N. ETHICS

N.1. Prosecution

TITLE: Matter of Faw

INDEX NO.: N.1.

CITE: (02-15-12), 961 N.E.2d 1001 (Ind. 2012)

SUBJECT: Ethics - prosecutor's representation of State limited by self-interest

HOLDING: Respondent was the prosecutor for Fayette County, and SD was an employee of the office. A police officer arrested SD's husband, BD, for the theft of metal pipes, which he had sold to a scrap yard. BD admitted he took the pipes but said he thought they were abandoned. The owner of the pipes told the officer that they were not abandoned or scrap. After transporting BD to the jail, the officer prepared an affidavit of probable cause and a report, which was delivered to the prosecutor's office. Respondent did not petition Tr. Ct. for the appointment of special prosecutor to handle the case. Instead, he told his staff he would handle the matter personally and spoke to the officer about the arrest. No criminal charges were filed against BD. Parties agree that Respondent violated Indiana Professional Conduct Rule 1.7(a)(2), which prohibits representing a client (the State) when the representation may be materially limited by the attorney's own self-interest or the attorney's responsibility to a third person. Court imposed a public reprimand for Respondent's misconduct in this case.

TITLE: State v. Culbreath
INDEX NO.: N.1.
CITE: 1999 Tenn. Ct. Crim. App. LEXIS 191 (1999)
SUBJECT: Privately Financed Special Prosecutor
HOLDING: Use of a special prosecutor financed by anti-obscenity group to pursue obscenity charges created appearance of impropriety and violated D's due process rights. Prosecutors represent government, and have ethical duty to seek justice, while private attorneys have ethical duty to zealously represent client. Special prosecutor here faced ethical dilemma, with prosecutorial duty to seek justice compromised by obligation to zealously represent interests of anti-obscenity group which paid him. Further, because he received over $300,000 in legal fees in course of two-year investigation and prosecution, he clearly had financial interest in the prosecution. In finding due process violation, Court uses 3-factor test: (1) because Ds face multiple felony charges, they have significant liberty interest at stake; (2) use of interested special prosecutor would allow influences other than justice or the public interest to weigh upon prosecutorial decisions; and (3) eliminating use of interested special prosecutor would not place undue burden on state, since prosecutor already has general responsibility to prosecute obscenity-related charges. Because prosecutor's office worked closely with special prosecutor and no screening provisions were in place, Court upholds order disqualifying not only special prosecutor, but entire prosecutor's office. Court reversed order dismissing charges, however, holding that "sufficiency and legality of the evidence presented to a grand jury is not the proper subject of judicial review." Instead, the Court suggested, the proper remedy would be to seek suppression of evidence in the event of trial.

N. ETHICS

N.1. Prosecution

N.1.a. General investigative and charging responsibilities

TITLE: Foster v. Pearcy
INDEX NO.: N.1.a.
CITE: (4-3-79), Ind., 387 N.E.2d 446
SUBJECT: Prosecution - General investigative & charging responsibilities; informing public
HOLDING: Because it is prosecutor's duty to inform public as to his investigative, administrative, & prosecutorial activities, prosecutor must be afforded absolute immunity carrying out such duties. Immunity is not limited to cases where prosecutor is acting as State's advocate in Ct. of law. Duty of prosecutor to inform public can be characterized as discretionary function falling within absolute immunity granted under Tort Claims Act. Prosecutors are subject to professional discipline if their actions stray beyond bounds of ethical conduct. Here, prosecuting attorney enjoyed absolute immunity from liability for statements made by him or his deputies to press regarding pending cases in his office. It was immaterial whether deputy's allegedly defamatory statements concerning plaintiff's drug activities were within or beyond scope of his authority as deputy. If allegedly defamatory statements by deputy in office of county prosecuting attorney were within scope of deputy's authority, his superior was absolutely immune & if statements were beyond scope of deputy's authority, superior again could not be liable, as government officers are responsible only for official acts of their deputies acting within scope of their authority. Held, Ct. App. opinion vacated & Tr. Ct. judgment granting motion to dismiss affirmed.

N. ETHICS

N.1. Prosecution

N.1.c. Conflicts

TITLE: Asbell v. State
INDEX NO.: N.1.c.
CITE: (10/2/84), Ind., 468 N.E.2d 845
SUBJECT: Ethics - conflict; inapplicable to charging decision
HOLDING: Prosecutor who defended D in 2 of 4 prior felonies alleged in habitual may properly file habitual charge against D. Here, D contends CPR requires special prosecutor should have been appointed before actual decision to file habitual charge was made. If lawyer gained knowledge of facts upon which prosecution is predicated/closely interwoven, as result of professional relations with D, lawyer should not participate in prosecution of criminal case. EC 4-6; State ex rel. Meyers v. Tippecanoe County Ct. 432 N.E.2d 1377. Trial judge did appoint special prosecutor to prosecute habitual. Special prosecutor has discretion to dismiss charges if evidence of overreaching or unethical conduct exists. Ind. Code 35-34-1-13.

TITLE: Banton v. State
INDEX NO.: N.1.c.
CITE: (2d Dist. 3/26/85), Ind. App., 475 N.E.2d 1160
SUBJECT: Ethics - conflicts; substantial relationship to prior representation
HOLDING: Tr. Ct. erred by not granting D's motion to disqualify John Meyers (who, as public defender, had represented co-D in same matter) from serving as prosecutor. Lawyer must be disqualified if controversy in pending case is substantially related to matter in which lawyer previously represented another client. State ex rel. Meyers v. Tippecanoe County Ct. 432 N.E.2d 1377. Determination is made on case-by-case basis. Id. Public trust in integrity of judicial process requires Ct. to resolve any serious doubt in favor of disqualification. Id. at 1379. Ct. finds present controversy not simply substantially related to matter in which Meyers represented co-D but exactly the same (same cause number, Ct. & set of facts). Meyers' recusal in favor of deputy was inadequate. Id., State ex rel. Goldsmith v. Superior Ct. of Hancock County 386 N.E.2d 942; Walker, App., 401 N.E.2d 795. Held, reversed & remanded for new trial.

RELATED CASES: Romero, 578 N.E.2d 673 (former prosecuting attorney should have been disqualified from representing murder D at trial where former prosecutor did not gain consent to represent D from prosecutor and former prosecutor's previous participation was personal and substantial); Matter of Alexander 504 N.E.2d 584 (public reprimand given to prosecuting attorney who represented man in dissolution matter & later dismissed DWI charges against him); Shuttleworth, App., 469 N.E.2d 1210 (held, prosecutor's prior representation of wife in divorce proceedings did not preclude prosecution of ex-husband for criminal nonsupport; includes excellent discussion of prosecutor's ethical responsibilities); Jaske, App., 553 N.E.2d 181 (prosecution of D on escape charge was not so substantially related to prosecutor's former representation of D in post-conviction relief proceeding so as to require disqualification of prosecutor).

TITLE: Broshears v. State

INDEX NO.: N.1.c.

CITE: (1st Dist., 12-10-92), Ind. App., 604 N.E.2d 639, *overruled on other grounds*, 698 N.E.2d 732

SUBJECT: Prosecutor - no conflict because of prior representation of D

HOLDING: Where prosecutor was disqualified from habitual offender (HO) portion of trial, it was not error for him to prosecute underlying offense, even though he had represented D in one of prior felonies used for HO proceeding. D was charged with attempted murder for shooting at police officer, & HO enhancement was sought. Prosecutor represented D 16 years earlier in another shooting conviction which was used as prior offense for HO determination. Tr. Ct. therefore disqualified prosecutor from HO proceedings, but allowed him to prosecute attempted murder, & D was convicted of criminal recklessness. Ct. rejected D's argument that because two shooting incidents were similar, & facts of first incident could have been used against him in current prosecution, prosecutor should have been disqualified from all portions of trial. Ct. noted that facts from first shooting were not used against D in this trial & found they also did not predicate the current prosecution & were not "closely interwoven" with it. Ct. also found that State ex rel. Meyers v. Tippecanoe County, 432 N.E.2d 1377 did not require disqualification of prosecutor from underlying prosecution. Meyers involved similar situation & held that where HO charge was based on 2 prior theft cases in which prosecutor had represented D prosecutor had to be disqualified. Concern for appearance of impropriety raised by HO prosecution based on convictions where prosecutor had represented D was not involved in instant case, because prosecutor was disqualified from HO phase of proceeding. Held, no error in allowing prosecutor to prosecute underlying felony.

TITLE: Daugherty v. State
INDEX NO.: N.1.c.
CITE: (1st Dist. 7/18/84), Ind. App., 466 N.E.2d 46
SUBJECT: Ethics - conflicts; deputy prosecutor represents D on civil matters
HOLDING: D was not denied due process because of prosecutor's alleged conflict of interest. Here, D (Hendricks County Sheriff) was eventually indicted for official misconduct (battery upon jail prisoners). Prosecutor participated in grand jury proceedings & presented evidence re batteries. Grand jury was convened to investigate sheriff's dept., not alleged beatings. Deputy prosecutor represented sheriff's dept. in civil matters & had met with & given advice to sheriff's deputies re allegations when first made. After indictments were returned, prosecutor requested appointment of special prosecutor on 3 grounds (independent professional judgment, deputy's representation & appearance of impropriety). Ct. distinguishes cases cited by D: State v. Hardy 406 N.E.2d 313 (dismissal affirmed on grounds once prosecutor recuses self, recusal applies to all aspects of case including presence in grand jury room) & State ex rel. Goldsmith v. Superior Ct. of Hancock County 386 N.E.2d 942 (recusal of entire prosecutorial staff not required where deputy prosecutor is potential witness; DR 5-102(A) & 2-102(A) primarily directed at private law firms with financial interests at stake). Ct. emphasizes distinction between D's due process rights & ethical considerations of lawyers. D makes no showing he was denied fair trial. Trinkle 288 N.E.2d 165. Dismissal of indictment is unnecessary simply because deputy prosecutor has conflict of interest. Citations omitted. Held, no error.

RELATED CASES: Cole, 738 N.E.2d 1035 (attorney's representation of D in juvenile delilnquency case while serving as deputy prosecutor violated Ind.R.Prof. Conduct 1.7); Miller, 677 N.E.2d 505 (attorney engaged in conduct prejudicial to administration of justice, in violation of Ind.R.Prof.Conduct 8.4(d), by acting to advance cause of civil litigant while serving as duly elected county prosecutor).

TITLE: Matter of Flatt-Moore
INDEX NO.: N.1.c.
CITE: (01-12-12), 959 N.E.2d 241 (Ind. 2012)
SUBJECT: Ethics - Surrendering to a crime victim prosecutorial discretion in plea negotiations
HOLDING: Respondent, a deputy prosecutor, engaged in conduct prejudicial to the administration of justice in violation of Professional Conduct Rule 8.4(d) by surrendering her prosecutorial discretion in plea negotiations entirely to the pecuniary demands of the victim of a crime. The D in this case had written$68,000 in bad checks to a vendor in 2006 and was charged with Class C felony check fraud. The victim-vendor demanded more than $18,000 in restitution, including attorney's fees, interest at 18%, and almost $12,000 for a "billing error." **D** objected to the additional charges and asked that the amount of restitution be left to the judge. The victim refused to agree, and prosecutor told defense counsel, "I don't have authority to make an offer that the victim doesn't agree to." The newly-elected prosecutor had made a campaign promise that the office "would have a policy of police and victim approval of felony plea agreements." Hearing officer found that this policy did not include giving the victim of a property crime the right to dictate the terms of restitution as a pre-condition to his office agreeing to a plea. Court noted that prosecutors may allow crime victims to have "substantial and meaningful input" into plea agreements, but by giving the victim "unfettered veto power in the plea negotiations leading up to the First Plea Offer, Respondent entirely gave up her prosecutorial discretion to enter into what would otherwise be a fair and just resolution of the charges. If a prosecutor puts the conditions for resolving similar crimes entirely in the hands of the victims, Ds whose victims are unreasonable or vindictive cannot receive the same consideration as Ds whose victims are reasonable in their demands. At very least such a practice gives the appearance that resolution of criminal charges could turn on the whims of victims rather than the equities of each case." Court concluded that public reprimand was appropriate sanction for Respondent's misconduct in this case.

TITLE: Johnson v. State
INDEX NO.: N.1.c.
CITE: (12-20-96), Ind., 675 N.E.2d 678
SUBJECT: Ethics - prosecutor's representation of client previously charged with same crime
HOLDING: Disqualification of prosecutor was not required where prosecutor formerly represented client who had been charged with same crime for which D was subsequently tried & convicted. Lawyer must be disqualified if it is shown that controversy involved in pending case is substantially related to matter in which lawyer previously represented another client. Test must be applied to facts of each case to determine whether issues in prior & present cases are essentially same or closely interwoven. Williams, 631 N.E.2d 485. In criminal cases, Cts. properly determine whether prosecuting attorney gained confidential information through prior representation & whether such information may assist in present prosecution to D's detriment. State ex rel. Meyers v. Tippecanoe County Ct., 432 N.E.2d 1277. Here, D originally implicated Hiatt in murder of victim in exchange for dismissal of unrelated charge against D. Hiatt was represented by attorney Reed, who obtained dismissal of charges against Hiatt. Subsequently Reed became Delaware County Prosecutor, where D was later convicted of same victim's murder. Ct. found that issues in Reed's prior representation of Hiatt were not sufficiently interwoven with D's case to require reversal for failure to disqualify Reed as prosecutor. Specifically, Hiatt's defense had been that he was out of town at time of murder & knew nothing of crime. D failed to show that Reed obtained any information about D's participation in crime from Hiatt or that such information was used in prosecution of D. Held, conviction affirmed; Sullivan, J., concurring. **Note:** D argued that evidence linking D to murder also implicated prosecutor's former client, & that independent prosecutor would not have chosen to pursue D. Ct. noted that determination of who shall be prosecuted lies within sole discretion of prosecuting attorney, & Ct. may not substitute its discretion with that of prosecutor.

TITLE: Matter of Henderson
INDEX NO.: N.1.c.
CITE: (1/13/2017), 2017 Ind. LEXIS 6 (Ind. 2017)
SUBJECT: Public reprimand for prosecutor who negotiated book deal
HOLDING: Court imposed a public reprimand against Floyd County prosecutor, who violated Rules of Professional Conduct after he failed to recuse himself from a case he planned to write a book about. Respondent was lead prosecutor in the case against David Camm, a former police officer charged with and eventually acquitted of the murder of his wife and two children after multiple trials. Days after a jury found Camm guilty during a second trial, Respondent entered into an agreement with a literary agent to write a book about the case. When the Indiana Supreme Court reversed Camm's convictions and remanded the case for a third trial, Respondent told the agent that he now had a "bigger story." Although the book contract was eventually dropped, Camm petitioned for a special prosecutor to be appointed in his third trial. Indiana Court of Appeals eventually ordered Respondent's removal from the case and the Disciplinary Commission then began an investigation into Respondent's conduct, so he hired private counsel to represent him and sent payment vouchers, which included invoices from his private counsel, to the Floyd County Auditor.

Court affirmed hearing officer's findings that Respondent violated Indiana Professional Rules of Conduct 1.7(a)(2), 1.8(d) and 8.4(d) based on the conflict between his duties to the State and his own personal interests in the book deal, and the effect that conflict had on Camm's trial. However, Court agreed with hearing officer's conclusion that there was a lack of "clear and convincing evidence that [Respondent's invoices] to Floyd County were fraudulent" in violation of Rules 8.4(c) and 8.4(d).

Although Respondent's violation "is serious and adversely affected the administration of justice in this case," public reprimand is appropriate sanction because his "misconduct occurred in connection with a single, unusual case and is an aberration from what otherwise has been a long and distinguished career as a public servant." All justices concurred except Slaughter, J., who did not participate.

TITLE: Matter of Ryan

INDEX NO.: N.1.c.

CITE: (03-31-05), Ind., 824 N.E.2d 687

SUBJECT: Ethics - conflict of interest; prosecuting Ds & simultaneously providing business service to them

HOLDING: Respondent violated Ind. Professional Conduct Rule 1.7(b) by operating a business that obtained international driver's licenses for individuals charged with driving license offenses, while at the same time serving as a part-time deputy prosecutor in that Ct. Rule 1.7(b), which prohibits a lawyer from representing a client if the representation of the client may be materially limited by lawyer's own interests, was clearly violated because Respondent's duties as a deputy prosecutor conflicted with his interests related to his business. As a deputy prosecutor, Respondent served a public trust to enforce the law & State was entitled to his undivided loyalty. Respondent's conduct breeds mistrust & lack of confidence in the judicial system & damaged perception of administration of justice. He used his position as deputy prosecutor to obtain a significant financial windfall for himself. Moreover, Respondent did not seem to recognize the inappropriateness of prosecuting Ds & simultaneously providing a business service to them designed to obtain a favorable result in the prosecution. Ct. concluded that Respondent should be suspended from practice of law for nine months.

TITLE: State v. Tippecanoe County Court
INDEX NO.: N.1.c.
CITE: (4-2-82), Ind., 432 N.E.2d 1377
SUBJECT: Conflicts - Change of prosecutor; disqualification of entire staff
HOLDING: Although it appeared that nothing in prosecuting attorney's representation of accused in two prior theft cases would have any relation to present theft case, where habitual offender charge was based upon prior cases in which prosecuting attorney represented accused, prosecutor had to be disqualified in case in which accused was charged with theft & with being habitual offender. Here, since prosecutor had administrative control over entire staff, Tr. Ct. properly disqualified entire staff of deputies. Held, petition for permanent writ denied.

N. ETHICS

N.1. Prosecution

N.1.d. Public statements re pending case

TITLE: Matter of Brizzi
INDEX NO.: N.1.d.
CITE: (03-12-12), 962 N.E.2d 1240 (Ind. 2012)
SUBJECT: Prosecutor's statements were prejudicial to administration of justice
HOLDING: Marion County Prosecutor engaged in attorney misconduct by making public statements that he knew or should have known would have a substantial likelihood of materially prejudicing adjudicative proceedings and a substantial likelihood of heightening public condemnation of criminal Ds in violation of Rules of Professional Conduct 3.6(a) and 3.8(f). Rules do not require a finding of actual prejudice to Ds, but rather a substantial likelihood of heightened public condemnation of the accused.

Here, Disciplinary Commission accused Respondent of making statements that went beyond the public information purpose and prejudiced the cases. One of the allegations stems from a news conference when Respondent made statements about accused multi-state serial killer Bruce Mendenhall. The second allegation involved a press release about the Indianapolis Hamilton Avenue slayings, where seven people were killed and Respondent initially sought the death penalty. Court agreed with hearing officer on dismissing the Mendenhall charge on grounds that Respondent did not recall making at least some of specific statements alleged and Respondent's public comments were misquoted in the media on a number of occasions. However, the press release relating to the Hamilton Avenue murders did not include the required explanation that a charge is merely an accusation and the D is presumed innocent until proven guilty. Court found that this led to a substantial likelihood of prejudice under Rule 3.6(d).

Rule 3.6(b)(2) provides that a lawyer may state "information contained in a public record." Court agreed with definition of "public record" set forth in Attorney Grievance Committee v. Gansler, 835 A.2d 548 (Md. 2003), which refers only to public government records on file with a government entity to which an ordinary citizen would have lawful access. "'On file' does not mandate such formalities as file stamping or entry on a case docket. A more expansive concept of a public record that includes the unfiltered and untested contents of all publicly accessible media would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech." Moreover, prosecutor must make clear that what is being disclosed is, in fact, the contents of a probable cause affidavit or other identified public document so that statements cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt.

With respect to other "safe harbors" and permitted statements under Rule 3.6(b)(2), Court concluded that there was no evidence that any of Respondent's statements were meant to serve such law enforcement purposes as protecting potential victims or apprehending suspected perpetrators still at large. In performing his important responsibility of apprising the public of activities in his office, Respondent stepped beyond the bounds permitted by Rules 3.6 and 3.8. Noting that Respondent was repeating information in media accounts and the probable cause affidavit in the Hamilton Avenue murders, Court gave him benefit of a broad interpretation of the public record safe harbor, but warned that the narrower interpretation will be applied to future statements. Some of Respondent's statements, however, fall well outside these parameters, including the statements that Respondent

would not trade all the money and drugs in the world for the life of one person, let alone seven, that Turner deserved the ultimate penalty for this crime, that the evidence was overwhelming, and that it would be a travesty not to seek the death penalty. Court found Respondent should receive public reprimand for this misconduct.

TITLE: Sims v. Barnes
INDEX NO.: N.1.d.
CITE: (12-16-97), Ind. App., 689 N.E.2d 734
SUBJECT: Prosecution - statements informing public re: pending case; absolute immunity
HOLDING: Prosecutor was acting within scope of his personal authority when he made statement to press about pending case &, thus, enjoyed absolute immunity from liability in defamation action. Prosecutor enjoys absolute immunity from defamation liability only when his statement to press informs public about case pending in his office. In defamation action, prosecutor whose statement does not so inform will be entitled only to qualified immunity, for such statement will have been made outside scope of prosecutor's authority. Prosecutor's duty to inform public can be characterized as discretionary function & thus would fall within absolute immunity granted under Indiana Tort Claims Act. Official seeking absolute immunity bears burden of showing that such immunity is justified for function in question. Held, judgment affirmed.

RELATED CASES: Foster v. Pearcy, 387 N.E.2d 446 (see card at N.1.a)

N. ETHICS

N.1. Prosecution

N.1.f. Withheld/recanted Testimony

TITLE: Matter of Hudson
INDEX NO.: N.1.f.
CITE: (8/29/2018), 105 N.E.3d 1089 (Ind. 2018)
SUBJECT: Suspension for ex-prosecutor who withheld recanted testimony
HOLDING: Per Curiam. Court suspended a former Porter County deputy prosecutor from the practice of law for 18 months without automatic reinstatement for failing to disclose exclupatory evidence and by prosecuting a charge she knew was not supported by probable cause. D was fired for withholding from the defense evidence that an alleged victim (A.V.) said he had been coached to lie and had recanted allegations of child molestation. Respondent did not immediately disclose to trial court that she had known about A.V.'s recantation, and after learning of Respondent failure to disclose the false testimony, the judge acquitted D as to all four counts of child molesting and referred the matter to the Disciplinary Commission.

