of Custody, but failed to serve the custodial parent. The custodial parent learned of the filing and hearing from the non-custodial parent. After the hearing, while

the matter was under advisement, the lawyer learned from the judge that he was going to recommend a change of custody. The lawyer thereafter notified the custodial parent that the Court had granted temporary custody to his client and requested arrangements for the transfer of custody. Based upon the lawyer's representation, the custodial parent transferred custody. The next day, when the custodial parent was unable to obtain a copy of the Order changing custody (because it did not yet exist) the custodial parent retrieved custody of the child. Later that day when the Order was signed, the lawyer again contacted the custodial parent and demanded transfer of custody.

The Indiana Supreme Court, in the decision, noted that it was approving "the relatively lenient sanction in light of its interest in fostering agreed resolution of attorney-disciplinary matters." *Id.*, at p. 778.

In Re Foster, 809 NE2d 330 (Ind., 2004), Decided June 3, 2004, an attorney was publicly reprimanded on the basis of the following facts.

The attorney was hired to represent a client in a dissolution of marriage action for an agreed hourly fee of \$150 per hour. Over the course of the representation, the lawyer was paid approximately \$11,500 in hourly fees.

During the pendency of the dissolution matter, state authorities began a criminal investigation of the client and the lawyer rendered legal service to the client in relation to that investigation. The client then hired the attorney to represent him against the criminal allegations resulting from the investigation. The attorney and the client signed another fee agreement which required advance payment. The lawyer undertook the client's representation in the criminal matter upon the basis of a "non-refundable flat fee of \$10,000, plus expenses." The fee was paid November 26, 2001. Charges of child molesting were filed January 12, 2002. The client was

arrested January 15, 2002, and posted a surety bond. The lawyer filed an Appearance January 16, 2002. An initial hearing was conducted January 17, 2002. Two weeks later, the client fired the lawyer and requested return of the \$10,000 he had paid. The attorney did not promptly comply, nor did he provide an accounting. After the Complaint was filed by the Commission, the lawyer provided an itemization of the time and expenses he rendered in the dissolution and the criminal matter. The lawyer later refunded \$1,700 to the client as an “unearned and unreasonable fee.”

The Supreme Court noted in its decision, that “we express no opinion as to whether the agreed facts, reflect that the Respondent characterized his fee as a ‘non-refundable flat fee,’ clearly and convincingly support a finding of unreasonable fee absent the Respondent’s stipulation to the violation.” *Id.*, at p. 330.

The Foster case was handed down after **In Re Kendall**, 804 NE2d 1152, (Ind. 2004). In Kendall, a public reprimand issued upon the basis of a Petition for Review of the findings by a hearing officer that the Disciplinary Commission did not carry its burden of proof on certain of the Counts. The Indiana Supreme Court found the attorney had violated the Indiana Rules of Professional Conduct and issued a public reprimand.

In the Opinion, Justice Dickson, wrote:

“Among the matters to be clarified in this case are two questions important to many practicing Indiana lawyers. First, when a lawyer receives a payment for legal services to be rendered in the future, must the lawyer hold the funds in a trust account until earned? Second, may the lawyers fee contract specify that all or a portion of a preliminary (or advanced) fee is non-refundable?” *Id.*, at p. 1153.

In Kendall, the lawyer required certain of his clients to prepay a portion of his fees before he performed legal services. The fee arrangements were set forth in a written fee contract and provided the fees were “non-refundable.” Notwithstanding the “non-refundability” language, it

was the lawyer's intention and practice to refund any unearned portion of the advanced fee payment. The payments were deposited in the lawyers operating account. After execution of the fee contract and deposit of the monies into the operating account, the lawyer and his law firm were placed in bankruptcy. Because of the bankruptcy, the lawyer was unable to refund the unearned advanced fee payments when several clients who had paid them terminated his representation.

The hearing officer concluded that the lawyer's conduct violated Rule 1.4 (a), (failure to keep clients reasonably informed), Rule 1.15 (b), (failing to render a prompt accounting), Rule 1.16 (d), (failing to promptly refund fees after termination of representation). The hearing officer likewise found the evidence did not prove the Commission's claimed violations of Rule 1.5 (a), (charging an unreasonable fee), and/or Rule 1.15 (a), (failing to segregate client and attorney's funds).

The Disciplinary Commission petitioned for review of the hearing officer's conclusions.

