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Professional Responsibility
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PROFESSIONAL RESPONSIBILITY

I. GENERAL DUTIES TO CLIENT

A. COMPETENCE

1. Duty to Provide Competent Representation - Rule 1.1

Ind. R. Prof. Conduct 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Matter of Schlesinger, 53 N.E.3d 417 (Ind. 2016) (public reprimand for incompetent appellate representation; 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Rule 7(B)'s shift in sentencing review beginning in 2003, in at least four appeals Respondent continued to invoke the outdated "manifestly unreasonable" standard, including three appeals initiated more than a decade afer that standard was replaced with the "inappropriate" standard; in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).

Matter of Johnson, 53 N.E.3d 1177 (Ind. 2016) (Respondent was incompetent for recommending a criminal client pursue a course of action that could have required client to be retried, resulting in mandatory additional prison time).

Matter of Bernacchi, 83 N.E.3d 700 (Ind. 2017) (one-year suspension without automatic reinstatement for, in part, incompetently representing a client; in child support case, grandmother hired Respondent, but Respondent appeared for both the grandmother and her son, who were adverse parties; Respondent made false statements to trial court, which were largely adverse to grandmother).

In re Godshalk, 987 N.E.2d 1095 (Ind. 2013) (while representing RM for allegedly battering JB, Respondent's non-laywer assistant met with JB and agreed that Respondent would represent JB in a unrelated matter without checking for a potential concurrent conflict of interest; held, Respondent failed to give competent representation as required by Rule 1.1).

In re Jones, 782 N.E.2d 345 (Ind. 2003) (after being appointed to represent a criminal defendant sentenced to life without parole, Respondent filed the record of proceedings but delayed several years without filing a brief, thereby violating Rule 1.1 by failing to provide competent representation, and Rule 1.3 by failing to act with reasonable diligence and promptness in representing a client; four-month suspension).

In re Meek, 755 N.E.2d 161 (Ind. 2001) (Respondent, who had never handled a drug case and had little experience defending criminal cases, agreed to represent a client in an appeal from a drug conviction, inaccurately determined that no appealable issues existed, and failed to file an appeal, violating Ind. R. Prof. Cond. 1.1).

In re Clifton, 961 N.E.2d 18 (Ind. 2011) (Respondent who was inexperienced in appellate law failed to provide competent representation by committing substantial, glaring, and flagrant violations of the appellate rules in seven different briefs, despite Court of Appeals' decisions pointing out deficiencies in his briefs). See also In re McCord, 722 N.E.2d 820 (Ind. 2000).

a. Factors in Assessing Competence to Handle a Case

- the relative complexity or specialized nature of case;
- the lawyer's general experience;
- the lawyer's training and experience in the field in question;
- the preparation and study the lawyer can devote to the matter;
- the opportunity a lawyer has to consult with specialist;
- whether the problems presented by case lend themselves to solution by traditional legal skills (recognition of issues, analysis of precedent, oral/written advocacy, draftsmanship, etc.).

See Comments [1] and [2] to Rule 1.1.

b. Higher Standard for Criminal Defense Specialists

Lawyers who specialize in criminal defense practice may be held to a higher standard of knowledge of criminal law and procedure.

> Matter of Beck, 902 F.2d 5, 7 (7th Cir. 1990) ("Indigent criminal defendants do not select their own lawyers. If counsel offer feeble assistance, meritorious defenses may go unclaimed, or defendants may languish in prison...while the court obtains a second lawyer to put up a stiffer defense.").

2. Duty of Court to Investigate Client Complaints

Where a public defender client complains to the trial court about neglect by the public defender, the trial court should pass the complaint along to the public defender's office. However, if there is a track record of professional misconduct, the trial court has a duty to, at minimum, receive assurances that the complaint has been properly addressed by the public defender's office. Johnson v. State, 948 N.E.2d 331 (Ind. 2011).

B. LIMITS ON REPRESENTATION

1. Criminal, Fraudulent and Prohibited Conduct

Ind. R. Prof. Conduct, Rule 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

In re Evans, 759 N.E.2d 1064 (Ind. 2001) (filing a client's federal tax return containing information Respondent knew to be fraudulent violated Ind. R. Prof. Conduct 1.2(d)).

a. May Not Knowingly Assist

The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. Ind. R. Prof. Conduct 1.2(d).

There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

> Matter of Blickman, 158 N.E.3d 752 (Ind. 2020) (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." 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.).

b. Attorney Not Obligated to Disclose

An attorney is permitted, but not required, to reveal information relating to representation (e.g., to law enforcement or DCS) when a client threatens a criminal act. Rule 1.6(b) provides:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy

between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

See In re Goebel, 703 N.E.2d 1045, 1048 n.1 (Ind. 1998) (earlier version of Rule 1.6).

The attorney may reveal confidential information only to the extent the lawyer reasonably believes necessary. Ind. R. Prof. Conduct 1.6(b).

Where the client's course of action has already begun and is continuing, the lawyer is only permitted to reveal the client's wrongdoing as specified in Ind. R. Prof. Conduct 1.6.

However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed.

c. May Not Continue to Assist

A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legal but then discovers is criminal or fraudulent. The attorney may be required to withdraw from the representation.

d. Disobedience of Law

The last clause of Rule 1.2(d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

2. Perjury

a. Witness Perjury

Ind. R. Prof. Conduct 3.3(a)(3) provides:

(a) A lawyer shall not knowingly:
(3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer *reasonably believes* to be false.

For more on Client Perjury, see page 14-16.

b. Lawyer Perjury

(1) Legal Authority

Ind. R. Prof. Conduct 3.3 provides in pertinent part: "(a) A lawyer shall not knowingly: (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client

and not disclosed by opposing counsel."

(2) Lying in Legal Proceedings

Ind. R. Prof. Conduct 3.3(a) provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 108 S. Ct. 1895 (1988) (defense counsel may not deliberately mislead the court with respect to either the facts or the law).

Clark v. State, 180 Ind. App. 472, 389 N.E.2d 712, 718 (1979) (court will not tolerate purposeful and deliberate misstatements of the record and untruths in briefs).

However, "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." Ind. R. Prof. Conduct 3.1.

(3) Lying to the Client

Matter of Massa, 624 N.E.2d 939 (Ind. 1993) (lying to the client, given genuine remorse and prompt retribution, may only net a public reprimand).

Matter of McGrath, 626 N.E.2d 449 (Ind. 1993) (a pattern of neglect coupled with an intentional deception warrant disbarment).

Matter v. Steele, 45 N.E.3d 777 (Ind. 2015) (Court disbarred Respondent "without hesitation" for 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).

Matter of Ellison, 87 N.E.3d 460 (Ind. 2017) (Court suspended Respondent 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).

(4) Misrepresentation for Temporary Admission

Matter of Fieger, 887 N.E.2d 87 (Ind. 2008) (misconduct found in making material misrepresentation in a sworn application for temporary admission in an Indiana court pursuant to Admission and Discipline Rule 3(2)(a)(4)(v) relating to discipline proceedings pending against an attorney in another jurisdiction; respondent attempted to narrow language of rule by stating no "formal" disciplinary proceedings were pending against him).

C. ESTABLISHMENT OF RELATIONSHIP

For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Scope, *Indiana Rules of Professional Conduct*.

1. Question of Fact

Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

2. When Duties Attach

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.

Some duties, such as that of confidentiality under Rule 1.6, may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Ind. R. Prof. Conduct, Scope [17]. See also ABA *Defense Function Standards*, Standard 4-3.1.

D. FEES

1. Shall be Reasonable, Preferably Written

Rule 1.5 provides in part:

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) the fee customarily charged in the locality for similar legal services.
(4) the amount involved, and the results obtained.
(5) the time limitations imposed by the client or by the circumstances.
(6) the nature and length of the professional relationship with the client.
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

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

Cf. ABA *Defense Function Standards*, Standard 4-3.4(b).

a. Violation

Attorneys have been disciplined for charging unreasonable fee where fee was "far in excess of a proper fee for services rendered."

Matter of Canada, 986 N.E.2d 254 (Ind. 2013) (Commission failed to prove by clear and convincing evidence that Respondent violated Rule 1.5(a), regarding unreasonable fees, or Rule 1.16(d), failure to refund unearned; charging $10,000 to represent Defendant charged with Class A felony conspiracy to commit dealing in methamphetamine was a permissible flat fee).

In re Cosby, 844 N.E.2d 478 (Ind. 2006) (Attorney's conduct in committing to represent criminal client for flat rate of $5,000, then later requesting additional $500 for deposition and refusing to refund client money upon his firing violated Rule 1.5).

United States v. Strawser, 800 F.2d 704 (7th Cir. 1986) ($47,500 fee for negotiating two fairly simple guilty pleas was unreasonable).

b. Expenses

Matter of Baker, 955 N.E.2d 729 (Ind. 2011) (fact that attorney obtained money from client's family to pay for printing and binding of appellate briefs, even though trial court issued an order finding defendant indigent for purposes of costs of transcript violated Rule 1.5(b) for negotiating unreasonable expenses).

2. No Contingency Fees in Criminal Cases

Ind. R. Prof. Conduct, Rule 1.5(d) provides in part: "A lawyer shall not enter into an arrangement for, charge, or collect: (2) a contingent fee for representing a defendant in a criminal case."

Matter of Fasig, 444 N.E.2d 849 (Ind. 1983) (fee contingent upon "receipt of a lesser criminal penalty" than that charged by prosecution improper).

3. Terms of Payment

Comments to Rule 1.5 regarding terms of payment:

a. Unearned Fee

A lawyer must return any unearned portion of advance payment of a fee. Comment [4], Ind. R. Prof. Conduct 1.5.

Matter of Whitehead, 861 N.E.2d 702 (Ind. 2007) (in dissolution of marriage case, client signed an employment contract that required him to pay a $1,000 non-refundable minimum fee; client later terminated Respondent's legal service and requested a refund, which respondent initially noted there would be no refund; three months later Respondent provided an itemization and a refund of $92.50; court determined respondent violated Rule 1.5(a), which prohibits making an agreement for, charging, or collecting an unreasonable fee, and Rule 1.16(d), which requires an attorney to refund promptly unearned fees upon termination of representation).

Matter of Rathburn, 858 N.E.2d 636 (Ind. 2006) (violation of Rule 1.5(a) and 1.16(d) found among other violations).

Matter of 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 Court found to be $5,000 based on hearing officer's finding).

b. Property

A lawyer may accept property in payment providing this does not involve acquisition of proprietary interest in cause of action or subject matter of litigation contrary to Rule 1.8(j).

In re Colman, 885 N.E.2d 1238 (Ind. 2008) (3-year suspension for Respondent who, among other things, arranged for one of his friends to prepare a will for one of Respondent's clients who wanted to make Respondent a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).

4. Referral Fee

a. Rule

Rule 1.5(e) provides:

> A division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer, or each lawyer assumes joint responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the arrangement is confirmed in writing; and
> (3) the total fee is reasonable.

The rule permits referral fees where the client agrees to the arrangement in writing, the total fee charged is reasonable, and the division is either in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.

5. Modification of fee arrangement

Matter of Hammerle, 952 N.E.2d 751 (Ind. 2011) (where client and attorney modified fee arrangement when attorney realized the case was going to take more work than expected, attorney violated Rule 1.5(a) for charging in excess of the 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; held, public reprimand).

6. Attorney Appointed as Public Defender Negotiating Employment as Private Counsel

An attorney may not negotiate for, or accept payment from, a client in a case to which the attorney has been appointed as a public defender, regardless of whether the client initiates the discussion and regardless of whether the trial judge approves. In re Hanley, 627 N.E.2d 800 (Ind. 1994).

In re Brown, 854 N.E.2d 348 (Ind. 2006) (60-day suspension for accepting appointment on pauper appeal while at same time demanding $3,000 cash from client before he would commence appeal, he knew court would pay him to pursue).

