

THE TOP TEN: A SUMMARY OF RECENT PROFESSIONAL LIABILITY CASES

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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 Hemphill*, 971 N.E.2d 665 (Ind. 2012), Respondent was suspended for six months without automatic reinstatement after she violated Prof. Cond. Rules 4.1(a), 4.4(a), 8.4(c), and 8.4(d) in her investigation of her client's claim that his daughter may have been sexually abused by her mother's boyfriend. Respondent picked up the children from school and drove them around and asked them questions about their relationship with their mother and her boyfriend. Respondent intimidated the school secretary to obtain their release from school to her and refused to tell the mother where she and the children were. Respondent refused to admit any wrongdoing, maintaining that her conduct served the higher purpose of protecting the safety of the children.

In *Matter of Brizzi*, 962 N.E.2d 1240 (Ind. 2012), Respondent received a public reprimand for making public statements involving murder cases that could have prejudiced the criminal defendants while serving as the county prosecutor. It was immaterial whether the statements actually resulted in prejudice to the defendants, as Rule 3.6 requires only "a substantial likelihood of material prejudicing an adjudicative proceeding" and Rule 3.8(f) requires "a substantial likelihood of heightening public condemnation of the accused."

In *Matter of Kuchae*, 961 N.E.2d 1218 (Ind. 2012), Respondent was suspended for 180 days with automatic reinstatement for pursuing a default judgment and garnishment proceedings for a \$5 million judgment, without giving required notice to the defendant pursuant to Indiana Rule of Trial Procedure 5(A). Respondent admitted violations of the following Rules: 3.1: asserting a position for which there is no non-frivolous basis in law or fact; 3.3(a): knowingly making a misleading statement to a tribunal; 3.4(c): knowingly disobeying an obligation under the rules of a tribunal; 3.5(b): engaging in an improper ex parte communication with a court; and 8.4(d): engaging in conduct prejudicial to the administration of justice.

In *Matter of Cotton*, 939 N.E.2d 619 (Ind. 2010), In an off-the-record conversation, Respondent told a Judge that the husband to a client had said that he wanted to remove his personal property from a South Central Way Property. She told the Judge that the address for this property had inadvertently been left out of the Order for Protection and asked him to add that address to the order. The Judge wrote that address on a photocopy of the Order for Protection provided by the Respondent and gave it back to Respondent. He did not sign or initial the photocopied Order or do anything else to it. Neither the Judge nor Respondent took any steps to have the photocopied Order entered in the Court's records. Respondent, however, took the court's seal

and impressed it on the photocopied Order over the South Central Way Property address written by the Judge to “authenticate” it. Respondent then gave the photocopied Order to the wife for her use in preventing the husband from removing property from the South Central Way Property. The Court found that Respondent engaged in attorney misconduct by engaging in an improper *ex parte* communication with a judge and by engaging in conduct prejudicial to the administration of justice. For this misconduct, the court found that Respondent should be suspended from the practice of law in this state for thirty days with automatic reinstatement.

In *Matter of McCarthy*, 938 N.E.2d 698 (Ind. 2010), Respondent was an officer of a title company who gave legal advice to the company and represented it in legal disputes. The title company became involved in a dispute regarding a cloud on the title of property subject to a sales agreement. At some point, the agent representing the seller directed his secretary to send an email to Respondent demanding that he arrange a meeting of all involved in the dispute. In response, Respondent sent an email to the secretary stating:

I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his nigger. You do not tell me what to do. You ask. If you ever act like that again, it will be the last time I give any thought to your existence and your boss will have to talk to me. Do we understand each other?

The hearing officer found that the word “nigger” is a derogatory racist insult, that Respondent’s use of the term was not simply a historical reference to slavery but rather manifested racial bias, that he was acting as an attorney when he sent the email, and that his use of the term was not connected to legitimate advocacy. The Court found that Respondent violated Prof. Cond. R.8.4(g), which prohibits engaging in conduct, in a professional capacity, manifesting bias or prejudice based upon race, unless the conduct constitutes legitimate advocacy. For Respondent’s professional misconduct, the Court suspended Respondent from the practice of law in this state for a period of not less than 30 days, without automatic reinstatement.

In *Matter of Shapiro*, 932 N.E.2d 1234 (Ind. 2010), Respondent was hired to represent a client in an employment dispute. In a letter to the former employer, Respondent stated that the act was enforced by the Office of the Indiana Attorney General, that Respondent had attended high school with the former attorney general, and that Respondent therefore did not think he would have much problem in getting his successor’s attention in the matter. Respondent was cooperative with the Commission and had no disciplinary history. The parties agreed that Respondent violated Prof. Cond. R. 8.4(e), which prohibits stating or implying an ability to influence improperly a government agency or official. The Court imposed a public reprimand for Respondent’s misconduct.

In *Matter of Kelley*, 925 N.E.2d 1279 (Ind. 2010), Respondent received, at her unlisted phone number, persistent pre-recorded messages from a company that was seeking a person by the same name as her husband. Respondent called the company and identified her husband as her client in speaking to a male representative. As she spoke to this representative, Respondent noted what she thought was a feminine-sounding voice, and she asked the representative if he was gay. The representative commented on the unprofessional nature of this question and ended the conversation abruptly. Respondent agreed that this behavior constituted a violation of Prof. Cond. R. 8.4(g), which prohibits an attorney from engaging in conduct, in a professional capacity, manifesting bias or prejudice based upon sexual orientation. For this violation, the Court imposed a 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 should be 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

Obviously, lawyers are like any other segment of the population when it comes to criminal misconduct. Lawyers have been convicted of crimes 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 Scott*, 989 N.E.2d 1249 (Ind. 2013), Respondent pled guilty to domestic battery, a class A misdemeanor, after an incident of domestic violence involving his wife and witnessed by his minor children. He was placed on probation for one year. For this misconduct, Respondent received a public reprimand.

In *Matter of Corbitt*, 988 N.E.2d 1136 (Ind. 2013), Respondent was convicted of two class A misdemeanors, resisting law enforcement and operating a motor vehicle while intoxicated. For this misconduct, Respondent received a public reprimand.

In *Matter of Jones*, (45S00-1012-DI-680, June 17, 2013), Respondent, while visiting with his client in jail, delivered contraband to the client, which included a letter from the client's girlfriend offering to give a false alibi, letters from the client's mother and brother, and other items. Respondent stated the letters confiscated were mailed by the client's mother. Respondent later testified he brought the letters to his client. For Respondent's misconduct, he was suspended from the practice of law for at least six months, without automatic reinstatement.

In *Matter of Eyster*, 988 N.E.2d 264 (Ind. 2013), Respondent pled guilty to a class C misdemeanor and a class D felony, for operating a motor vehicle with at least 0.08 grams of alcohol per 210 liter of breath ("OWI") and for OWI with a previous OWI conviction within five years, respectively. Respondent was suspended from the practice of law for a period of ninety days, all stayed subject to completion of at least two years probation.

In *Matter of Compton*, 988 N.E.2d 262 (Ind. 2013), Respondent had four alcohol related arrests within three and a half months and pled guilty to public intoxication, a class C misdemeanor, resisting law enforcement, a class A misdemeanor and operating a vehicle while intoxicated, a class D felony. The parties agreed that Respondent violated Prof. Cond. R. 8.4(b) and was suspended from the practice of law for 180 days, all stayed subject to completion of two years of probation.