The Opinion characterizes the appeal as:

“upon a single principle issue: how should Indiana lawyers handle fees paid in advance for legal services to be rendered?” Id., at p. 1153.

The Commission argued that client fee deposits (to be earned in the future on an hourly fee basis) must be held in trust until earned. The Respondent argued there was no requirement to segregate in special trust accounts, retainers, or attorney's fees charged in advance for the performance of legal services. The hearing officer observed:

“Requiring that advanced fees of all kinds be put in trust is not a simple issue for the profession. Criminal, divorce, employment, contract, and many other areas of day-to-day practice justify retainers for many reasons. Ruling here that all of those fees must go into trust without seeking input from the Bar should be avoided.” Id., at p. 1154.

In the Opinion, the Indiana Supreme Court discusses In Re Stanton, 504 NE2d 1, (Ind. 1987), wherein the Supreme Court held flat fees do not have to be deposited in a trust account. The lawyer in Kendall, argued that the Stanton holding was not limited to flat fees, but generally authorized Indiana attorneys to place all unearned retainers in an operating account.

The Supreme Court noted:

“While Stanton generally stated that the segregation of funds and accounting requirements are not applicable to advanced attorney fees, it did so only in the context of granting rehearing expressly to clarify the ethical requirements as to the treatment of flat fees. One commentator describes the term “flat fee” as embracing “all work to be done, whether it be relatively simply and of short duration, or complex and protracted?” Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It And Where Should It Be Deposited?* 1 Fla. Coastal L.J., 293, 299 (1999) (hereinafter Rothrock, *Forgotten Flat Fee*). As distinguished from a partial initial payment to be applied to fees for future legal services, a flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services.” Id., at p. 1157.

The Court then noted that in the case at hand, the fees were not “pre-paid flat fees,” but rather were initial retainers to be applied toward future legal services, the total fees for which were not determined in advance and that “Except in the case of flat fees governed by Stanton, a lawyer’s failure to place advance payment of fees in a separate account violates this Rule,” Prof. Cond. R. 1.15 (a.) Id., at p. 1158.

The Disciplinary Commission also argued that it was unreasonable for a lawyer to incorporate into a fee agreement a provision for non-refundability of advanced fee payments even if he or she does not intend to, and does not in fact, insist upon enforcement. The Commission’s argument was based upon In Re Thonert, 682 NE2d 522, 524 (Ind. 1997). Thonert arose from a criminal defense case in which the lawyer was requested a \$4,500 “non-refundable retainer” upon the express understanding that there would be additional attorney’s

fees and expenses depending on the nature of the work to be done. An initial payment of \$1,000 was made and a note signed (apparently by the Defendant's Wife) requiring a subsequent weekly payment of \$75 until the retainer was paid in full. Shortly after signing the note, the lawyer was fired. The client's wife was told that the retainer was non-refundable and that she was still responsible for the unpaid balance of the note. The lawyer continued to represent the client in criminal matters for approximately two months and his wife made further payments totaling \$450.

The Court held:

“Although Thonert was not charged with violating Prof. Cond. R. 1.5 (a) requiring all fees to be reasonable, we stated that Thonert's “demand for nonrefundable \$4,5000 fee irrespective of any termination of the respondent's employment was an unreasonable fee,” *Id.*, at 524, and determined that his failure to promptly refund unearned fees after termination of representation violated Prof. Cond. R. 1.16 (d). We further noted that Thonert's “attempted retention of \$1,450 for the nominal service he provided to his client might have violated Prof. Cond. R. 1.5” had he been so charged. *Id.*, at p. 525, n. 2. In discussing the nonrefundability provision, we observed:

We do not hold that unrefundable retainers are per se unenforceable. There are many circumstances where, for example, preclusion of other representations or guaranteed priority of access to an attorney's advice may justify such an arrangement. But here there is no evidence of, for example, any value received by the client or detriment incurred by the attorney in return for the nonrefundable provision, other than relatively routine legal services. 682 NE2d at 524. Where a retainer is thus justified, a lawyer would be well advised to explicitly include the basis for such non-refundability in the attorney-client agreement.”

Kendall, *supra* at p. 1160.

The Court held that except for flat fees, or retainers justified by the value received by the client or detriment incurred by the lawyer, all fees must be separately held until actually earned. Any claim in a fee agreement that such advance payments are non-refundable violates Prof.