7. Literary or Media Rights

Rule 1.8(d) provides: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

a. Share of Ownership in Property

This rule does not prohibit a lawyer representing a client in transaction concerning literary property from agreeing that the fees shall consist of a share in ownership in the property if arrangement conforms to Rules 1.5 and 1.8 (a)(i). Comment [9], Ind. R. Prof. Conduct 1.8.

b. Denial May Violate Right to Counsel

It is questionable whether a disciplinary agency can act to chill a client's constitutional right to engage attorney of their choice through ethical code prohibitions.

Maxwell v. Superior Court of Los Angeles County, 639 P.2d 248 (Cal. 1982) (criminal defendants in appropriate cases may have a constitutional right to engage retained attorneys of their choice under a life-story fee contract), *overruled on other grounds by* People v. Doolin, 198 P.3d 11 (Cal. 2009).

c. Denial may require special prosecutor

Camm v. State, 957 N.E.2d 205 (Ind. Ct. App. 2011) (prosecutor's entering into a contract to write a book about a case that was still pending on appeal constituted a conflict of interest requiring his removal when case was reversed on appeal and remanded for new retrial; fact that book contract was cancelled did not change prosecutor's personal interest in writing the book).

Matter of Henderson, 78 N.E.3d 1092 (Ind. 2017) (Court imposed a public reprimand against prosecutor in Camm v. State, 957 N.E.2d 205 (Ind. Ct. App. 2011), who violated Rules of Professional Conduct after he failed to recuse himself from a case he planned to write a book about; when Disciplinary Commission began to investigate Respondent, he hired private counsel to represent him and sent payment vouchers 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)).

a. Reporting of Fees and Other Cash PaymentMust Report Identity of Cash-Paying Clients > $10,000

Under cash transaction reporting requirements set out in 26 USC §60501, any person engaged in a trade or business who receives more than $10,000 in cash in any one transaction, or two or more related transactions must file Form 8300, disclosing payor and describing transaction. More than just fees are covered; the implementing regulations also mandate reporting of cash received for a custodial, trust or escrow account. See generally, Axelrod and Harris, *The Perils of Getting Paid in Cash*, 3-WTR Crim. Just. 6 (Winter 1989).

The identity of the client and source of legal fee payment is not protected by the attorney-client privilege, except in special circumstances. U.S. v. Golberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991).

Willful failure to report a reportable transaction, or structuring a transaction to avoid the reporting requirement, is a crime. A lawyer aiding a client to avoid a currency transaction report may be prosecuted as a conspirator or an aider and abettor or as a money launderer. Hall, Professional Responsibility in Criminal Defense Practice, § 8:1.

8. Safekeeping Property/Funds

Rule 1.15 deals with a lawyer's obligations to hold property of clients or third parties in connection with a representation separate from the lawyer's own property.

Matter of Webb, 854 N.E.2d 821 (Ind. 2006) (12-month suspension for attorney who requested and received from client's family $3,000 to hire a DNA expert but did not deposit in his trust account or hire an expert although told family that he did; additional $1,000 paid by family also not credited to the client's account).

9. Unreasonable Fees

Matter of Krasnoff, 78 N.E.3d 657 (Ind. 2017) (180-day suspension without automatic reinstatement for violation of, *inter alia*, Rule 1.5(a) by charging unreasonable fees and renegotiating fees related to two lawsuits Respondent filed for Client against his employer).

E. DILIGENCE

1. Reasonable Diligence Required

Rule 1.3. provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

See ABA *Defense Function Standards,* Standard 4-3.7 and Standard 4-1.2(g) (diligence required in cases where capital offense is charged).

2. Violation

Attorneys are often sanctioned for lack of diligence.

Matter of Ellison, 87 N.E.3d 460 (Ind. 2017) (Court suspended Respondent 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 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]).

In re Kieser, 631 N.E.2d 916 (Ind. 1994) (failure to receive/return telephone calls or to conduct discovery and investigation of personal injury claim).

In re Briscoe, 629 N.E.2d 851 (Ind. 1994) (failure to file dissolution petition or to reply to repeated requests for information).

In re Levinson, 604 N.E.2d 599 (Ind. 1992) (failure to review transcripts, records, and merits of possible post-conviction petition as agreed).

In re Kinnard, 873 N.E.2d 58 (Ind. 2007) (failure to appear at pretrial conferences and to respond to trial court's show cause order).

In re Schrems, 856 N.E.2d 1201 (Ind. 2006) (after accepting $1,500 fee, Respondent only once returned client's calls and met once or twice with client during course of representation).

In re Freeman, 835 N.E.2d 494 (Ind. 2005) (pattern of neglecting clients).

In re Roberts, 842 N.E.2d 1293 (Ind. 2006) (failure to notify two clients that the Court of Appeals had affirmed the clients' convictions).

F. COMMUNICATION WITH CLIENT

1. Duty to Keep Client Informed

A lawyer has a duty to keep the client informed. Rule 1.4 provides:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See also ABA *Defense Function Standards*, Standard 4-3.9(a); 4-6.2(a) and (b).

a. Fulfill Reasonable Expectations

The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. Comment [6], Rule 1.4.

Matter of Ellison, 87 N.E.3d 460 (Ind. 2017) (Court suspended Respondent 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 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]).

Matter of Hicks, 786 N.E.2d 272 (Ind. 2003) (Respondent, as public defender, failed to advise client of case's disposition after Court of Appeals affirmed conviction, violating Rule 1.4(b), which requires a lawyer to explain matters to client; respondent also violated Rule 5.3(b) for failing to supervise nonlawyer employee who played a role in the lack of communication with the client; Court imposed 60-day suspension but stayed the sanction on conditions of 18-month period of probation).

Matter of Brown, 973 N.E.2d 562 (Ind. 2012) (30-day suspension with automatic reinstatement for Respondent's 18-year pattern of misconduct relating to neglect of criminal appeal; see Rules 1.3, 1.4(a) and 1.4(b)).

Matter of Roberts, 842 N.E.2d 1293 (Ind. 2006) ((Respondent, while serving as a public defender, failed to timely notify two clients that Court of Appeals had affirmed their convictions, resulting in the clients' loss of the right to file petitions to transfer, thus violating Rule 1.3, which requires a lawyer to act with reasonable diligence and promptness, and Rule 1.4(b)).

Matter of Dahlberg, 611 N.E.2d 641 (Ind. 1993) (lawyer failed to explain plea agreement to extent necessary to permit client to make informed decisions; client relied on lawyer's false assurance that pleading guilty to Class B felony would result in maximum sentence of six months of work release).

Matter of Kinnard, 873 N.E.2d 58 (Ind. 2007) (violation of Rule 1.4 (a) and (b) in relation to failing to appear at pretrial conferences and hearings in relation to trial court's show cause order).

Matter of Roberts, 842 N.E.2d 1293 (Ind. 2006) (violation of Rule 1.4(b) in relation to failing to timely notify two clients that Court of Appeals had affirmed their convictions).

Matter of Clifton, 961 N.E.2d 18 (Ind. 2011) (where Respondent told his client that her appeal was dismissed because she entered into a plea agreement when, in fact, it had been dismissed for noncompliance with the appellate rules, respondent violated Rule 1.4(a) and (b)).

Matter of Webb, 854 N.E.2d 821 (Ind. 2006) (violation of Rule 1.4(b) in relation to situation where attorney took $3,000 from client's family to hire DNA expert but did not hire expert).

Matter of Rader, 907 N.E.2d 966 (Ind. 2009) (where attorney failed to respond to defendant and his family's requests to expedite ruling on petition for post-conviction relief for two years, attorney's conduct violated Rule 1.4(a) (2) even though attorney did send two email inquiries about the status of the ruling to the magistrate who conducted the hearing).

2. Exceptions

a. Child, Mental Disability or Diminished Capacity

Fully informing the client according to Rule 1.4 may be impracticable where the client is a child or suffers from mental disability. See Rule 1.14.

Practical exigency may also require a lawyer to act for a client without prior consultation. Rule 1.4, Comment 3.

b. Withholding Information from a Client

A lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.

Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders. Rule 1.4, Comment 7.

3. Violations

Attorneys have been disciplined for failure to keep client reasonably apprised of status or disposition.

In re Shull, 741 N.E.2d 723 (Ind. 2001) (counsel failed to inform client of court proceedings, in violation of Professional Conduct Rule 1.4(a)).

Matter of Haller, 248 Ind. 255, 226 N.E.2d 164 (1967) (suspended and disbarred where counsel accepted fee to file bankruptcy and never filed petition or made explanation).

G. ATTORNEY-CLIENT DECISION-MAKING

1. Rule 1.2(a)

Ind. R. Prof. Conduct, Rule 1.2(a) provides:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

a. Client's Authority over Litigation Objectives

Client has ultimate control over litigation objectives within limits imposed by law and lawyer's professional obligations. Client should decide regarding expense to be incurred and concern for third persons who might be adversely affected. Comment [2], Rule 1.2.

Client has right to consult with lawyer about means used in pursuing objectives. Ind. R. Prof. Conduct 1.2(a).

b. Lawyer's Authority over Litigation Means

A lawyer is not required to pursue objectives or employ means simply because client wants lawyer to do so. The lawyer is responsible for technical and legal tactical issues.

(1) Duty to Represent Client's Best Interests

Atchley v. State, 622 N.E.2d 502 (Ind. 1994) (counsel's refusal to assist defendant in attempt to withdraw guilty plea was not an improper abandonment of client. Attorney advised against it, appeared at hearing on motion, and argued it was against client's best interests to withdraw plea. Attorney stayed by client's side and attempted to represent him in manner he thought best).

c. Disagreements

In case of disagreement on significant matters of strategy, if the lawyer chooses to make a record of the circumstances, the lawyer's advice and reasons, and the conclusions reached, she should be careful not to violate the confidentiality of the lawyer-client relationship.

See ABA *Defense Function Standards*, Standard 4-5.2 (specific guidance on who makes decisions as to control and direction of the defense).

d. Client with Diminished Capacity

Ind. R. Prof. Conduct 1.14 states in part:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

To the extent reasonably possible, the lawyer should maintain a normal lawyer-client relationship with the impaired client. However, attorneys must be careful in conveying information to, or obtaining tactical and strategic information and decisions from, such clients.

See generally Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Impaired Defendant: Zealous Advocate or Officer of the Court*, 1988 Wis. L. Rev. 65 (1988).

2. Constitutional Law

a. Scope of Criminal Defendant's 6th Amendment Rights

Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983) (accused has ultimate decision whether to plead guilty, waive jury, testify, or take an appeal; however, indigent does not have a 6th Amendment right to require counsel to argue all nonfrivolous issues he wants advanced).

b. Constitutional Right to Counsel and Attorney's Duty Under the Ethics Rules

A breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment right to counsel. Nix v. Whiteside, 475 U.S. 157, 165, 106 S. Ct. 988, (1986).

Jones v. Barnes, 463 U.S. 745, 754, 103 S. Ct. 3308 (1983) (concluded criminal defense lawyer has *ethical* obligation to follow client's wishes regarding non-frivolous issues to be put forward on appeal, irrespective that client has no *constitutional* right to order attorney to do so. The majority did not reach this ethical issue).

H. CONFIDENTIALITY OF INFORMATION

1. No Disclosure Without Client's Consent

Rule 1.6 provides, in part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

a. When Not Compelled by Law

The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies to all information relating to the representation, whatever its source, not merely to matters communicated in confidence by the client. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. Rule 1.6, Comment 3.

b. Separate from the Attorney-Client Privilege

The attorney-client evidentiary privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

2. Exceptions

a. May Disclose for Professional Self-Defense

Under Rule 1.6(b)(5) a lawyer may make disclosures reasonably believed necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

Kennedy v. State, 232 Ind. 695, 116 N.E.2d 98 (1953) (allegation of ineffective assistance of counsel raised by former client; waiver of attorney-client privilege to defend self from attack).