The Commission charged Respondent with violating Indiana Professional Conduct Rules 3.8(a), 3.8(d), and 8.4(d) by putting an alleged victim on the stand to testify after the child recanted the accusation against D. Rule 3.8(a) forbids prosecuting a charge that the prosecutor knows is not supported by probable cause. On appeal, Respondent conceded that she violated Rule 3.8(a), but attempted to cast her violation as a "formal" one, in that the child molesting count which A.V. recanted technically was left "in the case" as trial commenced but otherwise was abandoned by the prosecution. "The hearing officer did not agree with this reductive view, nor do we," the Court wrote. "Respondent gave no indication that Count II was being abandoned when the court reviewed with counsel the proposed preliminary instructions (which included an instruction on the Count II charge), nor did she do so when those instructions were given to the jury orally and in writing. And immediately after the preliminary instructions were given to the jury, Respondent told the jury in her opening statement that '[a]t the end of the evidence . . . I will ask you to find this D guilty in what he is charged with, the four counts of child molesting.'"

Next, Respondent admitted she failed to disclose C.W.'s recantation to the defense, but she argued that Rule 3.8(d) did not require her to do so because it was merely impeachment evidence, which Rule 3.8(d) does not encompass. The Court disagreed, noting that Rule 3.8(d) requires timely disclosure of "all evidence or information known to the prosecutor that tends to negate the guilt of the accused" and that under the circumstances, the recantation was not impeachment evidence."..[I]n a case in which all remaining counts likewise were founded entirely upon reports made by D's two stepchildren, we find it very difficult to characterize direct evidence that the stepchildren's father successfully coached at least one of them to lie about what D had done as mere impeachment."

Finally, Court rejected Respondent's argument her conduct was not "prejudicial to the administration of justice" within the meaning of Rule 8.4(d). Respondent contended D was never actually at risk of conviction of Count II, notwithstanding its inclusion in the trial, because Respondent elicited no evidence to support that count. She also argued the trial court "overreacted" in entering judgment of acquittal on all four counts and instead should have taken less drastic remedial action. "Even assuming that the trial court had other options within its discretion to exercise, we are not inclined to shift culpability for the prejudicial effects of an attorney's misconduct onto the court forced

to take remedial action to address that misconduct." Court affirmed hearing officer's findings that Respondent violated Rules 3.8(a), 3.8(d) and 8.4(d), noting that prosecuting a charge known to lack probable cause and failing to disclose known information or evidence tending to negate a D's guilt "are among the most serious ethical violations a prosecutor could commit."

N. ETHICS

N.1. Prosecution

N.1.h. Conduct at trial (see D.15)

TITLE: Matter of Winkler & Goode
INDEX NO.: N.1.h.
CITE: (09-13-05), Ind., 834 N.E.2d 85
SUBJECT: Prosecutorial misconduct - taking notes from defense counsel's table
HOLDING: Ct. suspended prosecutor & her chief deputy for 120 & 60 days, respectively, for their parts in surreptitiously taking notes from defense counsel's table during a hearing & then denying they did so. By their conduct, respondents infringed upon the D's right to communicate freely with his counsel by improperly seizing his deposition notes, which he had shared with his attorney. This conduct is contrary to requirements of Indiana Prof. Cond. R. 4.4, which prohibits a lawyer from obtaining evidence by means that violate the rights of a third person. Respondents also violated PCR 4.1(a), which provides that a lawyer shall not make a false statement of material fact to a third person. Winkler directly misled the D by stating that she did not know where the missing notes were located, while Goode failed to inform the D he had taken the notes & stood by without revealing the deception. This same conduct also violates PCR 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Finally, respondents' conduct was prejudicial to the administration of justice in violation of PCR 8.4(d). Ct. found hearing officer's recommendation for punishment as to Goode appropriate, but added 30 days of suspension

TITLE: Matter of Smith

INDEX NO.: N.1.h.

CITE: (10/25/2016), 60 N.E.3d 1034 (Ind. 2016)

SUBJECT: Ethics - prosecutor's misconduct during trial was not prejudicial to administration of justice

HOLDING: Disciplinary Commission failed to meet its burden of proving by clear and convincing evidence that Respondent prosecutor violated Indiana Professional Conduct Rule 8.4(d) during retrial of child molesting charges. Commission alleged that Respondent engaged in conduct prejudicial to the administration of justice by: 1) improperly eliciting testimony from county sheriff about a confession in violation of order in limine; 2) by eliciting improper vouching testimony; and 3) by making statements during closing argument that were inaccurate and that placed undue emphasis on the improper vouching testimony. Court of Appeals' opinion in Bean v. State, 15 N.E.3d 12 (Ind. Ct. App 2014), that improper vouching and prosecutorial misconduct cumulatively constituted fundamental error, is not dispositive of this disciplinary matter. There was a material difference between written transcript and audio recording of Respondent's closing argument.

RELATED CASES: Matter of Keiffner, 79 N.E.3d 903 (Ind. 2017)

TITLE: Timberlake v. State
INDEX NO.: N.1.h.
CITE: (12-30-97), Ind., 690 N.E.2d 243
SUBJECT: Prosecution - Conduct at trial; using witness who gives contradictory testimony
HOLDING: While knowing use of perjured testimony may constitute prosecutorial misconduct, contradictory or inconsistent testimony by witness does not constitute perjury. Therefore, use of such testimony will not support prosecutorial misconduct claim. Here, prosecutor's use of testimony by witnesses who had given inconsistent or contradictory statements did not constitute prosecutorial misconduct. Nothing indicated that prosecutor had knowingly used false testimony, & use of such testimony did not place D in grave peril, as only witness whose trial testimony was not corroborated by others was thoroughly discredited as witness through cross-examination. Held, judgment affirmed.

RELATED CASES: Baxter, 727 N.E.2d 429 (where State did not know what exactly happened night of crime, State could not know that witness was lying).

N. ETHICS

N.1. Prosecution

N.1.j. Other

TITLE: Matter of Barce
INDEX NO.: N.1.j.
CITE: (09-30-10), 934 N.E.2d 732 (Ind. 2010)
SUBJECT: Prosecutor's unauthorized practice of law
HOLDING: After closing his private law practice to become full-time prosecutor, Respondent signed an affidavit of inactivity, which placed his law license on inactive status. Defense counsel in a case Respondent was prosecuting pointed out minutes before a jury trial was to commence that his law license was inactive. Promptly thereafter, Respondent placed his license on active status, self-reported the violation to the Disciplinary Commission and offered to pay the difference between the reduced fees he paid and active status fees for years he was on inactive status. Court found that Respondent violated Professional Conduct Rule 5.5(a)(engaging in unauthorized practice of law) and 8.4(d)(engaging in conduct prejudicial to the administration of justice). Majority of Court concluded that public reprimand was appropriate sanction for Respondent's misconduct. Shepard, C.J., joined by Rucker, J., dissenting, believe that 30-day suspension is warranted, conditioned on paying both back registration fees and reimbursing costs of convening jury that had to be sent home when his violation was brought to light.

TITLE: Matter of Cooper

INDEX NO.: N.1.j.

CITE: (02-03-21), 161 N.E.3d 362 (Ind. 2021)

SUBJECT: Four-year suspension without automatic reinstatement for long-serving elected prosecutor convicted of domestic battery and confinement

HOLDING: In 2019, Respondent pleaded guilty to criminal confinement, indentity deception, and official misconduct as Level 6 felonies. The charges stemmed from a domestic dispute with Respondent's then-fiancee. The hearing officer recommended disbarment, citing a prior reprimand for critical comments Respondent made about a judge's ruling in a case he had prosecuted and that the prior misconduct did not prompt Respondent to address his underlying concerns of alcohol use disorder and anger management issues. Indiana Supreme Court stopped short of disbarment, instead issuing a four-year suspension without automatic reinstatement given fact Respondent accepted responsibility for his deplorable acts and has taken meaningful and substantial steps to address his alcohol use disorder and anger management issues. "While these after-the-fact measures do not mitigate the misconduct itself, which was reprehensible, they do point to Respondent’s potential for rehabilitation and narrowly persuade us that the door to Respondent’s legal career should not be permanently and irrevocably closed."

TITLE: Matter of Neary
INDEX NO.: N.1.j.
CITE: (11/6/2017), 84 N.E.3d 1194 (Ind. 2017)
SUBJECT: Deputy prosecutor suspended 4 years for eavesdropping
HOLDING: Respondent, a LaPorte County deputy prosecutor who listened in on privileged communications between defense attorneys and their clients, has been suspended from the practice of law for four years without automatic reinstatement. Respondent and several detectives used remote audio and video feeds to listen in on a confidential communication between a homicide suspect and his attorney in an interview room at the Michigan City police department on March 14, 2014. Respondent also separately viewed a video recording of a 2012 "defense strategy" conversation between another homicide suspect and his attorney that inadvertently was taped in a police interview room during an interrogation break.

Based on these actions, Court affirmed hearing officer's finding that Respondent violated Indiana Rules of Professional Conduct 4.4(a)(using methods of obtaining evidence that violate the rights of a third person) and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice). "Respondent's conduct in both cases fundamentally infringed on privileged attorney-client communications and, at an absolute minimum, has caused significant delays and evidentiary hurdles in the prosecutions of (the suspects), even assuming they still can be prosecuted at all." Court declined Disciplinary Commission’s request to disbar Respondent, given fact he has no prior discipline, he self-reported his conduct to the Commission, and several persons testified to his good reputation in the community.

TITLE: Matter of Walker
INDEX NO.: N.1.j.
CITE: (8-21-92), Ind., 597 N.E.2d 1271
SUBJECT: Prosecution - Held to higher standard of conduct
HOLDING: D's position as deputy prosecutor requires even higher scrutiny of his conduct. As prosecuting attorney, D engaged in conduct which reflected adversely upon his fitness as lawyer & was prejudicial to administration of justice. Physically assaulting female companion & her daughter during term as prosecutor warranted six-month suspension from practice of law. D's violent outburst occurred after D was asked to & expected to leave victim's home. Although not charged or prosecuted, D's crime had two very real victims. D's position as official with duty of enforcing very laws he violated further exacerbated his actions. As part-time prosecutor, D inevitably encountered domestic assaults, & this incident called into question his ability to zealously prosecute or to effectively work with victims of such crimes. As part-time practitioner, D's effectiveness with his own clients or with adversaries in situations involving issues of domestic violence is compromised by his own contribution to this escalating societal problem. In both of his capacities, Ct. believed perception of his fitness was tainted. Held, D suspended for six months.

N. ETHICS

N.2. Defense

TITLE: In re Geller
INDEX NO.: N.2.
CITE: (5/16/2014), 9 N.E.3d 643 (Ind. 2014)
SUBJECT: Disbarment for multiple misconduct violations
HOLDING: Court disbarred Respondent for multiple acts of misconduct, including dishonesty to a court and to the Disciplinary Commission, improper ex parte communication with a judge, improper communication with a represented party, pervasive neglect of vulnerable clients, disorderly conduct in a judicial facility by instigating a physical altercation with former client, and conduct prejudicial to the administration of justice. Respondent had been suspended for one year for three financial violations and threatening to reveal a client's conviction for child molesting to fellow inmates in retaliation when the client threatened to file a grievance. Disbarment was warranted in light of Respondent's history of misconduct, his inability to manage his anger, his unsuccessful prior attempt at rehabilitation, his inability to appreciate the wrongfulness of his current misconduct, and his confrontational attitude toward those involved in the disciplinary process. Held, Respondent disbarred for 12 violations of Rules of Professional misconduct; Massa, J. concurring in part and dissenting in part, would impose a three-year suspension without automatic reinstatement.

TITLE: Matter of v. Baker

INDEX NO.: N.2.

CITE: (10-21-11), 955 N.E.2d 729 (Ind. 2011)

SUBJECT: Multiple ethical offenses demonstrated "gross disregard" for Professional Rules of Conduct

HOLDING: In 2006, J.M. was indicted for a murder that occurred in 2000, and a public defender was appointed to represent him. Without invitation from J.M. or anyone else, Respondent visited J.M. in jail and agreed to represent him without charge. During his opening statement, Respondent stated that search dogs were sent out shortly after the victim's disappearance and one dog "alerted" at the home of B.H., but the dog was called off. These statements were false and Respondent should have known that no evidence would be admitted at trial to support them. J.M. was found guilty of murder and sentenced to 65 years. Respondent filed a notice that he would be providing pro bono representation for J.M. in his appeal. Tr. Ct. issued an order finding J.M. indigent for purposes of paying the costs of a transcript for the appeal. However, Respondent never requested funds for copying and binding the appellant's brief and appendix. Instead, he told J.M.'s mother that technically they could probably request the Tr. Ct. to pay these costs, but the court would not pay because of extreme criticism of the judge and prosecutor in the appellate brief. Respondent sent J.M.'s mother a copy of appellant's brief that was not file-stamped and expressed his hope that family or friends would pay the costs to the printer. He later informed J.M.'s mother that the brief would be refiled to correct grammatical errors, told her that the copying expenses needed to be paid, and asked for her payment of at least $1,500. J.M.'s mother was unaware that original brief had already been filed and feared that failure to pay the costs of printing and binding would result in brief not being filed. She therefore sold some personal items and sent Respondent a check for $1,500.

Court held that by his conduct, Respondent violated Ind. Professional Conduct Rule 1.4(b), failure to explain matter to extent reasonably necessary to permit client to make informed decisions; Rule 1.5(b), making an agreement for, charging, or collecting an unreasonable amount for expenses; Rule 3.4(e), alluding to any matter in trial that lawyer does not reasonably believe will be supported by admissible evidence; Rule 4.1(a), knowingly making a false statement of material fact or of law to a third person in course of representing a client, and Rule 7.3(a), improperly soliciting employment in-person from a person with whom the lawyer has no prior relationship when a significant motive is lawyer's pecuniary gain. Court suspended Respondent for six months, without automatic reinstatement.

TITLE: Matter of Drook
INDEX NO.: N.2.
CITE: (06-29-11), 949 N.E.2d 354 (Ind. 2011)
SUBJECT: Ethics - trafficking candy and written material with inmate
HOLDING: Respondent went to 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 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 pre-trial diversion agreement under which Respondent admitted the allegations. Parties agree that Respondent violated Indiana Professional Conduct Rule 8.4(b), which prohibits a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer. Respondent's prior discipline was cited as fact in aggravation. See Matter of Drook, 855 N.E.2d 989 (Ind. 2006). Held, 30-day suspension with automatic reinstatement.

RELATED CASES: Jones, 992 N.E.2d 669 (Ind. 2013) (Respondent committed misconduct by delivering letters and other items to incarcerated client and giving untruthful response to Disciplinary Commission).

TITLE: Matter of James

INDEX NO.: N.2.

CITE: (02-20-07), Ind., 861 N.E.2d 703

SUBJECT: Ethics - false statement of fact to Ct.

HOLDING: At sentencing hearing for client convicted of operating while intoxicated (OWI), Respondent told judge that five of client's prior convictions had been expunged or vacated in Kentucky, in an attempt to avoid a limitation on trial Ct.'s ability to suspend the sentence. When called upon to produce documentation supporting his assertion, Respondent was unable to do so, either at the hearing or afterward. Commission alleged that Respondent knew at all times that his representation to the Ct. about the Kentucky convictions was false. Respondent admitted that his statement was erroneous, but he contended that he had confused the client's case with the similar case of another client whose out-of-state convictions had been expunged or vacated. Ct. found that Respondent violated Professional Conduct Rule 3.3(a)(1), which prohibits an attorney from knowingly making a false statement of fact to a Ct. For this professional misconduct, Ct. suspended Respondent from practice of law for ninety days, with automatic reinstatement subject to conditions of Admission & Discipline Rule 23, section 4(c).

TITLE: Matter of Krasnoff
INDEX NO.: N.2.
CITE: (7/20/2017), 78 N.E.3d 657 (Ind. 2017)
SUBJECT: 180-day suspension for unreasonable fees
HOLDING: The Supreme Court suspended Respondent's license to practice law for at least 180 days without automatic reinstatement because he violated, inter alia, Rule of Professional Conduct 1.5(a) by charging unreasonable fees related to two lawsuits he for Client against his employer, General Motors ("GM"). Respondent used his representation of Client to extract fees at every opportunity, and he did so to Client's detriment. Respondent charged Client $10,000 for the first GM Case, which settled for $3,000 and left Client indebted to Respondent. In the second GM Case, Respondent charged a $5,000 retainer, which he promised to (but never did) credit against an eventual recovery. He charged another $8,000 for work that was never carried out; he charged another $10,000 to resist giving GM discovery that GM already had; he negotiated a settlement agreement that effectively doubled the contingent fee previously agreed upon, and then, after collecting his own share of the settlement, made only token efforts to collect Client's share. Between the two cases, Respondent collected over $50,000 for himself and nothing for Client, and Respondent claims Client still owes him money.

TITLE: Matter of Litz
INDEX NO.: N.2.
CITE: (12-30-99), Ind., 721 N.E.2d 258
SUBJECT: Ethics - extrajudicial statements
HOLDING: Defense counsel's statement to newspapers violated Indiana Rules of Professional Conduct because it created substantial likelihood of materially prejudicing retrial of his client's case. Lawyer shall not make extrajudicial statement that reasonable person would expect to be disseminated by means of public communication if lawyer knows or reasonably should know that it will have substantial likelihood of materially prejudicing adjudicative proceeding. Ind. R. Prof. Conduct 3.6(a). Here, defense counsel wrote letter to local newspapers which stated that D had been in jail for eighteen months for crime she did not commit, that she passed lie detector test, & that prosecutor's decision to retry case was abominal. Such statements created environment where fair trial was much less likely to occur & set stage for D's motion for change of venue based on pretrial publicity. Because defense counsel has not previously been subject to disciplinary proceeding, that he cooperated with Commission & he continued to represent client through resolution of her case, appropriate sanction was public reprimand. **Note:** See Gentile v. Sate Bar of Nevada, 111 S.Ct. 2720 (1991) (rule containing identical "substantial likelihood" standard held void for vagueness as applied by state Ct.).

RELATED CASES: Muex, App., 800 N.E.2d 249 (D failed to show prosecutorial misconduct from prosecutor's comments about DNA evidence to media prior to trial. DNA evidence was included in Affidavit of Probable Cause & thus were not "extrajudicial." As this information was part of a public record, Ct. rejected D's claims that prosecutor violated Prof. Cond. R. 3.6 or 3.8 for making extrajudicial statements prejudicing judicial proceedings. Prof. Cond. R. 3.6(c) provides that a lawyer may state information contained in public record).

TITLE: Matter of Mendenhall
INDEX NO.: N.2.
CITE: (01-12-12), 959 N.E.2d 254 (Ind. 2012)
SUBJECT: Disbarment for attempted murder
HOLDING: An attorney who commits attempted murder of another attorney engages in professional misconduct that "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." See Professional Conduct Rule 8.4(b). Respondent lured his victim to a meeting using a false name, ostensibly to discuss sale of some property. Respondent then attempted to shoot victim, but the gun malfunctioned. He then beat the victim and took his wallet before running away. Jury in criminal case rejected Respondent's insanity defense and he was convicted of attempted murder, aggravated battery, armed robbery, criminal confinement, and resisting law enforcement. In disciplinary case, Respondent did not formally assert mental illness as a mitigating factor, let alone provide any information regarding his mental condition, either at the time of the incident in question or at the present time. Court found permanent disbarment is the appropriate sanction.

TITLE: Matter of Page
INDEX NO.: N.2.
CITE: (8-30-02), Ind., 774 N.E.2d 49
SUBJECT: Ethics - failing to take action to correct untruthful testimony
HOLDING: Indiana Professional Conduct Rule 3.3(a)(2) provides that a lawyer shall not fail to disclose material fact to tribunal where disclosure is necessary to avoid assisting criminal or fraudulent act against tribunal by client. Respondent in this case violated that rule by remaining silent & taking no action when, in open Ct. with his client, during hearing on client's petition for probationary license, client testified that he had not driven a car in nine years when in fact client had, a statement respondent had reason to believe was untruthful. Ct. recognized tension between duty to keep client confidence under Prof.Cond.R. 1.6 & obligation to disclose under Prof.Cond.R. 3.3(a)(2). In some circumstances, resignation is appropriate step. However, doing nothing, as respondent did here, is not an acceptable action. Ct. concluded that public reprimand & admonishment was appropriate sanction for misconduct in this case.

TITLE: Matter of Rathburn
INDEX NO: N.2.
CITE: (12-21-06), Ind, 858 N.E.2d 636
SUBJECT: Ethics - failure to turn over clients' files & refund unearned fees
HOLDING: Respondent failed to comply with Ct. App.' order to turn over client's file to assist new attorney in preparing client's appeal, & eventually purged himself of contempt by turning over the file. In another case, Respondent turned over a clients' file in response to S.Ct.'s Order to Show Cause, but failed to refund any unearned fees to client & failed to communicate to client that he needed additional funds for transcripts in order to pursue case. In a habitual traffic violator case, client paid Respondent $4,000 out of an agreed retainer of $16,000. Respondent's fee agreement provided that client would not receive a refund of any unused portion of the retainer. Aside from entering appearance & filing discovery requests, Respondent took no other substantive steps to advance client's interests. Respondent failed to respond to client's attempts to make contact.

Ct. held that by his conduct, Respondent violated Ind. Professional Conduct Rule 1.3, which requires a lawyer to act with reasonable diligence & promptness; Rule 1.4(a), which requires a lawyer to keep a client reasonably informed about status of a matter & promptly comply with reasonable requests for information; Rule 1.4(b), which requires a lawyer to explain a matter to extent reasonably necessary to permit client to make informed decisions; Rule 1.5(a), which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses; Rule 1.16(d), which requires a lawyer to surrender client files & return unearned fees upon termination of representation; Rule 3.4(C), which requires a lawyer to obey an obligation under the rules of a tribunal; & Rule 8.1(b), which prohibits a lawyer from knowingly failing to respond to a lawful demand for information from a disciplinary authority. Ct. suspended Respondent from practice of law for eighteen months, after which he may petition for reinstatement.