Cond. R. 1.5 (a) that the lawyer's fees "shall be reasonable" and Prof. Cond. R. 1.16 (d) which requires lawyers to promptly refund any unearned portion of advanced fees.

The Indiana Supreme Court also concluded that:

"Where the advance payment is in the nature of a flat fee, however, or for a partial payment of a flat fee, it is not only reasonable but also advisable that the agreement expressly reflect the fact that such flat fee is not refundable except for failure to perform the agreed legal services. If the legal services covered by a flat fee are not provided as agreed, an attorney must refund any unearned fees. Stanton, 492, NE2d at 1061. Furthermore, regardless whether the attorney-client contract refers to the advanced fee "retainer" or "flat fee," it is the actual nature of the attorney-client relationship, not the label used, that will be determinative." Id., at p. 1160.

In Re Westerfield, 802 NE2d 926 (Ind. 2004). Decided February 10, 2004.

The lawyer represented a client in a dissolution of marriage action. The client was not satisfied with the result and directed the lawyer to prepare an appeal. The lawyer filed a Notice of Appeal. Due to errors in the Decree, the pension administrator refused to accept the Decree. The lawyer filed a Motion with the trial court to correct the Decree. The trial court granted the Motion. The lawyer did not advise the client to proceed with a formal appeal of the Decree. No action having been taken upon the Notice of Appeal, the appeal was dismissed. The lawyer did not advise the client of the dismissal.

In the course of the representation, the lawyer failed to comply with the client's request for information about her case or her request for return of the case file materials which she required to prosecute a bankruptcy.

By way of mitigation, the parties agreed that the lawyer was out of her office for a period of time for surgery, and was closing her practice.

The lawyer was publicly reprimanded for having violated:

- a) Indiana Prof. Cond. R. 12 (a) which provides a lawyer shall abide by the client's objectives concerning representation and consult with the client as to the means by which they are pursued;
- b) Indiana Prof. Cond. R. 1.14 (a) which requires lawyers to keep clients reasonably informed about the status of their legal matters;
- c) Indiana Prof. Cond. R. 1.4 (b) which requires lawyers to explain matters to clients to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation;
- d) Indiana Prof. Cond. R. 1.16 (d) which requires lawyers upon termination of representation to steps to the extent reasonably practicable to protect the client's interest, including surrendering papers and property to which the client is entitled.

In Re Breunig, 810 NE2d 716 (Ind. 2004). Decided June 25.¹ The lawyer billed his client over \$300,000 for two years work in a dissolution of marriage action. The lawyer obtained the client's signature on an "assignment" giving him any outstanding balance due from a property settlement. The lawyer did not advise the client to seek independent counsel, nor provide her with a written disclosure, and did not obtain written consent.

The lawyer and the client began a sexual relationship during the course of the representation.

The lawyer was subsequently convicted for operating a vehicle while intoxicated and endangering a person.

The Court determined that the lawyer violated Indiana Prof. Cond. R. 1.8 (a), 1.7 (b), and 8.4(d). The lawyer was suspended from the practice for 60 days with 30 days stayed and placed on probation for six (6) months. The lawyer was Ordered to attend therapy sessions, participate in Alcoholics Anonymous meetings, and submit to alcohol and drug screening.

¹ Subsequent history: 2004 Ind. Lexis 605; 811 NE2d 816 both related to timing of suspension.

In Re Brunner, 814 NE2d 251, (Ind. 2004), Decided August 30, 2004. The lawyer was hired to represent the husband in a dissolution of marriage action. The final hearing was held March 11, 2003. The Court directed the lawyer to file the appropriate entry. On May 2, 2003, the Court contacted the lawyer regarding the filing of the entry. The lawyer, or his staff, advised the Court the entry would be filed in 10 days. On August 14, 2003, the Court again contacted the lawyer's office, and an additional 60 day extension was requested and granted. On November 12, 2003, the Court scheduled the matter for hearing on December 5, 2003, unless the entry was filed. The lawyer filed the entry on December 2, 2003.

The Court found the lawyer violated Ind. Prof. Cond. R. 3.2 which provides that lawyers shall make reasonable efforts to expedite litigation consistent with the interest of their clients and Prof. Cond. R. 8.4 (d) which prohibits lawyers from engaging in conduct prejudicial to the administration of justice. The lawyer was suspended for 180 days with the entire suspension stayed upon successful completion of 24 months of probation.