NOTE: An attorney is not permitted to reveal confidential communications from client relating to commission of past crimes. See Rule 1.6(a).

b. Compelled Disclosure

Lawyers must comply with the final orders of a court or other tribunal of competent jurisdiction requiring lawyer to give information about the client.

Also, where ethical code provisions require revelation of client confidences in a given situation, these provisions must be followed. Rules 3.3(b) and 4.1(b). Rule 1.6, Comments 13-15.

(1) Client's Whereabouts

The Indiana Rules of Professional Conduct are silent as to when or whether an attorney is permitted or required to divulge client's address or whereabouts. Courts are divided on whether the attorney-client privilege protects against compelled disclosure of client's whereabouts.

Matter of Walsh, 623 F.2d 489, 494 (7th Cir. 1980) (not privileged).

Matter of Nackson, 555 A.2d 1101 (N.J. 1989) (privileged).

Burkoff, *Criminal Defense Ethics*, § 5.14 (attorney-client privilege should apply where legal services sought by client relate directly to issue of client's whereabouts).

In re Goebel, 703 N.E.2d 1045 (Ind. 1998) (attorney disciplined for showing an envelope, addressed to one client but returned as undeliverable, to a second client who had threatened to kill the first client).

See Annotation, *Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege*, 16 A.L.R. 3d 1047.

(2) Client Perjury

Rule 3.3 provides in part:

(a) A lawyer shall not knowingly: [. . .]

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.[. . .]

(b) The duties stated in [paragraph (a)] continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(a) Attorney must "know" defendant's testimony is false

In 2005, Rule 3.3(a)(3) was amended to allow a defense attorney to call a defendant as a witness even if the attorney reasonable believes the defendant is lying. Rather, an attorney is only prohibited from calling the defendant if he knows the defendant is lying. Prior to 2005, a defense attorney who simply had

reason to believe the defendant was lying could not call or had to correct the defendant's testimony.

Matter of Page, 774 N.E.2d 49 (Ind. 2002) (attorney violated Rule 3.3 by remaining silent and taking no action when, in open court with his client, during a hearing on the client's petition for a 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).

(b) Reasonable measures

Attorney must not actively assist or encourage client to commit perjury. Rule 1.2(d). Defense counsel must attempt to dissuade the client from perjuring himself or herself.

The U.S. Supreme Court has held that the Sixth Amendment is not violated when attorney threatens to withdraw or to reveal client's intention when client proposes to commit perjury. Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988 (1986).

United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988) (Nix v. Whiteside was unusual because in that case defendant's intended perjury was clear; it is practically impossible to know in advance for certain whether defendant will testify falsely, therefore disclosures by counsel should be rare).

(c) Narrative testimony

Reynolds v. State, 625 N.E.2d 1319, 1320-21 (Ind. Ct. App. 1993) (counsel not required to directly elicit testimony from defendant where to do so would be unethical; defendant may exercise his right to testify in narrative form).

(d) When possibility of perjury disclosed to trial court

United States v. Long, 857 F.2d 436, 446-47 (8th Cir. 1988) (uses a "firm factual basis test").

See generally Lefstein, *Client Perjury in Criminal Cases:* Still in Search of an Answer*,* 1 Geo. J. Legal Ethics 521 (1988).

(e) Additional reading

Hall, *Handling Client Perjury after Nix v. Whiteside: A Criminal Defense Lawyer's View*, 42 Mercer L. Rev. 769 (1991) (Article dealing with practical issues: What is client perjury and who decides? How does the criminal defense lawyer deal with the client who intends to commit perjury? Is the ethical requirement of withdrawal ever really the answer? Can the client be put on the stand and questioned in a manner satisfying both the lawyer's legal ethics and the client's constitutional rights? Can the personal moral considerations of the zealous advocate, who thinks she can control the client on the stand, be accommodated? Finally, how does the lawyer handle client perjury after it occurs?)

Lefstein, *Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C.L. Rev. 897, 918-21 (1986).

(3) Client's Frauds upon Court

Attorney must take reasonable remedial measures upon learning of a client's fraud upon the court before the conclusion of the proceeding, even if discovered after the fact. Ind. R. Prof. Conduct 3.3(b) and (c). See also Rule 4.1(b).

NOTE: It is not clear whether the term "proceeding" in Rule 3.3(c) refers to close of trial or the point at which there is no longer an opportunity for a new trial, appeal, etc.

(4) Revealing Existence of Physical Evidence

Defense counsel's duty to protect client confidences may conflict with the ethical obligation not to conceal or suppress relevant physical evidence or assist another in such activity. Rule 3.4(a) provides: "A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;"

(a) Where State is Unaware of Physical Evidence

It is not clear whether defense counsel has a duty to disclose to prosecution physical evidence coming into counsel's possession as a direct or indirect result of client's confidential communications. "Applicable law may require the lawyer to turn the evidence over to the police or prosecuting attorney, depending on the circumstances." Comment [2], Ind. R. Prof. Conduct 3.4.

Cf. ABA *Defense Function Standards*, Standard 4-4.7 for rules on defense counsel's entitlements and obligations (no obligation). See also *The American Lawyer's Code of Conduct*, Chapter III, Illustrative Cases 3(a)-(d).

(b) Evidence sought by lawful subpoena or court order

Comment [13] to Rule 1.6: "A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order."

(c) Evidentiary Disclosure by Prosecutor

Rule 3.8 provides in pertinent part:

> The prosecutor in a criminal case shall:
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

A prosecutor has a constitutional obligation to disclose material, exculpatory evidence to the defendant in a criminal case. Matter of Hudson, 105 N.E.3d 1089 (Ind. 2018). See IPDC Pretrial Manual, Chapter 6, Discovery.

(5) Violations of Duty of Confidentiality

Attorneys have been subjected to disciplinary sanctions for unethically revealing client confidences for personal gain or simply to the detriment of the client. Matter of Gemmer, 566 N.E.2d 528 (Ind. 1991).

Matter of Rhame, 416 N.E.2d 823 (Ind. 1981) (attorney's revelation to the police of confidences of his former client, suspected of murdering her husband, relating to particulars of her divorce and desperate financial condition).

Matter of Roberts, 626 N.E.2d 457 (Ind. 1993) (respondent's secretary informed him that a client was soliciting money by impersonating a deaf mute. Respondent filed a motion to withdraw under oath in which he informed the court of the incident and that he had serious doubts as to his client's veracity. Violation of Rule 1.6(a)).

I. GENERAL DUTIES AS LAWYER

In re Usher, 987 N.E.2d 1080 (Ind. 2013) (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; Court suspended respondent for 3 years without automatic reinstatement for trying to discredit and humiliate intern while she was seeking employment and for also not cooperating with Commission; See Rules 3.3(a)(1); 8.1(a),(b); 8.4 (a)-(d), (g)).

Matter of Smith, 97 N.E.3d 621 (Ind. 2018) (serious nature of Respondent's misconduct, his resulting felony intimidation conviction for threatening his estranged wife with an axe, and his noncooperation with disciplinary process collectively persuaded majority to conclude that disbarment was appropriate sanction).

II. CONFLICTS OF INTEREST

A. SIMULTANEOUS CONFLICTS OF INTEREST SITUATIONS

1. Concurrent Conflict of Interest

Ind. R. Prof. Conduct 1.7(b) provides:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

In re Godshalk, 987 N.E.2d 1095 (Ind. 2013) (Respondent violated Rule 1.7(a), concurrent conflict of interest, where as he represented RM for allegedly battering JB, his non-laywer assistant met with JB and agreed that Respondent would represent JB in a unrelated matter).

Matter of Kern, 555 N.E.2d 479, 483 (Ind. 1990) (prohibited conflict of interest where court determined that a disinterested lawyer would not continue to represent his client after prosecution's offer of immunity if client provides information about counsel).

In re Maternowski and Dillon, 674 N.E.2d 1287 (Ind. 1996) (defense lawyers with policy against representing clients who cooperate with the prosecution cannot accept payments from the client's accomplices without breaching the duty of loyalty and independence owed to the 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 a disinterested lawyer would conclude that client should not agree to representation under circumstances).

2. Vicarious Disqualification

Disqualification of one attorney due to simultaneous conflict of interest may serve to vicariously disqualify that attorney's associates or employees. See Rule 1.10(a). Whether public defenders who represent clients with adverse interests have a conflict under the Rules may depend on whether the public defenders are part of the same firm. Matter of Recker, 902 N.E.2d 225 (Ind. 2009). Whether a public defender office constitutes a firm will differ from county to county.

> Matter of Recker, 902 N.E.2d 225 (Ind. 2009) (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; although the courts provided office space for the public defenders in the courthouse, one incoming phone line, part-time secretarial assistance and generic letterhead with the

words "Office of the Public Defender," each public defender contracted with a different court, maintained their own offices, could only have access to his or her own files and had no control over the space provided by the courts).

People v. Banks, 520 N.E.2d 617 (Ill. 1987) (conflict of interest on part of one public defender does not necessarily disqualify other public defenders).

For vicarious disqualification issues after lawyer leaves or joins a law firm, see Rules 1.9(b) and 1.10(b).

3. Criminal Cases - Grave Potential for Conflict

"The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." Rule 1.7, Comment [23] (in part).

Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708 (1980) (joint representation of conflicting interest is suspect because of what it tends to prevent the attorney from doing).

Holloway v. Arkansas, 435 U.S. 475 (1978) (defendant objecting to joint representation must be given the opportunity to show a potential conflict impermissibly imperils his right to a fair trial).

Where two criminal defendants are jointly represented and seek to waive conflict-free representation, the trial court must make a detailed inquiry to resolve the conflict between the right to counsel of one's choice and the right to competent counsel. Latta v. State, 743 N.E.2d 1121 (Ind. 2001).

See *ABA Defense Function Standards*, Standard 4-1.7(d) (regarding multiple representation).

a. Criminal Plea Bargaining

Rule 1.8(g) provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, *or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas*, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. (Emphasis added)

b. Waivers of Simultaneous Conflicts Under Sixth Amendment

Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692 (1988) (trial judge acted within her discretion in denying defendant in a conspiracy case the choice of substituting his lawyer for one representing two other defendants, even though all defendants waived their right to conflict-free counsel. Presumption in favor of defendant's choice may be overcome not only by showing of actual conflict but also by a showing of a serious potential).

But see Alcocer v. Superior Court, 254 Cal. Rptr. 72 (Cal. App. 1988) (rejected application of Wheat under California constitutional law; the choice is up to defendant).

B. SUCCESSIVE CONFLICTS OF INTEREST - FORMER CLIENTS

1. Rule 1.9

Rule 1.9 applies to situations in which defense counsel's current representation of clients or interests differs from those previously represented.

a. Successive Representation in Same or Substantially Related Matter

Rule 1.9 provides, in part:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

"The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Rule 1.9, Comment [2] (in part).

> In re Wilder, 764 N.E.2d 617 (Ind. 2002) (attorney, who represented an unmarried couple jointly, violated [former Rule 1.9] by later representing one of the couples in matters directly adverse to the other in dissolving their legal affairs).

Principles in Rule 1.7 (conflict of interest: general rule) determine whether interests of former and present client are adverse.

b. Prohibition on Use of Information Relating to Former Client

Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of a former client, except as permitted by the Rules or when the information has become generally known.

> Matter of Smith, 991 N.E.2d 106 (Ind. 2013) (Supreme Court disbarred Respondent for, among other things, publishing a book for personal gain that revealed sensitive information about a former client obtained during the course of representing the former client; see Rule Prof. Cond. 1.9(c)(1), (2)).

> Matter of Henderson, 78 N.E.3d 1092 (Ind. 2017) (Court imposed a public reprimand against prosecutor in Camm v. State, 957 N.E.2d 205 (Ind. Ct. App. 2011) who violated Rules of Professional Conduct after he failed to recuse himself from a case he planned to write a book about; when Disciplinary Commission began to investigate Respondent, he hired private counsel to represent him and sent payment vouchers 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)).

