

# DEVELOPMENTS IN PROFESSIONAL RESPONSIBILITY

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## INTRODUCTION

This Survey Article examines developments in the Indiana law of professional responsibility from October 1, 2012 to September 30, 2013. A few cases captured attention during the survey period with bizarre fact patterns. Readers may remember (1) the lawyer who wrote a tell-all book about a former client;<sup>1</sup> (2) the lawyer who distributed flyers about “bloodsucking shylocks”;<sup>2</sup> or (3) the law firm partner who sent a fake e-mail to humiliate an associate that spurned his romantic advances.<sup>3</sup> These cases—and several less scandalous examples—remind all lawyers of their ethical obligations to clients, courts, and other lawyers. This Article also discusses trends in attorney discipline that may be linked to newly appointed Indiana Supreme Court Justices and Disciplinary Commission staff.

## I. CHANGING OF THE GUARD

New Justices have been appointed to Indiana’s Supreme Court since 2010. While the change may not affect long-standing procedures, there is speculation that the new court may adopt a stricter view of lawyer regulation. The new cast, and particularly Justices David and Rush, are visible in the survey year.

As background, the Indiana Supreme Court governs the practice of law and exercises original and final jurisdiction over cases involving the admission, discipline, and disbarment of attorneys and judges—as well as the unauthorized practice of law by lay persons.<sup>4</sup> The makeup of the supreme court was remarkably stable from 1999, when Justice Rucker replaced Justice Myra Selby, to 2010. The panel of Justices Randall Shepard, Brent Dickson, Frank Sullivan, Jr., Theodore Boehm, and Robert Rucker sat together for more than decade. Justice Boehm retired from the bench in 2010 and was replaced by Justice Steven David. In 2012, Chief Justice Randall Shepard, who had served on the supreme court since 1985, retired from that position. Justice Sullivan stepped down from

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1. *In re Smith*, 991 N.E.2d 106 (Ind. 2013).
2. *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013).
3. *In re Usher*, 987 N.E.2d 1080 (Ind. 2013).
4. IND. CONST. art. 7, § 3.

the bench four months later—and the pair was succeeded by Justices Mark Massa and Loretta Rush.<sup>5</sup>

The Disciplinary Commission assists the supreme court by investigating grievances against attorneys and charging attorneys with misconduct. The Executive Secretary of the Commission administers its work, supervises the Commission's staff of eleven lawyers, and is charged with large quantities of discretion and responsibility in the investigation of grievances against attorneys.<sup>6</sup> Stability existed here too, as Donald Lundberg served as the Commission's Executive Secretary from 1991 to 2010. In 2010, Lundberg stepped down and was succeeded by G. Michael Witte (former Judge in Dearborn County).

How will the new guard differ from the old? One place to look for change is in the sanctions meted out for common misconduct (*e.g.* client neglect, lack of client communication, and criminal behavior). Mr. Lundberg, who is now in private practice, suggested the supreme court may be tightening its treatment of first-time Operating-While-Intoxicated convictions, which traditionally were handled without formal discipline.<sup>7</sup> Similarly, an unnamed federal law clerk noted that upon joining the bench, Justice David often dissented from his colleagues in favor of more severe sanctions for attorney misconduct. The clerk cited a handful of decisions and argued: “Not only is Justice David unlikely to show leniency to disciplined attorneys, but his proposed punishments are growing harsher. . . . I wonder if Justice David will be able to cobble together a coalition of Justices who share his approach.”<sup>8</sup>

Notably, the supreme court published eleven disciplinary orders in the survey period where one or more justices dissented from the majority position. While Justice David was a frequent dissenter (five times), Justice Rush and Chief Justice Dickson dissented just as often (five and six times, respectively), in each case proposing a more severe sanction.<sup>9</sup> Eleven dissents is not extraordinary. The

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5. The State of Indiana hosts a list and biography of each of its justices at <http://www.in.gov/judiciary/supreme/2332.htm>.

6. IND. ADMISSION & DISCIPLINE R. 23 §§ 9, 10, 12 (2013).

7. Donald R. Lundberg, RES GESTAE, *The Disappearing First Free Bite of the DUI Apple* 33-36 (May 2012).

8. Marcia Oddi, *Ind. Decisions—Observations on Some Supreme Court Disciplinary Rulings*, INDIANA LAW BLOG (May 8, 2013, 10:53 AM), [http://indianalawblog.com/archives/2013/05/ind\\_decisions\\_o\\_215.html](http://indianalawblog.com/archives/2013/05/ind_decisions_o_215.html).