RELATED CASES: In re Snulligan, 987 N.E.2d 1065 (Ind. 2013) (Respondent violated Rule 1.16(d) by failing to refund the unearned part of the $6,000 fee she collected after being terminated a month later, which Ct. found to be $5,000 based on hearing officer's finding); Matter of Earhart, 957 N.E.2d 611 (Ind. 2011) (client's death soon after retaining Respondent clearly rendered at least a portion of the client's $10,000 payment unearned, thus he violated Rule 1.5(a) and 1.16(d)); Anonymous, 914 N.E.2d 265 (private reprimand for attorney who admitted to failing to surrender client=s papers, in violation of Rule 1.16(d)); Whitehead, 861 N.E.2d 702 (respondent violated Professional Conduct Rule 1.5(a), which prohibits making an agreement for, charging, or collecting an unreasonable fee; & Rule 1.16(d), which requires an attorney to refund promptly unearned fees upon termination of representation).

TITLE: Matter of Steele
INDEX NO.: N.2.
CITE: (12/1/2015), 45 N.E.3d 777 (Ind. 2015)
SUBJECT: Respondent disbarred for multiple, serious misconduct
HOLDING: Court disbarred Respondent "without hesitation" for violating Rules of Professsional Conduct by stealing approximately $150,000 from his clients, disclosing client confidences for purposes of both retaliation and amusement, threatening and intimidating his office staff, pervasive dishonesty, obstructing the Commission's investigation, and engaging in a pattern of conduct prejudicial to the administration of justice.

One Count involved Respondent actively manipulating his profile and reviews on Avvo.com, a legal marketing website, by monetarily incentivizing positive reviews and punishing clients who write negative reviews by publicly exposing confidential information and numerous false statements about them. Compounding this misconduct, on at least one occasion Respondent was mistaken about the identity of a negative reviewer, prompting him to expose confidential information of a former client other than the one who had posted the review.

TITLE: Matter of Steele

INDEX NO.: N.2.

CITE: (8/6/2021), 171 N.E.3d 998 (Ind. 2021)

SUBJECT: Professional misconduct - demanding disciplinary complaints be withdrawn as condition of settlement

HOLDING: Respondent committed attorney misconduct by making an improper demand that disciplinary grievances filed against him be withdrawn as a condition for settlement in a civil matter. The order suspending Respondent stems back to his 2018 breakup with a former girlfriend, who had obtained a protective order against him before Respondent sued her for defamation and other counts. Respondent was subsequently charged with felony stalking and misdemeanor intimidation and harassment counts, which were dismissed in 2019. Respondent's ex-girlfriend and her sister also filed disciplinary grievances against him, which were also eventually dismissed.

Prior to the dismissals, Respondent sent an email to opposing counsel in the defamation case, demanding, among other things, that the disciplinary grievances filed against him be withdrawn as a condition precedent to settlement discussions. The Supreme Court reiterated that a coercive threat to file a grievance with the Disciplinary Commission, or (as here) a quid pro quo demand that a grievance be withdrawn, is prejudicial to the administration of justice and violates Rule 8.4(d), even when those grievances are meritless. While Respondent's demand was not actually prejudicial to the outcome of the underlying litigation, and while "having to deal with meritless disciplinary grievances certainly is understandable," the Court concluded that any attempt to interfere with the investigatory process required by Rule 23 or use the disciplinary process to leverage more favorable settlement terms is "forbidden." Held, Respondent violated Rule 8.4(d) as charged and is suspended from the practice of law in Indiana for 30 days with automatic reinstatement.

TITLE: Matter of Thonert
INDEX NO.: N.2.
CITE: (8-22-00), Ind., 733 N.E.2d 932
SUBJECT: Ethics - failure to disclose adverse legal authority
HOLDING: Attorney's failure to disclose to client & to appellate tribunal controlling authority known to him, not disclosed by opposing counsel, that was directly adverse to his client's position warranted public reprimand & admonishment. In his appellate brief filed on behalf of client, attorney failed to cite to Indiana S.Ct. case on which attorney had served as counsel of record. Case was adverse to arguments that attorney offered on client's appeal. Attorney violated Indiana Professional Conduct Rule 3.3(a)(3), which provides that lawyer shall not knowingly fail to disclose to tribunal legal authority in controlling jurisdiction known to lawyer to be directly adverse to position of client & not disclosed by opposing counsel.

By failing to advise client of Indiana S.Ct. ruling that was adverse to legal arguments contemplated for his client's case on appeal, & instead choosing only to advise client of earlier appellate decision favorable to his position, attorney effectively divested his client of opportunity to assess intelligently legal environment in which his case would be argued & to make informed decisions regarding whether to go forward with it. This misconduct violated Prof.Cond.R. 1.4(b), which provides that lawyer shall explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation.

TITLE: Matter of Webb
INDEX NO.: N.2.
CITE: (09-28-06), Ind., 854 N.E.2d 821
SUBJECT: Attorney misconduct - misuse of funds; false statements
HOLDING: In criminal case, Respondent requested & received from client's family $3,000 to hire a DNA expert. Respondent did not deposit these funds in his trust account & did not hire an expert but told client's family that an expert had been hired. Later in proceedings, Respondent obtained a continuance of scheduled trial claiming "D's retained expert for DNA analysis" recommended deposing certain State Police Lab personnel. Respondent testified that at the time, based upon recommendation of his consultant/DNA expert he intended to depose the Lab personnel, but later changed his strategy. Respondent did not inform his client until start of trial that no DNA expert had been retained. Respondent later informed prosecutor & client's post-conviction counsel that an expert had not been retained because family could not afford to hire an expert. During trial, client's family paid an additional $1,000 to Respondent that was not credited to the client's account. Finally, Respondent stated to Commission that there never was an agreement to use the $3,000 for hiring a DNA expert.

Respondent violated Ind. Professional Conduct Rule 1.15(a), which requires a lawyer to hold client funds entrusted to the lawyer separate from lawyer's own property; Rule 8.1(a), which prohibits a lawyer from making a false statement of material fact in connection with a disciplinary matter; Rule 8.4(b), which prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; & Rule 1.4(b), which requires a lawyer to explain a matter to the extent reasonably necessary to permit client to make informed decisions regarding the representation. Court suspended Respondent from practice of law for twelve months, after which Respondent may petition Court for reinstatement.

N. ETHICS

N.2. Defense

N.2.a. General Duties to Client

TITLE: Matter of Canada
INDEX NO: N.2.a.
CITE: (4/26/2013), 968 N.E.2d 254 (Ind. 2013)
SUBJECT: Ethics - Commission failed to prove unreasonable/unearned fee allegations
HOLDING: Disciplinary Commission failed to meet its burden of proving by clear and convincing evidence that Respondent violated Indiana Professional Conduct Rule 1.5(a), making an agreement for, charging or collecting an unreasonable fee; or Rule 1.16(d), failure to refund fees that have not been earned. Charging $10,000 to represent D charged with Class A felony conspiracy to commit dealing in methamphetamine was a permissible flat fee (notwithstanding the fee agreement's one sentence mentioning possible preclusion of other representation and guaranty of priority of access, which would have been more relevant if the fee were a general retainer). Commission likewise failed to prove that Respondent improperly collected and failed to refund an unearned part of the flat fee. Client made it clear from outset that he wished to resolve the case through a plea agreement. Respondent spent 20 hours on the case and negotiated a plea agreement that Client initially viewed with favor. Client then changed his mind and hired replacement counsel to negotiate a somewhat different plea agreement. Held, judgment entered for Respondent.

TITLE: Matter of Clifton
INDEX NO.: N.2.a.
CITE: (12-08-11), 961 N.E.2d 18 (Ind. 2011)
SUBJECT: Ethics - failure to provide competent appellate representation
HOLDING: Respondent indicated to Allen County Public Defender's Office that he was available to handle criminal appeals. He was at the time very inexperienced in appellate law and did not undertake a study of appellate law that would enable him to handle criminal appeals. Over the course of about one year, while representing seven criminal Ds in their appeals, Respondent committed numerous violations of applicable appellate rules, characterized by Court of Appeals as substantial, glaring, and flagrant. In one case, Respondent told his client that the case could not be appealed because he had entered into a plea agreement when, in fact, the appeal had been dismissed for noncompliance with the appellate rules. He failed to heed warnings in Court of Appeals' decisions pointing out his deficiencies and caused additional, unnecessary work for the Court of Appeals and Indiana Attorney General. Respondent violated Indiana Professional Conduct Rule 1.1, failure to provide competent representation; 1.4(a), failure to keep client reasonably informed about status of matter; 1.4(b), failure to explain matter to extent reasonably necessary to permit client to make informed decisions; 3.4(c), knowingly disobeying an obligation under the rules of a tribunal; and 8.4(b), engaging in conduct prejudicial to administration of justice. Court approved parties' agreed discipline of 180-day suspension with automatic reinstatement.

TITLE: Matter of Ellison
INDEX NO.: N.2.a.
CITE: (12/20/2017), 87 N.E.3d 460 (Ind. 2017)
SUBJECT: 90-day suspension for neglecting an appeal and lying to cover up neglect
HOLDING: In a Per Curiam opinion, Court suspended Repondent for 90 days without automatic reinstatement for failing to timely file an appellant's brief for a client seeking an expungement and thereafter engaging in a "very troubling" pattern of dishonesty in an effort to cover up his neglect. Respondent was a supervisor at a pro bono expungement clinic sponsored by Ivy Tech Community College, but had no experience in expungement appeals. He agreed to represent a client in an appeal of the denial of her petition to expunge a misdemeanor theft conviction and filed notice of the appeal in September 2015. Notice of completion of the transcript was filed in November 2015, but Respondent failed to subsequently file an appellant's brief that was due the following December. The client began emailing Responent to ask about the status of her appeal, and he falsely implied the brief had been filed in two of his replies. In March 2016, the online appellate docket indicated the appeal would be dismissed for failure to file an appellant's brief. When the client emailed Respondent demanding an explanation, he chose not to respond, but rather moved in the Indiana Court of Appeals for leave to file a belated brief, falsely claiming he had appended the brief to the transcript and notice of appeal, but apparently did not attach it. Respondent emailed a copy of the tendered brief to his client, who was able to discern that it had not been accepted for filing. The appeal was then dismissed with prejudice, though Respondent failed to inform his client of the dismissal or of any available options. The client eventually filed a grievance with the Disciplinary Commission, which Respondent responded to by giving knowingly false explanations of his conduct on two occasions.

Court affirmed hearing officer's findings that Respondent violated the following Professional Conduct Rules: 1.1 (failing to provide competent representation); 1.3 (failing to act with reasonable diligence and promptness); 1.4(a)(3) (failing to keep client reasonably informed); 1.4(b) (failing to explain matter to the extent reasonably necessary to permit a client to make informed decisions); 3.3(a)(1) (knowingly making a false statement of fact to a tribunal); 8.1(a) (knowingly making false statement of material fact to Disciplinary Commission); and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

TITLE: Matter of Freeman
INDEX NO.: N.2.a.
CITE: (10-17-05), Ind., 835 N.E.2d 494
SUBJECT: Ethics - pattern of neglecting clients
HOLDING: Respondent was suspended from practice of law for twelve months for: 1) failing to return unearned fees & withdrawing from case without notice to client or protecting client's interest in violation of Prof.Cond.R. 1.16(d); 2) failing to communicate with clients or explain matters such that clients could make informed decisions in violation of Rule 1.4(a) & (b); 3) violating duty to abide by client's decisions concerning objectives of representation as set forth in Rule 1.2(a); 4) seeking to limit his liability for malpractice in violation of Rule 1.8(h); 5) filing of a verified pleading that had not in fact been verified or authorized by client in violation of Rule 3.3(a) & 8.4(d); & 6) threatening to "make trouble" for incarcerated client if he sent Respondent another letter in violation of Rule8.4(d). Respondent's overall conduct demonstrated a lack of competence & diligence that is contrary to requirements of Prof.Cond.R. 1.1 & 1.3.

RELATED CASES: Schrems, 856 N.E.2d 1201 (Respondent violated Ind. Professional Conduct Rule 1.3, which requires a lawyer to act with reasonable diligence & promptness; Prof. Cond.R. 1.4(a), which requires a lawyer to keep a client reasonably informed about the status of a matter & promptly comply with reasonable requests for information; & Rule 1.4(b), which requires lawyer to explain a matter to extent reasonably necessary to permit client to make informed decisions).

TITLE: Matter of Hammerle
INDEX NO.: N.2.a.
CITE: (09-12-11), 952 N.E.2d 751 (Ind. 2011)
SUBJECT: Professional responsibility - fee agreement changes
HOLDING: Respondent and client entered into an agreement under which Respondent would represent client for a "retainer/flat fee" of $35,000, plus an hourly fee of $250 if trial lasted more than two days. After nearly seven months of work on the case, Respondent had concluded that client was certain to be convicted after a lengthy trial and anticipated difficulty collecting the balance of his fee from an incarcerated client. Parties amended their fee agreement and agreed that client would pay Respondent an additional flat fee of $20,000 and, in exchange, Respondent would drop billing by the hour for all work done after five days of trial. Respondent believed the ultimate fee under this modification would be more beneficial to client given everyone's anticipation of a lengthy trial, but Respondent now recognizes he should have considered the possibility that the fee modification would be more beneficial to Respondent if the case could be resolved before trial. Respondent did not advise client to consult with another attorney about the advisability of amending the fee agreement, and he did not obtain client's written consent to modify the original agreement.

Parties agree that Respondent violated Professional Conduct Rule 1.5(a) for charging fee in excess of original fee agreement, and Rule 1.8(a) for entering into a fee agreement modification with a client without giving that client a reasonable opportunity to seek independent counsel and obtaining the client's written consent to the transaction. Commission does not contend that the total fee client paid to Respondent would have been unreasonable if Respondent had complied with Rule 1.8(a) in modifying the fee agreement. Held, public reprimand.

TITLE: Matter of Hicks
INDEX NO.: N.2.a.
CITE: (4-8-03), Ind., 786 N.E.2d 272
SUBJECT: Duty to client - failing to advise client of disposition of appeal
HOLDING: Respondent, as public defender, failed to advise client of case's disposition after Ct. App. affirmed conviction. When client called respondent's office three months after appellate decision, respondent's legal assistant advised client that Ct. App.' decision had apparently been forwarded to Allen County public defender's office. In fact, legal assistant did not know if that was true, & in fact Ct. App. sent copy of decision to respondent's office. Later, when D asked respondent's legal assistant for copies of relevant file materials, legal assistant advised client that office no longer housed files, when if fact it did. Ct. held that respondent violated Ind.Professional Conduct Rule 1.4(b), which requires lawyer to explain matters to client to extent reasonably necessary to permit client to make informed decisions regarding representation. He also violated Prof.Conduct Rule 5.3(b), which provides that lawyer shall make reasonable efforts to ensure that conduct of non-lawyer under direct supervisory control of lawyer is compatible with obligations of lawyer. Held, 60-day suspension stayed on conditions of 18-month period of probation.

RELATED CASES: Brown, 973 N.E.2d 562 (Ind. 2012) (Ct. imposed a 30-day suspension with automatic reinstatement for Respondent's 20-year pattern of misconduct relating to neglect of criminal appeal); Roberts, 842 N.E.2d 1293 (Respondent, while serving as a public defender, failed to timely notify two of his clients that the Ct. App. had affirmed the clients' convictions. As a result, the clients' right to petition for transfer was lost. By his conduct, Respondent violated Ind. Professional Conduct Rule 1.3, which requires a lawyer to act with reasonable diligence & promptness, & Prof. Cond.R. 1.4(b)); Kiefer, 814 N.E.2d 250.

TITLE: Matter of Kinnard
INDEX NO.: N.2.a.
CITE: (09-07-07), Ind., 873 N.E.2d 58
SUBJECT: Ethics - failure to appear at Ct. hearing & obey Ct. orders
HOLDING: After discovering that client was incarcerated in a different county for unrelated probation violation, Respondent twice failed to appear at pretrial conferences. Tr. Ct. issued a show cause order directed at Respondent, who failed to appear on three hearing dates. Respondent violated Indiana Professional Conduct Rule 1.3 (failure to act with reasonable diligence & promptness; Rule 1.4(a) (failure to keep client reasonably informed); 1.4(b) (failure to explain matter to extent reasonably necessary to permit client to make informed decisions); 3.2 (failure to expedite litigation consistent with interests of client); 3.4(c)(knowingly disobeying an obligation under rules of a tribunal) & 8.4(d)(engaging in conduct prejudicial to administration of justice). Although Respondent's inexperience at the time is a fact in mitigation, Ct. noted that "even an inexperienced attorney should appreciate the importance of appearing at Ct. hearings & obeying Ct. orders." In re Shull, 741 N.E.2d 723 (Ind. 2001). For Respondent's misconduct, Ct. imposed public reprimand.

TITLE: Matter of Maternowski & Dillon

INDEX NO.: N.2.a.

CITE: (12-13-96), Ind., 674 N.E.2d 1287

SUBJECT: Duty to client - conflict of interest; policy of excluding clients who cooperate with government

HOLDING: Criminal defense lawyers with policy against their client's cooperating with government cannot accept payments from third parties whom they have reason to believe may be accomplices without breaching the duty of loyalty & independence they owe their client. Here, Respondents violated Indiana Professional Conduct Rule 1.7(b), which prohibits lawyer from representing client if representation may be materially limited by lawyer's responsibilities to third person or lawyer's own interests, & Rule 1.8(f), which prohibits lawyer from accepting compensation from person other than client being represented. Both Rules contain exception where client consents after consultation. Respondents had policy of refusing to represent clients who indicate willingness to cooperate with government. Respondents continued to represent criminal D who vacillated greatly in deciding whether to cooperate with government & whose attorney fees were being paid by suspected accomplices. Ct. found that Respondents' policy conflicted with duty to objectively advise client once client expressed interest in cooperating with government, & Respondents had duty to withdraw from representation. Client's consent to continued representation despite conflict is invalid where disinterested lawyer would conclude that client should not agree to representation under circumstances. Matter of Kern, 555 N.E.2d 479. Ct. further found that Respondents neglected duty to client to disclose inherent conflict of interest where there was reasonable possibility that attorney fees were being paid by suspected accomplices who could be implicated if client cooperated with government. Convergence of non-cooperation policy & reasonable possibility that attorneys' fees were being paid by accomplices impermissibly conflicted with independence of Respondents' professional judgment. By accepting payment from third parties under reasonable possibility that said parties were accomplices, & at same time counseling against cooperation with government, Respondents violated Prof. Cond. Rules 1.7(b) & 1.8(f). Held, findings of Indiana S.Ct. Disciplinary Commission affirmed & Respondents suspended from practice of law for 30 days.

TITLE: Matter of Rader
INDEX NO.: N.2.a.
CITE: (03-13-09), 907 N.E.2d 967 (Ind. 2009)
SUBJECT: Ethics - failure to communicate with client
HOLDING: Respondent represented a client in a post-conviction relief proceeding. At a hearing on March 16, 2005, DNA evidence was introduced in support of client's assertion that he was entitled to a new trial on charge of rape for which he was incarcerated. After the hearing, the client and his family repeatedly tried to contact Respondent about expediting a ruling, but Respondent failed to communicate with client or his family. Respondent did, however, send two email inquiries to magistrate who conducted the hearing. Client's petition was finally granted on March 8, 2007, and he was released from prison the following month. It is not known whether consultation between Respondent and client would have resulted in an earlier decision and release. Parties agreed that Respondent violated Indiana Professional Conduct Rule 1.4(a)(2), which requires lawyer to consult reasonably with a client about means by which client's objectives are to be accomplished.

For Respondent's misconduct, majority of Court concluded that appropriate sanction was public reprimand. Sullivan, J., dissenting, would reject conditional agreement and believes public reprimand is insufficient; Shepard, C.J., dissenting from majority's conclusion that there is no way to know whether Respondent's failure to communicate with her client and his family would have hastened a ruling and release, and believes a short period of suspension is warranted.

TITLE: Nolan v. Forste
INDEX NO.: N.2.a.
CITE: (5-1-69), Ind., 247 N.E.2d 60
SUBJECT: Defense - General duties to client; misconduct
HOLDING: Conversion of money to which clients were legally entitled & failure & refusal to turn over sum or any part thereof to clients warranted disbarment. Moral turpitude is controlling factor in any disciplinary action to be taken by S.Ct. "Being of good moral character" necessarily implies that attorney will conform to moral standards of his profession as provided by law. Held, attorney disbarred.

RELATED CASES: Matter of Brewer, 110 N.E.3d 1141 (Ind. 2018) (3-year suspension without automatic reinstatement for neglecting client's cases, failing to appear at show cause hearings, failing to withdraw from cases when Respondent's cocaine abuse rendered her unable to assist her clients, committing a crime that reflects adversely on her fitness as a lawyer, and failing to cooperate with the disciplinary process); Matter of Lewis, 445 N.E.2d 987 (neglecting clients, making misrepresentations to Tr. Ct., suggesting inappropriate conduct if elected to public office & subjecting client to accusations of fraud warrants disbarment). Matter of Campbell, 546 N.E.2d 821 (misconduct, including misappropriation of client's funds, warranted three-year suspension). Matter of Moerlein, 520 N.E.2d 1275 (engaging in conflict of interest & revealing client's confidences & secrets by using such to client's disadvantage warrants public reprimand).

TITLE: Matter of Stanton
INDEX NO.: N.2.a.
CITE: (2/24/87), Ind., 504 N.E.2d 1
SUBJECT: Advance fee for services - segregation
HOLDING: On rehearing. Segregation of funds & accounting requirements of Rule 1.15 [previously DR 9-102(A)(2) & 9-102(B)(3)] are not applicable to attorney fees charged in advance for performance of legal services. Rule 1.16(D) [previously DR 2-109(A)(3) merely provides that upon termination of professional relationship, unearned fees paid in advance must be returned. There is no requirement to segregate funds; record keeping requirements mandated under this provision are limited to that necessary to fulfill this obligation. Held, in all other respects petition for rehearing denied.