In re Wilder, 764 N.E.2d 617 (Ind. 2002) (attorney violated Rule 1.9(b) by using information obtained during earlier representation of an unmarried couple in later representing one of the couples in matters directly adverse to the other).

2. Constitutional Right

Under federal law, trial courts may override defendant's attempt to waive his 6th Amendment right to conflict-free counsel. Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692 (1988).

United States ex rel. Stewart v. Kelly, 870 F.2d 854 (2d Cir. 1989) (upholding defense counsel's disqualification where counsel's prior representation of a prosecution witness posed a potential conflict of interest).

C. CONFLICTS WITH COUNSEL'S SELF-INTEREST

1. Literary or Media Rights

Rule 1.8(d) provides: "Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

Camm v. State, 957 N.E.2d 205 (Ind. Ct. App. 2011) (prosecutor entering into a contract to write a book about the case created an irreversible, actual conflict of interest with his duty to the people of the State of Indiana).

Cf. Matter of Smith, 991 N.E.2d 106 (Ind. 2013) (Supreme Court disbarred Respondent for, among other things, publishing a book for personal gain that revealed sensitive information about a former client obtained during the course of representing the former client; see Rule Prof. Cond. 1.9(c)(1) and (2)).

Matter of Henderson, 78 N.E.3d 1092 (Ind. 2017) (Court imposed a public reprimand against prosecutor in Camm v. State,*supra*, who violated Rules of Professional Conduct after he failed to recuse himself from a case he planned to write a book about; when Disciplinary Commission began to investigate Respondent, he hired private counsel to represent him and sent payment vouchers 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)).

2. Personal Relationship with Victim

Matter of Faw, 961 N.E.2d 1001 (Ind. 2012) (elected prosecutor's decision to talk with officer who arrested his employee's husband and not to bring charges violated 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 responsibility to a third party).

3. Sexual Relationship with Client

Matter of Smith, 991 N.E.2d 106 (Ind. 2013) (Respondent violated Rule 1.7, Conflict of Interest, by having a sexual relationship with and loaning money to client).

4. Bail Bond

"Defense counsel should not act as surety on a bond either for the accused represented by counselor for any other accused in the same or a related case, unless it is required by law, or it is clear that there is no risk that counsel's judgment could be materially limited by counsel's interest in recovering the amount ensured." ABA *Defense Function Standards*, Standard 4-1.7(M).

5. Prohibited Referrals

ABA *Criminal Justice Standards*, Defense Function Standard 4-2.5(a) provides:

(a) Defense counsel should not give anything of value to a person for recommending the lawyer's services, except that

(i) counsel may pay reasonable costs of advertisements, or the usual charges for a legal services plan or qualified lawyer referral service, as described in ABA Model Rule 7.2; and

(ii) counsel may maintain nonexclusive reciprocal referral arrangements with other lawyers, if the client is fully informed of the arrangement and the arrangement does not constrain defense counsel's independent professional judgment regarding the client's best interests.

(b) Defense counsel should not have an ongoing or regular referral relationship with any source (such as prosecutors, public defender programs, law enforcement personnel, bondsmen, or court personnel) when such an ongoing relationship is likely to create conflicting loyalties for the lawyers involved or an appearance of impropriety. Defense counsel's relationship with a referral source should be disclosed to the client.

(c) Referrals by one defense counsel to another should be based on merit, experience, competence for the particular matter, and other appropriate considerations.

6. Providing Financial Assistance to Client

It is permissible to advance litigation expenses to client and offer them in a form other than that of a loan. See Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991).

Rule 1.8(e) provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

7. Counsel Employed by a Third Party

A lawyer shall not accept compensation for representing a client from one other than the client unless the client gives informed consent; there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and information relating to representation of a client is protected as required by Rule 1.6. Ind. R. Prof. Conduct 1.8(f).

Wood v. Georgia, 450 U.S. 261, 101 S. Ct. 1097 (1981) (discusses potential 6th Amendment and due process ramifications of conflicts arising out of defense counsel's employment by a third party).

In re Maternowski and Dillon, 674 N.E.2d 1287 (Ind. 1996) (client's consent to continued representation despite conflict is invalid where a disinterested lawyer would conclude that client should not agree to representation under circumstances).

8. Compensating Witnesses

a. Rule 3.4

Rule 3.4 provides, in part: "A lawyer shall not: (b)... offer an inducement to a witness that is prohibited by law;"

b. Cannot Pay Occurrence Witness for Testifying

The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying. Rule 3.4, Comment [3].

c. Contingency Fee

In most jurisdictions it is improper to pay an expert witness a contingent fee. Rule 3.4, Comment [3].

d. Can Pay Lost Wages and Pocket Expenses

It is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

e. Compelling Experts

Experts may be compelled to appear and testify. See Ind. Code § 34-45-3-1, -2, et seq.

However, expert can refuse to testify regarding expert opinion unless he is compensated by a professional fee. Buchman v. State, 59 Ind. 1 (1877).

Dills v. State, 59 Ind. 15 (1877) (a physician and surgeon cannot be required to testify as an expert, by giving his professional opinion, over his objection to doing so, unless compensated therefore by a professional fee, before so testifying; and his refusal to so testify unless so compensated is not a contempt).

State v. Bailey, 714 N.E.2d 1144 (Ind. Ct. App. 1999) (professionals can be made witnesses in deposition as to facts learned while engaged in that profession upon tender of statutory witness fee and without compensation on professional fee basis).

f. Fees for State's Witness

Ind. Code § 33-37-10-2:

(a) Except as provided in section 3.5 [Ind. Code § 33-37-10-3.5] of this chapter [compensation for school employees testifying in criminal actions,] a witness in a criminal action may receive a fee if the witness:

(1) is summoned by the state;
(2) is named on the indictment or information; and
(3) testifies under oath to a material fact in aid of the prosecution.

(b) A fee paid under subsection (a) is the sum of the following:

(1) An amount for mileage at the mileage rate paid to state officers for each mile necessarily traveled to and from the court.
(2) For each day of attendance in court equal to:
(A) fifteen dollars ($ 15) for witnesses subpoenaed under Ind. Code § 35-37-5-4; or
(B) five dollars ($ 5) for all other witnesses.

9. Gifts from Clients

Rule 1.8(c) provides: "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship."

A lawyer may accept a gift from a client if the transaction meets general standards of fairness. Rule 1.8, Comment [6].

10 Client Trust Accounts

In order to avoid commingling of clients' and attorney's funds, attorneys must keep separate identifiable client trust accounts to deposit monies of the client. See Rule 1.15 for the requirements of trust accounts.

Rule 1.15(a) requires attorneys to keep clients' or third parties' property separate from attorney's property.

11. Public Defender Negotiating Employment as Private Counsel

In a matter in which a public defender is already engaged, the public defender may not negotiate employment as private counsel, regardless of whether the client initiates the discussion and regardless of whether the appointing judge approves the conduct.

Matter of Hanley, 627 N.E.2d 800 (Ind. 1994) (negotiation in such circumstances is violation of Rule 8.4(d) as conduct prejudicial to administration of justice. Return of retainer after initiation of disciplinary proceedings not a mitigating factor).

Matter of Relphorde, 596 N.E.2d 903 (Ind. 1992) (negotiating for private employment in a matter where attorney was participating as a public defender violated former Rule 1.11(c)). See now Rule 1.11(d)(2)(ii).

D. FORMER PROSECUTORS, JUDGES OR OTHER PUBLIC EMPLOYEES

1. Former and Current Government Lawyer

Rule 1.11 addresses special conflicts of interest for former and current government officers and employees.

a. Defense Lawyer who was Former Prosecutor

Former prosecutor may not represent a private client in connection with a matter in which the prosecutor participated personally and substantially as a public officer or employee unless the appropriate government agency gives its informed consent, confirmed in writing. Rule 1.11(a).

b. Prosecutor who was Former Criminal Defense Lawyer

A prosecutor cannot participate in a matter in which he participated personally and substantially while in private practice. Rule 1.11(d)(2)(i).

"Matter" is broadly defined to include investigations, arrests, etc. See Rule 1.11(e).

See also State ex rel. Meyers v. Tippecanoe County Court, 432 N.E. 2d 1377 (Ind. 1982); Asbell v. State, 468 N.E.2d 845 (Ind. 1984); Banton v. State, 475 N.E.2d 1160 (Ind. Ct. App. 1985); and Kubsch v. State, 866 N.E.2d 726 (Ind. 2007).

Williams v. State, 631 N.E.2d 485 (Ind. 1994) (trial court did not err in refusing to appoint special prosecutor, even though deputy prosecutor had formerly been defense attorney for one of defendant's co-defendants and negotiated plea agreement for him that required his testimony against D).

Kubsch v. State, 866 N.E.2d 726 (Ind. 2007) (where prosecutor previously represented co-defendant who testified against defendant in exchange for charges being dismissed, trial court did not abuse its discretion in refusing to appoint special prosecutor; State showed no actual conflict existed).

Swallow v. State, 19 N.E.3d 396 (Ind. Ct. App. 2014), *trans. denied* (no error in refusing to appoint special prosecutor when defendant's public defender withdrew as counsel and became employed by prosecutor, where no confidential information was shared with prosecutor's office).

Brown v. State, 270 Ind. 399, 385 N.E.2d 1148, 1151 (1979) (not reversible 6th Amendment error where defense counsel had merely performed ministerial task as deputy prosecutor by signing informations charging his current client and could not

recall his involvement in the case).

2. Former Judges

Rule 1.12 addresses successive conflicts of interest of former judges, arbitrators, or their law clerks.

A former judge cannot represent anyone in a matter in which he/she "participated personally and substantially" in a judicial capacity, without informed written consent from all parties. Rule 1.12(a).

Judicial capacity includes service as judge pro tempore, special judge, commissioner, or other parajudicial or part-time judicial officer. Rule 1.12, Comment [1].

> Tokash v. State, 232 Ind. 668, 115 N.E.2d 745 (1953) (attorney's conduct denied defendant his right to counsel, where pauper counsel had served as judge *pro tempore* in various stages of proceedings against defendant both before and after trial).

E. IMPUTED DISQUALIFICATION

1. Rules Dealing with Imputed Disqualification

- Rule 1.7. Conflict of Interest: Current Clients;
- Rule 1.8. Conflict of Interest: Current Clients: Specific Rules;
- Rule 1.9. Duties to Former Clients;
- Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral (see special provisions at 1.12(c)); and
- Rule 2.2. Intermediary.

2. Disqualification of a Firm

If one lawyer in a firm is disqualified by a conflict of interest, usually all are disqualified. See Rule 1.10. "Firm" includes government and private corporations and other organizations. See Rule 1.10, Comment [1].

Whether two or more lawyers practicing together is a firm is dependent on facts.

Whether public defenders who represent clients with adverse interests have a conflict under the Rules may depend on whether the public defenders are part of the same firm. Matter of Recker, 902 N.E.2d 225 (Ind. 2009). Whether a public defender office constitutes a firm will differ from county to county.

> Matter of Recker, 902 N.E.2d 225 (Ind. 2009) (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; although the courts provided office space for the public defenders in the courthouse, one incoming phone line, part-time secretarial assistance and generic letterhead with the words “Office of the Public Defender,” each public defender contracted with a different court, maintained their own offices, could only have access to his or her own files and had no control over the space provided by the courts).

a. New Lawyers May Create Conflict for Firm

Firm is disqualified if the new lawyer is disqualified, directly or by imputation, because he represented a person with materially adverse interests in the same or "substantially related" matter, and the new lawyer acquired information protected under Rules 1.6 and 1.9 that is material to the matter for which representation is sought.

b. Resignation, or Other Termination May End Conflict for Firm

If lawyer's association with firm is terminated, no disqualification is imputed to the firm unless the matter is the same or "substantially related" to one where prior associate represented person with materially adverse interests; and one of the remaining lawyers has information protected under Rules 1.6 and 1.9 that is material to the matter. Rule 1.10(b).