9. *In re Weldy*, 989 N.E.2d 1252, 1256 (Ind. 2013) (Dickson, C.J. and Rush, J., dissenting); *In re Holcomb*, 989 N.E.2d 1250, 1252 (Ind. 2013) (David and Rush, JJ., dissenting); *In re Eyster*, 988 N.E.2d 264, 265 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting); *In re Compton*, 988 N.E.2d 262, 263 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting); *In re Usher*, 987 N.E.2d 1080, 1091 (Ind. 2013) (David, J., dissenting); *In re Dempsey*, 986 N.E.2d 816, 818 (Ind. 2013) (David, J., dissenting); *In re Watson*, 985 N.E.2d 1094, 1095 (Ind. 2013) (Dickson, J., dissenting); *In re Robison*, 985 N.E.2d 336, 336 (Ind. 2013) (Dickson, C.J., and Rush, J., dissenting); *In re Denney*, 983 N.E.2d 571, 574 (Ind. 2013) (Rucker, J. dissenting in favor of a more lenient sanction, and David, J., dissenting in favor of disbarment); *In re Muse*, 980 N.E.2d 838, 839 (Ind. 2013) (Dickson, C.J., dissenting); *In re Engebretsen*, 976 N.E.2d 1225, 1227 (Ind. 2012) (David, J.,

average for the 1999-2010 period was between nine and ten dissents per year for disciplinary opinions.<sup>10</sup> But the character of the dissents is remarkable. In all but one dissent during the survey period, the dissenters lobbied for a more-severe sanction (the lone exception being *In re Denney*, in which Justice Rucker sought a shorter suspension but Justice David sought disbarment). In prior years, a number of dissenting votes sought a less severe sanction or a finding of no misconduct.<sup>11</sup>

It remains to be seen whether the addition of Justices David and Rush will tip the balance of the court, but the possible consequences are grave for lawyers traveling through the disciplinary system. Many first-time or comparatively mild forms of misconduct are punished with a reprimand—which does not interrupt one’s practice (aside from the potential stigma).<sup>12</sup> The next step up is a short suspension from the practice of law (usually thirty days), which poses a greater interruption and requires the disciplined lawyer to inform his or her clients about the suspension.<sup>13</sup> For lawyers who have committed more serious offenses (or multiple offenses), sanctions include terms of 90 days or less, which may allow automatic reinstatement. Suspensions longer than 90-days are *without* automatic reinstatement and require a lawyer to file a petition for reinstatement, which not only delays re-entry into the profession but means the lawyer must then demonstrate his or her fitness to practice.<sup>14</sup> These decisions—reprimand or suspension, automatic reinstatement or not—have big implications for practitioners, and lie within the supreme court’s discretion.

The perception of the supreme court’s attitude is also likely affect the type of plea agreement the Disciplinary Commission will offer to lawyers in the great many disciplinary cases that are settled.<sup>15</sup> Any plea agreement must be approved by the supreme court. If the Commission senses the supreme court is leaning towards harsher sanctions, then it may offer less-forgiving conditional agreements to improve the chances of court approval.

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dissenting).

10. Donald R. Lundberg, RES GESTAE, *Chief Justice Randall T. Shepard: An Appreciation, Reminiscence and Retrospective* 18 & 21 (Jan./Feb. 2012).

11. *Id.* (showing a total of 18 votes for “lesser sanction,” primarily from Justices Rucker and Boehm, and a total of 12 votes for “no misconduct” during the period of 1999–2010).

12. See IND. ADMISSION & DISCIPLINE R. 23, § 3 (2013) (types of discipline and suspension).

13. *Id.* at 23(26) (duties of disbarred or suspended attorneys, and attorneys who have resigned).

14. *Id.* at 23, §§ 4, 18 (procedure and grounds for reinstatement); see, e.g., *In re Relphorde*, 949 N.E.2d 355, 355–356 (Ind. 2011) (“We note, however, that regardless of the date on which Respondent is eligible to petition for reinstatement, reinstatement is discretionary and his petition would be granted only if he meets the most stringent requirements of proving by clear and convincing evidence that his rehabilitation is complete and he can safely reenter the legal profession.”).