In *Matter of Schalk*, 985 N.E.2d 1092 (Ind. 2013), Respondent, while representing a client charged with possession of drugs, sought to prove the confidential informant involved in the case was dealing drugs. Respondent met with two men and convinced them to purchase drugs from the confidential informant. Respondent supplied these two men with a voice recorder and \$200 to purchase marijuana. The two men reported back that they were successful in their purchase of the drugs, and attempted to give Respondent the drugs. Respondent declined to take the package, and asked the men to hold the drugs until law enforcement could take possession of the drugs.

Respondent was charged with conspiracy to possess marijuana, a class D felony, and attempt to possess marijuana, a class A misdemeanor. Respondent was disqualified from representing a client while his own criminal case was pending. Respondent waived his right to a jury in exchange for a dismissal of his felony charge. After a bench trial, Respondent was found guilty of misdemeanor attempt to possess marijuana. For this misconduct, Respondent was suspended from the practice of law for not less than nine months, without automatic reinstatement.

In *Matter of Muse*, 980 N.E.2d 838 (Ind. 2013), Respondent plead guilty to one count of possession of marijuana, a class D felony and was sentenced to 365 days, with four days served and the balance suspended. The Commissioner and Respondent entered into a Conditional Agreement stating that Respondent violated Prof. Cond. R. 8.4(b), which prohibits committing a criminal act that reflects adversely on the trustworthiness or fitness as a lawyer. Respondent was suspended for a period of 180 days, with 30 days actively served and the remainder stayed subject to completion of at least two years of probation.

In *Matter of Mendenhall*, 959 N.E.2d 254 (Ind. 2012), Respondent was permanently disbarred for the commission of attempted murder, aggravated battery, armed robbery, criminal confinement, and resisting law enforcement, all acts that reflected adversely on the lawyer's honesty, trustworthiness, and fitness as a lawyer.

In *Matter of Smith*, 974 N.E.2d 1017 (Ind. 2012), Respondent consented to discipline pursuant to Admis. Disc. R. 23(17), and was suspended for a period of 90 days, stayed subject to the completion of two years of probation after he was convicted for the class D felony of operating a vehicle while intoxicated with a minor passenger. Respondent admitted endangering his three minor children, who were passengers in his car as well as the public, by driving while intoxicated. Among mitigating factors cited were Respondents voluntary participation in JLAP monitoring and intensive out-patient treatment for alcoholism.

In *Matter of Patterson*, 969 N.E.2d 593 (Ind. 2012), Respondent was permanently disbarred after his conviction on three counts of D felony theft. These convictions came after he had previously been sanctioned for violations of attorney trust account provisions.

In *Matter of Buckley*, 969 N.E.2d 1 (Ind. 2012), Respondent was suspended for 30 days, stayed subject to two years of probation, after admission of class A misdemeanors: possession of marijuana and possession of paraphernalia. In mitigation, the Court noted Respondent's voluntary submission to JLAP monitoring and treatment in groups such as Narcotics Anonymous.

In *Matter of LeBeau*, 961 N.E.2d 995 (Ind. 2012), Respondent was publicly reprimanded for his possession of marijuana, as it "involves a nexus with the chain of distribution and trafficking of illegal drugs."

In *Matter of Jerry T. Drook*, 949 N.E.2d 354 (Ind. 2011), in November 2009, Respondent went to a jail to visit a client awaiting trial for the murder of his wife. While there, Respondent gave the client candy and written material that had not been authorized by the jail authorities. The written material was a letter from the client's sister pertaining to conversations between the sister and a witness for the state. Respondent was charged with two counts of trafficking with an inmate, which were resolved by a pre-trial division agreement under which Respondent admitted the allegations. The parties agreed that Respondent violated Prof. Cond. R.8.4(b), which prohibits committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. For Respondent's professional misconduct, the Court suspended Respondent from the practice of law for a period of 30 days.

In *Matter of Massillamany*, 946 N.E.2d 581 (Ind. 2011), based on an incident on March 27, 2010, Respondent pled guilty to operating a vehicle while intoxicated in a manner that endangers a person, a class A misdemeanor. At the time of the incident, he was employed as a Marion County deputy prosecutor. He resigned from that position shortly thereafter. Respondent has no disciplinary history. He contacted JLAP after his arrest and executed a monitoring agreement with the program. The parties agreed that Respondent violated Prof. Cond. R. 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice. The Court imposed a public reprimand for Respondent's misconduct.

In *Matter of Sutton*, 943 N.E.2d 807 (Ind. 2011), in May 2009, while employed by the Madison County Prosecutor's Office, Respondent was charged with operating a vehicle while intoxicated. She completed a deferral program, and the case was dismissed. Respondent resigned from her position with the prosecutor's office and voluntarily participated in and successfully completed services from JLAP. The parties agreed that Respondent violated Prof. Cond. R. 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice. The parties proposed the appropriate discipline be a public reprimand. The Court, having considered the submissions of the parties, approved the agreed discipline and imposed a public reprimand for Respondent's misconduct.

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Lawyers have been convicted of crimes from alcohol problems to murder.
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Over the past few years, there have been many cases that fall into this category that arguably involve the use of alcohol. In fact, there have been a significant number of lawyers involved in cases involving drinking and driving. The following is a list of disciplinary actions in which some component of the case involves alcohol consumption by the respondent lawyer. The fact patterns underlying these cases may not be particularly remarkable, but the number of cases involving similar misconduct over just a few years is striking.

Matter of Corbitt, 988 N.E.2d 1136 (Ind. 2013)

Matter of Eyster, 988 N.E.2d 264 (Ind. 2013) (90 day stayed suspension)

Matter of Compton, 988 N.E.2d 262 (Ind. 2013) (180 day stayed suspension)

Matter of Nelson, 981 N.E.2d 549 (Ind. 2013) (180 day suspension with 30 served and 150 stayed)

Matter of Stewart, 973 N.E.2d 563 (Ind. 2012) (180 day suspension with 90 served and 90 stayed)

Matter of Thornburg, 969 N.E.2d 586 (Ind. 2012) (90 day stayed suspension)

Matter of Strup, 961 N.E.2d 992 (Ind. 2011) (90 day stayed suspension)

Matter of Howe, 952 N.E.2d 749 (Ind. 2011) (180 day suspension with 60 served and 120 days stayed)

Matter of Willadsen, 950 N.E.2d 300 (Ind. 2011) (180 day stayed suspension)

Matter of Tweedy, 947 N.E.2d 915 (Ind. 2010)

Matter of Russell, 928 N.E.2d 198 (Ind. 2010)

Matter of DePrez, 928 N.E.2d 198 (Ind. 2010)

Matter of Recker, 926 N.E.2d 1015 (Ind. 2010)

Matter of Kelsay, 919 N.E.2d 1135 (Ind. 2010)

Matter of Martenet, 913 N.E.2d 1242 (Ind. 2009)

Matter of Record, 913 N.E.2d 1244 (Ind. 2009)

Matter of Bartlett, 913 N.E.2d 201 (Ind. 2009)

Matter of Collins, 904 N.E.2d 660 (Ind. 2009)

Matter of Followell, 904 N.E.2d 211 (Ind. 2009)

Matter of Tolliver, 907 N.E.2d 967 (Ind. 2009)