3. Waiver

The client may waive disqualification by informed consent, confirmed in writing, under Rule 1.7 and Rule 1.10(d).

F. DECLINING OR TERMINATING REPRESENTATION

1. Mandatory Withdrawal: Client Demands Unethical Conduct

Client's demand (not mere request) that a lawyer violates the Rules of Professional Conduct, or the law, triggers duty to withdraw. Rule 1.16(a)(1).

Attorney may have an obligation not to disclose particular reason for motion to withdraw. "The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." Rule 1.16, Comment [3].

2. Refusal to Withdraw

In re Pitschke, 627 N.E.2d 440 (Ind. 1994) (lawyer failed to withdraw her representation in a marital dissolution proceeding and appeared at a hearing after receiving a letter terminating her representation. She attempted to justify her conduct on the basis that she feared the wife was acting under duress, she feared for the minor daughter, and she did not believe she was validly discharged until she appeared at the final hearing and determined whether the wife had obtained other counsel. The court rejected the explanations).

3. Discharge - Rule 1.16(a)(3)

a. Of Retained Counsel

"A client has the right to discharge a lawyer at any time, with or without cause[.]" Rule 1.16, Comment [4].

b. Of Appointed Counsel

Indigent clients do not have a right to counsel of their choice.

"Whether a client can discharge appointed counsel may depend on applicable law. A

client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client." Rule 1.16, Comment [5].

c. By Incompetent Clients

"If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14." Rule 1.16, Comment [6].

Gilmore v. State, 953 N.E.2d 583 (Ind. Ct. App. 2011) (similar warnings are required before trial court will grant attorney's motion to withdraw based on defendant's obstreperous conduct).

4. Optional Withdrawal

A lawyer may withdraw from representing a client if the withdrawal can be accomplished without material adverse effect on the interests of the client or under other listed circumstances. See Rule 1.16(b).

Local rules of court in many counties prescribe a mechanism for withdrawal. Those rules should be observed in like situations and court permission sought for withdrawal. Rule 1.16(c).

5. Must Take Steps to Protect Client's Interest

Rule 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

a. Even if Unfairly Discharged

"Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15 and Rule 1.16, Comment [9].

b. Even if Client Died

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, failure to refund some of the payment violated Rule 1.5(1) and 1.16(d)).

6. Refusal to Deliver Over Money or Papers; Contempt

When the services of a lawyer are terminated, the client is "entitled to delivery of all papers or property and communication except that which state law permits the lawyer to retain under the attorney's lien at the conclusion of representation." Hall, *Professional Responsibility in Criminal Defense Practice*, 3d § 21:4.

Ind. R. Prof. Conduct 1.16(d) requires an attorney to turn papers and property relating to the case over to the client on demand. An attorney who refuses is subject to disciplinary action. If the client asks the trial court to order the attorney to return the file, the trial court has no discretion to deny the motion. Johnson v. State, 762 N.E.2d 222, 223 (Ind. Ct. App. 2002) and McKim v. State, 528 N.E.2d 484, 485-486 (Ind. Ct. App. 1988). A hearing and reasonable notice to the attorney is necessary. Ferguson v. State, 773 N.E.2d 877 (Ind. Ct. App. 2002).

Ind. Code § 33-43-1-9 provides:

> If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney's professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

a. Jurisdiction

McKim v. State, 528 N.E.2d 484 (Ind. Ct. App. 1988) (in light of Rule 1.16 of Rules of Prof. Conduct requiring surrender of papers and property to which client is entitled, granting of motion brought under former I.C. § 34-1-60-10 [see now I.C. § 33-43-1-9] to compel production of documents which attorney had received for client in the course of his employment was not discretionary with the trial court; criminal defendant had requested copy of his file so he could institute civil proceedings against the attorney).

Durre v. Sturgeon, 69 Ind. App. 500, 122 N.E. 341 (1919) (courts have summary jurisdiction over attorneys to order the return of money wrongfully withheld from clients).

b. Attorney's Right to a Retaining Lien

Stewart & Irwin v. Johnson Realty, 625 N.E.2d 1305 (Ind. 1993) (attorney has right to retain possession of client's documents, money or other property which come into hands of attorney professionally, until general balance due attorney for professional services has been paid).

c. Suspension from Practice

A statute, Ind. Code § 33-43-1-10, purporting to give trial courts the authority to suspend attorneys from the practice of law for violations of Ind. Code § 33-43-1-9, is superseded by Ind. R. Admission and Discipline of Attorneys Rule 23, which provides that the Indiana Supreme Court has exclusive original jurisdiction in all attorney misconduct

cases. Article 7, Section 4 of the Indiana Constitution also places original jurisdiction for attorney discipline with the Indiana Supreme Court.

d. Continue Representation Per Order

An order by a tribunal to continue representation is binding on the lawyer notwithstanding good cause for termination. Rule 1.16(c).

III. LAWYER AS COUNSELOR, ADVISOR OR WITNESS

A. ADVICE

Rule 2.1 provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

B. MERITORIOUS CLAIMS AND CONTENTIONS

1. Lawyer's Duty to Require State to Establish Every Element

Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

2. Asserting a Defense or Legal Issue

The lawyer's obligations under Rule 3.1 are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by the rule. Rule 3.1, Comment [3]. Rule 3.1.

C. INVESTIGATION AND PREPARATION

1. Duty to Investigate

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

ABA *Criminal Justice Standards*, Defense Function Standard 4-4.1.

Smith v. State, 565 N.E.2d 1114 (Ind. Ct. App. 1991) (effective representation requires at

least cursory inquiry into factual background of case before advising defendant to enter guilty plea; attorney made no effort to acquire relevant information resulting in finding that guilty plea was involuntary and unintelligent).

2. Illegal Investigation

Defense counsel should not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so. ABA *Criminal Justice Standards*, Defense Function Standard 4-4.2.

Matter of Schalk, 985 N.E.2d 1092 (Ind. 2013) (Respondent attempted a form of vigilante justice by trying to run an amateur sting operation in an attempt to cause an informant against his client to be caught in possession of marijuana).

3. Interviewing the Client

(d) When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance.

ABA *Criminal Justice Standards*, Defense Function Standard 4-3.3(d).

4. Ineffective Assistance of Counsel Claims

In Indiana, failure to investigate and prepare is often raised as an ineffective assistance of counsel issue in post-conviction relief proceedings.

Smith v. State, 565 N.E.2d 1114 (Ind. Ct. App. 1991) (when defendant pled guilty to 2 counts of theft without knowing that victims were either deceased or their whereabouts unknown, defense attorney's failure to file for additional discovery or attempt to contact State's witnesses constituted IAC because had defendant known of witnesses' unavailability, there was reasonable probability he would not have pled guilty. Therefore, his plea was not knowing and voluntary; held that counsel had duty to investigate further).

Taylor v. State, 442 N.E.2d 1087 (Ind. 1982) (where defendant alleges ineffectiveness of counsel because of lack of preparation as demonstrated by failure to interview witnesses prior to trial, defendant must show what information attorney could have elicited from witnesses had attorney interviewed them, which this defendant failed to do; mere verified statement by attorney that he did not conduct research does not constitute strong and convincing evidence necessary to rebut presumption of competency).

D. DUTY TO EXPLORE DISPOSITION WITHOUT TRIAL

1. Diversion

"Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process." ABA *Criminal Justice Standards*, Defense Function Standard 4-6.1(a).

2. Plea Negotiating

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest. ABA *Criminal Justice Standards*, Defense Function Standard 4-6.1(b).

E. EXPEDITING LITIGATION

1. Rule 3.2

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

In re Shull, 741 N.E.2d 723 (Ind. 2001) (counsel suspended for deliberately delaying proceedings by failing to appear for hearings as a tactic to achieve a favorable outcome for the client).

2. ABA *Criminal Justice Standards: Defense Function Standard 4-1.9*

(a) Defense counsel should act with diligence and promptness in representing a client and should avoid unnecessary delay in the disposition of cases. But defense counsel should not act with such haste that quality representation is compromised. Defense counsel and publicly funded defense entities should be organized and supported with adequate staff and facilities to enable them to represent clients effectively and efficiently.

(b) When providing reasons for seeking delay, defense counsel should not knowingly misrepresent facts or otherwise mislead. Defense counsel should use procedural devices that will cause delay only when there is a legitimate basis for their use. Defense counsel should not accept a representation for the purpose of delaying a trial or hearing.

(c) Defense counsel should not unreasonably oppose requests for continuances from the prosecutor.

(d) Defense counsel should know and comply with timing requirements applicable to a criminal representation so as to not prejudice the client's rights.

(e) Defense counsel should be punctual in attendance at court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. Defense counsel should emphasize to the client, assistants, and defense witnesses the importance of punctuality in court attendance.

F. CANDOR TOWARD THE TRIBUNAL

1. General Rule

Rule 3.3(a) provides:

A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

Rule 3.3(c) provides: "The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

Matter of James, 861 N.E.2d 703 (2007) (at OWI sentencing, respondent advised judge that five of client's prior convictions had been expunged or vacated in Kentucky but could not provide documentation either at hearing or afterward; suspended for 90 days for knowingly making false statement of fact to court under Rule 3.3(a)(1)).

2. *Ex Parte* Proceedings

Rule 3.3(d) provides: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

PRACTICE POINTER: This rule may be useful in support of prosecutorial misconduct allegations, e.g., manipulation of grand jury proceedings, challenge to ex parte probable cause determination.

3. *Ex Parte* Communications

Under Rule 3.5(b) a lawyer shall not communicate *ex parte* with a judge, juror, prospective juror or other official except as permitted by law or court order.

Prosecutor's *ex parte* contacts with trial judge may violate criminal defendant's 6th Amendment right to public trial, or 14th Amendment due process rights.

Indiana Criminal Rule 24(C)(2) permits some ex parte communication between the court and defense counsel seeking funds for support services and incidental expenses in death penalty cases.

Matter of Anonymous, 43 N.E.3d 568 (Ind. 2015) (private reprimand for *ex parte* communication where Respondent sent her associate to judge's chambers to present an emergency petition to have grandparents appointed as temporary guardians where Respondent did not first provide notice to Mother or putative father before presenting petition to judge).

Matter of Marek, 609 N.E.2d 419 (Ind. 1993) (note to trial judge discussing allegations of sexual misconduct by opposing party without serving copy on opposing counsel or

making opposing counsel aware of existence of note is unethical act of ex parte communication of evidence and argument to judge without affording opposing counsel benefit of information and opportunity to respond, which warrants public reprimand regardless of motive behind issuance of note).

State v. Crawford, 577 P.2d 1135 (Idaho, 1978) (6th Amendment violation).

NOTE: For *ex parte* communication by judge, see IPDC Pretrial Manual, Chapter 5.

G. FAIRNESS TO OPPOSING PARTY AND COUNSEL

1. Rule 3.4

a. Obstructing Access to Evidence

Rule 3.4(a) provides: "A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

Matter of Geisler, 614 N.E.2d 939 (Ind. 1993) (obstructing prosecuting attorney's access to evidence by assisting witnesses' efforts to be unavailable for service and trial is misconduct, warranting 90-day suspension).