RELATED CASES: Matter of Stanton, 492 N.E.2d 1056 (holding, attorney disbarred; Ct. finds multiple violations of disciplinary rules, including neglect of legal matters entrusted to attorney, failure to carry out contract for professional employment, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, conduct prejudicial to administration of justice & conduct adversely reflecting on attorney's fitness to practice law where D accepted large advance payments, failed to follow through in filing PCR petitions, improperly withdrew from representation of clients, & refused to refund unearned fees); Matter of Haller, 226 N.E.2d 164 (attorney was suspended and disbarred when he accepted fee to file bankruptcy and never filed petition or made explanation).

TITLE: Williams v. State
INDEX NO.: N.2.a.
CITE: (6-16-87), Ind., 508 N.E.2d 1264
SUBJECT: Defense - General duties to client; compensation irrelevant to ethical obligation
HOLDING: Code of Professional Responsibility & attorney's oath do not exempt from professional norms those attorneys who are not fully compensated by clients. Once lawyer has undertaken representation of accused, duties & obligations are same whether lawyer is privately retained, appointed, or serving in legal aid or defender program. Trial counsel, who was not paid by petitioner, should have brought financial handicaps inherent in case to attention of Tr. Ct. long before scheduled trial date. Held, judgment reversed & remanded; Pivarnik, J., concurring in result.

N. ETHICS

N.2. Defense

N.2.b. General obligations as court officer

TITLE: In re Dixon
INDEX NO.: N.2.b.
CITE: (10/8/2013), 994 N.E.2d 1129 (Ind. 2013)
SUBJECT: Ethics - criticism of judge & minimal restrictions on counsel's advocacy
HOLDING: Per Curiam. Court adopted an objective test for anylyzing attorney statements alleged to have been made "with reckless disregard" as to truth or falsity concerning the qualifications or integrity of a judge under Indiana Professional Conduct Rule 8.2(a): I.e., whether basis for making statements was objectively unreasonable considering their nature and context, including the extent to which the attorney supported the statements with accurate facts. Court will interpret Rule 8.2(a)'s limits to be the least restrictive where, as here, an attorney is engaged in good faith professional advocacy in a legal proceeding requiring critical assessment of a judge or a judge's decision.

Here, Respondent did not engage in attorney misconduct based on following statements he made in support of a motion for change of judge: 1) that judge's inability to admit bias calls into question her ability to navigate the waters of Ds' legal defenses related to criminal trespass; 2) that judge did not feel duty bound to apply Trial Rule 65 because she was biased; and 3) that judge's refusal to allow an intervenor into case demonstrates she was willing to ignore applicable legal standards in order to move case in a direction that negatively affected intervenor's legal rights. Although these statements are somewhat similar in tone and quality to the "random pot-shot" statement found sanctionable in Matter of Wilkins, 782 N.E.2d 985 (Ind. 2003), Court noted that counsel supported his charges against judge with a lengthy recitation of facts, in documents totaling 40 pages in length, in support of his argument that judge should recuse herself. Also, Respondent's statements are relevant to, and required for relief sought. Counsel's advocacy in seeking a change of judge under Crim.R. 4(B) must not be chilled by an overly restrictive interpretation of Rule 8.2(a). Held, judgment entered in favor of Respondent; Rucker, J., concurring in part and dissenting in part, believes that Respondent's comments went beyond legal argument, became personal, and violated Rule 8.2(a).

RELATED CASES: Matter of Smith, 181 N.E.3d 970 (Ind. 2022) (Respondent committed misconduct by making several statements about a judge’s qualifications or integrity in an appellate brief, either knowing the statements were false or with reckless disregard for their truthfulness, in violation of Rule 8.2(a); while "attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients, that “wide latitude” is not a blank check).

TITLE: In re Usher
INDEX NO: N.2.b.
CITE: (5/17/2013), 987 N.E.2d 1080 (Ind. 2013)
SUBJECT: Ethics - emailing nude film clip to harm ex-intern
HOLDING: Respondent's rejected romantic advances toward a summer intern led him to have his paralegal email more than 50 attorneys a video clip purporting to depict the former intern nude in a film. Respondent's bid to discredit and humiliate intern while she was seeking employment resulted in a three-year suspension without automatic reinstatement. Respondent's misconduct involved pervasive dishonesty in the email, a civil action, and this disciplinary action. His misconduct involving the email was motivated by personal revenge and his intent was to harm intern personally and professionally. His evasive attitude toward his duties in the civil and disciplinary actions, lack of remorse or insight into his misconduct suggests a danger to the profession and to the public if he continues in practice. David, J., dissenting, would have disbarred respondent.

TITLE: In Matter of Anonymous
INDEX NO.: N.2.b.
CITE: (10/15/2015), 43 N.E.3d 568 (Ind. 2015)
SUBJECT: Private reprimand for ex parte communication
HOLDING: Supreme Court accepted the parties proposed agreement that Respondent receive a private reprimand. Respondent prepared an "Emergency Petition" seeking to have the grandparents appointed as the child's temporary guardians. Respondent sent an associate from her office to the White County Courthouse, telling her to present the Emergency Petition to the judge. The judge signed the proposed order appointing the grandparents as temporary co-guardians of the child. The order was directed to be served on the child's mother and putative father.

Respondent did not provide advance notice to the mother or the putative father before presenting the Emergency Petition to the judge. Respondent also did not comply with Trial Rule 65(B), which required Respondent to certify to the court the efforts (if any) made to give notice to adverse parties. Held, proposed agreement accepted.

TITLE: Matter of Atanga
INDEX NO.: N.2.b.
CITE: (6-30-94), Ind., 636 N.E.2d 1253
SUBJECT: Defense - general obligations as court officer; must obey judicial directive
HOLDING: 30-day suspension is appropriate sanction for attorney who knowingly disobeys obligation of tribunal by failing to appear at hearing & makes statement with reckless disregard as to its truth or falsity concerning qualifications of judge. Attorney's intentional disobedience of Tr. Ct.'s directive by failing to attend hearings constituted conduct prejudicial to administration of justice, even if attorney is forced to represent client in very difficult environment due to Tr.Ct's order rescheduling hearing for date known by Ct. to be unacceptable to defense counsel. No matter how difficult situation may be for attorney, he does not have option of knowingly disobeying directive. Held, attorney suspended; Shepard, C.J., concurring in part & dissenting in part; Sullivan, J., dissenting.

TITLE: Matter of Blickman
INDEX NO.: N.2.b.
CITE: 158 N.E.3d 752 (Ind. 2020)
SUBJECT: Ethics - balancing duty to report child abuse with duty to client confidentiality
HOLDING: Per Curiam. A short delay which allowed Respondent to do some research before advising his client (Park Tudor School) to report sexual abuse of a child to the DCS did not result in incompetence on Respondent's part under Prof. Cond. R. 1.1, or in counseling or assisting a criminal act, Prof. Cond. R. 1.2(d). The requirement to "immediately" report abuse under Ind. Code § 31-35-5-1 is a case-specific and fact-specific requirement, and the length of delay is not the only thing that matters. Other considerations include "the urgency with which the person files the report, the primacy of the action, and the absence of an unrelated and intervening cause for delay." C.S. v. State, 8 N.E.3d 668 (Ind. 2014) (four-hour delay of rape report not "immediate" where principal declined to contact police who were stationed in the school). Court noted that its decision in C.S. "does not demand perfection or even specialized expertise from attorneys."

As for the attorney's decision to not report himself, Ind. Code § 31-35-5-1 requires anyone who becomes aware of possible child abuse to report the matter to the DCS or local law enforcement. However, multiple authorities opine that attorneys may choose to not report evidence of child abuse or neglect protected by client confidentiality, except that attorneys must report suspected child abuse if the attorney believes it necessary to prevent reasonably certain death or substantial bodily harm. The Court refused to resolve the issue, because the lawyer's failure to report had no nexus with the lawyer's fitness under Rule 8.4. Digital images collected of a 15-year-old girl was child pornography and the "best course of action for all who took possession of these materials [] would have been to promptly involve law enforcement." However, Respondent's act of taking possession of the images and not immediately contacting law enforcement did not reflect adversely upon the lawyer's fitness.

But the Court found Respondent violated Rule 1.1 and 8.4(d) for drafting and including a confidentiality provision in the proposed settlement agreement at the mutual wish of both school and student-victim's family. "If Respondent believed that full disclosure already had occurred, it is difficult to conceive what legitimate objective might be gained from preventing Park Tudor personnel or the Student's family from speaking with DCS or law enforcement during any follow-up on the initial report." Court thus cited Respondent's efforts to "silence a fifteen-year-old crime victim and frustrate law enforcement" as aggravators supporting a public reprimand. Justice Slaughter dissented from Court's finding re: Respondent's use of confidentiality clause, believing that Respondent did not violate either rule.

TITLE: Matter of Drook
INDEX NO.: N.2.b.
CITE: 855 N.E.2d 989 (Ind. 2006)
SUBJECT: Ethics - false notarizations and fictitious signatures
HOLDING: Respondent's secretary/notary public discovered that without her knowledge or consent a facsimile of her signature had been placed on a number of documents prepared by Respondent that she had not notarized. She also identified 22 papers that contained a fictitious facsimile of her signature, including documents and affidavits that had been filed in court proceedings, powers of attorneys, and deeds. Respondent had also signed the name of the receptionist as having witnessed, and attested to, the execution of four wills, all without her knowledge or consent. Hearing officer found that although Respondent appeared to have no self-serving motive in committing this misconduct, and no actual damage to his clients had occurred, his misconduct had the potential for significant injury. Respondent's misconduct under Ind. Professional Conduct Rule 8.4(c), 8.4(d) and 3.3(a)(1) constituted multiple acts of misrepresentation to others and to the courts. Court suspended Respondent for sixty days, after which he may petition for reinstatement; Dickson, J., dissenting, believes that Respondent should be disbarred.

TITLE: Matter of Fieger
INDEX NO.: N.2.b.
CITE: (05-23-08), Ind., 887 N.E.2d 87
SUBJECT: Ethics - misrepresentations in application for temporary admission
HOLDING: Respondent engaged in misconduct by making material misrepresentations in a sworn application for temporary admission in an Indiana court. In seeking temporary admission, out-of-state attorney must make certain representations under oath, including that "no disciplinary proceeding is presently pending against the attorney in any jurisdiction." Admission and Discipline Rule 3(2)(a)(4)(v). Respondent also has affirmative duty to update information after application for admission is filed. "Proceeding" includes any and all actions by a disciplinary body at any stage against the attorney seeking temporary admission.

Here, Respondent attempted to narrow language of rule by stating no "formal" disciplinary proceedings were pending against him. At time Respondent executed his application, Michigan disciplinary proceeding had been dismissed, but they were being appealed in both federal court and Michigan Supreme Court. Moreover, by time Respondent executed his application, a probable cause panelist had ordered the Arizona State Bar Association to file a complaint against Respondent, and he had received a "Probable Cause Order." Although Commission agreed with Respondent that no formal disciplinary action was pending at this point, Respondent was obligated to correct his application once he knew formal charges had been filed. Held, Respondent prohibited from seeking temporary admission to Indiana bar for two years. Dickson, J., dissenting, would bar Respondent permanently from temporary admission; Sullivan, J., dissenting, would adopt analysis of hearing officer, who found Respondent's application was accurate and recommended final disposition in favor of Respondent.

TITLE: Matter of Hanson

INDEX NO.: N.2.b.

CITE: (2/16/2016), 2016 Ind. LEXIS 121 (Ind. 2016)

SUBJECT: Ethics - sending threatening/obscene private social media message to client's ex-husband

HOLDING: Respondent sent a threatening and obscene private social media message to a client's ex-husband. Parties agree that Respondent violated Ind. Professional Conduct Rule 4.4(a), which prohibits using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person, and Rule 8.4(a), which prohibits engaging in conduct prejudicial to the administration of justice. For this misconduct, Court suspended Respondent for 30 days with automatic reinstatement.

TITLE: Matter of Johnson
INDEX NO.: N.2.b.
CITE: (5/17/2017), 74 N.E.3d 550 (Ind. 2017)
SUBJECT: Attorney misconduct by harrassing ex-girlfriend
HOLDING: Court suspended Respondent from the practice of law for one year, without automatic reinstatement, for harassing his ex-girlfriend.

Respondent was the Chief Public Defender for Adams County; he was married. Respondent suffered from mental illness. He had an affair with J.D that lasted several months. At the time, J.D. was on probation for an OWI conviction. She tried to break off the relationship, but Respondent repeatedly called her, texted her, and contacted her through Facebook. Several times he came to her apartment unannounced and refused to leave, once even standing in the doorway to prevent J.D. from closing the door. Police told Respondent to leave J.D. alone, but he persisted, so J.D. obtained a protective order against him. When served with the order, Respondent retaliated by advising J.D.'s probation officer that J.D. had violated her probation by drinking a glass of wine with him. J.D.'s probation was eventually revoked; she served 10 days in jail. Respondent was eventually convicted of trespass. His probation required that he not contact J.D., but he continued to do so.

The Court found that Respondent 1) committed a criminal act that reflected on his fitness as a lawyer (Rule 8.4(b)); 2) engaged in conduct prejudicial to the administration of justice (Rule 8.4(d)); and 3) stated or implied an ability to improperly influence a government official (Rule 8.4(e)).

Similar misconduct prompted disbarment in Matter of Keaton, 29 N.E.3d 103 (Ind. 2015) and a three-year suspension without automatic reinstatement in Matter of Usher, 987 N.E.2d 1080 (Ind. 2013). Yet the distinguishing factor here is Respondent's mental illness: depression, manic episodes, and bipolar disorder. However, while this is a mitigating factor, it does not excuse Respondent's misconduct. Further, Respondent committed some of his actions while receiving treatment, which lessened the severity of his symptoms.

TITLE: Matter of Keaton
INDEX NO.: N.2.b.
CITE: (4/21/2015), 29 N.E.3d 103 (Ind. 2015)
SUBJECT: Disbarment for "profoundly disturbing" harassment of ex-girlfriend
HOLDING: Court disbarred Respondent for, among other things, "engaging in an extreme and pervasive pattern of conduct involving harassment and dishonesty." For years, Respondent left profanity-laced, intimidating voicemails and emails that threatened and harassed his daughter's college roommate, with whom he had developed an intimate relationship a decade ago. The scores of voicemails and thousands of emails were sent to seek revenge against the woman for breaking up with him. The series of threats, which included unfounded accusations that the woman had a mental illness and substance abuse problems, began in 2008 and resulted in criminal charges for stalking against Respondent, which were ultimately dismissed without prejudice by the State in April 2011 based on personal privacy concerns raised by the woman.

Respondent also threatened suicide and carried through with a threat to post nude photos of the woman, sending them to others in emails, posting them on adult websites and posting them on his own blog, accompanied by “disparaging diatribes” about the woman. In addition, Respondent filed three pro se lawsuits against the woman and others “and later made duplicitous statements to the [disciplinary commission] in reference to those related proceedings.”

Court concluded that Respondent's “outrageous behavior falls woefully short” of ethics requirements that lawyers be of good moral character and fitness. “Put simply, Respondent engaged in–and continues to engage in–a scorched earth campaign of revenge in the wake of being dumped by JD seven years ago,” the Court wrote. “Most disturbingly, despite the entreaties of JD and several others, Respondent simply has refused to take ‘no’ for an answer.”

In addition to these allegations, Respondent failed to file an appeal in an unrelated unemployment compensation matter after he collected advance payment from a client.

RELATED CASES: Johnson, 74 N.E.3d 550 (Ind. 2017) (Respondent's harassment of ex-girlfriend similar to behavior in Keaton yet Respondent's mental illness called for a lesser sanction: one-year suspension without automatic reinstatement).

TITLE: Matter of Monfort

INDEX NO.: N.2.b.

CITE: (05-17-11), 946 N.E.2d 583 (Ind. 2011)

SUBJECT: Ethics - representing D in matter in which lawyer participated as judge without consent

HOLDING: While serving as a judge in 1998, Respondent presided over two cases in which D was convicted of OWI. In 2009, D contacted Respondent, who was then in private practice. Respondent met with prosecutor to explore the possibility of having D's convictions vacated. D, purportedly *pro se*, filed a petition to vacate both convictions. At a hearing on the petition, Respondent sat at counsel table with D. When presiding judge asked whether he was representing D, Respondent said he was not, but he was just there to "lay the background for the court." Later at the hearing, D testified that Respondent's office had prepared the petition and that he paid Respondent for his legal services. Parties agreed that Respondent violated Rule 1.12(a), representing someone in connection with a matter in which the lawyer participated personally and substantially as a judge without the consent of all parties to the proceeding; Rule 3.3(a)(1), knowingly making a false statement of fact to a tribunal; and 8.4(c), engaging in conduct involving deceit or misrepresentation. Court approved of agreed 30-day suspension but noted that discipline would likely be more severe had this matter been submitted without agreement.

TITLE: Matter of Putsey
INDEX NO.: N.2.b.
CITE: (6-20-03), Ind., 790 N.E.2d 436
SUBJECT: Ethics - obstructing State's access to evidence
HOLDING: Client hired respondent to represent him in criminal proceeding. Respondent learned that client's mother was key witness against client & that State had listed her on its witness list. Respondent contacted mother by phone & advised her that State would subpoena her as witness against her son. Mother testified that Respondent told her that if she was out of town for two weeks & prosecutor could not find her to serve subpoena, she would not have to testify against her son. Ct. held that Respondent violated Ind.Professional Conduct Rule 3.4(a), which prohibits attorney from unlawfully obstructing another party's access to evidence, & Prof. Conduct Rule 8.4(d), which prohibits attorney from engaging in conduct prejudicial to administration of justice. Held, in light of prior disciplinary actions, Respondent should be suspended from practice of law for two years.

TITLE: Matter of Schlesinger
INDEX NO.: N.2.b.
CITE: (3/21/2016), 53 N.E.3d 417 (Ind. 2016)
SUBJECT: Ethics - incompetent representation on appeal
HOLDING: Despite Ind. Appellate Rule 7(B)'s shift in sentencing review beginning in 2003, in at least four appeals Respondent continued to invoke the outdated "manifestly unreasonable" standard, including three appeals initiated more than a decade afer that standard was replaced with the "inappropriate" standard. In each of the first three appeals, the Court of Appeals warned Respondent to cite the correct standard in future cases, but he failed to heed these warnings. In the fourth appeal, Court ordered appellant's brief stricken and remanded the case to trial court "for the appointment of competent counsel." See Marcus v. State, 27 N.E.3d 1134 (Ind. Ct. App 2015). Respondent was suspended without pay from his employment as appellate public defender following the Marcus decision.

Parties agree that Respondent violated 1.1 (failing to provide competent representation); and 8.4(d) (engaging in conduct prejudicial to the administration of justice). Court imposed a public reprimand for Respondent's misconduct.

TITLE: Matter of Selner
INDEX NO.: N.2.b.
CITE: (7/9/2015), 36 N.E.3d 1048 (Ind. 2015)
SUBJECT: 3-year suspension for drug conviction
HOLDING: Respondent violated Indiana Professional Conduct Rule 8.4(c) by unlawfully distributing pseudoephedrine. Her federal felony conviction and factual basis for her guilty plea pont to her knowing assistance in the manufacture and distribution of methamphetamine. For this misconduct, Court suspended Respondent from the practice of law for at least three years without automatic reinstatement. Dickson, J., dissenting, would reject the Conditional Agreement, believing that the Respondent has demonstrated unfitness to responsibly represent, advise, and serve future clients.

TITLE: Matter of Smith
INDEX NO.: N.2.b.
CITE: (5/24/2018), 97 N.E.3d 621 (Ind. 2018)
SUBJECT: Disbarment for attorney who threatened estranged wife with axe
HOLDING: Per Curiam. Respondent was convicted of felony intimidation after threatening to kill his wife with an axe and then immediately driving to her house with the axe. He was in the process of entering her home when police arrived. Respondent violated Indiana Professional Conduct Rule 8.4(b) by "committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer." Agreeing with Responent's hearing officer that the incident represented "a total breakdown of self-restraint," the Court agreed to disbar Respondent, effective immediately. His noncooperation with the Commission's investigation and failure to participate in these disciplinary proceedings "likewise reflect exceedingly poorly on Respondent's committment to his responsibilities as an attorney and his fitness to practice."

Court recognized that the "profoundly troubling" circumstances of Respondent's crime were distinguishable from the prolonged "scorched earth campaign" committed by the attorney against his ex-girlfriend in Matter of Keaton, 29 N.E.3d 103, 110 (Ind. 2015), which prompted the hearing officer in this case to recommend a lengthy suspension rather than disbarment. "Nonetheless, the serious nature of Respondent's misconduct, his resulting felony conviction, his noncooperation with the disciplinary process, and his failure to participate in these proceedings, collectively persuade a majority of this Court to conclude that disbarment is the appropriate sanction in this case."

TITLE: Matter of Smith
INDEX NO.: N.2.b.
CITE: (12-22-00), Ind., 740 N.E.2d 849
SUBJECT: Ethics - contravening Ct. order without notice to prosecution
HOLDING: While his client remained incarcerated by order of one Ct., Respondent improperly obtained from another Ct. an order releasing his client. Respondent's failure to notify State of his filing of application for writ of habeas corpus was prejudicial to administration of justice in violation of Ind. Professional Conduct Rule 8.4(d). Ct. concluded that Respondent's actions constituted attempt to contravene order of Ct. presiding over his client's case. Respondent's failure to inform State of his request for relief from another Ct. prevented State from appearing in that proceeding & presenting its arguments, an omission that emphasizes that Respondent was attempting to use improper means to obtain his client's release. Ct. concluded that public reprimand was appropriate sanction for Respondent's misconduct.

TITLE: Matter of Thomsen
INDEX NO.: N.2.b.
CITE: (11-29-05), Ind., 837 N.E.2d 1011
SUBJECT: Ethics -- words/conduct manifesting racial prejudice
HOLDING: Respondent was publicly reprimanded for violating Ind. Professional Conduct Rule 8.4(g), which prohibits a lawyer from engaging in conduct in a professional capacity manifesting, by words or conduct, bias or prejudice based upon race. Respondent represented the husband in an action for dissolution of marriage filed by his wife. Custody of parties' children was at issue in case. Respondent filed a Petition for Custody that stated in part:

> The wife continues to associate herself around town in the presence of a black male, & such association is causing & is placing the children in harm's way, as husband has been advised by neighbors of the wife & children. Said black male has resided at the home of the wife & children, for lengthy periods of time, while "fixing the computer." The behavior is placing the children in harms way & should be stopped immediately.