Matter of Woods, 899 N.E.2d 646 (Ind. 2009)

Matter of Katic, 899 N.E.2d 648 (Ind. 2009)

Matter of Patheja, 897 N.E.2d 926 (Ind. 2008)

Matter of Spielman, 895 N.E.2d 113 (Ind. 2008)

Matter of Falls, 895 N.E.2d 112 (Ind. 2008)

Matter of Green, 895 N.E.2d 111 (Ind. 2008)

Matter of Baylor, 895 N.E.2d 110 (Ind. 2008)

Matter of Stites, 895 N.E.2d 109 (Ind. 2008)

Matter of Earls, 895 N.E.2d 108 (Ind. 2008)

In Matter of Hiroaki Nishikawara, 937 N.E.2d 810 (Ind. 2011), Respondent entered into a plea agreement under which he admitted to a charge of patronizing a prostitute, a class A misdemeanor, and executed an “Agreement to Withhold Prosecution.” Respondent completed the requirements of his probation, cooperated with the Commission, and had no prior criminal or disciplinary history. The parties agreed that Respondent violated Prof. Cond. R. 8.4(b), which prohibits committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer. 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 Godshalk*, 987 N.E.2d 1095 (Ind. 2013), Respondent represented RM, who was charged with many crimes, including battery of JB. Respondent entered an appearance on behalf of RM. After JB failed to appear for a deposition, Respondent moved to exclude her testimony in the case against RM. In the meantime, JB was separately charged with operating a vehicle while intoxicated, and her probation was revoked. JB went to Respondent's office to hire Respondent. A non-lawyer assistant agreed to the representation, agreed Respondent would accept assignment of JB's pre-trial release bonds as fees, prepared appearances using rubberstamp for Respondent's

signature, and filed appearances. At this time, Respondent and his assistant should have known JB was a victim and witness in the case against RM. For the misconduct, Respondent received a public reprimand.

In *Matter of Ross*, 982 N.E.2d 295 (Ind. 2012), Respondent represented 64 clients in a tort claim against a Central Soya plant in Indianapolis, Indiana, after an explosion at the plant damaged homes in the neighborhood. Respondent obtained full authority to settle all of her clients' claims and entered into a confidential settlement agreement on behalf of her clients. Believing the confidentiality provision prohibited her from discussing the settlement terms, including the total amount, with her clients, Respondent unilaterally created a formula for distribution of the settlement proceeds among all of the clients. Respondent was charged with violating Prof. Cond. R. 1.2(a), 1.4(b), 1.7(b), and 1.8(g). The hearing officer found that Respondent violated each of the Rules but for 1.7(b), as Respondent had disclosed the limitations of her joint-representation to her clients and they had insisted that she continue as counsel for her clients. The Court agreed and imposed a public reprimand, citing in mitigation that Respondent's clients were grateful for her representation and the outcome, among other mitigators.

In *Matter of McKinney*, 948 N.E.2d 1154 (Ind. 2011), Respondent, while serving as a deputy prosecuting attorney, conducted asset forfeiture proceedings in a manner that created a conflict of interest between his duties as a public official and the private gain he realized in the forfeiture proceedings. The Commissioner charged Respondent with violating rules 1.7 (a)(2) and (b), 1.8(1), and 8.4(d) of the Indiana Rules of Professional Conduct. The Court found that Respondent should be suspended from the practice of law for 120 days with automatic reinstatement.

In *Matter of Pugleise*, 941 N.E.2d 1044 (Ind. 2011), in September 2009, a client hired Respondent to represent her in a dissolution action. They did not know each other prior to this point. During the representation, Respondent had a sexual relationship with the client. In January 2010, Respondent refunded the money the client had paid him but continued to represent her for approximately two months until the court granted his motion to withdraw his appearance. Shortly thereafter, the client reconciled with her husband and the dissolution action was dismissed. The parties agree that Respondent violated Prof. Cond. R. 1.8(j), which prohibits engaging in a sexual relationship with a client unless it began prior to the representation. For Respondent's professional misconduct, the Court suspends Respondent from the practice of law for a period of 30 days.

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.

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 Snullivan*, 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 Williams*, 971 N.E.2d 92 (Ind. 2012), an elderly client executed a power of attorney (POA) designating Respondent as her attorney in fact. Subsequently, Respondent indicated to the client's niece that the client's money was gone. The client then executed a POA in favor of her niece, who requested an accounting under Ind. Code § 30-5-6-4. Respondent failed to respond. In a civil action, Respondent was found to have failed to keep records of the use of the client's funds and of legal services provided. The grievance at issue was then filed, but Respondent claimed, contrary to the civil action, that he was not acting as an attorney but that the client was funding his publication of books. Finding that claim incredible, the court held that Respondent violated Ind. R. Prof. Conduct 1.5(a), 1.7, 1.8(a), and 1.15; Respondent specifically violated Ind. R. Prof. Conduct 8.4(b) by writing checks to himself totaling about one-third of his client's estate. Respondent's failure to keep even rudimentary records of his dealings with the client's property was an aggravation of his professional misconduct. Because Respondent was not currently practicing law, disbarment did not seem to be appropriate as it would not be a deterrent and Respondent was suspended for two years without automatic reinstatement, the Court explaining that it would put the onus on Respondent to prove his fitness.

In *Matter of Newman*, 958 N.E.2d 792 (Ind. 2011), Respondent engaged in attorney misconduct by failing to comply with a client's reasonable requests for an accounting of the hours he worked prior to being discharged, charging an unreasonable fee, failing to withdraw from representation promptly after being discharged, and failing to return the client's file after its retention was no longer necessary to secure payment of his fee. Respondent filed a "Notice of Intent to Hold Attorney's Lien" on his client's estate distribution in the amount of his hourly fee plus 25 percent of the distribution. Moreover, Respondent held a client's file for three years after discharge, while the amount and validity of fees were being determined in court. Respondent was suspended for 18 months, without automatic reinstatement.

In *Matter of Earnhart*, 957 N.E.2d 611 (Ind. 2011), Respondent was suspended for 30 days for charging an unreasonable fee. Respondent was retained and paid \$10,000 to represent an Indiana client. Respondent's engagement letter to the client stated that an additional \$10,000 would be required to represent the client through trial if criminal charges were filed. The letter stated that the initial fee was a "non-refundable retainer." The client committed suicide and despite only having performed 5 hours of work on the case, Respondent refused to return the unearned portion of the retainer to the client's widow.

In *Matter of Powell*, 953 N.E.2d 1060 (Ind. 2011), Respondent violated Prof. Cond. R. 1.5(a) by collecting a clearly unreasonable and exploitive fee from a vulnerable client and was suspended for 120 days, without automatic reinstatement. Respondent accepted the client's case on a contingency basis, in which the client sought access to funds from a previous lawsuit which were held in trust at the recommendation of her prior attorney-- who perceived that the funds would be squandered by the client's abusive partner. Respondent took over as the trustee of the trust, and then released the trust funds to the client, retaining a one-third fee for himself. The Court held that even if the contingency agreement had seemed reasonable at the outset, if the amount of the fee later becomes unreasonable, Respondent had a duty to modify the fee agreement when he realized that his actions as trustee would be uncontested and his legal representation would be completed in a matter of days.