Matter of Hudson, 105 N.E.3d 1089 (Ind. 2018) (Court suspended a former deputy prosecutor for failing to disclose exculpatory evidence and by prosecuting a charge she knew was not supported by probable cause).

b. Counseling Witness to Testify Falsely

Rule 3.4(b) provides: "A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

c. Evading Tribunal Rules

Rule 3.4(c) provides: "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

Matter of Clifton, 961 N.E.2d 18 (Ind. 2011) (appellate attorney's failure to heed the repeated warnings in Court of Appeals' decisions pointing out his deficiencies constituted a violation of Rule 3.4(c); his failure caused additional, unnecessary work for the Court of Appeals and Indiana Attorney General).

d. Abusing Rules of Discovery

Rule 3.4(d) provides: "A lawyer shall not in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

Matter of Shaul, 610 N.E.2d 253, 255 (Ind. 1993) (attorney failed to make reasonably diligent effort to comply with a legally proper discovery request).

e. Testifying or Giving Opinions

Rule 3.4(e) provides:

> A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Matter of Baker, 955 N.E.2d 729 (Ind. 2011) (statements respondent made during opening arguments in murder trial violated Rule 3.4(e) because they were false, and he did not reasonably believe that they would be supported by the introduction of admissible evidence).

f. Obstructing Access to a Witness

Rule 3.4(f) provides:

> A lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (1) the person is a relative or an employee or other agent of a client, and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

g. Prosecutorial Misconduct – Doesn't Necessarily Constitute Professional Misconduct

"It is the exclusive province of this Court to regulate professional legal activity." Matter of Mitthower, 693 N.E.2d 555, 558 (Ind. 1998). "While appellate claims of prosecutorial misconduct and disciplinary allegations of Rule 8.4(d) violations may share some similarities, the analyses are not exactly the same, nor are the parties and interests at stake in the proceedings the same. A criminal appeal examines the propriety of a defendant's conviction, not whether an attorney's conduct merits professional discipline. Respondent was not a party to the criminal appeal and did not have an opportunity prior to the instant proceedings to defend his own professional conduct. Moreover, disciplinary proceedings afford the opportunity for evidentiary development beyond the cold record available to the Court of Appeals in a criminal appeal. We have previously recognized that a written trial transcript 'presents only a small part of the whole picture,' see Whiting v. State, 969 N.E.2d 24, 31 (Ind. 2012), and in a disciplinary proceeding the parties may be able to offer additional evidence that paints a more complete picture." Matter of Smith, 60 N.E.3d 1034, 1036 (Ind. 2016).

Matter of Smith, 60 N.E.3d 1034 (Ind. 2016) (Court of Appeals opinion in Bean v. State, 15 N.E.3d 12 (Ind. Ct. App. 2014) that prosecutorial misconduct constituted fundamental error is not dispositive in disciplinary case; here, Respondent improperly elicited testimony from a county sheriff in violation of an order *in limine*, elicited improper vouching testimony, and made statements during closing argument that were improper and placed emphasis on vouching testimony).

Matter of Keiffner, 79 N.E.3d 903 (Ind. 2017) (semi-spontaneous comments during the heat of trial that were basis of finding of prosecutorial misconduct did not constitute professional misconduct).

H. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

1. Rule 3.5

Rule 3.5 provides:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress, or harassment.

(d) engage in conduct intended to disrupt a tribunal.

a. Abusive Conduct

"The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." Rule 3.5, Comment [4].

Matter of Ortiz, 604 N.E.2d 602 (Ind. 1992) (intentional disruption of criminal proceeding in response to an unfavorable decision by trial court, after having been previously disciplined for similar misconduct, warrants 60-day suspension).

b. Influencing Officials

Matter of Mann, 270 Ind. 358, 385 N.E.2d 1139 (1979) (disbarment is appropriate discipline for stating to client that public official can be improperly influenced and for transmitting money from client in criminal matter to arresting officer for purpose of improperly influencing outcome of criminal prosecution against client).

c. Harassing and Embarrassing Jurors

Matter of Berning, 468 N.E.2d 843 (Ind. 1984) (public reprimand to elected prosecutor who sent jury members letters critical of decision in favor of defendant in domestic battery case; letters harassed jurors for their decision and sought to influence their future judgment in such cases, conduct degraded judicial process and diminishes public

confidence).

I. TRIAL PUBLICITY

1. Rule 3.6

Rule 3.6 precludes lawyers from making extrajudicial statements that have a "substantial likelihood of materially prejudicing" the proceeding. Rule 3.6(b) and (c) list permitted statements such as information contained in a public record, and Rule 3.6(d) describes statements which are rebuttably presumed to have a substantial likelihood of materially prejudicing adjudicative proceedings.

In re Litz, 721 N.E.2d 258 (Ind. 1999) (attorney reprimanded and admonished for writing letter to newspaper, criticizing prosecutor's decision to retry a client and declaring that the client was innocent; the letter "created a substantial likelihood of materially prejudicing the client's case" in violation of former Rule 3.6(a)).

In re Brizzi, 962 N.E.2d 1240 (Ind. 2012) (attorney's misconduct in making public statements as a prosecutor that had a substantial likelihood of materially prejudicing adjudicative proceedings and a substantial likelihood of heightening public condemnation of criminal defendants warranted a public reprimand).

Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720 (1991) (U.S. Supreme Court invalidated on vagueness grounds part of Nevada's Rule 177, which is similar to Indiana's Rule 3.6).

PRACTICE POINTER: In re Litz is difficult to reconcile with Gentile v. State Bar of Nevada; the latter case was not mentioned in the Litz opinion. Gentile is an unusual opinion because part of the holding is contained in one justice's written opinion and part in another, and the court was deeply divided. However, Gentile is required reading for any attorney dealing with the media. While it may be wise not to make spontaneous comments, a curt "no comment" should be usually avoided in favor of some explanation about the restrictions on lawyers' speech. See Shapiro, "Using the Media to Your Advantage", Indiana Defender, August 1993, page 22.

2. References

BNA Practice Manual 121:801 (discusses strategic concerns).

Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 Fla. L. Rev. 1873 (2014).

Campbell, *Gentile v. State Bar and Model Rule 3.6*: *Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 Geo. J. Legal Ethics 583 (1993).

Daly, *What Can the Defense Attorney Say at a "Pre-formal Charge" Press Conference? Gentile v. State Bar of Nevada Puts a Porous Gag on Trial Lawyers*, 15 Am. J. Trial Advoc. 269 (Winter 1991-92).

Fulstone, *Gentile v. State Bar of Nevada: Trial in the "Court of Public Opinion" and Coping With Model Rule 3.6—Where Do We Go From Here?*, 37 Vill. L. Rev 619 (1992).

Albright, *Gentile v. State Bar*: *Core Speech and a Lawyer's Pretrial Statements to the Press*, 1992 B.Y.U. L. Rev. 809 (1992).

J. LAWYER AS WITNESS

1. If Likely to be Called

Rule 3.7 provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

a. Disqualification of Lawyer

A party's lawyer should be disqualified if it appears the lawyer should be called as a witness. It does not matter whether the lawyer actually testifies. The test is whether the attorney's testimony could be significantly useful to the client. Jackson v. Russell, 498 N.E.2d 22 (Ind. Ct. App. 1986).

As a general rule, a prosecutor may only be called as a defense witness if there is a "compelling and legitimate need" for his testimony. Matheney v. State, 583 N.E.2d 1202, 1206 (Ind. 1992), *overruled on other grounds by* Jackson v. State, 709 N.E.2d 326, 329 n.4 (Ind. 1999).

Ferguson v. State, 670 N.E.2d 371, 374 n.1 (Ind. Ct. App. 1996) (trial court's quashing of subpoena for prosecutor's testimony violated defendant's right to compulsory process because prosecutor's testimony was essential to get at truth to fully protect due process rights of criminally accused).

Cox v. State, 475 N.E.2d 664 (Ind. 1985) (testimony of a cumulative nature does not rise to the level to make it obvious to counsel that he ought to withdraw and testify).

Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975) (trial court may allow defense counsel to call prosecutor to testify as a defense witness, however, the information sought should be shown to be vital to the defense).

Indiana-Kentucky Electric Corp. v. Green, 476 N.E.2d 141, 149 (Ind. Ct. App. 1985) (D.R. 5-101 (B)(4) permits attorney to testify without withdrawing if refusal would work substantial hardship on client due to distinctive value of lawyer as counsel in the case).

2. Asserting Personal Opinion, Knowledge

Rule 3.4 provides in part:

> A lawyer shall not:
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused…

Wallace v. State, 553 N.E.2d 456, 471 (Ind. 1990) (improper for prosecutor to assert his personal knowledge of facts in issue or assert his personal opinion as to credibility of witness or as to guilt or innocence of accused).

3. Prosecutors

a. Elected Prosecuting Attorney

The general rule is that if the elected prosecutor is disqualified from the case, the entire office is disqualified, and a special prosecutor must be appointed.

(1) Prosecutor as witness

State ex rel. Meyers v. Tippecanoe County Court, 432 N.E.2d 1377 (Ind. 1982) (prosecutor disqualified because the habitual offender charge was based on two prior theft cases in which the elected prosecutor had been the defendant's public defender).

Corn v. State, 659 N.E.2d 554 (Ind. 1995) (deputy prosecutor not automatically disqualified from prosecuting former client). See also State ex rel. Goldsmith v. Superior Court of Hancock Cty, 270 Ind. 487, 386 N.E.2d 942 (1979).

Cf. United States v. Goot, 894 F.2d 231, 234 (7th Cir. 1990) (ethical breach by prosecutor is not *per se* a constitutional violation).

b. Deputy Prosecutor

Deputy prosecuting attorney may withdraw to become a witness without requiring recusal of prosecuting attorney's entire staff.

Holder v. State, 571 N.E.2d 1250, 1255 (Ind. 1991) (timely objection required if deputy prosecutor testifies without withdrawing from case).

K. COMMUNICATION WITH PERSONS OTHER THAN CLIENTS

1. Represented by Counsel - Need Consent or Authorization

Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order."

2. Not Represented by Counsel

Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

3. Relations with Prospective Witnesses

a. Ethics Rules

Rules 3.4(a), (b) and (f) discuss proper and improper relations with prospective lay or expert witnesses. See also Rules 4.1, 4.3 and 4.4.

For a most useful set of practical guidelines see ABA *Criminal Justice Standards*, Defense Function Standard 4-4.3and Standard 4-4.4, relating to expert witnesses.

b. Criminal Statutes

Indiana has criminal statutes prohibiting such acts as:

- bribery (Ind. Code § 35-44.1-1-2 and Ind. Code § 35-44.1-1-1(2);
- to influence witnesses (Ind. Code § 35-44.1-1-2(a)(7), (a)(8)); and
- obstruction of justice (Ind. Code § 35-44.1-2-2).

In re Trimble, 79 N.E.2d 213 (Ind. 1948) (attorney disbarred for creating false witness testimony).

L. CRITICIZING JUDICIAL OFFICIALS

Rule 8.3(b) requires a lawyer, who knows that a judge has committed a violation of a rule of judicial conduct which raises a substantial question as to the judge's fitness for judicial office, to report it. This rule is tempered by Rule 8.2(a), which prohibits a statement which is false or made with reckless disregard as to its truth or falsity, about the qualifications or integrity of a judicial officer, adjudicatory officer, or public legal officer (see also Rule 8.4(d) (conduct prejudicial to the administration of justice)).

In re Ogden, 10 N.E.3d 499 (Ind. 2014) (Respondent's "repeated and virulent accusations" that judge committed malfeasance in initial stages of administration of an estate were not just false, they were impossible as judge was not even presiding over estate at the time, which Respondent could easily have determined; because respondent lacked objectively reasonable basis for statements, he made them in reckless disregard of their truth or falsity, violated Rule 8.2(a), and would be suspended for 30 days with automatic reinstatement).

In re Wilkins, 777 N.E.2d 714 (Ind. 2002) *modified on rehearing at* 782 N.E.2d 985, *cert. den*. 124 S.Ct. 63 (statements in petition to transfer, that the Court of Appeals opinion was

"disturbing" with "misstatements of material facts," "misapplies controlling case law" and "does not even bother to discuss relevant cases that are directly on point," roughly paraphrased the grounds for transfer in former Appellate Rule 11(B) (2), and therefore did not violate Rule 8.2(a); however, comments in footnote suggesting that judges of the Court of Appeals acted with unethical motives violated Rule 8.2(a) because they were made with reckless disregard for truth or falsity regarding the integrity of the panel), *modified on rehearing at* 782 N.E.2d 985.