At bench trial, Respondent referred to the African-American man as "the black guy" & "the black man." Further, when wife testified that a "...black kid across the street [was] yelling racial slurs at them...", Respondent replied, "Well, you're used to that. I mean you have them in your home." Additionally, when evidence was introduced about dead animals being placed on wife's porch & in her yard, Respondent asked, "[c]ould your animals or your dog have been killed as [sic] the problem that's been going on in the neighborhood with regard to the black man you had at your house?" Because, as stipulated by parties, Respondent neither made nor substantiated any argument to Ct. that man's race was relevant to dissolution, her comments were unnecessary & inappropriate. Interjecting race into proceedings where it is not relevant is offensive, unprofessional & tarnishes image of profession as a whole. Respondent's misconduct is a significant violation & only serves to fester wounds caused by past discrimination & encourage future intolerance. Commission on Race & Gender Fairness reported in 2002 that a significant minority of those surveyed observed Ct. Room harassment & disparagement on basis of gender, ethnicity or race. Indiana S.Ct. Commission of Race & Gender Fairness, *Executive Report & Recommendations*, p.6 (2002).

RELATED CASES: In re Barker, 993 N.E.2d 1138 (Ind. 2013) (30-day suspension for sending disparaging letter accusing Mother of being in country illegally).

TITLE: Matter of Wilkins

INDEX NO.: N.2.b.

CITE: (10-29-02), Ind., 777 N.E.2d 714

SUBJECT: Attorney's comments in petition to transfer - allegation of deliberate unethical conduct by Ct. App.; free speech claim

HOLDING: Respondent, an experienced appellate practitioner, stated in a brief supporting petition to transfer to Indiana S.Ct. that an opinion of Indiana Ct. App. left him wondering whether Ct. was determined to find for adverse party, & whether it then said whatever was necessary to reach that conclusion. Ct. held that such statements violated Ind.Professional Conduct Rule 8.2(a) & warranted thirty-day suspension from practice of law, because they were made with reckless disregard as to truth or falsity concerning integrity of three-judge panel of Ct. App. Ct. rejected Respondent's argument that application of Prof.Cond.R. 8.2 in this case would be an unconstitutional restriction of free speech. State's interest in preserving public's confidence in judicial system & overall administration of justice far outweighed any need for Respondent to air his unsubstantiated concerns in an improper forum. A statement used in a document filed before appellate Cts. that contains assertion lawyer knows to be false or made with reckless disregard as to truth or falsity concerning qualifications or integrity of judge is neither a format contemplated by Indiana appellate rules nor allowed by Rules of Professional Conduct.

Ct. also concluded that following language used by respondent in his petition to transfer, though heavy-handed, roughly paraphrased bases of transfer as set forth in App.R. 11(b) such as to avoid violation of Prof.Cond.R. 8.2(a): "The opinion erroneously & materially misstates the record by making affirmative misstatements regarding the evidence...The...[o]pinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, & it does not even bother to discuss relevant cases that are directly on point." Sullivan & Boehm, JJ., dissenting, believed that D's statements were "rhetorical hyperbole," protected by First Amendment.

RELATED CASES: Dixon, 994 N.E.2d 1129 (Ind. 2013) (distinguishing Wilkins, Ct. noted that counsel supported his charges against judge with a lengthy recitation of facts in support of his motion for recusal; also, Respondent's statements are relevant to, and required for relief sought; see full review, this section); Wilkins, 782 N.E.2d 985 (on rehearing, Ct. revised Respondent's sanction to public reprimand, noting that Respondent's outstanding & exemplary record for honesty, integrity, & truthfulness among bar & judiciary warrants substantial weight).

TITLE: Matter of Ogden
INDEX NO: N.2.b.
CITE: (6/16/2014), 10 N.E.3d 499 (Ind. 2014)
SUBJECT: Critical statements about judge
HOLDING: Respondent's "repeated and virulent accusations" that judge committed malfeasance in the initial stages of the administration of an estate were not just false; they were impossible because judge was not even presiding over the estate at this time — fact Respondent could easily have determined. Because Respondent lacked any objectively reasonable basis for these statements, Court concluded that he made them in reckless disregard of their truth or falsity, thus violating Indiana Professional Conduct Rule 8.2(a).

However, Commission did not meet its burden of proof regarding three other criticisms Respondent made regarding judge's rulings, as they fall within his broad First Amendment rights. Although another allegation of a conflict of interest turned out to be false, it was based upon Respondent's client's reports to him. Respondent's allegation that judge was unqualified as a judge and that he engaged in judicial misconduct in presiding over the estate were "more in the nature of opinions as opposed to statements of fact."

Respondent also sent letters to the Marion Superior Court, Prosecutor's Office, the Indiana attorney general and the Marion County public safety director, asking that they ensure the law regarding forfeiture is followed and enforced. At the time the letters were sent, Respondent was not representing any party in pending forfeiture cases. Court held that Commission did not present clear and convincing evidence that the letters were prejudicial to the administration of justice. Held, 30-day suspension with automatic reinstatement.

N. ETHICS

N.2. Defense

N.2.c. Conflicts (ineffective assistance of counsel allegations, see Y.4.f)

TITLE: Aubrey v. State
INDEX NO.: N.2.c.
CITE: (5/29/85), Ind., 478 N.E.2d 70
SUBJECT: Conflicts - prior marital relationship between defense counsel & state's witness
HOLDING: D, who made no objection at trial, failed to establish that a conflict of interest adversely affected his lawyer's performance. See Smith 465 N.E.2d 1105. Here, defense counsel was former husband of state's first witness, mother of homicide victim. D contends attorney did not effectively cross-examine witness because of this relationship. Ct. finds attorney did attempt to cross-examine witness re son's police record & involvement in holdups, but state's objection that questioning was outside scope of direct was sustained. Ct. finds no indication that relationship affected cross-examination. Held, denial of PCR affirmed.

TITLE: Carpenter v. State
INDEX NO.: N.2.c.
CITE: (12/23/86), Ind., 501 N.E.2d 1067
SUBJECT: Ethics - conflicts; representation of D & co-D
HOLDING: Defense counsel did not violate Canon of Ethics by representing co-D (who pled to 20 years) & D (who received life imprisonment following jury trial). Even under today's stricter rules, Ct. finds conduct was not improper. Legitimate difference existed between 2 clients & neither was jeopardized by counsel's representation of other. Joint representation does not constitute ineffective representation per se. Ross 377 N.E.2d 634. Held, denial of PCR affirmed.

RELATED CASES: Hanna, App., 714 N.E.2d 1162 (Tr. Ct. erred by overriding co-D's consent to joint representation; D's right to counsel of his choice prevails over D's right to conflict-free counsel); Wise 501 N.E.2d 435 (no actual conflict shown by D, who failed to object); Bean 460 N.E.2d 936 (Ds insisted on joint representation/trial; no actual conflict shown); Ward 447 N.E.2d 1169 (if D objects to multiple representation, D must be given opportunity to demonstrate that right to fair trial is jeopardized; D who does not object must demonstrate that lawyer's act of representation of conflicting interests affected the adequacy of his/her performance, *citing* Cuyler v. Sullivan (1980), 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333; here, D actively consented to representation by attorney who disclosed to him that attorney had earlier represented state's witness but had withdrawn when witness volunteered to work as informant); Loy, App., 443 N.E.2d 111 (dual representation was not fundamental error).

TITLE: Commonwealth v. Croken
INDEX NO.: N.2.c.
CITE: 733 N.E.2d 1005 (Mass. 2000)
SUBJECT: Romance with Prosecutor -- Conflict of Interest
HOLDING: Where defense attorney is having intimate relationship with attorney employed by prosecutor's office, lawyer should refuse to represent D if he reasonably believes that the representation would be adversely affected by relationship. If the lawyer determines that he can represent D vigorously, he must still disclose relationship to D and obtain informed consent.

TITLE: Cox v. State
INDEX NO.: N.2.c.
CITE: (3/21/85), Ind., 475 N.E.2d 664
SUBJECT: Ethics - conflicts; attorney is potential witness
HOLDING: Where defense counsel's testimony would have been cumulative, failure to withdraw & testify does not constitute ineffective assistance of counsel or a violation of DR 5-102(A). See Hodge 344 N.E.2d 293 (Tr. Ct. did not err in refusing defense counsel's request to testify; testimony was cumulative therefore any error was harmless). Here, central issue in case was how D knew precise sequence of wounds to decedent if he wasn't killer. D contends he learned sequence from defense counsel, who should have testified re D's independent knowledge. Ct. finds same information was established by 2 other witnesses thus counsel's testimony was cumulative. Held, no error.

TITLE: Hennings v. State
INDEX NO.: N.2.c.
CITE: (3rd Dist., 08-08-94), Ind. App., 638 N.E.2d 811
SUBJECT: Conflict of appellate counsel, remedy on Post-Conviction Relief (PCR)
HOLDING: Where appellate counsel was judge pro tem who ruled on pretrial State's motion for D's bodily substance samples, conflict of interest was demonstrated, but because error arose after trial, remedy was to treat PCR as direct appeal. D was convicted of rape & burglary, & convictions affirmed on direct appeal, at 532 N.E.2d 614. Prior to trial State sought order for D to produce bodily substances, & phone order issued by judge pro tem. After trial, trial counsel filed MCE, & bodily substance issue was not raised therein. Same judge pro tem was then appointed to perfect appeal, & only issues from MCE were raised on appeal. D then filed pro se PCR petition, which was denied. Ct. first noted that lawyer should not accept employment on any matter upon merits of which he previously acted in judicial capacity, & that where that kind of conflict arises, demonstration of actual prejudice is not required. Here, although MCE was filed by trial counsel who was not involved as judge, & listed only two errors raised on direct appeal, it was still improper for decision-making authority to later act as advocate. Conflict arose when judge pro tem accepted appellate appointment, & appellate counsel had ruled on very motion D complained of on PCR. Therefore, error was not harmless. However, because error occurred after trial, D was not entitled to reversal. Ct. determined appropriate remedy to be review of errors raised in PCR, as if raised on direct appeal, McBride v. State, App., 595 N.E.2d 260. Here, PCR issues related solely to order requiring production of bodily substances & competency of counsel regarding order. However, record did not reveal order was ever acted on, & no evidence of bodily substances was entered into evidence, probably because D contended intercourse was consensual. PCR issues had no bearing on D's trial & could not give rise to any relief. Held, PCR Ct. affirmed.

TITLE: In re Godshalk
INDEX NO.: N.2.c.
CITE: (5/23/2013), 987 N.E.2d 1095 (Ind. 2013)
SUBJECT: Ethics - conflict of interest; negligent supervision of nonlawyer
HOLDING: Respondent represented RM, who was charged with battery of JB. Respondent moved to exclude JB's testimony after she failed to appear for a deposition. JB was on probation resulting from a theft conviction and was charged with operating while intoxicated. She went to Respondent's office to hire him to represent her in the probation revocation and OWI cases. A non-lawyer assistant agreed to the representation, agreed that Respondent would accept assignment of JB's pre-trial release bonds as payment for his fees, prepared and filed appearances. At the time, Respondent and his assistant had sufficient information that they should have known JB was victim and witness in RM's criminal case. Eventually, Respondent was disqualified from representing RM and withdrew his representation of JB. Respondent did not seek any payment from either JB or RM.

By failing to check adequately for conflicts, Respondent violated Indiana Professional Conduct Rule 1.1 (failure to provide competent representation); 1.7(a)(representing client when representation involves a concurrent conflict of interest); 5.3(b)(failure to make reasonable efforts to ensure that conduct of nonlawyer employee is compatible with professional obligations of lawyer); and 5.5(a)(assisting in unauthorized practice of law). Respondent's actions also did not conform with Rules 9.3(a) and (b), guidelines regarding use of non-lawyer assistants to comply with Rules of Professional Conduct. Held, public reprimand imposed.

TITLE: Johnson v. State

INDEX NO.: N.2.c.

CITE: (12-20-96), Ind., 675 N.E.2d 678

SUBJECT: Prosecution - factors in determining whether recusal is required; imputed disqualification

HOLDING: In addressing question of prosecutorial recusal in criminal cases, while acknowledging importance of professional ethics, S.Ct. applies analysis distinct from that used in attorney disqualification questions in civil cases. Prosecutor must be disqualified if it is shown that controversy involved in pending case is substantially related to matter in which prosecutor previously represented another client. Key inquiries in determining whether prosecutorial Recusal is required by reason of prosecutor's prior representation of another individual are: whether issues in prior & present cases are essentially same or are closely interwoven therewith; whether prosecutor has received confidential information in prior representation; &, more importantly, whether information may have subsequently assisted prosecution. Conflicts of interest on part of county prosecutor arising out of prosecutor's participation in matter which he or she participated personally & substantially while in private practice will disqualify entire prosecutor's office, despite general rule that conflict of interest of deputy prosecutor will not necessarily disqualify entire prosecutor's office. County prosecutor speaks & acts through deputies, & integrity of process of criminal justice compels that elected prosecutor's personal disqualification requires recusal of prosecutor's deputies. Held, judgment affirmed; Sullivan, J., & Shepard, C.J., concurring.

TITLE: Latta v. State

INDEX NO.: N.2.c.

CITE: (3-16-01), Ind., 743 N.E.2d 1121

SUBJECT: Joint representation of Ds - waiver; conflict of interest vs. right to counsel of one's choice

HOLDING: Counsel's joint representation of both D & Co-D is not per se violation of constitutional guarantee of effective assistance of counsel. Hanna v. State, 714 N.E.2d 1162 (Ind. Ct. App 1999). Moreover, under some circumstances D may properly waive right to conflict-free representation. Ward v. State, 447 N.E.2d 1169 (Ind. Ct. App 1983). Here, D & her husband were charged with felony murder, tried jointly, & were represented by same counsel. State moved for mistrial, arguing, among other things, that testimony of State's witness had given rise to conflict of interest. *Citing* Wheat v. United States, 486 U.S. 153 (1988), Ct. noted that Tr. Ct. must be given latitude in its efforts to reconcile conflicting Sixth Amendment rights to counsel of one's choice & to competent counsel. Important step in evaluating whether actual conflict or serious potential for conflict is sufficient to override D's express choice of counsel is assessment of D's apprehension of dangers of joint representation. Presumption of deference to D's choice is strengthened by confidence that it is informed & individual choice by D.

Ct. held that D's waiver of conflict-free representation should be presumed valid, & burden in post-conviction proceedings is on D to prove otherwise. If there is evidence supporting conclusion of uninformed or improperly influenced waiver, post-conviction Ct. must assess D's appreciation of risks. If knowing & voluntary, waiver is at least entitled to very strong presumption of validity & may be conclusive because it invokes her right to counsel of her choice. If waiver does not preclude subsequent claim of ineffective assistance, there remains issue of whether actual conflict of interest adversely affected lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, Tr. Ct.'s questioning of D was quite brief, with conclusory testimony at trial that D & Co-D were informed of & discussed risks associated with joint representation. Ct. found that D's counsel was ineffective on other grounds but cautioned Tr. Ct.'s in similar circumstances to inquire in greater detail as to D's understanding of potential areas of conflict. Here, these included risk that defenses may not be fully aligned & that evidence exculpatory of one may be inculpatory of another.

Ct. App. erred in applying fundamental error analysis in this case, as Cuyler expressly sets forth standard to follow where ineffectiveness claim is based on counsel's conflict of interest. Because it involves balancing conflicting Sixth Amendment interests, merits of claim may depend on circumstances leading up to D's consent to joint representation, but it has nothing to do with fundamental error. Held, transfer granted, Ct. App.' opinion at 722 N.E.2d 389 vacated; denial of post-conviction relief reversed & remanded for new trial.

RELATED CASES: Jones, 151 N.E.3d 790 (Ind. Ct. App. 2020) (D failed to show that the joint representation resulted in an actual conflict of interest that adversely affected counsel's performance), Edwards, App., 807 N.E.2d 742 (D, convicted of sexual misconduct with a minor in a joint bench trial with her husband, was not denied effective assistance of counsel where the same attorney represented them both).

TITLE: Majors v. State
INDEX NO.: N.2.c.
CITE: (12/6/82), Ind., 441 N.E.2d 1375
SUBJECT: Ethics - conflicts; mandatory representation by State Public Defender (SPD)
HOLDING: PC 1, Section 9(a) forecloses trial judge from appointing counsel other than SPD for petitioner in post-conviction proceeding. Here, deputy moved to be released from appointment & for appointment of other counsel because D wished her to raise ineffectiveness of another deputy from same office who had represented him at PCR hearing. PCR judge denied motion. D argued denial of motion placed Public Defender in untenable position of arguing her own ineffectiveness, prohibited by the Code of Professional Responsibility, or refusing to argue all of D's allegations, in direct contravention of Dixon, App., 284 N.E.2d 102. Ct. finds denial of motion supported by Dixon which holds Public Defender is not entitled to withdraw as counsel for D in appeal from denial of PCR simply because deputy believes appeal is frivolous. Dixon held PC 1, Section 9 mandates SPD to represent pauper D from denial of PCR without exception. Ct. declines to recognize an exception here. Held, no error in denying withdrawal. CONCURRING IN RESULT, Prentice does not agree rule precludes Tr. judge from appointing counsel other than SPD. Prentice interprets rule to say absent clear showing SPD cannot or probably would not adequately represent D, there is no duty to appoint other counsel. However, Prentice finds D's allegation does not state prima facie case.

RELATED CASES: Music, 489 N.E.2d 949 (public defender need not raise on appeal every issue petitioner requests to be raised, overruling Dixon).

TITLE: Matter of Recker
INDEX NO.: N.2.c.
CITE: (03-11-09), 902 N.E.2d 225 (Ind. 2009)
SUBJECT: Imputed conflict - public defender agency not a firm
HOLDING: Respondent, who was a public defender, did not engage in misconduct by disclosing information provided to him from another public defender regarding her client because the two public defenders were not part of a firm. "Law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal service organization or the legal department of a corporation or other organization. Professional Conduct Rule 1.0. Whether two or more lawyers constitute a firm can depend on specific facts, including how they present themselves to the public, if they conduct themselves as a firm, whether they have mutual access to information concerning the clients they serve and the underlying purpose of the Rule that is involved. Commentary, Professional Conduct Rule 1.0.

Here, Respondent contracted with the Putnam Circuit Court to handle indigency cases; whereas, the other public defender contracted with Putnam Superior Court for its indigency cases. Although there was no centralized Putnam County public defender's office, the County provided office space in the Courthouse for the two public defenders, one incoming phone line, part-time secretarial assistance and generic letterhead listing both courts and the words "Office of the Public Defender." One of the secretaries kept all public defender files in a central location and allowed the files to be checked out only by attorneys who had entered an appearance on the case. The other public defender's client had let the sheriff and prosecutor know that his cellmate was talking to him about details of a battery he committed. Not knowing that the cellmate was represented on a CHINS case by the Respondent, the other public defender told Respondent about the cellmate/informant situation and asked his advice. After the conversation, Respondent called his client's attorney on the criminal case and told him that their mutual client was talking to cellmates.

If the public defenders were part of a firm, Respondent had a duty not to use the information he learned from the other public defender and the other public defender's client. Although the common space, staff, letterhead and phone line might in some circumstances tend to give the impression that the public defenders were a firm, the public defenders did not choose or have any say about those trappings, which were provided by the Putnam County courts. Moreover, a secretary provided by the courts kept all the files in a central location and released a file only to an attorney who appeared in that case. Thus, the public defenders were not part of a firm, and Respondent owed no duty to the other public defender's client. Held, judgment entered in favor of Respondent; Sullivan, J., dissents on basis that employing an overly technical, near-sighted definition of "firm" loses sight of the principal interest at stake; the inviolability of client confidences.

TITLE: Matter of Smith
INDEX NO.: N.2.c.
CITE: (6-13-91), Ind., 572 N.E.2d 1280
SUBJECT: Defense - Conflicts of interest
HOLDING: Disclosure that is required by conflict of interest rule & rule governing business transaction with client necessitates "disclosure" of existence & nature of conflict, advisement that exercise of lawyer's independent professional judgment could be affected by lawyer's own interests, & insistence that client seek independent legal counsel. Here, clear & convincing evidence established that elderly client was incompetent to give informed consent to gifts to attorneys, consent to conflict of interest, & consent to business transaction with attorney. Client was unable to converse, gradually stopped communicating, needed to be restrained in rocking chair to keep from wandering, & was believed to be incompetent to make gifts of funds. Transactions between attorney & client are presumed to be fraudulent, so that attorney has burden of proving fairness & honesty. Attorney-client transactions during confidential relationship are presumptively invalid as product of undue influence. Attorney has independent duty to assure that client is fully advised as to inherent conflict in giving gift to attorney. Professional judgment of lawyer should be exercised solely for benefit of client & should be free of compromising influences & loyalties. Making gifts to one's self, son, secretary, & law firm from entrusted assets of mentally incompetent, elderly client is prejudicial to administration of justice & violates prohibition against accepting employment if exercise of professional judgment on behalf of client will be or reasonably may be affected by financial, business, property, or personal interest. Held, suspensions ordered.

TITLE: Richardson v. State
INDEX NO.: N.2.c.
CITE: (9/14/82), Ind., 439 N.E.2d 610
SUBJECT: Ethics - conflicts; co-Ds represented by same firm
HOLDING: Fact co-D's attorney was associated with D's attorney does not necessarily constitute conflict. D must show actual conflict of interest adversely affecting his attorney's performance. Contra ABA Standards Section 3.5(b) (1974) [now 4-3.6 (2d ed. 1980)]: lawyers associated in practice should not undertake to defend more than one D in the same criminal case if duty to one D may conflict with duty to another. Here, possibility of conflict described in Standard existed, but D did not prove actual conflict. Held, no error.

RELATED CASES: Averhart 470 N.E.2d 666 (Crim L 641.5(3,6); Ct. finds Ds, charged with death penalty & each represented by separate counsel from Lake County Public Defender Office, failed to show actual conflict).