In *Matter of Zielinski*, 943 N.E.2d 809 (Ind. 2011), a criminal defendant hired Respondent to represent him for a flat fee of \$15,000 and Respondent prepared for trial 3 times. After the client was convicted of two felonies, Respondent told the client he had done much more work than anticipated and asked for additional compensation. The client agreed that Respondent would be paid \$17,000 from a \$20,000 cash bond. Respondent did not give the client written advice of the desirability of seeking the advice of independent counsel and the client did not consent in writing to the renegotiation of the fee agreement. Respondent began working on an appeal but the client soon terminated his representation. Respondent was paid and retained the additional \$17,000 for his services until he refunded \$5,000 to the client after the Commission filed its Verified Complaint against Respondent. The parties agreed that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct: 1.8(a) and 1.16(d). The parties proposed the appropriate discipline be a public reprimand and the Court so ordered.

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.

In *Matter of Beacham*, 934 N.E.2d 73 (Ind. 2011), on December 17, 2003, Client AB retained Respondent to represent her in pursuing claims against the USPS. The written fee agreement required a “nonrefundable retainer of \$5,000” and provided that Respondent’s fee would be “the greater of the hourly rate of \$200 per hour or twenty five percent of the net recovery.” The fee agreement stated that AB “shall be billed on a monthly basis” and that she was “entitled to receive a written, itemized bill on a regular basis at least every 60 days.” On November 22, 2004, Respondent filed a 38-page complaint on AB’s behalf in a Florida district court. Included were claims found to have been preempted in the case. The work done by Respondent in litigating these claims provided no value to AB. AB began requesting interim billing statements in October 2004, but Respondent sent no such statements. On April 2006, by which time he asserted an hourly fee total of \$220,684, Respondent sent a final bill showing an hourly fee total of \$233,484. Eventually, at the recommendation of new counsel, AB settled the case for \$20,000. The Court found that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct: 1.4(a) and (b) and 1.5(a). For Respondent’s professional misconduct, the Court suspended Respondent from the practice of law in this state for a period of not less than 180 days, without automatic reinstatement.

In *Matter of Lauter*, 933 N.E.2d 1258 (Ind. 2010), in May 2003, Respondent and his law firm were retained by a client to pursue an employment discrimination claim. The client and Respondent’s firm entered into a written “Attorney Services Contract” (“Contract”) that was signed by the client. The Contract provided for a contingency fee based on the amount recovered (one-third if settled prior to trial, 40% otherwise). It also called for an “engagement fee” of \$750, which the client paid. Finally, the Contract contained a hand-written notation in the bottom margin, initialed by the client, calling for an “additional retainer fee payable if client and firm agree to file federal court litigation” (“additional retainer”). The client’s lawsuit was successfully settled, and on May 15, 2006, the client recovered \$75,000 from the defendant. Respondent’s total fee was \$30,000 (the \$750 engagement fee, the \$4,250 additional retainer, and a \$25,000 one-third contingent fee). The Court concluded that Respondent violated Prof. Cond. R. 1.5(b) and 1.5(c) by failing to communicate adequately the basis of his fee to a client. 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 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.

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 Staples*, 969 N.E.2d 584 (Ind. 2012), Respondent was hired to defend a client in a lawsuit. Respondent failed to timely respond to discovery requests, including requests for admissions; to comply with orders to compel discovery; to appear at hearings; to attempt to recreate client's file when it was destroyed by storm damage to his office; to inform client or the court of his departure from his firm; to respond to a summary judgment motion; to appear at a hearing on the motion; to inform client when judgment was entered against her; and to inform her of an order to appear for proceedings supplemental. Client's legal fees and damages were recovered from Respondent's malpractice insurer. Respondent was suffering from depression at the time of his misconduct, but failed to follow advice to receive treatment in 2007, instead waiting until 2011. Respondent was suspended for 60 days, with 30 days served and the remainder stayed subject to completion of 24 months of probation.

In *Matter of Kendall-Sage*, 851 N.E.2d 295 (Ind. 2006), a client hired Respondent in 1997 to represent her in a claim for damages arising from a traffic accident. Respondent failed to file the lawsuit within the two-year statute of limitations and failed to notify the client that the lawsuit had not been timely filed. Over the next six years, the client tried unsuccessfully to contact Respondent to discuss the status of the case. In 2004, Respondent notified the client that the case settled for \$10,000. There was no settlement and Respondent paid the client out of her own funds. Since Respondent did not consult with the client before the "settlement," the client looked into the matter further and discovered that Respondent never filed a lawsuit. The client filed a malpractice action against Respondent, which settled for \$165,000. The Indiana Supreme Court Respondent received a sixty-day suspension from the practice of law.

In *Matter of Bash*, 947 N.E.2d 420 (Ind. 2011), in May 2009, after two youths broke a window at the home of a friend of Respondent's, Respondent went to the home of one of the youths and gave the mother an "invoice" for \$917.72 for the resulting damages, including round trip air fare to Indiana from Arkansas, where Respondent was then living. Respondent was at the time suspended from practicing law in Indiana. He gave the mother a business card reading: "Law Office of Richard Bash." Later, Respondent and his friend filed suit as co-plaintiffs against the parents of the youths. Even if Respondent did not explicitly state that he was acting as his friend's attorney, this was the clear message his actions conveyed. He did not own the property at which

the window was broken, he did not deny using a business card indicating he was an attorney, he never made a claim at any point for the alleged damage to his sofa—the only basis he posits for being a co-plaintiff in the suits against the parents, and the requested an award of attorney fees in the complaint. Based on these facts, the Court concludes that Respondent held himself out as an attorney and practiced law while suspended in violation and in contempt of the Court's order suspending him from practice. The Court suspended Respondent from the practice of law for no less than 180 days without automatic reinstatement, and be fined the sum of \$500.

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 Parilman*, 947 N.E.2d 915 (Ind. 2011), Respondent practices law in Arizona and is not licensed in Indiana. In spring of 2010, he caused radio stations broadcasting in Indiana to air an advertisement inviting listeners involved in traffic accidents to call him. At least two Indiana residents responded to the advertisement. Respondent’s only office is located in Phoenix and he is not part of a national law firm. He is not certified as a specialist in any field of practice by either Indiana or Arizona. In fact, neither Indiana nor Arizona certify lawyers in the area of “automobile accidents.” The parties agreed that Respondent violated these Prof. Cond. R. 5.5(b)(2), 7.2(b), 7.2(c)(4), 7.2(c)(6), and 7.4. The Court bars Respondent indefinitely from acts constituting the practice of law in this state, including temporary admission and solicitation of clients, until further order of the Court.

In *Matter of Rocchio*, 943 N.E.2d 797 (Ind. 2011), the Court found that Respondent engaged in attorney misconduct that, standing alone, would warrant a sanction in the lowest range. However, Respondent’s conduct during the disciplinary process demonstrated his inability to recognize his clear violations of this state’s disciplinary rules, his contempt for those rules and the disciplinary process, and his lack of appreciation for the role of the Court’s hearing officer and Disciplinary Commission members and staff. The Respondent, a Michigan resident, sent a letter to an Indiana resident who had recently been in a motor vehicle accident. Respondent is licensed to practice law in Michigan but registered his Indiana law license as inactive effective August 24, 2009. The Commission charged Respondent with violating Rules 7.2(c)(3) and 5.5(b)(2) of the Indiana Professional Conduct Rules.