The terms of the probation were as follows:

1. The Respondent shall comply in all aspects with his obligations, duties, and responsibilities under the Indiana Rules of Professional Conduct.
2. During the period of his probation, the Respondent shall comply with all of the terms of a monitoring agreement that has been entered into between the Respondent and the Indiana Judges and Lawyer's Assistance Program ("JLAP"). The Respondent's obligations under the monitoring agreement are specifically incorporated herein as terms of the Respondent's probation.
3. The Respondent's violation of any term of the monitoring agreement or of these probationary rules will be sufficient grounds to revoke the Respondent's probation.
4. The Respondent shall be responsible for any and all costs associated with his probation.

5. The Respondent specifically consents to the release of all records relating to the treatment the Respondent receives during the entire period of probation and further agrees to execute the appropriate “Consent for the Release of Confidential Information” on a form provided by the representatives of JLAP with said information to be provided to the Commission.
6. At the conclusion of the probationary period, all consents and releases shall be revoked.
7. The Respondent shall report in writing seven (7) days, any failure to comply with any terms of his probation and to specifically identify the circumstances of his violation.
8. The Respondent shall continue to receive counseling and/or therapy for his mental health problems as required by JLAP or its designated care provider. Reports of the Respondent’s compliance with the JLAP monitoring agreement shall be made by JLAP to the Commission on a quarterly basis. A final report shall be provided by JLAP to the Respondent and to the Commission at the conclusion of the probationary period.
9. In the event it is established pursuant to Ind. Admission and Discipline Rule 23, Section 17.2, that the Respondent has violated any terms of his probation, then the entire period of the stayed suspension shall become executed or active and the Respondent shall be suspended for the entire one hundred eighty (180) days without automatic reinstatement. The Respondent’s reinstatement to the practice of law shall be subject to the procedure and requirements of Ind. Admission and Discipline Rule 23, Sections 4 and 18.

In Re Small, 2004 Ind. Lexis 1003. Decided November 23, 2004. The lawyer was suspended for 6 months for mismanagement of his attorney trust account. The suspension was stayed subject to certain conditions designed to insure the lawyer’s compliance with the required provisions concerning the management of trust accounts. Amongst the terms of the probation were a requirement that the lawyer have his trust account monitored by a CPA through criteria acceptable to the Disciplinary Commission, who was required to report quarterly to the Commission on the Respondent’s compliance with the Rules of Professional Conduct and the Admission and Discipline Rules for Lawyer Trust Accounts.

In Re Reichert, 15 NE2d 117 (Ind. 2004), Decided October 25, 2004. The lawyer was suspended for 60 days from the practice of law with 30 days of the suspension to be served and reinstatement to be automatic. The remainder of the suspension was stayed upon the condition that the lawyer comply with the terms of her probation for one year.

In Count I, the lawyer represented a client in a custody dispute. Prior to hearing, the client advised the lawyer that she would settle the matter by allowing the father to have custody upon certain conditions. The lawyer later presented the client with an Agreed Entry drafted by opposing counsel. The client rejected the Entry because it contained a condition unacceptable to her. The client then confirmed with the lawyer at least twice that the hearing on custody had been postponed due to ongoing settlement negotiations. In fact, the hearing occurred and the Respondent (but not her client) attended. In the hearing, the lawyer signed on behalf of her client, the Agreed Entry the client had previously rejected. The lawyer failed to respond to the Commission's demand for a response to the client's grievance.

In Re Bosch, 816 NE2d 414 (Ind., 2004), Decided October 25, 2004. This case is notable for the fact that the lawyer was sanctioned for "issuing a Non-Party Subpoena without complying with the notice requirements."

In Re Junk, 815 NE 2d 505 (Ind., 2004), Decided October 4, 2004. The lawyer was an Indiana Deputy Attorney General who pleaded guilty to DWI. At the time of his arrest, the lawyer was not driving a state car and was not on state business. In mitigation, the parties agreed the lawyer had never had an alcohol-related conviction before, that he self-reported his arrest and conviction to the Disciplinary Commission, and then he served the two-week suspension from the Attorney General's Office. The lawyer completed all terms of his criminal probation. The

lawyer was publicly reprimanded for violating Ind. Prof. Cond. R. 8.4(d) which prohibits lawyers from engaging in conduct which is prejudicial to the administration of justice.