TITLE: State v. Romero
INDEX NO.: N.2.c.
CITE: (10/02/91), Ind., 578 N.E.2d 673
SUBJECT: Ethics - conflicts, defense attorney prior prosecutor
HOLDING: It was error to allow attorney to represent D at second trial after mistrial, where attorney had been prosecutor who consulted with deputy trying first time, & where he did not obtain state's consent to represent D; granting transfer & reversing Romero, App., 563 N.E.2d 134. S.Ct. looked to Rule 1.11 of Rules of Professional Conduct & found representation inappropriate. During preparation for first trial, deputy prosecutor had consulted with prosecutor regarding several significant evidentiary matters, & trial resulted in hung jury. Prosecutor then left office & entered his appearance for D. State objected & Ct. overruled objection. At second trial D was found not guilty on all counts, & State sought review on reserved question of law. S.Ct. found that prosecutor's participation by consultation in first trial was sufficient to be personal & substantial & that he should have been disqualified from representing D at 2d trial, because 1) public might suspect D got off by hiring someone with inside information, & 2) criminal Ds would be encouraged to hire counsel based on those very reasons. Held, Ct. App. decision on State's reserved question of law reversed because State's objection should have been sustained.

N. ETHICS

N.2. Defense

N.2.d. Investigation

TITLE: State v. Berryman
INDEX NO.: N.2.d.
CITE: (1st Dist., 9-24-03), Ind. App., 796 N.E.2d 741, trans. granted 801 N.E.2d 170
SUBJECT: Advising D not to cooperate with court-appointed experts
HOLDING: After jury's finding that D was not responsible by reason of insanity on charge of murder, State appealed upon two questions of law. First, Ct. affirmed Tr. Ct.'s denial of State's motion to exclude testimony of D's expert witnesses after D refused to speak to Ct.-appointed expert witnesses. Indiana S. Ct. has held that testimony of D's expert witness should not be excluded because of D's refusal to cooperate with Ct.-appointed expert witnesses. McCall v. State, 408 N.E.2d 1218 (Ind. 1980). While Ind. Code 35-36-2-2 requires Tr. Ct. to appoint experts & experts to testify, statute places no obligation on D to cooperate. Ct. noted that decision might be different if State moved Tr. Ct. for order to compel cooperation or face sanctions.

Second, Ct. held that Tr. Ct. erred in allowing defense counsel to attend Ct.-appointed psychiatric evaluations where his sole purpose was to advise D not to cooperate. D has no right to counsel at examination conducted by Ct.-appointed expert because such an examination is not a critical stage of proceeding. Williams v. State, 555 N.E.2d 133 (Ind. 1990). Advising a client not to cooperate with Ct.-appointed expert is an obstructive tactic which should be prohibited in violation of Indiana Professional Conduct Rule 3.4. Held, judgment affirmed in part & reversed in part. Friedlander, J., dissenting, distinguished this case from McCall because in that case, D was not cooperating due to irrational behavior, whereas here D was not cooperating solely for tactical reason. Dissent notes that this decision will encourage defense advisements to clients not to cooperate.

Note: On transfer at 801 N.E.2d 170, Indiana S. Ct. held that, had there been an order compelling D's cooperation, & a hearing advising him that testimony of his experts could be excluded if he failed to cooperate with Ct.-appointed experts, the State would have prevailed on this issue.

TITLE: In re Schalk
INDEX NO.: N.2.d.
CITE: (4/15/2013), 985 N.E.2d 1092 (Ind. 2013)
SUBJECT: Ethics - arranging controlled drug buy with informant
HOLDING: By assisting a client in purchasing marijuana in order to prove that a police informant involved in the case was a drug dealer, Respondent violated Indiana Professional Conduct Rule 8.4(b)(committing a criminal act that reflects adversely on lawyer's honesty) and Rule 8.4(d) (engaging in conduct prejudicial to administration of justice). Court of Appeals had previously affirmed D's conviction for misdemeanor conspiracy to commit possession of marijuana, holding that an attorney is not exempt from the criminal law even if his only purpose is the defense of his client. See Schalk v. State, 943 N.E.2d 427 (Ind. Ct. App 2011).

"Respondent's illegal attempt at a drug sting without the assistance of law enforcement, aggravated by his complete lack of any insight into his misconduct and his repeated and unfounded attacks on those involved in his criminal case and this disciplinary proceeding, demonstrate his need for a substantial period of suspension followed by a rigorous reinstatement proceeding before resuming practice." Held, Respondent suspended from practicing law for at least 9 months without automatic reinstatement.

TITLE: U.S. v. Midgett
INDEX NO.: N.2.d.
CITE: 342 F.3d 321 (4th Cir. 2003)
SUBJECT: Attorney's Disbelief in Client's Story Does Not Constitute Knowledge of Perjury
HOLDING: Attorney's disbelief in client's story did not justify refusal to present client's testimony absent client's clearly stated intention to commit perjury. D claimed that he was asleep in Co-D's car when a "mystery man" murdered victim. Although "mystery man" story lacked corroboration -- co-D said story was false, victim IDed D in court as assailant, and D sent victim a letter that might have been interpreted as a feeble apology -- D consistently claimed his story was true and never stated his intent to commit perjury. Counsel's duty to client was not dependent upon whether he personally believed D's story or how much corroboration existed. Absent D's clear statement of intent to commit perjury, Counsel had duty to put on D's testimony.

N. ETHICS

N.2. Defense

N.2.d.1. Contact with witnesses

TITLE: Matter of Geisler
INDEX NO.: N.2.d.1.
CITE: (6-7-93), Ind., 614 N.E.2d 939
SUBJECT: Defense - Investigation; contact with witnesses
HOLDING: Obstructing prosecuting attorney's access to evidence by assisting witnesses' efforts to be unavailable for service & trial is misconduct, warranting 90-day suspension. Such conduct frustrates orderly administration of justice & reflects negatively in legal profession. Fair competition in adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures & the like. Attorney breached his ethical duty as lawyer to legal system, public, & legal profession.

N. ETHICS

N.2. Defense

N.2.e. Control of litigation

TITLE: Matter of Fisher
INDEX NO.: N.2.e.
CITE: (9-23-97), Ind., 684 N.E.2d 197
SUBJECT: Altering documents - Misconduct prejudicial to administration of justice
HOLDING: Intentionally altering documents to be used in legal proceeding after they were signed & notarized by opposing party constituted conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to administration of justice, conduct adversely reflecting on fitness to practice law, & failure to represent client within bounds of law. Lawyers are obligated to adhere to ethical structures regardless of perceived transgressions of other participants in litigation. Held, publication of opinion & imposition of costs constituted sanction for D's conduct. Sullivan, J., voted for period of suspension & concurred in part & dissented in part with separate opinion in which Shepard, C.J., joined. Boehm, J., was in general agreement with points made by Sullivan, J., but would have imposed public reprimand. Dickson, J., would have imposed private reprimand.

RELATED CASES: Matter of Cholis, 484 N.E.2d 963 (altering will is misconduct warranting 90-day suspension).

N. ETHICS

N.2. Defense

N.2.e.2. Matters within attorney's control

TITLE: Judy v. State
INDEX NO.: N.2.e.2.
CITE: (3d Dist. 11/8/84), Ind. App., 470 N.E.2d 380
SUBJECT: Control of litigation - matters within attorney's control
HOLDING: It was not reversible error to permit 6-member jury to hear D's Class C felony case upon consent of D's trial attorney. Here, D contends his express consent was necessary. Ct. finds consent did not involve fundamental right; rather, it was a matter of trial procedure, to which D's attorney could properly consent. Held, no error.

N. ETHICS

N.3. Public Defenders

N.3.a. Compensation from client

TITLE: In Matter of J. Frank Hanley, II
INDEX NO.: N.3.a.
CITE: (01-20-94), Ind., 627 N.E.2d 800
SUBJECT: Negotiating private employment with public defender (PD) client
HOLDING: Negotiating for payment from client & his family in case where attorney was being paid as PD is prejudicial to administration of justice & violation of Prof. Cond. R. 8.4(d), even though Tr. Ct. approved conduct. Tr. Ct. appointed respondent as PD to represent D on murder charge. When respondent met with D to discuss charges, D asked if he could represent him as paid attorney. Respondent said he could, but only if he was paid in advance. D's family made down payment of $200, but never made any additional payments. On two subsequent occasions, respondent sent letters to D & his family, noting he had to advise Ct. of his position as either private counsel or PD, & indicating that his representation would be no different in either case, but that "it would be untruthful for me to say I can be as well prepared on a case in which I am appointed to represent the D as I can be on a private case." He also indicated that "[m]y job as a public defender does not require that I report to my clients to tell them what's going on, but to ensure that they are adequately represented." Respondent eventually represented D as PD through trial with no interruption in services, & eventually refunded $200 paid, with interest. Tr. Ct. specifically authorized its PDs to accept private employment by Ds if, subsequent to appointment, D or his family found they could afford to hire PD in that capacity. Ct. found actions were clear ethical violation of Prof. Cond. R. 8.4(d), & that letters also misstated duty of public defender to client, because Prof. Cond. R. 1.4 requires all lawyers to keep clients reasonably informed. Ct. imposed public reprimand as sanction, due to mitigating factors. Held, public reprimand ordered, Dickson, J., dissenting, disapproving of sanction as not severe enough.

RELATED CASES: Brown, 854 N.E.2d 348 (60-day suspension for accepting appointment on PD appeal while at same time demanding $3000 cash from client before he would commence appeal he knew Ct. would pay him to pursue); Relphorde, 596 N.E.2d 903 (public reprimand is appropriate sanction for collecting fee for representing D after being appointed to represent D as indigent).

N. ETHICS

N.4 Judiciary

TITLE: Abney v. State
INDEX NO.: N.4.
CITE: (6/22/2017), 79 N.E.3d 932 (Ind. Ct. App 2017)
SUBJECT: Recusal of judge not required
HOLDING: It was unnecessary for judge to recuse himself, even though the elected prosecutor served on his campaign committee, because the prosecutor had yet to take any action on behalf of the judge and his role on the committee was not significant.

Defendant was charged in Howard County with drug-related offenses. He asked Judge William Menges to recuse himself because the Howard County elected prosecutor, Mark McCann, served on Judge Menges' campaign committee and had publicly endorsed him.

Even the mere appearance of bias may require recusal if an objective person, knowing all the circumstances, would have a "rational basis for doubting the judge's impartiality." Bloomington Magazine, Inc. v. Kiang, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012). A party seeking recusal need not show "actual bias." In Bloomington Magazine, recusal was necessary because one of the attorneys had served as the chairman of the judge's election campaign, which would give a reasonable person a rational basis for doubting the judge's impartiality. Id. at 66. But here, McMann was not the campaign chairman and had yet to perform any election committee activities on behalf of Judge Menges. Moreover, Judge Menges noted that Defendant's counsel was a deputy public defender and that two members of his attorney's private law firm were the Chief Public Defender and the Chief Deputy Public Defender, who had also agreed to serve in the same role in the judge's campaign as had Prosecutor McMann. Under these circumstances, an objective person would not have a rational basis for doubting Judge Menges' impartiality. Held, judgment affirmed.

Note: Interestingly, the Court's decision did not discuss two recent U.S. Supreme Court cases on judicial bias and recusal, which stated, like here, that a party seeking recusal need not show actual bias. See Rippo v. Baker, 137 S. Ct. 905 (2017) and Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

TITLE: Brown v. State
INDEX NO.: N.4.
CITE: (8-20-97), Ind. App., 684 N.E.2d 529
SUBJECT: Judiciary - When recusal necessary; appearance of partiality
HOLDING: Judge should recuse himself under circumstances in which reasonable person, knowledgeable of all circumstances, would have reasonable basis for doubting judge's impartiality. Therefore, even appearance of partiality requires recusal. Facial expressions, body language, & oral communications of judge can result in appearance of judicial bias requiring recusal. Law presumes that judges are not biased or prejudiced. Adverse rulings & findings do not, in & of themselves, establish judge's bias or prejudice. Held, judgment affirmed.

TITLE: Cannon v. State

INDEX NO.: N.4.

CITE: (05-22-07), Ind., 866 N.E.2d 770

SUBJECT: Consideration of *ex parte* communications at sentencing - notes from judge in related case

HOLDING: Judicial Cannon 3(B)(8) provides that a judge shall not consider *ex parte* communications made to judge outside presence of parties, concerning a pending or impending proceeding. *Ex parte* communications are not limited to communications between judges & lawyers or parties. A judge may not permit the receipt of extra-judicial information about a case from anyone, including a colleague. A judge may not provide or entertain case-specific facts or allegations &, in every case, must exercise independent judgment. However, it is not so that "any" communication about a case outside presence of parties is improperly *ex parte*. Judges may seek each other's advice & counsel in performance of their judicial duties, Canon 3(B)(8)(c), & thus may confer about specific cases in furtherance of their adjudicative responsibilities without violating the rule against *ex parte* communications.

Here, judge's reference to hand-written notes made by another judge in Ct. 6 case was not an improper ex parte communication because judge had an adjudicative responsibility over both instant case & Ct. 6 case, a "companion case" involving violation of home detention program. Inasmuch as judge was performing judicial functions with respect to both D's cases, the Ct. 6 case file was properly before the Ct. as part of the record, not as an external communication. Held, transfer granted, Ct. App.' opinion at 839 N.E.2d 185 reversed on this issue & otherwise summarily affirmed, judgment affirmed.

TITLE: Caperton v. A.T. Massey Coal

INDEX NO.: N.4.

CITE: (06-08-09), U.S., 08-22, 129 S.Ct. 2252

SUBJECT: Recusal required where "probability of actual bias" is too high

HOLDING: It was unconstitutional for a state supreme court justice to sit on a case involving the financial interests of a major donor to the judge's election campaign. Taking into consideration "all of the circumstances of this case," Court held that probability of actual bias was too high, and disqualification was therefore required. The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case. Tumey v. Ohio, 273 U.S. 510 (1927), but Court has also identified additional instances which, as an objective matter, require recusal where, as here, "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35 (1975). Majority rejected arguments that its ruling would bring a train of adverse consequences ranging from a flood of recusal motions to unnecessary interference with judicial elections. "The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case." Held, reversed and remanded. Roberts, CJ., joined by Scalia, J., Thomas, J., and Alito, J., DISSENTING; Scalia, J., DISSENTING.

RELATED CASES: Rippo, 137 S.Ct. 905 (2017) (D need not show actual bias to disqualify judge but merely that “the risk of bias is too high to be constitutionally tolerable”).

TITLE: Cheek v. State
INDEX NO.: N.4.
CITE: (6/22/2017), 79N.E.3d 388 (Ind. Ct. App 2017)
SUBJECT: Recusal of judge not required
HOLDING: In a companion appeal to Abney v. State, the Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann had yet to do anything as a committee member. Cf. Zaias v. Kaye, 643 So.2d 687 (Fla. Dist. Ct. App. 1994) ("The fact that an attorney made a campaign contribution to a judge or served on a judge's campaign committee does not, without more, require disqualification." Id. Rather, sufficient grounds for disqualification include "a specific and substantial political relationship between the parties." Id.). Held, judgment affirmed.

RELATED CASES: Williams, 136 S. Ct. 1899 (U.S. 2016) (In companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member).

TITLE: In re Harkin
INDEX NO.: N.4.
CITE: (12-20-11), 958 N.E.2d 788 (Ind. 2011)
SUBJECT: Judicial misconduct - operating illegal traffic school deferral program
HOLDING: By referring traffic infraction litigants to Traffic School and then dismissing their cases upon their completion of the program without any dismissal request from the prosecutor, Respondent abused his judicial authority, committed conduct prejudicial to the administration of justice, and violated Code of Judicial Conduct's provisions that required him: to "comply with the law," Ind. Judicial Conduct Rule 1.1; to "act at all times in a manner that promotes public confidence in the integrity, independence, and impartiality of the judiciary," Jud. Cond. R. 1.2; to "uphold and apply the law," Jud. Cond. R. 2.2; and to "perform judicial and administrative duties competently," Jud. Cond. R. 2.5. In mitigation of these violations, the Hammond City Court had been referring litigants to Traffic School for decades, and previous judges of that court had not been notified of any concerns about the legality of the program from the Lake County Prosecutor's Office, the State Board of Accounts, or any other entity. Further, deputy prosecutors were aware of the Traffic School program but did not voice any objections to it until July, 2010. Finally, Respondent had taken measures to address some of the personal issues that may have accounted, in part, for his lack of thoroughness in investigating the concerns brought to his attention about the legality of his court's Traffic School program when they were raised with him.

Judge also violated Judicial Conduct Rules 1.2, 2.2, 2.6(B) and 2.8(B) when he dissuaded a litigant from contesting a seatbelt violation in court. See also In re Young, 943 N.E.2d 1276 (Ind. 2011) (imposing discipline where judge threatened to, and did, impose increased penalties for traffic infraction litigants who exercised their right to trial instead of pleading guilty, so as to penalize them for doing so and to discourage others from doing so). Held, 60-day suspension with automatic reinstatement.

TITLE: In re Young

INDEX NO.: N.4.

CITE: (02-14-11), 943 N.E. 2d 1276 (Ind. Ct. App 2011)

SUBJECT: Judicial ethics - imposing harsher sentences after trial

HOLDING: Traffic court judge violated the Judicial Code by imposing a harsher sentence and fines for those who decided to go to trial. Indiana Rules of Judicial Conduct require a judge to perform the duties of judicial office impartially, competently, and diligently; to act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary and to avoid impropriety and the appearance of impropriety; to comply with, uphold and apply the law; accord to every person who has a legal interest in a proceeding the right to be heard according to law; and not act in a manner that coerces any party into settlement. Here, D was charged with class A misdemeanor driving while suspended. During the first State witness's testimony, D claimed she wished to accept State's plea offer which she tried to take before trial, but her attorney misunderstood her. Judge responded, "It's too late. If I find her guilty, she's going to jail for a year." Judge did find her guilty and sentenced her to one year executed, although he reduced it to twenty-two days a couple weeks later. The judge's behavior violated the Rules of Judicial Conduct. Moreover, the judge engaged in a practice of imposing substantially higher penalties in fines against traffic-infraction litigants who exercised their right to trial and lost, as compared to those who pleaded guilty and waived their right to trial. In fact, the judge told one D, "I'm a great listener but sometimes I'm very expensive." The judge also would explain to the Ds what he thought the State's evidence would be and would misstate the burden of proof. This behavior also violated the Rules of Judicial Conduct. Because judge did not have prior violations and entered into a conditional agreement, a thirty-day suspension with no pay was ordered. Shepard, C.J., concurring on the basis that in the absences of a settlement, this case should have resulted in a lengthier suspension.

TITLE: Matter of Boles
INDEX NO.: N.4.
CITE: (6-29-90), Ind., 555 N.E.2d 1284
SUBJECT: Judiciary - Misconduct; using judicial power as instrument of retaliation
HOLDING: Declaring ex parte that parents of juvenile could afford to pay pauper attorney fees, ordering salaried public defender in criminal case to be paid additional attorney fees by juvenile, improperly denying juvenile's attorney any fees, & wrongfully accusing attorney of attempting to cheat taxpayers of county is abuse of judicial power which warrants 60-day suspension without pay. Circuit Ct. judge's becoming embroiled in political dispute & purporting to lead campaign against other public officials is breach of duty to be impartial. Use of judicial power as instrument of retaliation is serious violation of Code of Judicial Conduct. Held, suspension ordered; Pivarnik & Givan, JJ., dissenting.

RELATED CASES: Matter of Danikolas, 838 N.E.2d 422 (Ct. suspended Judge 60 days without pay for discharging Magistrate in retaliation for testimony she provided during a previous disciplinary matter brought against Judge; further, Judge providing "fallacious excuses" for Magistrate's discharge to the Commission & under oath is prejudicial to administration of justice, impairs public confidence in integrity of judiciary, & constitutes failure to cooperate with Commission in investigation & prosecution of Magistrate's complaint); Matter of Terry, 394 N.E.2d 94 (acts of making false accusation against judge & communicating with person known to be member of venire from which grand jury is to be selected warrant disbarment in light of prior suspension without pay from judicial duties, despite contention that comments concerning judge were protected by First Amendment).

TITLE: Matter of Cox
INDEX NO.: N.4.
CITE: (5-23-97), Ind., 680 N.E.2d 528
SUBJECT: Violation of Judicial Canons
HOLDING: Canons 1, 2, 3(B)(2), 3(B)(9), & 3E(1) of Code of Judicial Conduct generally require judges to uphold integrity of judiciary, to maintain high standards of conduct, to respect & comply with law & act at all times in manner that promotes public confidence in integrity & impartiality of judiciary, to be faithful to law, to dispose of all matters fairly, & to avoid conduct prejudicial to administration of justice. Here, judge violated these Canons by: 1) misrepresenting law to criminal D & forcing her to choose between proceeding involuntarily without counsel or exercising her right to counsel & facing contempt & incarceration; 2) imposing added penalty on another criminal D for exercising her right to jury trial; & 3) failing to disqualify himself or disclose to this D that he had previously submitted written materials highly critical of her in support of attorney in unrelated disciplinary action. Ct. concluded that 30-day suspension without pay was appropriate sanction for Respondent's misconduct.

TITLE: Matter of Cruz
INDEX NO.: N.4.
CITE: (07-25-06), Ind., 851 N.E.2d 960
SUBJECT: Judicial Disciplinary action - arrest for operating while intoxicated
HOLDING: Respondent, Commissioner of Marion Superior Ct., was arrested for operating while intoxicated & with an alcohol concentration of at least .08 grams of alcohol per 210 liters of breath. Approximately five months later, on the State's motion, Tr. Ct. dismissed all counts prior to any adjudication of guilt or innocence. Respondent & Commission agreed that by driving with BAC equivalent to .08 grams of alcohol per 210 liters of breath, Respondent failed to uphold integrity of judiciary & to maintain high standards of conduct, thereby violating Canon 1 of Code of Judicial Conduct. Ct. agreed with parties that appropriate sanction for this misconduct is a public reprimand, with costs of proceeding assessed against Respondent.