Subsequently, Respondent’s brief to the Court attacked the Commission’s former executive secretary (“a first-class ass”), the Commission (“soft and lazy”), the disciplinary process (“a modern day version of the Star Chamber, a Salem witch hunt, or a Spanish Inquisition”), and the

Court's disciplinary rules ("frivolous and antiquated," "rules of behavior conceived over a cigar and brandy . . . during the late Victorian Era by a group of self-impressed lawyers"), as well as his repeated use of caustic terminology (e.g., "despicable," "deceptive and ridiculous," "naked stupidity," "cutesy and evasive"). The Court suspended Respondent from the practice of law in this state for a period of not less than 180 days, without automatic reinstatement.

In *Matter of Loomis, Grubbs, and Wray*, 905 N.E.2d 406 (Ind. 2009), Respondents formed "Attorneys of Aboite, LLC." Aboite is a township in Allen County, where Respondents maintained law offices. Respondents did not practice as a firm, and they used "Attorneys of Aboite, LLC" and "Attorneys of Aboite" in professional documents, communications, signage, telephone directory listings, numerous advertisements, and an internet website without revealing that they did not practice law as a firm. The State Board of Law Examiners never issued a certificate of registration for "Attorneys of Aboite, LLC" or "Attorneys of Aboite." Respondents ceased using "Attorneys of Aboite" in all its forms in October 2008. The Court found that Respondents violated Prof. Cond. R. 7.2(b), which prohibits the use of an advertisement that contains a false or misleading statement or claim; Prof. Cond. R. 7.5(a), which prohibits the use of professional documents and communications containing a false or misleading statement; and Prof. Cond. R. 7.5(b), which prohibits practicing under a name that is misleading as to the identity, responsibility, or status of those practicing there under, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair. This includes practicing under a trade name. Respondents also violated Admis. Disc. R. 27(g) and (i) because they used LLC without meeting the requirements of R. 27 and did not practice law together as a firm, but instead simply shared office space. The court imposed a public reprimand on Respondents.

“
In a nutshell, truthful lawyer advertising is protected speech under the first amendment of the U.S. Constitution.”

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 Weldy*, 991 N.E.2d (Ind. 2013), includes grievances from multiple clients for various reasons including lack of communication, issues involving attorney's fees, and making false assertions to the court and dishonesty. Respondent represented one client as a class representative against Clarian Health Partners, Inc. Respondent asserted that counsel for Clarian acknowledged certain discovery responses were due on a certain date, knowing the assertion was untrue. The trial court imposed sanctions. Clarian and the client settled their dispute, mooting the class, but Respondent filed an appeal, allegedly on behalf of the client, to dispute the sanctions. The client then died, and the Court of Appeals ruled that the class issues were moot and upheld the sanctions. Respondent then filed petitions for rehearing and for transfer, purportedly on behalf of deceased client, which were denied. The Court of Appeals then awarded Clarian fees and costs against Respondent under Appellate Rules 66(E) and 67 for frivolous and bad faith appellate filings. For Respondent's professional misconduct, the Court suspended Respondent from the practice of law for a period of 180 days, with 90 days actively served and the remainder stayed subject to completion of at least one year probation.

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.

In *Matter of Dempsey*, 986 N.E.2d 816 (Ind. 2013), Respondent entered into a land contract with Sellers to purchase a residential property. Sellers filed suit seeking foreclosure or forfeiture alleging default by Respondent. Respondent filed a Chapter 13 bankruptcy petition ten days before the foreclosure sale in an effort to stay the sale. The property was eventually sold in a foreclosure sale, resulting in a deficiency judgment of \$164,000. Respondent initiated three appeals and attempted to re-litigate issues after being warned not to. Respondent made inflammatory accusations against Seller, Seller's attorneys, and the courts. For this misconduct, Respondent was suspended from the practice of law in the state for a period of not less than three years, without automatic reinstatement.

In *Matter of Watson*, 985 N.E.2d 1094 (Ind. 2013), Respondent admitted to converting \$1,500 in client fees paid to Respondent's law firm, converting \$6,900 in money orders given to him by several clients for payment to the trustee in their bankruptcy cases, and made unauthorized charges for personal use on the firm's credit card. The parties agreed that Respondent engaged in misconduct and was suspended from the practice of law for a period of not less than eighteen months, without automatic reinstatement.

In *Matter of Robison*, 985 N.E.2d 336 (Ind. 2013), Respondent gave one co-personal representative a number of documents to sign. When one document was returned unsigned, Respondent signed the client's name and forwarded the documents to be signed by the second representative. The second representative noticed that one signature was not that of her sister. When confronted, Respondent admitted to signing the document. The co-personal representatives terminated Respondent's representation and he withdrew his appearance for the estate. The parties agreed that the Respondent violated Indiana Professional Conduct Rule 8.4(c), which prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. For this misconduct, the parties agreed and the Court imposed a public reprimand.

In *Matter of Adolf*, 969 N.E.2d 8 (Ind. 2012), Respondent agreed to a 180-day suspension with automatic reinstatement after admitting to various allegations of misconduct including: neglect of his client's cases, misrepresentations to tribunals and opposing counsel, and improper conflicts. The Court noted that it would likely have imposed a more severe sanction in light of Respondent's misrepresentations to opposing counsel and the court. In a related proceeding, *Matter of Hultquist*, 961 N.E.2d 999 (Ind. 2012), Respondent was sanctioned by a public reprimand for essentially assigning his clients to Mr. Adolf without his clients' knowledge or consent. In *Matter of Adolf*, (02S00-1302-DI-121, June 20, 2013), Respondent was suspended from the practice of law for continued noncooperation with the Commission.

In *Matter of Loiseau*, 957 N.E.2d 609 (Ind. 2011), Respondent was suspended for 90 days, without automatic reinstatement. Respondent represented a client in a deportation proceeding and he missed the hearing on the client's deportation. Respondent made conflicting representations to the Court about why he missed the hearing, and the Court concluded that Respondent lied about why he had missed the hearing. Respondent sought asylum for the client, but it was denied.

Respondent then represented to an immigration judge during a hearing on client's husband's asylum case that he was representing client in an ongoing asylum proceeding. The Court made special note of Respondent's pattern of dishonesty and failure to accept responsibility for his actions.

In *Matter of Relphorde*, 949 N.E.2d 355 (Ind. 2011), Respondent was appointed to represent a client as his public defender in a criminal matter. Not aware of this, the client's father asked Respondent to represent the client. Respondent accepted \$1,000 from the client's father and continued to represent the client as a public defender. Respondent did not return the \$1,000 to the client's father. Respondent has a history of prior discipline, including the same type of misconduct involved in the current case. The parties agreed that Respondent violated Prof. Cond. R. 1.11(d), which prohibits negotiating for private employment in a matter in which the lawyer was participating as a public employee or officer. For Respondent's professional misconduct, the Court suspended Respondent from the practice of law in this state for a period of not less than 180 days, without automatic reinstatement.