In Re Lehman, 815 NE2d 116 (Ind., 2004), Decided September 17, 2004. The lawyer and the Commission agreed that the lawyer, during a personal injury trial (where he represented the plaintiffs) gave written jury witness questions to his witness over the objection of opposing counsel and before the judge ruled on the appropriateness of the questions resulting in a mistrial and removed a book from opposing counsels table despite opposing counsel's objections. The book contained opposing counsel's handwritten notes concerning his examination of the Respondent's witness.

By way of mitigation, the parties agreed that the lawyer: a) did not discuss the questions with the witness or coach the witness with regard to such questions; b) there was no specific case law or rule at that time which prohibited showing juror questions to a witness before testimony; and, c) the lawyer did not know the book he removed contained opposing counsel's handwritten notes as he did not look at the notes.

The lawyer was publicly reprimanded for violating Ind. Prof. Cond. R. 8.4(d) which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice.

In Re DeWalt, 815 NE2d 119, (Ind., 2004), Decided September 20, 2004. In DeWalt, the lawyer was hired to handle a personal injury claim on a contingency fee basis. The insurance company sent two (2) checks in settlement, one for \$9,500 damages to the client's car, and the other for \$227.76 for rental car expenses. The lawyer forwarded the checks to his client without deducting any fee. Subsequently, the personal injury claim was settled for \$12,000. After deducting one-third (1/3) from the gross recovery, the client should have received at least \$4,757.41 from the last check. The lawyer deposited the last check in his trust account and

forwarded no funds to the client. Shortly thereafter, the balance of the lawyer's trust account fell below \$4,750 and remained below that amount almost consistently for two (2) years. The lawyer's trust account was not in an approved financial institution. The lawyer paid checks from his trust account in cash.

The client tried for over a year to contact the lawyer about the settlement. The lawyer did not respond. The client then hired another attorney who contacted the lawyer demanding an accounting. The lawyer still did not respond. The client sued the lawyer, who replied with a general denial.

After being contacted by the Disciplinary Commission, the lawyer settled the suit filed by the client for \$25,000. However, in the settlement process, the lawyer attempted to have the client sign a document asking that no action be taken against him.

The lawyer was suspended for a period of "not less than eighteen months" for violating Ind. Prof. Cond. Rs. 1.15(a) which requires lawyers to hold client's funds in trust; 3.1 which prohibits a lawyer from defending a proceeding by asserting or controverting an issue therein without a good faith basis for doing so that is not frivolous; 3.4 which prohibits lawyers for knowing disobedience of obligations to the tribunal; 8.4(b) which prohibits lawyers from engaging in criminal acts that reflect adversely on honesty, trustworthiness, and fitness as a lawyer in other respects; 8.4(c) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; Ind. Admission and Discipline Rule 23(29)(a)(1) which requires lawyers to maintain funds in a trust account at a financial institution approved by the Disciplinary Commission, and Admis. Disc. R. 23(29)(a)(5) which require lawyers to maintain ledgers for trust account transactions.

In The Matter of Anonymous, 2004 Ind. LEXIS 1084 (Ind. 2004). Although this case is not a family law case, it speaks to “bypass” communications through clients. I am sure each of you has had a client appear at your office with a Settlement Agreement, or other Entry you prepared, signed by his/her spouse without counsel’s signature.

In The Matter of Anonymous, the Disciplinary Commission charged the lawyer with communicating about the subject of a representation with a party, the lawyer knew was represented by another lawyer. This type of communication is commonly referred to as a “bypass” communication. Such communications are prohibited by Ind. Prof. Cond. R.4.2 which provides:

“In representing a client, a lawyer shall not communicate about the subject of the representation with the party the lawyer knows to be represented by another lawyer in a matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

The facts of the case were that the owner of a business, and one of his employees, were charged with multiple charges of conspiracy to defraud the United States, food stamp trafficking, and filing false income tax returns. The Respondent-lawyer represented the employer. The lawyer concluded that the trial of his client should be severed from that of the employee. In order to obtain severance, the lawyer believed he would have to demonstrate that the employee would waive his Fifth Amendment rights and testify on behalf of and favorably for the client. The lawyer decided he needed a signed Affidavit from the employee to file in support of the Motion.

The lawyer spoke with the employee’s counsel several times about the severance issue. The employee’s counsel gave the lawyer no indication of whether or not she was in favor of, or opposed, to severance. The Respondent’s co-counsel sent to the employee’s counsel a copy of a

form Affidavit for the employee's signature. The employee's counsel again gave no indication of whether or not she would recommend the employee sign it.