RELATED CASES: Felts, 902 N.E.2d 255

TITLE: Matter of Drury
INDEX NO.: N.4.
CITE: (10-29-92), Ind., 602 N.E.2d 1000
SUBJECT: Judiciary - Willful misconduct
HOLDING: Evidence supported finding that judge committed willful misconduct by soliciting, accepting, & failing to report $2000 loan from attorney practicing in his Ct. This conduct violated Judicial Conduct Canons 1, 2, 3 (C) & 5 (C) (1). Moreover, once judge accepted loan, he should have disqualified himself from all cases involving attorney's law firm. Judge committed willful misconduct by misrepresenting source of loan. Judge had duty to report loans he received which totaled over $7000, whether or not loans came from judge's girlfriend or girlfriend's mother. Judge violated Judicial Canon 5 (C) (4) by failing to disclose loans he received from either girlfriend or girlfriend's mother, not withstanding judge's contention that he did not believe he had to report loans. Girlfriend's testimony indicated that judge knew of his reporting responsibilities. Further, judge committed willful misconduct by being involved in creation of letter falsely accusing former girlfriend of being convicted felon, even if judge was not responsible for mailing letter. Letter was sent to Indiana Division of Family & Children which had jurisdiction over licensing of day-care centers & appeared to be attempting to intimidate & retaliate against girlfriend & her mother for cooperating in investigation of judge. Held, judge's removal affirmed.

RELATED CASES: Matter of Wireman, 367 N.E.2d 1368 (sitting as city Ct. judge in matters involving clients, ordering police to release client after client was arrested, encouraging client & others to perpetuate first-degree burglary & knowingly receiving stolen property from burglary warrants disbarment).

TITLE: Matter of Edwards
INDEX NO.: N.4.
CITE: (5-1-98), Ind., 694 N.E.2d 701
SUBJECT: Judicial ethics - presiding over case involving former clients; duty to disclose on record
HOLDING: It is not improper per se for judge to preside over case involving former client. Rather, inquiry should focus on whether facts are such that judge's impartiality might reasonably be questioned. Jud.Canon 3(E)(1). Test for determining whether judge should recuse himself or herself under this particular Canon is whether objective person, knowledgeable of all circumstances, would have reasonable basis for doubting judge's impartiality. Relevant considerations include nature of prior representation, duration of attorney-client relationship, extent to which prior representation might in some limited way be related to current case, & lapse of time between prior representation & appearance of former client before judge.

Judge has separate obligation, broader than duty to disqualify, to disclose on record information that judge believes parties or their lawyers might consider relevant to question of disqualification, even if judge believes there is no real basis for disqualification. Jud.Canon 3(E)(1) (commentary, in part). Here, respondent committed ethical violations in presiding over child support proceedings involving former client with whom he had current & ongoing sexual relationship & was contributing financially to her support at time of proceeding. Respondent engaged in other numerous intentional acts of deceit, exploitation, & neglect, both as lawyer & as judge. Held, permanent disbarment ordered.

RELATED CASES: Carr, App., 799 N.E.2d 1096 (by failing to object or move for recusal, D waived issue of whether his right to a fair trial was violated when judge did not recuse himself after indicating that he had previously represented D in an unrelated family law proceeding; judge also disclosed relevant information to all parties on record pursuant to commentary to Canon 3(E)); Hammond, App., 594 N.E.2d 509 (absent showing of prejudice, not reversible error for judge to refuse to recuse himself in criminal case when he had previously represented D in unrelated criminal matter; whether presiding over case might nevertheless violate code of judicial conduct is, however, related but separate question.

TITLE: Matter of Haan
INDEX NO.: N.4.
CITE: (3-12-97), Ind., 676 N.E.2d 740
SUBJECT: Judicial candidate's campaign pledges violated Code of Judicial Conduct
HOLDING: Judicial candidate's written campaign pledge to "stop suspending sentences" & to "stop putting criminals on probation" committed him to outcome of criminal cases in violation of Canon 5A(3)(d)(ii) of Code of Judicial Conduct & in manner inconsistent with judge's duties to impose sentences in accordance with law & evidence. Canon provides that candidates for judicial office shall not make statements that commit or appear to commit candidates to cases, controversies or issues likely to come before Ct. Held, agreed discipline of public reprimand accepted.

RELATED CASES: Spencer, 759 N.E.2d 1064; Matter of Bybee, 716 N.E.2d 957

TITLE: Matter of Hawkins
INDEX NO.: N.4.
CITE: (03-11-09) 902 N.E.2d 231 (Ind. 2009)
SUBJECT: Judicial misconduct - disorganization & mismanagement of PCR cases
HOLDING: Judge's conduct in failing to organize post-conviction relief files, permitting excessive delays in PCR cases, and failing to review orders issued by commissioner in PCR cases violated Code of Judicial Conduct, Canons 2(A), 3(B)(2), 3(B)(9), 3(C)(2), and 3(C)(3). Judge and Commissioner were charged with various violations of Code arising out of excessive delays in issuing rulings on prisoners' petitions for post-conviction relief, which in one case resulted in a prisoner's incarceration being unnecessarily prolonged by nearly two years, and other issues that arose during Commission's investigation of delays. Specifically, judge impeded investigation by failing to notify Commission during its early disciplinary investigation that a missing PCR case file had been located and an order granting PCR had been issued in the case. Code requires judge to dispose of judicial matters fairly, promptly, and efficiently, require staff members to observe standards of fidelity and diligence that apply to judge, and take reasonable measures to assure prompt disposition of matters before judges over which judge has supervisory authority. Held, Respondent suspended for 60 days without pay. In so holding, Court distinguished Matter of Kouros, 816 N.E.2d 21 (Ind. 2004), where removal of office was ordered because respondent proved unable to respond to repeated remedial steps to bring her into compliance with her duties. Shepard, CJ., and Sullivan, J., would suspend Respondent from office for one year; Boehm and Rucker, JJ., would impose a 30-day suspension.

TITLE: Matter of Johnanningsmeier
INDEX NO.: N.4.
CITE: (8/10/2018), 103 N.E.3d 633 (Ind. 2018)
SUBJECT: Public reprimand for judge's failure to recuse from close friend's traffic-infraction case
HOLDING: Court publicly reprimanded Knox Superior Court judge for reinstating a close friend's suspended driver's license and suggesting a deputy prosecutor dismiss the case. Respondent's conduct violated the following provisions of the Code of Judicial Conduct: Rule 1.1 (requiring judges to comply with the law); Rule 1.2 (requiring judges to avoid impropriety and act at all times in a manner promoting public confidence in the judiciary's integrity); Rule 1.3 (prohibiting judges from abusing the prestige of judicial office to advance others' personal or economic interests; Rule 2.2 (requiring judges to uphold and apply the law and to perform all judicial duties fairly and impartially); Rule 2.4(B), prohibiting judges from allowing social relationships to influence the judge's judicial conduct or judgment; and Rule 2.11(A) (requiring judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned). As mitigators, the parties agree that Respondent cooperated with the Commission's investigation and is remorseful. Following In re Van Rider, 715 N.E.2d 402, 404 (Ind. 1999), the appropriate sanction under the circumstances is a public reprimand plus assessing costs of this proceeding against Respondent.

TITLE: Matter of Johnson
INDEX NO.: N.4.
CITE: (8-27-99), Ind., 715 N.E.2d 370
SUBJECT: Judicial misconduct - contravening another judge's order without notice to prosecutor
HOLDING: Granting writ of habeas corpus in contravention of another judge's order & failure to ensure that notice of petition was provided to prosecutor violated Code of Judicial Conduct. Specifically, judge's conduct violated Canon 1, which generally requires judges to uphold integrity & independence of judiciary; Canon 2(A), which generally requires judges to avoid appearance of impropriety, to respect & comply with law, & to act at all times in manner that promotes public confidence in integrity & impartiality of judiciary; & Canon 3(B)(8), which generally requires judges to accord every person who has legal interest in proceeding right to be heard according to law. Ct. concluded that appropriate sanction for this misconduct is public reprimand.

RELATED CASES: Spencer, 798 N.E.2d 175 (judge violated Code of Judicial Conduct by engaging in an improper ex parte proceeding when he issued a special prosecutor Order without notice to prosecutor & failing to follow special prosecutor law).

TITLE: Matter of Kouros
INDEX NO.: N.4.
CITE: (10-12-04), Ind., 816 N.E.2d 21
SUBJECT: Removal of judge for inability to carry out her duties
HOLDING: Ct. removed Judge from office where evidence demonstrated that over a substantial period of time, involving a large number of litigants, Judge proved either unable or unwilling to issue timely & documented decisions in cases assigned to her. Moreover, her representations to Ct. about measures taken to conduct Ct.'s business in accord with acceptable standards have proven unreliable. Respondent violated her duty under Canon 3(B)(9) to dispose of judicial matters promptly by failing to issue sentencing orders in at least 35 felony cases. Respondent also violated Canon 1, which provides that a judge shall uphold integrity of judiciary, & Canon 2, which requires a judge to avoid impropriety & the appearance of impropriety, when she failed to provide Ct. with full, accurate information, by having too many files checked out from clerk's office, & by allowing her office to return to a state of disarray. In mitigation, Respondent expressed remorse & demonstrated effort to improve her Ct.- management skills during her prior suspension. However, Respondent's misconduct was not isolated but included a persistent failure to perform judicial duties over a substantial period. Balancing all circumstances, Ct. concluded that protecting integrity of judicial system & ensuring fair & timely administration of justice require that Respondent be removed from office, but not suspended from practicing law.

RELATED CASES: Matter of Brown, 4 N.E.3d 619 (Ind. 2014) (Ct. removed Respondent from office for significant judicial misconduct, including wrongful detention of at least nine criminal Ds, failing to properly oversee her court, improperly supervising trials, failing to act on Court of Appeals orders, showing hostility toward parties who came before her, and retaliating against court staff who complained or those whom she perceived as cooperating with investigations of her court).

TITLE: Matter of Newman
INDEX NO.: N.4.
CITE: (12-19-06), Ind., 858 N.E.2d 632
SUBJECT: Judicial misconduct - failure to follow appellate remand order
HOLDING: In Dawson v. State, 751 N.E.2d 812 (Ind. Ct. App 2001), Ct. App. reversed Respondent's judgment revoking probation & remanded the case to Respondent for proceedings consistent with its opinion. In a concurring opinion, Judge Darden concluded that there was no evidence that supported further delay by State for keeping the D locked up & would order immediate release. In response, Respondent told his Ct. reporter to arrange Dawson's release, but did not specifically instruct her to prepare an order. As a result of Respondent's failure to execute an appropriate order for Dawson's release & to provide proper supervision & instruction to his Ct. reporter, Dawson unnecessarily spent over one year incarcerated with the DOC & one year on supervised parole. In several written & oral statements concerning this matter, Respondent failed to exhibit meaningful remorse for the effect that his neglect had on Dawson's liberty &, instead, blamed his Ct. reporter, the DOC, & the Ct. App.

Respondent & Commission on Judicial Qualifications agree that his actions violated several Canons of Code of Judicial Conduct, namely: Canon 1A, which requires a judge to "observe [high standards of conduct] to preserve the integrity & independent of the judiciary"; Canon 2A, which requires a judge to "respect & comply with the law" & "act at all times in a manner that promotes public confidence in the integrity & impartiality of the judiciary,"; Canon 3B(9), which requires a judge to "dispose of all judicial matters fairly, promptly, & efficiently"; & Canon 3C(2), which requires a judge to "require staff, Ct. officials & others subject to the judge's direction & control to observe the standards of fidelity & diligence that apply to the judge." Ct. accepted agreement between parties that appropriate sanction for Respondent is a public reprimand. A Tr. Ct. judge is duty-bound to carry out the orders of a reviewing appellate tribunal. That duty is highest when an appellate remand order affects the substantial rights & interests of a party under the Tr. Ct.'s control.

TITLE: Matter of Pfaff
INDEX NO.: N.4.
CITE: (12-13-05), Ind., 838 N.E.2d 1022
SUBJECT: Judicial misconduct
HOLDING: In published opinion documenting circumstances surrounding Respondent's resignation from judicial office, Ct. adopted Commission's finding that, while in office as elected judge of Elkhart Superior Ct., Respondent violated Canons 1 & 2 of Code of Judicial Conduct & engaged in conduct prejudicial to the administration of justice by: 1) entering a private residence without invitation while searching for his daughter & forcibly grabbing, restraining, & threatening a male at gunpoint while stating something to the effect of, "This M...F... better talk or he's going to die"; & 2) providing false information to a Special Prosecutor's investigator & to the Commission as each investigated the incident. Canon 1 states judges "should participate in establishing, maintaining & enforcing high standards of conduct, & shall personally observe those standards in order to preserve the integrity & independence of the judiciary." Canon 2 states judges "shall respect & comply with the law & shall act at all times in a manner that promotes public confidence in the integrity & impartiality of the judiciary." Ct. accepted Respondent's resignation & permanently prohibited him from seeking or accepting any judicial office & from serving in any judicial capacity.

RELATED CASES: Matter of Greenaway, 2020 Ind. Lexis 932 (Ind. 2020) (magistrate convicted after meth sting permanently barred from bench, suspended).

TITLE: Matter of Scheibenberger
INDEX NO.: N.4.
CITE: (01-21-09), Ind., 899 N.E.2d 649
SUBJECT: Judicial disciplinary action - confrontation with criminal D and his family
HOLDING: Respondent's son died accidentally, a contributing factor to which was his son's use of drugs. Approximately three months later, Respondent suspended his court session and attended a sentencing hearing for a criminal D whom Respondent believed played a tangential or indirect role in his son's drug use. At conclusion of sentencing hearing, Respondent stated to deputy prosecutors, "Law-abiding citizen, my ass!" or words to that effect, and said that the D was a "drug dealer." Respondent also turned to three members of the D's family and said "Are you related to this piece of shit? Law-abiding citizen, my ass! He'll get what's coming to him" or words to that effect. Respondent and Commission agree that his behavior violated Canons 1(A) and 2(A) of Code of Judicial Conduct. In mitigation, parties agree that: a) Respondent acted as a grieving parent; b) he did not attend sentencing hearing with intent of confronting the D or his family, but only rather to observe; c) he cooperated fully with Commission in its investigation of the matter; d) he has accepted responsibility and is remorseful for his conduct; and e) he has undertaken appropriate measures to address his grief. An aggravating factor in this matter is the fact that in 2002 Commission issued a Public Admonition against Judge Scheibenberger for taking judicial action in a case in which his son was charged in Allen Superior Court with a misdemeanor. Held, in accordance with agreement, three-day suspension without salary and costs assessed against Respondent.

TITLE: Matthews v. State
INDEX NO.: N.4.
CITE: (12/12/2016), 64 N.E.3d 1250 (Ind. Ct. App 2016)
SUBJECT: Code of Judicial Conduct does not create enforceable rights for litigants
HOLDING: Where the defendant's CR 12 motion for change of judge was not properly filed, the Code of Judicial Conduct does not create enforceable rights in litigants and cannot be used to secure a change of judge. The Code does fix a judge's obligations, but these obligations are enforced first by the judge herself, or by a disciplinary action of the Indiana Supreme Court. Allowing the defendant to obtain a change of judge via the Code would effectively nullify CR 12 by creating a way around it, and would also allow litigants to usurp the supervisory authority of the supreme court.

TITLE: Ortiz v. United States

INDEX NO.: N.4.

CITE: (6/22/2018), 138 S.Ct. 2165 (U.S. 2018)

SUBJECT: Court-martialed airman not entitled to relief even though military judge reviewing appeal also presided over another court

HOLDING: The simultaneous service of military officers on both the criminal courts of appeals (CCAs) for the armed forces and the United States Court of Military Commission Review (CMCR) does not violate the rule that bars active-duty military officers from holding a second job that requires presidential nomination and Senate confirmation – sometimes known as the "dual-office holding ban." Thus, the conviction of D, who served as an Airman First Class in the U.S. Air Force, was affirmed. D was convicted by a military court-martial of knowingly possessing and distributing child pornography, sentenced to two years in prison, and dishonorably discharged. He appealed to the Air Force CCA, where his conviction was upheld by a panel that included Colonel Martin Mitchell, who approximately a month earlier had been confirmed to serve as a judge on the CMCR. The U.S. Court of Appeals for the Armed Forces (CAAF) reviewed D's case, concluding even if the judge's simultaneous service on the CCA and CMCR did violate the law, that would not affect either the judge's authority to sit on the CCA or the service members' convictions.

The Supreme Court held that Mitchell's simultaneous service did not violate federal law because federal law expressly allowed the secretary of defense to appoint Mitchell to the CMCR. Once that occurred, it was of no consequence that the president later nominated Mitchell to ward off a constitutional challenge on the ground that the Constitution requires the president to nominate, and the Senate to confirm, judges on the CMCR. Also, the simultaneous service did not violate the Constitution's appointments clause. D is incorrect that the clause means that Mitchell could not "serve as an inferior officer on one court and a principal officer on another." The Court has never read the appointments clause that way, and even if it had, it would not do so here because Mitchell was serving as a judge in two different systems without "any overlapping jurisdiction," eliminating any prospect that service in one could somehow influence the other. Held, cert. granted, 76 M. J. 125 and 189, affirmed. KAGAN, J., joined by ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ; THOMAS, J., concurring; ALITO, J., dissenting, joined by GORSUCH, J.

TITLE: Palmer v. State
INDEX NO.: N.4.
CITE: (3-31-81), Ind., 418 N.E.2d 530
SUBJECT: Judiciary - contempt; failure to follow order from S.Ct.
HOLDING: Superior Ct. judge, who understood orders of S.Ct. directing him to sentence D who pleaded guilty to first-degree burglary as required by statute, & yet failed to execute them for over two months, finally recusing himself, was guilty of indirect criminal contempt. Special judge, who was selected to continue cause when superior Ct. judge recused himself, was not guilty of indirect criminal contempt for his actions of allowing D to make record of due process issues permitting him to perfect another appeal to S.Ct. & allowing him to post appeal bond, where special judge followed course of action which he sincerely believed was in compliance with S.Ct.'s order. Held, Tr. Ct. Judge guilty of indirect criminal contempt, Special Judge not guilty; Hunter & Prentice, JJ., concurring in part & dissenting in part.

TITLE: Rippo v. Baker
INDEX NO.: N.4.
CITE: (3/6/2017), 137 S. Ct. 905 (S.Ct. 2017)
SUBJECT: "Actual bias" not required to disqualify a judge
HOLDING: Due process requires recusal of a judge based on bias, even if there is no evidence of "actual bias," when, considering all the circumstances under an objective standard, "the risk of bias is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975).

During trial, D received information that the federal government was investigating the presiding judge for bribery. D surmised that the local district attorney, who was prosecuting him, was helping the government investigate the judge. D sought to disqualify the judge, on 14th Amendment due process grounds, contending the judge could not impartially adjudicate a case in which one of the parties was investigating him. The judge denied the request, and D was convicted of capital murder. D later filed a post-conviction action, where he established that the local district attorney had, in fact, helped the government investigate the judge during D's trial. The Nevada Supreme Court ruled D was not entitled to discovery or an evidentiary hearing in his post-conviction matter because his allegations "did not support the assertion that the trial judge was actually biased in this case."

The Nevada Supreme Court applied the wrong standard. Due process may sometimes require a judge to recuse herself even if she has no actual bias. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). Here, on remand, the Nevada courts shall determine if the risk of bias by the judge was too high to be constitutionally tolerable. Held, cert. granted, opinion at 368 P.3d 729 reversed, and remanded for further proceedings. Per Curiam.

RELATED CASES: Cheek, 79 N.E.3d 388 (Ind. Ct. App 2017) (in companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member), Abney, 79 N.E.3d 932 (Ind. Ct. App 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

TITLE: S.R. v. DCS

INDEX NO.: N.4.

CITE: (6/19/19), 130 N.E.3d 114 (Ind. Ct. App. 2017)

SUBJECT: Magistrate & Judge's failure to follow Court of Appeals opinion on Interstate Compact on Placement of Children

HOLDING: The Interstate Compact on Placement of Children (ICPC) does not apply to placement with out-of-state biological parents. In Re B.L.P., 91 N.E.3d 625 (Ind. Ct. App 2018). Nevertheless, here, Magistrate said, "The Court is well aware of the Appellate Court's position on an ICPC and respectfully disagrees with their position." Then, presiding judge of Vanderburgh Superior Court issued an order signing off on her decision.

Court cautioned Magistrate and Judge that the Indiana Code of Judicial Conduct requires judicial officers to uphold the law. See Ind. Judicial Conduct Rule 1.1. Vertical stare decisis requires judicial officers to follow Court's opinions despite their own personal opinions otherwise. In re C.F., 911 N.E.2d 657 (Ind. Ct. App 2009). Because Child in this case has since been placed with Mother and CHINS case is closed, Court dismissed this appeal as moot.

TITLE: Williams v. Pennsylvania
INDEX NO.: N.4.
CITE: (6/9/2016), 136 S. Ct. 1899 (U.S. 2016)
SUBJECT: Judge must recuse for death penalty decision as prosecutor 30 years earlier
HOLDING: The 14th Amendment's Due Process Clause requires a judge to recuse himself where, previously, he was "significantly and personally" involved as a prosecutor in a critical decision in a D's case. Here, the Pennsylvania Supreme Court Chief Justice, who was considering D's post-conviction appeal, thirty years earlier made the decision to seek the death penalty against D. The inquiry is objective, that is, whether the average judge is likely to be neutral or whether there is an unconstitutional potential for bias. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009). The fact that the judge was just one of several judges on the Pennsylvania Supreme Court does not overcome the constitutional infirmity: "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." Held, cert. granted, opinion of Pennsylvania Supreme Court vacated, and case remanded. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.; Roberts, C.J., dissenting, joined by Alito, J., Thomas, J., dissenting.

N. ETHICS

N.5. Disciplinary Proceedings

TITLE: In re Mercho
INDEX NO.: N.5
CITE: (3/29/2017), 78 N.E.3d 1101 (Ind. 2017)
SUBJECT: Attorney misappropriation of funds not criminal in nature
HOLDING: The Supreme Court suspended Respondent from the practice of law for 180 days, with 90 days suspended, subject to successfully completing one year of probation, for misappropriating funds from his attorney trust account. See Professional Conduct Rules 1.15(a) and 8.1(a); Admission and Discipline Rules 23(29)(a)(4) (2016) and 23(29)(a)(5)(2016). However, the Court rejected the Commission's argument that under Rules of Professional Conduct 8.4(b) and 8.4(c), Respondent's financial mismanagement was criminal in nature. Held, judgment affirmed.