In *Matter of Sniadecki*, 924 N.E.2d 109 (Ind. 2010), Respondent faced disciplinary action for several ethical violations. In Count I, Respondent was charged with violating a prior suspension. Respondent violated the terms of his suspension by failing to notify his current clients of the nature and duration of his suspension. Instead, Respondent committed perjury by submitting a false affidavit stating that he had complied with this requirement. He also violated the terms of his suspension by maintaining a strong presence in his law office during the time of his suspension. Respondent also met with several new clients between the time he received his notice of suspension and the effective date of his suspension. In handling some of these matters, Respondent signed a fellow attorney's name to documents without his knowledge and also directed his assistant to sign a fellow attorney's name. In addition to violating the terms of his suspension, Respondent violated Prof. Cond. R. 3.3(a) by knowingly making a false statement of fact to a tribunal and Rule 8.4 in committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to be an attorney.

In Count II, Respondent was found to have entered into an improper business transaction with a client in violation of Rule 1.8. Respondent operated his law practice on a piece of property known as the Colfax property, which he owned as a tenant in common with a co-owner. Respondent sought to sell this property to a client and was planning to purchase a piece of property in Mishawaka. Respondent did not advise the client to seek independent counsel in the decision and insisted that the client pay him quickly for the property. When the client gave Respondent \$180,000 cash for a down payment, Respondent put this money down immediately on the property in Mishawaka. The client later sought to withdraw her offer to purchase the Colfax property when Respondent discouraged her from having the property inspected and she requested the return of her down payment. Respondent presented the client with a promissory note for the amount that he owed her but he failed to set up a payment schedule.

In Count III, Respondent still owed his former client over \$180,000, and Respondent committed several more ethical violations in his attempts to come up with a repayment agreement with the client's new counsel. In order to repay, Respondent attempted to refinance the Mishawaka property, which was in his wife's name. In the application to refinance the property, Respondent falsely represented his wife's income and her employment by stating that she was the CEO of his law firm. When the lender requested more information about his wife's employment, Respondent asked his assistant to create several false documents for the lender, including false corporate and personal tax returns. The Court found that Respondent was complicit in this forgery and had committed a crime in violation of Prof. Cond. R. 8.4. In considering all of these violations, the Court found that Respondent should be permanently disbarred.

In *Matter of Montgomery*, 919 N.E.2d 1146 (Ind. 2010), Respondent had been elected prosecutor of Crawford County in 2002. In 2005, he used county funds to buy a set of West's Indiana Code for the prosecutor's office, at which point he donated his personal set to the county public library. When Respondent did not win re-election in 2006, he took the new set of the Indiana Code with him. During the Commission's investigation of this matter, Respondent falsely stated that he believed that he had donated the new set to the public library and had taken his old set with him. Respondent later stipulated that he had violated Prof. Cond. R. 8.1(a) in making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter. He also stipulated that he had violated Rule 8.4 in engaging in a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, and fitness to practice law. For these violations, Respondent received a six-month suspension without automatic reinstatement.

In *Matter of Fieger*, 887 N.E.2d 87 (Ind. 2008), Respondent was a Michigan attorney admitted to the Indiana Bar on a temporary basis. Prior to his temporary admission to Indiana, Respondent was brought up on disciplinary charges in Michigan for allegedly making disparaging and threatening remarks on a radio program about three Michigan Court of Appeals judges who had ruled against him. At the time of his admission to Indiana, Respondent asserted under oath that no formal disciplinary proceedings were currently pending against him, despite the fact that the Michigan disciplinary case was still pending as it was currently on appeal to the 6th Circuit Court of Appeals. Additionally, Respondent failed to tell the Indiana Bar of another disciplinary action that was initiated against him in the state of Arizona after he was temporarily admitted to the Indiana Bar. Respondent argued that the Michigan action was not formally underway since it was on appeal, but the Court stated that since the Michigan action had not come to rest, it was still underway and fit within the intended definition of proceeding. The Indiana Court found that Respondent violated Prof. Cond. R. 3.3(a)(1), knowingly making a false statement of fact to a tribunal and failing to correct a false statement of material fact previously made to the tribunal; Rule 3.3(a)(3), failing to take reasonable remedial efforts after becoming aware that the lawyer offered false material evidence; and Rule 8.4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The sanction the court enacted against Respondent was to bar him from applying for temporary admission in Indiana in any new cases for two years.

In *Matter of Page*, 774 N.E.2d 49 (Ind. 2002), the Supreme Court held that Respondent's failure to inform the court that his client had lied under oath violated Prof. Cond. R. 3.3(a)(2). At a hearing on a Petition for Probationary License, the client was asked by the presiding commissioner if he had driven an automobile in the last nine years. The client answered "no," under oath. Although Respondent was present at the hearing and had reason to believe the client's answer was untrue, he did not take any steps to convince the client to disclose the untruthfulness and continued to represent the client. The Court found that Respondent committed misconduct by remaining silent and taking no action when he knew of credible evidence that his client had driven a vehicle within nine years of the hearing, and was given a public reprimand.

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 Holcomb, Jr.*, 989 N.E.2d 1250 (Ind. 2013), Respondent stipulated to using his attorney trust account as both a trust account and an office account from which he withdrew funds for personal expenses. The Court held it was appropriate to impose a three-year suspension proposed by the parties, rather than a more severe sanction, because (1) the Commission agreed to the discipline, (2) regardless of the date on which the attorney was eligible to petition for reinstatement, reinstatement was discretionary and required clear and convincing evidence of the attorneys remorse, rehabilitation, and fitness to practice law, under Admin. Disc. R. 23(4)(b), and (3) the parties agreed restitution should be a condition for the attorneys reinstatement.

In *Matter of Suarez*, 984 N.E.2d 1233 (Ind. 2013), a bank notified the Commission of an overdraft on Respondent's trust account. Respondent first told the Commission the overdraft was a mistake, but he could not adequately account for trust account funds. Respondent retained a CPA to do an audit of the account, but there was insufficient documentation for an audit. The Commission undertook an in-house audit which revealed numerous violations of the Rules, including six instances of paying personal and business expenses from the trust account, fifty-five instances of disbursing funds in excess of the amount held in trust for each corresponding client, and making fourteen cash withdrawals. For this misconduct, Respondent was suspended from the practice of law for a period of sixty days, all stayed subject to completion of at least two years of probation.

In *Matter of Aguilar*, 984 N.E.2d 1235 (Ind. 2013), a check drawn on Respondent's account failed to clear, resulting in an overdraft fee. An audit showed fourteen occasions where deposits from the trust account without creating or retaining adequate documentation. Respondent made approximately twenty-one disbursements from her account by electronic withdrawal or on-line transfer that were not based upon written withdrawal authorizations. Respondent was suspended from the practice of law for a period of thirty days, all stayed subject to completion of at least two years probation.

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In *Matter of Dunnuck*, 978 N.E.2d 1159 (Ind. 2012), Respondent kept both client funds and personal funds in his trust account in violation of Prof. Cond. R. 1.15(a) because the Internal Revenue Service had imposed a levy on his personal checking account. Respondent withdrew \$3,200 from the trust account, which he believed to be personal funds, resulting in an overdraft of \$22.48, which he covered the day after he was notified of the overdraft. Respondent retained an accountant to assist him in managing his trust account, but it was an aggravating factor that Respondent’s actions resulted in delay of the government’s collection of taxes. Respondent submitted to agreed discipline of a six-month suspension with sixty days actively served and the remainder stayed subject to the completion of at least one year of probation.