Matter of Dixon, 994 N.E.2d 1129 (Ind. 2013) (distinguishing Wilkins, Court noted that counsel supported his charges against judge with a lengthy recitation of facts in support of motion for recusal).

Matter of Smith, 181 N.E.3d 970 (Ind. 2022) (Respondent committed misconduct by making several statements about judge's qualifications or integrity in appellate brief, either knowing the statements were false or with reckless disregard for their truthfulness, in violation of Rule 8.2(a); statements ranged from trial judge intentionally orchestrating hearings in attempt to deprive his client of the opportunity to be heard, to judge engaging in submissive interactions with opposing counsel causing detriment to his client, all of which went beyond permissible robust and effective advocacy for his client).

Matter of Garringer, 626 N.E.2d 809 (Ind. 1994) (Respondent issued written statement describing wide conspiracy involving judges, bankruptcy trustees, magistrates, United States attorneys and other court officers in Indiana; the statement was distributed to the president of the United States, along with other high federal and state judges and officials. Court emphasized that not "one iota of reliable evidence" was presented in support of "vague and unsubstantiated proclamations of wrongdoing without a single specificity." Statements were made with reckless disregard as to their truth or falsity, and the reporting obligation of Rule 8.3(b) did not excuse the statement. The statements were also deemed to be "made" under Rule 8.2 because even though not disseminated to the "general public," they nonetheless were "publicized to another individual.").

M. RULE 8.4 MISCONDUCT

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist, or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy

respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

1. Eavesdropping on Conversation Between Attorney and Client

Matter of Neary, 84 N.E.3d 1194 (Ind. 2017) (Respondent, a LaPorte County deputy prosecutor who listened in on privileged communications between defense attorneys and their clients, was suspended from practice of law for four years without automatic reinstatement; Respondent violated Rules 4.4(a) (using methods of obtaining evidence that violate the rights of a third person) and 8.4(d) (engaging in conduct prejudicial to the administration of justice)).

2. Discrimination Based on Race or Immigration Status

Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes image of legal profession as a whole.

Matter of Thomsen, 837 N.E.2d 1011 (Ind. 2005) (Respondent publicly reprimanded for filing a petition for child custody emphasizing that the children's mother 'associated with a black male' and making other inappropriate and unnecessary references to race at the bench trial, without any showing that race was relevant to dissolution).

Matter of Barker, 993 N.E.2d 1138 (Ind. 2013) (Court suspended respondent for 30 days for sending disparaging letter that accused Mother of being in country illegally).

3. Relinquishing control over case to victims

Although prosecutors may allow crime victims to have substantial and meaningful input into plea agreements, they may not give them unfettered veto power.

Matter of Flatt-Moore, 959 N.E.2d 241 (Ind. 2012) (deputy prosecutor's refusal to enter into just and fair agreement due to victim's insistence on unreasonable restitution constituted a violation of Rule 8.4(d); in the very least, such practice gives appearance that resolution of criminal charges could turn on whims of victims rather than equities of each case).

4. Criminal act

Matter of Raquet, 870 N.E.2d 1048 (Ind. 2007) (after being charged with possession of child pornography as a Class A misdemeanor, Respondent entered into and successfully completed a pretrial diversion program and case was dismissed; Court found violation of Rule 8.4(b), noting Respondent's conduct furthered the sexual exploitation of children, warranting sterner discipline than a reprimand, although Court found substantial mitigating factors; held: 30-day suspension with automatic reinstatement).

Matter of Coleman, 67 N.E.3d 629 (Ind. 2017) (Court suspended Respondent for two years without automatic reinstatement for misconduct during criminal representation and his own domestic battery convictions; Respondent violated twenty rules, including 1.2(a) for failing to abide by client's decisions concerning objectives of representation; 1.5(a) for charging unreasonable fee; 1.16(d) for failing to return case file to Client; 4.1(a) for knowingly making 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).

Matter of Selner, 36 N.E.3d 1048 (Ind. 2015) (three-year suspension without automatic reinstatement for federal conviction for unlawfully distributing pseudoephedrine).

Matter of Philpot, 31 N.E.3d 468 (Ind. 2015) (pursuant to 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).

Matter of Schalk, 985 N.E.2d 1092 (Ind. 2013) (by assisting client in purchasing marijuana to prove that police informant involved in the case was a drug dealer, Respondent violated 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].

Matter of Cooper, 161 N.E.3d 362 (Ind. 2021) (four-year suspension without automatic reinstatement for long-serving elected prosecutor convicted of domestic battery and confinement).

Matter of Hill, 144 N.E.3d 184 (Ind. 2020) (Attorney General received 30-day suspension with automatic reinstatement as a result of allegations that he drunkenly groped four women at a party—a state legislator and three legislative staffers; Court found "ample evidence" that the physical contact Respondent made with the women was rude and insolent, two factors necessary to establish misdemeanor battery. The Court found a sufficient nexus between Respondent's actions and his professional duties to conclude that he committed a criminal act reflecting adversely on his fitness to practice law in violation of Professional Conduct Rule 8.4(b); similarly, because Respondent was the "chief legal officer" of Indiana, his conduct was prejudicial to the administration of justice in violation of Rule 8.4(d). Although Respondent was "fully entitled" to defend himself against the allegations, he went "a step too far" by characterizing the allegations as "vicious" and by releasing one of his accuser's emails along with a press release, which "could serve only to intimidate [her] and anyone else thinking of stepping forward.")

Matter of 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).

Matter of Webb, 854 N.E.2d 821 (Ind. 2006) (violation of Rule 8.4(b) for taking $3,000 from client's family to hire DNA expert, but not depositing money into family's trust account or hiring expert).

Matter of Drook, 949 N.E.2d 354 (Ind. 2011) (where attorney gave client letter from his wife and candy during a prison visit, attorney was guilty of trafficking with an inmate and violated Indiana Professional Conduct Rule 8.4(b)).

Matter of Mendenhall, 959 N.E.2d 254 (Ind. 2012) (Respondent was disbarred for attempting to murder another attorney).

Matter of Mercho, 78 N.E.3d 1101 (Ind. 2017) (misappropriation of funds was not criminal in nature).

5. Dishonesty

Matter of Drook, 855 N.E.2d 989 (Ind. 2006) (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. Violations of PCR 8.4(c) (conduct involving dishonesty, etc.) and 8.4(d) (conduct prejudicial to the administration of justice) found; Held, 60-day suspension without automatic reinstatement); see also Matter of Webb, 854 N.E.2d 821 (Ind. 2006).

Matter of Ellison, 87 N.E.3d 460 (Ind. 2017) (Court suspended Respondent for 90 days without automatic reinstatement for, among other things, "very troubling" pattern of dishonesty in an effort to cover up his neglect).

Matter v. Steele, 45 N.E.3d 777 (Ind. 2015) (Court disbarred Respondent "without hesitation" for 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).

Matter of Monfort, 946 N.E.2d 583 (Ind. 2011) (where attorney told court that he was not representing defendant in his petition to vacate convictions but rather sitting with the defendant just to "lay the background for the court," counsel's statements violated Rules 3.3(a)(1) and 8.4(c) because they were contradicted by defendant's testimony that he had paid the attorney and the attorney drafted the petition; attorney could not represent defendant because he served as the judge in the convictions at issue).

Compare

Matter of Keaton, 29 N.E.3d 103 (Ind. 2015) (Court disbarred Respondent for, among other things, engaging in an extreme and pervasive pattern of conduct involving harassment and dishonesty, where, for years, respondent left profanity-laced, intimidating voicemails and emails with his daughter's former college roommate, with whom he had developed a romantic relationship).

Matter of Hanson, 53 N.E.3d 412 (Ind. 2016) (Court suspended Respondent for 30 days with automatic reinstatement for sending a threatening and obscene private social media message to a client's ex-husband; parties agreed 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(d), which prohibits engaging in conduct prejudicial to the administration of justice).

Matter of Johnson, 74 N.E.3d 550 (Ind. 2017) (one-year suspension without automatic reinstatement for harassing ex-girlfriend).

6. Conduct Prejudicial to the Administration of Justice – Rule 8.4(d)

The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. Matter of Adolph, 969 N.E.2d 8, 10 (Ind. 2012). Other Rule 8.4(d) cases address attorneys' misrepresentation or disregard of duties to tribunals. And actions by lawyers that affect the integrity of the lawyer discipline process will often be viewed as being conduct prejudicial to the administration of justice. See, e.g., Matter of Dimick, 969 N.E.2d 17 (Ind. 2012) (lawyer threatened to report professional misconduct as leverage to obtain a settlement proposal).

Matter of Lehman, 3 N.E.3d 536 (Ind. 2014) (lawyer found in contempt for failing to appear for client's criminal case; other disregard of duties to courts).

Matter of Clifton, 961 N.E.2d 18 (Ind. 2011) (disregard of Court of Appeals criticisms about deficiencies in appellate practice).

Matter of Criss, 999 N.E.2d 848 (Ind. 2013) (failure to appear as defense counsel in criminal cases; failure to respond to show cause order).

Matter of Broderick, 929 N.E.2d 199 (Ind. 2010) (signing deferral agreement misrepresenting that client had no prior arrests).

Matter of Laterzo, 908 N.E.2d 610 (Ind. 2009) (employing a false identity ploy in the course of representing a criminal defendant).

Matter of Butsch, 899 N.E.2d 647 (Ind. 2009) (intoxication while representing clients in court).

Matter of Geller, 9 N.E.3d 643 (Ind. 2014) (physical altercation with former client in environs of juvenile court courtroom).

Matter of Steele, 171 N.E.3d 998 (Ind. 2021) (Respondent committed misconduct by making an improper demand that disciplinary grievances filed against him be withdrawn as a condition for settlement in a civil matter).

IV. LAW FIRMS AND ASSOCIATIONS

A. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

1. Rule 5.3

Rule 5.3 provides:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

2. Example

In re Godshalk, 987 N.E.2d 1095 (Ind. 2013) (Respondent failed under Rule 5.3(b) to make reasonable efforts to ensure that conduct of his nonlawyer employee was compatible with the professional obligations of the lawyer where the nonlawyer employee agreed with JB that Respondent would represent JB while Respondent still represented RM, who was charged with battering JB in an unrelated case, creating an impermissible concurrent conflict of interest under Rule 1.7(a)).

B. UNAUTHORIZED PRACTICE OF LAW

1. Rule 5.5(a)

Rule 5.5(a) provides:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

2. Example

In re Godshalk, 987 N.E.2d 1095 (Ind. 2013) (Respondent assisted in the unauthorized practice of law, where his nonlawyer employee prepared and filed appearances).

V. ADVERTISING AND OBTAINING CLIENTS

A. ADVERTISING

"Subject to the requirements of this rule, lawyers and law firms may advertise their professional services and law related services. The term 'advertise' as used in these Indiana Rules of Professional Conduct refers to any manner of public communication partly or entirely indeed or expected to promote the purchase or use of the professional services of a lawyer, law firm, or any employee of either involving the practice of law or law-related services." Indiana Rule of Professional Conduct 7.2(a).

Ind. Rule of Prof. Conduct 7.1 prohibits false or misleading communications about the lawyer or the lawyer's services.

Ind. Rule of Prof. Conduct Rule 7.4(a) permits a lawyer to communicate the fact that the lawyer does or does not practice in particular fields of law, but Rule 7.4(d) prohibits a lawyer from claiming he or she is a specialist in certain areas unless certain requirements are met.

B. CONTACT WITH PROSPECTIVE CLIENTS

"A lawyer (including the lawyer's employee or agent) shall not be in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer." Indiana Rule of Prof. Conduct 7.3(a).

Matter of Baker, 955 N.E.2d 729 (Ind. 2011) (without invitation from accused or anyone else, Respondent visited accused in jail and agreed to represent him without charge; this violated Rule 7.3(a)).