Subsequently, the lawyer met with his client at the client's store where the employee worked. The lawyer brought with him to the meeting the client's file which included the proposed Affidavit. The employee was at work that day. However, although the Respondent was aware the employee worked many hours at the store, he was not specifically aware the employer would be at work. The client's home was attached to the store. At the meeting in the client's home, the lawyer removed the file copy of the Affidavit, presented it to his client and explained that he and co-counsel were: a.) trying to sever the client's trial from the employees; b.) the proposed Affidavit had been faxed to employee's counsel; and, c.) employee's counsel had not given the Respondent any indication whether the employee would sign it. The client then took the Affidavit, went to the store, and returned approximately 10 minutes later with the signed Affidavit in hand. The employee attempted to speak with the Respondent-lawyer about the Affidavit. The lawyer told the employee he would not speak with him unless counsel was present. The lawyer did not specifically know that the employee had not discussed the Affidavit with his counsel, but also had no reason to believe the two had discussed it.

After the employee signed the Affidavit, because all pre-trial motions in his client's case were due the same day, the lawyer left, and drove immediately to the federal courthouse. In route, the lawyer attempted to telephone the employee's counsel, but was unable to speak with her directly. The lawyer left a voicemail message requesting that she contact him as soon as possible. Without hearing back from the employee's lawyer, the Respondent filed the Affidavit. The next day, the lawyer, having not received a telephone call from the employee's counsel, filed

the Motion To Severe. At the time he filed the Motion, the lawyer did not know whether or not the employee's counsel intended for the employee to sign the Affidavit.

Subsequently, the employee's counsel filed a Motion To Strike the Affidavit and to prohibit its' use. With the Motion in place, counsel relayed that she had not spoken with the employee about whether he should sign the Affidavit. The employee's counsel then informed the Court the employee would not be testifying as the Affidavit claimed he would. The Respondent immediately withdrew the Motion.

In addition to Rule 4.2, the Respondent was charged with violating Ind. Prof. Cond. R. 4.4, which provides:

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.”

The parties agreed that the Respondent violated Rules 4.2 and 4.4. Upon the basis of the agreement, the Court opined:

“Even though the respondent had no direct communication with the employee, he was aware that his client was going to speak directly to the employee about signing a document that potentially affected the employee's legal rights and interests. They note that the employee signed the affidavit in the respondent's presence at a time when the respondent had not received permission from employee's counsel to deal directly with the employee and had no reason to believe that the employee had been counseled by his attorney about the implications of signing the document. Accordingly, the Commission and the respondent stipulate that even though his client may not have been acting as the respondent's agent in obtaining the signature on the affidavit, the respondent *ratified* his client's direct contact with the employee by failing to take steps to intervene when the client presented the affidavit for signature; by failing to take steps to contact employee's counsel while

he was waiting for him to sign the affidavit, by thereafter taking control of the affidavit once it was signed, and by filing the document with the federal court. The parties agree that respondent attempted to take procedural advantage of the signed document before abandoning that attempt when employee's counsel objected to its use.

If an attorney simply received the affidavit obtained by a client without suggesting, directly or indirectly, any contact between the two, no violation would have occurred. "Ratification" means the confirmation of a previous act done either by the party himself or by another. Black's Law Dictionary 1135 (5th Ed. 1979). Although ratification of a client's independently initiated communication is not sufficient to constitute a violation, we believe the affidavit amounts to more than mere ratification of his client's actions. Instead, the events of August 24 reflect the respondent's instigation of a series of contacts calculated to obtain the employee's signature through opposing counsel. The respondent visited his client's store, a place where he knew the employee worked, bringing with him the unsigned affidavit. He presented the affidavit to his client and explained that counsel had given no indication whether or not the employee would sign it. He made no effort to dissuade his client from speaking directly with the employee about signing the affidavit.

Although the respondent minutes later told the employee that he could not speak to him about the case without counsel present, the respondent did not intervene or attempt to contact counsel when the employee signed the document in his presence after again discussing the matter with the client. Under these facts, we find that the respondent violated Prof. Cond. R. 4.2."

A violation of Prof. Cond. R. 4.4 occurred because the Respondent, by attempting to take procedural advantage of the signed Affidavit under the circumstances, used a method to obtain evidence that violated the employee's legal rights.

The sanction was a private reprimand.