In *Matter of Johnson*, 969 N.E.2d 5 (Ind. 2012), Respondent failed to maintain complete trust account records for a period of five years. She failed to keep records that explained all receipts and withdrawals from her trust account. Respondent wrote checks on the trust account made payable to “Self” or to “Cash,” with no identified purpose. She deposited funds from her business account and from credit card payments into her trust account without any records of purpose of the funds or to whom they belonged. She deposited funds for a filing fee from a client into the trust account, but she never paid a filing fee for the client from the account. She paid herself earned fees from client funds in her trust account by a monthly electronic transfer to her business account. On multiple occasions, the withdrawals did not match the amount of earned fees shown on the client invoices. On occasion, she failed to deposit unearned fees in the trust account, and she failed to promptly withdraw earned fees. As a result of her accounting failures, Respondent used funds maintained for some clients to pay other clients’ expenses. She did not maintain a nominal balance in the trust account to pay credit card processing fees. Her attorney trust account became overdrawn, apparently as a result of the automatically withdrawn credit card processing fees. Because there was no evidence that Respondent used her trust account for personal use or that she intentionally misappropriated funds, the Court imposed a public reprimand.

In *Matter of Dal Santo*, 953 N.E.2d 468 (Ind. 2011), Respondent admitted numerous violations with his trust account from 2005 through 2009, which include writing numerous checks that did not clear due to insufficient funds, allowing the balance to become negative, writing checks to “cash,” using trust funds for personal expenses, and failure to keep proper records of his trust

account. The Court suspended Respondent for 180 days, with 60 days actively served and the remainder stayed subject to completion of 18 months of probation.

In *Matter of Castaldo*, 916 N.E.2d 905 (Ind. 2009), Respondent was hired by the state of Arizona to domesticate a judgment and enforce it against an Indiana resident. Respondent received funds for the filing fee in advance, deposited them in his trust account and let the trust account balance drop to zero without using the funds for the intended purpose. For this action, the Court found that Respondent violated Prof. Cond. R. 1.15(c) by failing to properly hold client property in a trust. In Count II, Respondent had accepted money from clients to help them in resolving a tax issue. Respondent failed to take action to resolve the issues and also failed to respond to the clients' attempts to communicate with him. Under this count, Respondent violated Rule 1.4(a) in failing to keep a client reasonably informed and Rule 1.3 in failing to act with reasonable diligence on the cases. For these violations, the Court suspended Respondent for 90 days, which was to be stayed subject to his completion of 24 months of probation.

In *Matter of Holland*, 911 N.E.2d 574 (Ind. 2009), Respondent was disciplined for his dishonesty and for mishandling his trust account. Respondent had allowed the balance of his trust account to drop below the amount of client funds he was supposed to be holding. He had used these funds for unauthorized purposes, including paying himself a contingent fee in excess of what he was entitled to collect. He had also comingled client property with his own personal funds. This misconduct was found to be a violation of Prof. Cond. R. 1.15(a), and Respondent was also found to have committed criminal conversion in violation of Rule 8.4(b). Respondent had also accused his opposing counsel of bribing a judge, and the Court found that he had made this statement in reckless disregard of the truth. This constituted a violation of Rule 8.2(a), which prohibits knowingly making a false or reckless statement concerning the integrity of a judge, and Rule 4.1(a), which prohibits knowingly making a false statement of material fact to a third person. For these violations, Respondent was suspended from the practice of law for a period of at least 12 months without automatic reinstatement.

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 Weldy*, 989 N.E.2d 1252 (Ind. 2013), includes multiple counts alleging lack of communication, issues involving attorney's fees, and making false assertions to the court, neglect and lack of communication. In one, client retained Respondent in a wage claim action, and Respondent thereafter neglected the case and failed to communicate with the client despite her repeated requests for information. Respondent moved his office without providing a forwarding address, and failed to notify her that her case was subject to T.R. 41(E) call of the docket for lack of prosecution in 2009.

Respondent failed to respond to another client and made no substantive progress on her wage claim action for more than a year. Respondent failed to withdraw his appearance, and at one point, told the client a summary judgment motion had been filed when it had not been filed. The case was dismissed on a T.R. 41(E) call of the docket in late 2009, but Respondent failed to notify the client of the dismissal.

For Respondent's professional misconduct, the Court suspended Respondent from the practice of law for a period of 180 days, with 90 days actively served and the remainder stayed subject to completion of at least one year probation.

In *Matter of Voils*, 930 N.E.2d 261 (Ind. 2013), Respondent represented a client in pursuing a claim for accidental death benefits from carbon monoxide inhalation, which would not be covered unless it resulted from an occupational accident. Despite the client's requests, Respondent did little in pursuit of the claim. After the client fired Respondent, he failed to comply with repeated requests from the client and her new counsel to transfer her file. Despite the fact that the client filed a grievance with the Disciplinary Commission, Respondent failed to respond in a timely manner to a subpoena duces tecum. For this misconduct, the court suspended Respondent from the practice of law for thirty days.

In *Matter of Fetter*, 988 N.E.2d 248 (Ind. 2013), Respondent was hired to represent a client in a dispute with his landlord. Respondent entered an appearance, and the issue of immediate possession was resolved in the client's favor. After Respondent and the client failed to appear at a hearing regarding unpaid rent and damages, Respondent did not notify the client the court entered a default judgment against him in the amount of \$6,089. Respondent then failed to respond to the client's efforts to contact him. After the client learned of the default judgment against him, Respondent assured the client he would appeal within the next thirty days, but Respondent failed to appeal the judgment. Respondent then refused to speak to the client when he called Respondent's office. Respondent communicated to the Commission that he had withdrawn from the case in court, but the case summary does not support this assertion. For this conduct, the court suspended Respondent from the practice of law in Indiana for a period of not less than six months, without automatic reinstatement. The court pointed out that if reinstatement were sought, it would likely only be considered after Respondent has made restitution to the client for any harm caused by Respondent's misconduct.

In *Matter of Denney*, 983 N.E.2d 571 (Ind. 2013), Respondent was charged with neglecting clients' cases, failing to do the work for which he was hired, failing to communicate with clients, failing to inform clients of the status of their cases, failing to inform clients when hearings were set or continued, failing to appear at a hearing, failing to inform clients of their appellate rights, and taking unilateral action in cases without clients' authorization. In one instance, he charged a client \$20,000 to defend him in a criminal case, but did minimal work and refused to refund of the fees, despite telling the Disciplinary Commission he would refund \$3,500. With a second client, Respondent was paid \$10,000 to defend a college student charged with two felonies. Respondent was aware this client was particularly vulnerable because a felony conviction would disqualify him from his chosen profession. After a year without resolution, the client hired another attorney for \$3,500, requested his file and demanded a refund of his fee. Two months after firing Respondent, the case was resolved by a misdemeanor plea agreement. Respondent did minimal work, failed to inform client of plea offer, failed to turn over client's papers, and refused to refund his fee.

While representing a third client in a divorce proceeding, Respondent failed to inform the client about nearly everything involving the case. He failed to notify her about hearings, took unilateral actions that affected the division of marital property, signed stipulations and filings without the consent of his client, and failed to notify his client about orders from the court requiring assertive conduct. For this misconduct, the court suspended Respondent from the practice of law for a period of not less than three years, without automatic reinstatement.