TITLE: In re Smith

INDEX NO.: N.5.

CITE: (7/17/2013), 991 N.E.2d 106 (Ind. 2013)

SUBJECT: Attorney disbarred for publishing book that revealed information about former client

HOLDING: Supreme Court disbarred Respondent for, among other things, publishing a book for personal gain that revealed sensitive information about a former client ("FC") obtained during the course of representing FC. See Rule Prof. Cond. 1.9(c)(1), (2). Respondent violated Rule 1.7, Conflict of Interest, by having a sexual relationships with FC and also by loaning money to FC during the course of representation. Disbarring Respondent was appropriate because in addition to the severity of Respondent's misconduct, Respondent made false statements to the Disciplinary Commission and showed no remorse.

TITLE: Matter of Bernacchi
INDEX NO.: N.5.
CITE: (10/16/2017), 83 N.E.3d 700 (Ind. Ct. App 2017)
SUBJECT: Incompetent representation, conflict of interest, improper fee, and obstructing disciplinary process results in one-year suspension without automatic reinstatement
HOLDING: The Supreme Court suspended Respondent for at least one year without automatic reinstatement for 1) incompetently representing a client (Prof. Cond. R. 1.1); 2) charging an unreasonable fee (Rule 1.5(a)); 3) improperly using and splitting his fee with a nonlawyer assistant (Rule 5.4(a); and 4) attempting to obstruct the disciplinary process (Rule 8.4(d)).

Client, the guardian of her grandson, hired Respondent to collect child support from her son and daughter in law. Strangely, Respondent also appeared on behalf of the son, an adverse party. During this time, Mario Sims worked as an independent contract paralegal working for Respondent. Client and Respondent signed an agreement, which called for Client to pay an $800 "non-refundable" retainer; Respondent told Client to pay this to Sims, indicating he would later collect his portion from Sims. At both child support hearings, Respondent gave mixed signals about whom he represented, but at the second hearing, he ultimately argued on behalf of the son, claiming the court should not order the son to pay child support because he was bedridden and unable to work. Client did not appear at either hearing, and Respondent gave inconsistent explanations for her failure to appear. After the second hearing, Client told Respondent to return to court to properly represent her position, but he refused. Client filed a grievance and asked Respondent to refund the fee. Two years later, Respondent refunded the fee, but both before and after issuing the refund, he repeatedly called Client and implored her to withdraw the grievance in exchange for the refund. Respondent also contacted multiple members of the Commission in an attempt to have the disciplinary investigation dismissed. Client eventually lost the home she shared with her grandson after she was unable to secure the child support payments from her grandson's parents.

Respondent admitted to the violation, so the only issue before the Court was the appropriate sanction. The Court found the mitigating factors slight but found the aggravating factors significant. Respondent engaged in a blatant conflict of interest, appearing on behalf of both the party seeking support and the party resisting support. He not only made false statements to the trial court, the substance of those false statements was largely adverse to Client. And Respondent not only improperly used and shared fees with an unsupervised paralegal, he did so in a way that subordinated his role to the paralegal. Indeed, Respondent never even met Client.

Respondent's conduct during the disciplinary proceedings was also troubling. He harassed Client about the grievance she filed. The letters Respondent inappropriately sent to the Commission's membership inaccurately stated that the disciplinary investigation was baseless and grounded in lies. Respondent also filed a frivolous Notice of Tort Claim against the Commission's counsel. Many of Respondent's responses to questions propounded by the Commission were at best nonsensical and at worst obstreperous. Held, Respondent suspended from the practice of law for at least one year without automatic reinstatement.

TITLE: Matter of Coleman

INDEX NO.: N.5.

CITE: (1/24/2017), 67 N.E.3d 629 (Ind. 2017)

SUBJECT: Misconduct during criminal representation and Respondent's own domestic battery conviction warrant two-year suspension

HOLDING: Respondent was suspended two years without automatic reinstatement for acts committed in the course of representing Client in a child molesting case and for his own conviction for domestic battery. Respondent sent a letter to Client to solicit employment, falsely stating he was associated with "The Cochran Law Firm," founded by Johnnie Cochran. Client paid Respondent a $4000.00 flat fee. Over the next several months, Respondent failed to keep Client informed about the case; made decisions without consulting Client; failed to appear at a pretrial conference; misinformed Client that results of a polygraph would not be shown to the prosecutor; deceived Client into signing a new fee agreement calling for a fee of $200 per hour; and negotiated a plea agreement without consulting Client, despite Client's prior instructions that he did not want to enter a plea agreement. Client continued to maintain his innocence and refused to sign the plea agreement. Client fired Respondent and hired new counsel, but Respondent would not withdraw his representation or send a copy of the file to Client's new lawyer until show cause proceedings were initiated against him. (The charge against Client was eventually dismissed). Respondent sued Client for $9000 under the new fee agreement, which Respondent induced Client to sign under false pretenses. Respondent also sought funds for expenses allegedly incurred by withdrawing from Client's criminal matter. Client filed a counterclaim. At a deposition of one of the Respondent's witnesses, Respondent and the witness concealed the fact that she was his wife. The trial court entered judgment in favor of Client's counterclaim, awarding Client $11,000.00. In 2012, Respondent was convicted of class A misdemeanor domestic battery for striking his wife in the presence of four children.

Respondent violated twenty Rules of Professional Conduct, including 1.2(a) for failing to abide by a client's decisions concerning the objectives of representation; 1.5(a) for charging an unreasonable fee; 1.16(d) for failing to return the case file to Client; 4.1(a) for knowingly making a false statement of material fact to a third person in the course of representing a client; 8.4(c) for engaging in fraud, dishonesty, and deceit; and 8.4(b) for committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

A two-year suspension without automatic reinstatement is appropriate because Respondent's misconduct involving Client was wide-ranging, pervasive, retaliatory, and deceptive. Respondent used his wife to deceive Client in the civil lawsuit and later committed domestic battery against his wife. "Respondent's systemic malfeasance in connection with his representation of Client, his criminal conduct, and his less-than-effective self-representation during most of these disciplinary proceedings reflect exceedingly poorly on his fitness to practice law." Held, judgment affirmed.

TITLE: Matter of Gutman
INDEX NO.: N.5.
CITE: (9-25-92), Ind., 599 N.E.2d 604
SUBJECT: Disciplinary - reinstatement proceedings
HOLDING: Attorney's exemplary behavior since misconduct was but one of several elements that had to be proven to establish attorney's fitness after discipline. Specific sanction imposed for original misconduct was relevant only indirectly to extent that it reflected on severity of underlying misconduct. Attorney failed to demonstrate his fitness to practice given lack of restitution or other indications of remorse. The more serious attorney's misconduct, the greater its negative impact on his future rehabilitation & eventual reinstatement, & the greater the attorney's burden of proof to overcome implication of unfitness which is conjured by misconduct. Here, attorney who resigned following his indictment for using official position as President Pro Tempore of state Senate to extract bribes or payoffs was not entitled to reinstatement to State Bar five years after his resignation, especially where attorney had not demonstrated his remorse by making some attempt at restitution. Fact that attorney apologizes for his misconduct & makes concerted effort at restitution can provide strong indication of his remorseful state of mind, while failure to make restitution without justification may be considered as strong indication of lack of rehabilitation. Held, petition for reinstatement denied.

RELATED CASES: Matter of Petition of Beck, 342 N.E.2d 611 (while petitioner, who resigned from Bar following Florida robbery conviction, ultimately was granted full pardon, & while his conduct since discipline was imposed had been exemplary & above reproach, his petition for reinstatement would nevertheless be denied, since his record reflected history of promotional activities to which his former practice of law was incidental, his testimony reflected intent to continue in that direction, & such ventures involved business where professional license could be improperly used & would appear unnecessary to petitioner's livelihood).

TITLE: Matter of Hollander
INDEX NO.: N.5.
CITE: (3/24/2015), 27 N.E.3d 278 (Ind. 2015)
SUBJECT: Attorney misconduct for patronizing a prostitute
HOLDING: The parties agreed that in patronizing a prostitute, Respondent violated nine Rules of Professional Conduct, including Rules 1.2(d) (attempting to counsel or assist client in conduct the lawyer knows to be criminal; 1.5(a) (attempting to charge an unreasonable (sex for legal services); and, 8.4(b) (committing criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer. The Court accepted the parties' proposed discipline of one-year suspension from the practice of law without automatic reinstatement.

TITLE: Matter of Johnson
INDEX NO.: N.5.
CITE: (5/18/2016), 53 N.E.3d 1177 (Ind. 2016)
SUBJECT: Respondent disbarred
HOLDING: Respondent was disbarred for providing incompetent representation, converting client funds, and failing to cooperate with the disciplinary process. Several clients hired law firms, who referred the cases to D for a portion of the fees the clients paid the law firms. Respondent failed to advise the clients that the fees were split between himself and the law firms. Client was incompetent when he advised a criminal client of a course of action that could have required the client to be retried and required him to serve additional prison time. After a client paid Respondent $32,800 through installments, Respondent performed no additional work and did not deposit all the funds into a trust account. Respondent was paid $5,500 to file a petition for writ of habeas corpus but failed to do so. Respondent failed to file an answer to a lawsuit and later failed to move to set aside the $430,000 judgment. Respondent failed to cooperate with the Commission numerous times during the course of the disciplinary matter. For these and other offenses, Respondent violated the following Rules of Professional Conduct: 1.1, 1.3, 1.4(a), 1.4(b), 1.5(a), 1.5(e), 1.15(a), 1.15(d) 1.16(d) 8.1(a), 8.1(b), 8.4(b), and 8.4(c). He also violated the following Indiana Admission and Discipline Rules: 23(29)(a)(2), 23(29)(a)(3) and (4), and 23(29)(a)(5).

TITLE: Matter of Martenet
INDEX NO.: N.5.
CITE: (12-18-96), Ind., 674 N.E.2d 549
SUBJECT: Disciplinary proceedings - Suspension for felony conviction
HOLDING: Attorney's three convictions for Operating a Vehicle While Intoxicated constituted professional misconduct since they revealed general indifference to legal standards of conduct. In assessing proper sanction for attorney misconduct, Ct. considers: actual or potential injury, state of mind of attorney, duty of Ct. to protect integrity of profession, risk to public in allowing attorney to continue in practice, & factors in aggravation & mitigation. Here, attorney's three convictions for Operating a Vehicle While Intoxicated warranted six-month suspension from practice of law, with suspension conditionally stayed for twelve months providing attorney continued in alcohol abuse aftercare treatment program.

RELATED CASES: Matter of McMahon, 194 N.E.3d 1124 (Ind. Ct. App. 2023) (two-year suspension without automatic reinstatement for attorney convicted of possession of child pornography); Raquet, 870 N.E.2d 1048 (30 day suspension for committing Class A misdemeanor possession of child pornography); Matter of DeArmond, 620 N.E.2d 698 (disbarment is warranted by improper withdrawal of representation, misdemeanor battery of estranged spouse, & felony battery of mother); Matter of Kight, 685 N.E.2d 472 (attorney's second conviction within five years for Operating a Vehicle While Intoxicated, punishable as felony, together with misconduct which included practicing while suspended, failure to provide prompt & diligent representation to clients, & failure to communicate with clients, warranted suspension for not less than three years).

TITLE: Matter of Mercho
INDEX NO.: N.5.
CITE: (3/29/2017), (Ind. 2017)
SUBJECT: Attorney misappropriation of funds not criminal in nature
HOLDING: The Supreme Court suspended Respondent from the practice of law for 180 days, with 90 days suspended, subject to successfully completing one year of probation, for misappropriating funds from his attorney trust account. See Professional Conduct Rules 1.15(a) and 8.1(a); Admission and Discipline Rules 23(29)(a)(4) (2016) and 23(29)(a)(5)(2016). However, the Court rejected the Commission's argument that under Rules of Professional Conduct 8.4(b) and 8.4(c), Respondent's financial mismanagement was criminal in nature. Held, judgment affirmed.

TITLE: Matter of O'Connor
INDEX NO.: N.5.
CITE: (5-3-90), Ind., 553 N.E.2d 481
SUBJECT: Disciplinary proceedings - Substance abuse not mitigating factor
HOLDING: Attorney misconduct in failing to represent clients with reasonable diligence, failing to return unearned fees, failing to keep clients reasonably informed, reaching settlement without consulting client, failing to promptly hand over settlement proceedings, spending such funds, & failing to render honest & candid advice warrants disbarment even if use of alcohol & cocaine has caused or contributed to attorney's actions. D's conduct in this case revealed callous disregard for clients & their interests. Although there is no specific contention that D's excessive use of alcohol & cocaine caused or contributed to his actions, Ct. stressed that findings relative to D's condition do not & cannot in any way diminish gravity of D's misconduct. Held, D disbarred.

RELATED CASES: Matter of McGrath, 506 N.E.2d 1083 (even though public defender suffered from health & alcohol-related problems at time of alleged misconduct, neglect of matters entrusted to him warranted one-year suspension).

TITLE: Matter of O'Connor
INDEX NO.: N.5.
CITE: (8/21/2017), 83 N.E.3d 693 (Ind. 2017)
SUBJECT: Fine or imprisonment for practicing law after disbarment
HOLDING: For providing legal services in an expungement matter after having been disbarred, the Indiana Supreme Court ordered Respondent to pay a $500 fine and disgorge the $1200 fee he charged in the expungement matter, both within thirty days of service of the Court's order. Failure to comply will result in a thirty-day term of imprisonment. If Respondent does not comply with the order and serves the term of imprisonment, he will be relieved of the obligation to pay the fine and disgorge the fee. David, J., dissenting, calling for a more severe sanction.

TITLE: Matter of Oliver
INDEX NO.: N.5.
CITE: (6/12/86), Ind., 493 N.E.2d 1237
SUBJECT: Disciplinary proceedings - effect of DWI by special prosecutor
HOLDING: Respondent (R) was serving as special prosecutor at time he had one car accident. He tested .23 BAC & was charged with DWI. R was charged with violating 3 sections of the Code of Professional Responsibility: (1) Rule 1-102(A)(3) - illegal conduct involving moral turpitude; (2) Rule 1-102(A)(5) - conduct prejudicial to administration of justice; (3) Rule 1-102(A)(6) - conduct that adversely reflects on R's fitness to practice law. Ct. finds R's behavior violated #2 but not #1 or #3 & orders public reprimand. Case contains discussion of concept of moral turpitude & determines that DWI is not moral turpitude per se. Ct. examines R's conduct in toto. Ct. finds judges & prosecutors have duty to conform behavior to law because as officers charged with administration of law, their own behavior has capacity to bolster or damage public esteem for system in a way different than that of attorneys otherwise in practice. It is not necessary to demonstrate harm in prosecution of cases in which R was serving as prosecutor. Harm done was to public esteem for those charged with enforcing law. Because this was R's first offense & because he had no history of alcohol problems, his reputation in community was such that it was unlikely that event would affect his ability to practice law. Held, R reprimanded & admonished. Pivarnik DISSENTS as to finding on issue #1 & argues that DWI is a crime demonstrating moral turpitude. Nonetheless, he agrees with appropriateness of sanction imposed.

TITLE: Matter of Strain
INDEX NO.: N.5.
CITE: (4/24/85), Ind., 477 N.E.2d 85
SUBJECT: Disciplinary proceedings - failure to timely file brief
HOLDING: Ct. accepts statement of Circumstances & Conditional Agreement for Discipline (submitted by Disciplinary Commission & Respondent [R]) & suspends R from practice of law for 30 days. Here, R was hired to perfect appeal, but filed brief one day after it was due. Ct. App. dismissed appeal because of late filing. R told client that appeal "was lost," but did not tell her appeal had been dismissed because of his failure to timely file brief. Ct. finds R neglected his client's case, prejudiced & damaged his client & engaged in conduct involving dishonesty, deceit or misrepresentation, & adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(4) & (6), 6-101(A)(3) & 7-101(A)(3). Held, suspension ordered.

RELATED CASES: Matter of Jones, 782 N.E.2d 345 (4-month suspension for failure to file timely appellate brief); Matter of Cherry Ind., 658 N.E.2d 596 (respondent violated Prof.Cond.R. 8.4(C), 1.3 & 1.4(a)).

TITLE: Peel v. Atty. Reg. & Disciplinary Commission

INDEX NO.: N.5.

CITE: 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990)

SUBJECT: Attorney holding out as certified as civil trial specialist by National Board of Trial Advocacy (NBTA)

HOLDING: PLURALITY. State may not enforce total ban on attorney's ability to hold self out as "certified civil trial specialist" by NBTA. Here, attorney's letterhead contained statement that he was certified by NBTA as civil trial specialist & licensed in 3 states. State supreme court publicly censured attorney for violation of disciplinary rule prohibiting attorney from publicly holding self out as certified legal specialist & for misleading advertisement. State may prohibit misleading advertising entirely, but may not place total ban on potentially misleading information if information may also be presented in non-deceptive way. In re R.M.J. (1982), 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed. 2d 64. Letterhead here is not actually/inherently misleading. Facts stated are true & verifiable. Public understands licenses are issued by governmental authorities & many certificates issued by private organizations. State's interest in avoiding any potential that statements might mislead is insufficient to justify total ban. However, state may require attorney "to demonstrate that such certification is available to all lawyers who meet objective & consistently applied standards relevant to practice in a particular area of the law." Held, total ban on such advertisement violates attorney's 1st Amend. rights. Marshall joined by Brennan, CONCURRING IN JUDGMENT (advertisement potentially misleading & thus state may enact regulations other than total ban to ensure public not misled); White, DISSENTING; O'Connor, joined by Rehnquist & Scalia, DISSENTING.

N. ETHICS

N.6. Miscellaneous

TITLE: Doyle v. State
INDEX NO.: N.6.
CITE: (4th Dist. 9/11/84), Ind. App., 468 N.E.2d 528
SUBJECT: Ethics - prosecutor may authenticate photocopies
HOLDING: A lawyer may testify in case he/she is trying if "testimony will relate solely toa matter of formality & there is no reason to believe that substantial evidence will be offered in opposition to the testimony." DR 5-101(B)(2). Here, prosecutor offered photocopies of document (trust indenture) for each juror's review. Only foundation was prosecutor's unsworn statement that photocopies were accurate copies of original document. Ct. notes prosecutor could have testified under oath as to authenticity of copies. 468 at 537 n.1. Held, no error.

TITLE: Lehman v. State
INDEX NO.: N.6.
CITE: (5/31/2016), 55 N.E.3d 863 (Ind. Ct. App 2016)
SUBJECT: Sufficient evidence for illegal practice of law
HOLDING: Sufficient evidence supported D's three convictions for unauthorized practice of law under Ind. Code § 33-43-2-1. After being suspended from the practice of law for not less than two years, D illegally practiced law by engaging in negotiations for one client. See State ex rel. State Bar Ass'n v. Diaz, 883 N.E.2d 433, 448 (Ind. 2005). He illegally practiced law with another client by consulting with the client, accepting a consultation fee, and offering to complete paperwork for a divorce. See Ind. Code § 33-43-2-1. He illegally practiced law with a third client by preparing a quitclaim deed. See Ind. Real Estate Ass'n, 191 N.E.2d 711, 717 (Ind. 1963). Held, judgment affirmed.

TITLE: Matter of Anonymous
INDEX NO.: N.6.
CITE: (5-5-03), Ind., 787 N.E.2d 883
SUBJECT: Employment of suspended attorney in law office prohibited
HOLDING: It is impermissible for an Indiana attorney to employ a suspended or disbarred attorney to perform work of any kind in a law office. A suspended or disbarred attorney shall not maintain a presence or occupy an office where practice of law is conducted. Ind. Admission & Discipline Rule 23, Section 26(b). Should the suspended or disbarred attorney's activities go beyond mere administrative or paraprofessional acts & constitute practice of law, the employing attorney may well be guilty of violation of additional provisions of Rules of Professional Conduct. Private reprimand was appropriate sanction under circumstances of this case.

TITLE: Matter of Jackson
INDEX NO.: N.6.
CITE: (7-3-97), Ind., 682 N.E.2d 526
SUBJECT: Assisting in unauthorized practice of law - failure to inform
HOLDING: Attorney violated Ind.R.Prof.Conduct 5.5(b) prohibiting assisting unauthorized practice of law by obtaining signature of decedent's nephew on legal document prepared by disbarred attorney in connection with estate matter, allowing or causing his name to be affixed to document as nephew's attorney & filing that document with Tr. Ct. Attorney assisted disbarred attorney in unauthorized practice of law by failing to inform Tr. Ct. for period of approximately five months that disbarred attorney had actually prepared & filed quiet title actions that he had filed as attorney of record. Held, attorney suspended for three years.

TITLE: Matter of Moore
INDEX NO.: N.6.
CITE: (5-15-96), Ind., 665 N.E.2d 40
SUBJECT: Miscellaneous Misconduct
HOLDING: Attorney's misconduct in striking opposing counsel while exiting from conference in judge's chambers violated rules of professional conduct prohibiting attorney from engaging in conduct intended to disrupt tribunal, committing criminal act adversely reflecting on attorney's fitness as lawyer, & engaging in conduct prejudicial to justice. Held, attorney suspended from practice of law for 60 days.

RELATED CASES: Matter of Weir, 668 N.E.2d 679 (attorney's masturbating & fondling of his genitals in presence of his female clients violated ethical rules & warranted one-year suspension from practice of law).

TITLE: Matter of Philpot
INDEX NO.: N.6.
CITE: (5/19/2015), 31 N.E.3d 468 (Ind. 2015)
SUBJECT: Attorney suspended 4 years for mail fraud and theft
HOLDING: Pursuant to the parties' proposed agreement, Court suspended Respondent for four years without automatic reinstatement because he used federal funds to pay himself impermissible bonuses in connection with his work as the Clerk of Lake County, resulting in convictions for mail fraud and theft. Respondent violated Indiana Rule of Professional Conduct 8.4(b), as he committed acts that reflect adversely on his honesty, trustworthiness, or fitness as a lawyer.