VI. MALPRACTICE LIABILITY/SUBSTANCE ABUSE

A. MALPRACTICE LIABILITY

1. Public Defender - Tort Claims

a. Federal Public Defenders

Federal public defenders are protected from direct liability for malpractice pursuant to the 1988 Federal Employees Liability and Tort Compensation Act (The Westfall Act), which amended the Federal Tort Claims Act.

Sullivan v. U.S., 21 F.3d 198 (7th Cir. 1994) (the Westfall Act provides immunity to appointed counsel).

(1) Pre-Westfall Act Case Law

Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445 (1981) (*pro se* civil rights action under 42 U.S.C. §1983. Public defenders do not act "under color of state law" when they discharge the traditional functions of a lawyer, even if actions on behalf of client are arguably negligent and subject to state tort remedies. Public defender could act "under color of state law" while performing "certain administrative and possibly investigative functions.").

See also Tower v. Glover, 467 U.S. 914, 104 S. Ct. 2820 (1984) and Ferri v. Ackerman, 444 U.S. 193, 100 S. Ct. 402 (1979).

b. Indiana Cases

Driver v. Howard County Public Defender's Office, 575 N.E.2d 1001 (Ind. Ct. App. 1991) (former client sued two deputy public defenders and chief public defenders, alleging violations of civil rights and malpractice. The trial court entered summary judgment in favor of public defenders. The Court of Appeals affirmed and held that: (1) deputy public defender could not be held liable in §1983 claim because a public defender does not act "under color of state law," *citing* Dodson; (2) chief public

defender is not liable for malpractice of deputies because he "has no right to interject himself into the attorney client relationship by controlling the decisions which the deputy makes in the exercise of his professional judgment"; and (3) evidence of malpractice by deputy public defender was insufficient to survive the motion for summary judgment).

Diaz v. Carpenter, 650 N.E.2d 688 (Ind. Ct. App. 1995) (public defender not liable for professional malpractice by her deputies).

Wright v. Elston, 701 N.E.2d 1227 (Ind. Ct. App. 1998) (under Indiana's Tort Claims Act, I.C. § 34-6-2-38, a public defender is an 'employee' of the county and the notice provisions of I.C. § 34-13-3-8 apply to legal malpractice claims).

2. Prospective Waiver of Malpractice Claims and the Ethical Rules

Rule 1.8(h) provides:

> A lawyer shall not:
>
> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
> (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

a. Violations

Matter of Cissna, 444 N.E.2d 851 (Ind. 1983) (violation to try or get client or former client to sign documents purporting to release attorney from potential malpractice liability).

Matter of Darby, 426 N.E.2d 683 (Ind. 1981) (refusing to release client's file until he or she has signed a release from potential malpractice liability).

B. ALCOHOL AND DRUG ABUSE

1. Alcohol

Attorneys have been disbarred or otherwise disciplined on the basis, *inter alia*, of the non-criminal act of alcohol abuse.

Matter of Slenker, 424 N.E.2d 1005 (Ind. 1981) (sanction imposed under ABA Code DR 1-102(A) (6), which provides that "[a] lawyer shall not [e]ngage in any other conduct that adversely reflects on his fitness to practice law.").

NOTE: The Indiana Rules of Professional Conduct premise "catch-all" discipline upon attorney's commission of a "criminal act." Rule 8.4 provides: "It is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Prof. Cond. R. 8.4.(b).

In re Martenet, 674 N.E.2d 549 (Ind. 1996) (attorney's three convictions for OWI constituted professional misconduct since they revealed general indifference to legal standards of conduct). See also In re Haith, 742 N.E.2d 940 (Ind. 2001).

In some cases, alcohol abuse has been considered a mitigating factor in the severity of professional discipline appropriate for a particular ethics offense.

In re Johnson, 322 N.W.2d 616, 618 (Minn. 1982) (must meet 5 criteria).

In re Strickland, 436 A.2d 1337, 1339 (N.J. 1981) (alcohol appeared to have caused the triggering misconduct and the attorney has been successfully rehabilitated through alcoholic counseling).

See generally, Bloom and Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?*, 61 Temp. L. Rev. 1409, 1413, 1429 (1988) and O'Keefe, *The Cocaine Impaired Lawyer*, 92 Dick. L. Rev. 615 (1988).

2. Other Drugs

In re McNeil, 704 N.E.2d 114 (Ind. 1998) (a lawyer's possession of marijuana tends to reflect adversely on his fitness to practice law because it "indicates an inevitable contact with the chain of distribution and trafficking of illegal drugs," warranting reprimand and admonishment).

Matter of Brewer, 110 N.E.3d 1141 (Ind. 2018) (lawyer suspended for neglecting client's criminal and family law cases, failing to appear at show cause hearings, failing to withdraw from cases when her abuse of cocaine rendered her unable to assist her clients, committing a crime which reflects adversely on her fitness as a lawyer, and failing to cooperate with the disciplinary process).

Matter of Greenaway, 165 N.E.3d 982 (Ind. 2020) (magistrate convicted after meth sting permanently barred from bench, suspended).

In re Kummerer, 714 N.E.2d 653 (Ind. 1999) (lawyer's possession of cocaine warranted suspension).

3. Lawyer's Assistance Program

Rule 8.3 provides in part:

(c) This Rule does not require reporting of a violation or disclosure of information if such action would involve disclosure of information that is otherwise protected by Rule 1.6, or is gained by a lawyer while providing advisory opinions or telephone advice on legal ethics issues as a member of a bar association committee or similar entity formed for the purposes of providing such opinions or advice and designated by the Indiana Supreme Court.

(d) The relationship between lawyers or judges acting on behalf of a judges or lawyers assistance program approved by the Supreme Court, and lawyers or judges who have agreed to seek assistance from and participate in any such programs, shall be considered one of attorney and client, with its attendant duty of confidentiality and privilege from disclosure.

VII. SCOPE - INDIANA RULES OF PROFESSIONAL CONDUCT

A. FRAMEWORK FOR ETHICAL LAWYERING

The Indiana Rules of Professional Conduct provide a framework for the ethical practice of law. Rules define a lawyer's professional role. They prescribe terms for resolving conflicts between responsibilities to clients, the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.

1. Obligatory Rules

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Preamble [14], Ind. R. Prof. Conduct.

2. Discretionary Rules

Rules cast in the term "may," are permissive and define areas in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Preamble [14], Ind. R. Prof. Conduct.

3. Comments Only Provide Guidance

The text of each Rule is authoritative. The Comments accompanying each Rule provide guidance for practicing in compliance with the Rules. Many of the Comments use the term "should." Comments do not add obligations to the Rule. Preamble [14], Ind. R. Prof. Conduct.

NOTE: For purposes of determining lawyer's authority and responsibility, one must consider court rules, statutes relating to matters of licensure, laws defining specific obligations of lawyers, substantive and procedural law in general, and moral and ethical considerations.

B. FAILURE TO COMPLY

Disciplinary proceedings are neither criminal nor civil, but instead arise from inherent powers of courts over their officers. Matter of Gerard, 634 N.E.2d 51 (Ind. 1994).

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.

1. Violations do not Give Rise to Civil or Criminal Liability

Violation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached.

See Burkoff, *Criminal Defense Ethics*, § 3.1 (violations of rules relating to competence may have little or no direct bearing on whether or not criminal defense counsel committed a tortious act of legal malpractice or was ineffective enough to establish his or her former client's claim that a new trial must be granted as a matter of constitutional right).

But see Broome v. State, 687 N.E.2d 590, 595 n.2 (Ind. Ct. App. 1997) (defendant may "invoke the Indiana Rules of Professional Conduct not because he believes his attorney has

engaged in professional misconduct, but rather because these rules are an expression of the prevailing professional norms with which, in an ineffective assistance action, an attorney's conduct may be compared."), *overruled on other grounds by* Voss v. State, 856 N.E.2d 1211, 1220 n.6 (Ind. 2006).

Mathews v. State, 64 N.E.3d 1250 (Ind. Ct. App. 2016) (where defendant's CR 12 motion for change of judge was not properly filed, Code of Judicial Conduct does not create enforceable rights in litigants and cannot be used to secure change of judge; obligations of Judicial Code are enforced first by judge herself, or by disciplinary action; allowing defendant to obtain change of judge via Judicial Code would effectively nullify CR 12 by creating a way around it, and would also allow litigants to usurp supervisory authority of Indiana Supreme Court).

a. Appropriate Sanction

Determination of discipline to be administered for attorney misconduct involves consideration of several factors, including duty violated, attorney's mental state, actual or potential injury caused by misconduct, and factors in aggravation and mitigation. Matter of Putsey, 634 N.E.2d 497 (Ind. 1994).

Refer to ABA *Model Rules for Lawyer Disciplinary Enforcement*, Rule 10. Indiana courts use the standards to provide a good measure of the proportionality of any particular sanction to alleged misconduct. See also ABA *Standards for Imposing Lawyer Sanctions* (linked here).

"In analyzing the appropriate sanction for lawyer misconduct, this court relies heavily upon the American Bar Association Standards for Imposing Lawyer Sanctions." Matter of Atanga, 636 N.E.2d 1253, 1260 (Ind. 1994) (Sullivan, J., dissenting).

Matter of Burchett, 630 N.E.2d 205 (Ind. 1994) (*citing* Standards 5.11(a) and 9.3)).

Matter of Hanley, 627 N.E.2d 800 (Ind. 1994) (*citing* Standard 9.4(a)).

Matter of Pitschke, 627 N.E.2d 440 (Ind. 1994) (*citing* Standard 9.2).

(1) Fine or Imprisonment

Matter of O'Connor, 83 N.E.3d 693 (Ind. 2017) (for providing legal services in expungement matter after having been disbarred, Respondent was ordered to pay a $500 fine and disgorge the $1200 fee he charged in the expungement matter; failure to comply would result in a thirty-day term of imprisonment; if Respondent failed to comply with the order and served the term of imprisonment, he would be relieved of the obligation to pay the fine and disgorge the fee; David, J., dissenting, calling for a more severe sanction).

2. Criteria for Assessing Violation

The Rules presuppose that:

(a) disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

(b) whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

See Preamble, Ind. R. Prof. Conduct.

3. Disciplinary Commission's Burden of Proof

In order to sanction an attorney for violation of IRPC, the Disciplinary Commission must prove each element of the alleged violation by clear and convincing evidence. See Ind. Admission and Discipline Rule 23 § 14 (g)(1). See also

a. Interfering with Commission's Investigation

Violates Rules 8.1(a) (false statement of material fact in connection with a disciplinary matter); 8.4(c) (dishonesty, deceit, or misrepresentation); and 8.4(d) (conduct prejudicial to administration of justice).

Matter of Grotrian, 626 N.E.2d 807 (Ind. 1994) (even more alarming than attorney's forgery was attorney's perjury at his deposition taken as part of the commission's investigation; two-year suspension imposed).

Matter of Shumate, 626 N.E.2d 459 (Ind. 1993) (attorney made false statements to the investigating Indianapolis Bar Association Grievance Committee member and made false statements in his written response to the grievance; 30-day suspension imposed).

4. Determination by Supreme Court

Involves de novo examination of all matters presented, including hearing officer's report and entire record tendered in the case. Supreme Court of Indiana makes ultimate determination as to misconduct and sanction. Matter of Levinson, 604 N.E.2d 599 (Ind. 1992) and Matter of Kern, 555 N.E.2d 479 (Ind. 1990).

Additional References

Burkoff, John M., *Criminal Defense Ethics: Law & Liability*.

Hall, John Wesley Jr., *Professional Responsibility in Criminal Defense Practice*.

ABA *Model Rules of Professional Conduct*.

ABA *Criminal Justice Standards, Defense Function*.

American Trial Lawyers Foundation (now National Civil Justice Institute) *American Lawyer's Code of Conduct.*