In *Matter of Dittrich*, 980 N.E.2d 836 (Ind. 2013), Respondent admitted to four counts of misconduct occurring from 2008 through 2010, including neglecting client's cases, failing to do the work for which he was hired, failing to respond to client's requests for information, failing to inform clients of the status of their cases, failing to safeguard unearned fees by placing them in a trust account, and failing to completely refund unearned fees. Respondent entered into a Conditional Agreement admitting violation of Prof. Cond. R. 1.3, 1.4(a)(3), 1.4(a)(4), 1.15(a), 1.16(a)(2), and 1.16(d) and submitting to a 90-day suspension with automatic reinstatement. Respondent also made full refunds of all unearned fees and voluntarily sought assistance from JLAP to deal with emotional stress and depression issues that predicated his misconduct.

In *Matter of McCloskey*, 976 N.E.2d 1224 (Ind. 2012), Respondent was hired by a convicted felon to file a motion to correct error or modify his sentence and request a pardon for prior state felonies. It was agreed that Respondent would not seek relief for the client until the client's simultaneous appeal had ended. Respondent had no experience with the procedures he was hired to perform and failed to make any filing in the year after the client's appeal was dismissed. Respondent was charged with violations of Rules 1.1: failure to provide competent representation; 1.3: failure to act with reasonable diligence and promptness; 1.5(a): charging an

unreasonable fee; and 3.2: failure to expedite litigation consistent with the interests of a client. Respondent submitted to agreed discipline and received a public reprimand.

In *Matter of Engebretsen*, 976 N.E.2d 1225 (Ind. 2012), Respondent was charged with neglecting clients' cases, failing to do the work for which he was hired, failing to communicate with clients, failing to inform clients that medical problems would severely limit his ability to represent them, failing to inform clients of court orders and hearings, failing to appear at hearings and a pretrial conference, unilaterally terminating his representation of clients without protecting the clients' interests, failing to refund unearned fees, and failing to cooperate with the Commission. Respondent did not respond to the Commission's Complaint and the hearing officer took the facts alleged to be true. The Court found that Respondent was already subject to two suspension orders and his serial misconduct injured his clients and tarnished the legal profession. The Court noted Respondent's medical problems but stated that they did not excuse his misconduct. Respondent was suspended for three years, without automatic reinstatement.

In *Matter of Davis Julian*, 973 N.E.2d 571 (Ind. 2012), Respondent admitted to violations of the following Rules: 1.3: Failure to act with reasonable diligence and promptness; 1.4(a)(3): Failure to keep a client reasonably informed about the status of a matter; 1.4(a)(4): Failure to comply promptly with a client's reasonable requests for information; 1.16(d): After the termination of representation, failure to protect a client's interests and failure to refund an unearned fee; 3.3: Failing to disclose a material fact to a tribunal; and 8.1(b): Knowingly failing to respond to a lawful demand for information from an admissions or disciplinary authority. In mitigation, the Court noted that Respondent submitted to JLAP monitoring and treatment for her alcohol addiction, but Respondent was suspended for two years, without automatic reinstatement.

In *Matter of Gambill*, 973 N.E.2d 573 (Ind. 2012), Respondent was suspended for six months, without automatic reinstatement, after she was hired to file a malpractice action against an Illinois attorney, but instead filed a personal injury case on her client's behalf in the Northern District of Indiana. Respondent misrepresented the status of the litigation to the client and repeatedly disregarded the client's requests for information. Eventually, Respondent did file the malpractice action she had been hired to file, but the client retained new counsel who dismissed this action and initiated a new action. This was not Respondent's first violation for neglect.

In *Matter of Brown*, 973 N.E.2d 562 (Ind. 2012), Respondent was suspended for a period of 30 days with automatic reinstatement after he filed a defective motion for extension of time in an appeal and failed to notify his client that the appeal was dismissed as a result. Respondent was originally appointed to represent the client in 1989 and the client finally requested new counsel in 2007. A belated appeal was filed on behalf of the client in 2009 by the State Public Defender.

In *Matter of Baggerly*, 954 N.E.2d 447 (Ind. 2011), Respondent settled a personal injury claim on behalf of his client and the client's three daughters. Respondent lost or misplaced a check for \$5,000 that he had received for one of the daughters. Respondent failed to respond to the client's repeated requests for the funds over the next ten or eleven years. Respondent admitted violation of the following: Prof. Cond. R. 1.1: Failure to provide competent representation; 1.3: Failure to act with reasonable diligence and promptness; 1.4(a): Failure to keep a client reasonably informed about the status of a matter and respond promptly to reasonable requests for information; 1.15(a): Failure to hold property of clients properly in trust; and 1.15(d): Failure to deliver promptly to a client funds the client is entitled to receive.

In *Matter of Transki*, 948 N.E.2d 1181 (Ind. 2011), shortly after Client A retained Respondent, this Court suspended Respondent for 90 days with automatic reinstatement. Respondent did not inform Client A of this, and two days before reinstatement, Respondent wrote to Client A about her case. After Client A lost in the trial court, Respondent was paid to take an appeal. She failed to file an appellant's brief, and the appeal was dismissed. Over four months later, she informed Client A that the appeal had been denied but falsely told her she had no documentation about it. Respondent made a partial refund of her fee. When Client A filed a grievance against her, Respondent failed to respond in a timely manner. When she did respond, she provided the Commission with a letter addressed to Client A purportedly confirming Client A's decision not to appeal. Respondent fabricated this letter after-the-fact to misrepresent to the Commission that she had sent the letter to Client A.

Client B retained Respondent to file a name-change petition. Respondent did not file a petition and failed to respond to Client B's requests for information. When Client B filed a grievance against her, Respondent failed to respond in a timely manner. Respondent returned her fee to Client B and agreed to file a petition at no charge. Respondent again failed to file a petition and to respond to Client B's requests for information. Respondent has been diagnosed with untreated major depression and anxiety disorder. She began treatment for these conditions and is committed to working toward recovery.

The Court found that Respondent violated Prof. Cond. R. 1.3, 1.4 (a) and (b), 3.3(a)(1), 8.1(a) and (b), and 8.4(c) as well as violated Admis. Disc. R. 23(26)(b). For Respondent's professional misconduct, the Court suspended Respondent from the practice of law in this state for a period of not less than six months, without automatic reinstatement.

In *Matter of Shapiro*, 937 N.E.2d 806 (Ind. 2010), in late 2006, a decedent's daughter (who lives in Poland and has very limited ability to communicate in English) hired Respondent to handle the probate estate of her mother, who died in Lake County. The estate's major assets were two savings accounts and a home. The daughter was the sole beneficiary. After the sale of the decedent's home, Respondent failed to move forward with closing the estate, failed to pay state inheritance taxes, failed to file an inventory, failed to respond to the daughter's requests for information, and made unauthorized payments totaling \$24,000 to himself from estate assets. After the daughter hired new counsel to replace Respondent, he failed to obey a court order that he provide an accounting and provide documents pertaining to the estate to new counsel. This resulted in the trial court issuing a bench warrant for his arrest. The Court finds that Respondent violated Prof. Cond. R. 1.1, 1.3, 1.4(a)(3), 1.4(a)(4), 1.15(d), and 8.4(b),(c), and (d). The Court suspended Respondent from the practice of law for a period of not less than three years, without automatic reinstatement.

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 P. McGoff. They were updated in August 2013 by Margaret Christensen and Kevin McGoff, Bingham Greenebaum Doll LLP.

NOTES



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