15. IND. ADMISSION & DISCIPLINE R. 23, § 11 (2013) (describing the conditional agreement for discipline) (“It is the intent of this rule to encourage appropriate agreed dispositions of disciplinary matters.”)

## II. BIAS AND DISCRIMINATION

Turning to the first case of interest in the survey period, the Indiana Supreme Court described the following behavior:

In 2010, Respondent authored a book purporting to be a true autobiographical account of Respondent's relationship from roughly 1990 through 2010 with a former client ("FC"), who was active in politics and at one point held a high-level job in the federal government. A sexual relationship between FC and Respondent began around 1990 and continued until about 2001. After their sexual relationship began, Respondent represented FC on various legal matters during these years. They maintained a personal relationship for a time thereafter. Respondent's professed motivation for writing the book was at least in part to recoup legal fees FC owed him and money FC had obtained from him over the years.<sup>16</sup>

The Commission charged misconduct under six rules, including improper divulgence of information relating to representation of a former client.<sup>17</sup> At the hearing, the lawyer offered the defense that the subject of his memoir gave informed consent, to the effect of: "That is a great idea! Write a book and make me famous!"<sup>18</sup> The Hearing Officer and Court disagreed.

It should be noted that consent is a valid defense to telling war stories. Professional Conduct Rule 1.9(c) allows disclosure of information "as these Rules would permit," and a lawyer may reveal information when authorized by a client (which authorization need not be in writing).<sup>19</sup> But the consent must be "informed consent," a defined term that demands that *adequate* information and explanation flow from client to lawyer.<sup>20</sup> For this reason, an off-the-cuff client approval cannot justify lengthy exposition.<sup>21</sup> Lawyers who tell detailed stories are well-advised to take stronger precautions, particularly when—as appears to be the case here—the story is unflattering.<sup>22</sup>

*In re Smith* is also noteworthy for being one of few published decisions to

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16. *In re Smith*, 991 N.E.2d 106, 107 (Ind. 2013).

17. *Id.*

18. *Id.* at 108.

19. IND. R. PROF'L CONDUCT 1.6(a) (2013).

20. *Id.* at 1.0(e).

21. *Smith*, 991 N.E.2d at 108 ("The hearing officer concluded, however, that Respondent has not demonstrated that FC gave the level of informed written consent necessary to permit Respondent to disclose and publish the confidential information in the book.").

22. Online retailer Amazon lists a book by a "Joseph Stork Smith, Esq." with a contemporaneous publication date. Its title is *Rove-ing Her Way Into the White House, Machiavelli's Sexy Twin Sister: How to Lie and Steal Your Way into Full Security Clearance at the White House*. <http://www.amazon.co.uk/Rove-Ing-Her-Way-White-House/dp/1770672753> (visited Aug. 10, 2014).

find misconduct through name-dropping. When discussing his former client's bail, the book author claim to have "dropped the names" of several people, including a person he knew who used to work for the [Marion County Bail Commissioner's] Project and a criminal court judge who was a friend of his."<sup>23</sup> This conduct implied an ability to influence improperly a government official.<sup>24</sup>

Another unusual decision, *Matter of Usher*, saw the deterioration of the friendship between a male law firm partner and a woman who was a summer associate when they first met. She consistently rebuffed the partner's romantic advances and eventually broke off their friendship.<sup>25</sup> "Respondent then began attempting to humiliate [the associate attorney] and to interfere with her employment prospects."<sup>26</sup> He eventually drafted a lengthy, fictitious e-mail purporting to show several legal professionals criticizing the woman for acting in a horror film in which she appeared to (but did not actually) appear nude.<sup>27</sup> He recruited his paralegal to send the e-mail from a phony address to 51 persons, many of whom were employed at law firms around Indianapolis.<sup>28</sup> The phony address was chosen to create the impression that the e-mail came from a senior partner at an Indianapolis firm.<sup>29</sup>

This conduct did not lead to any discipline by the court,<sup>30</sup> but the lawyer's later conduct did. The associate attorney filed a civil lawsuit against Usher and asked him to admit in discovery that he composed the e-mail, caused it be sent, directed someone else to send the e-mail, and knew who sent it. Usher responded "Deny" to all requests.<sup>31</sup> The supreme court's discussion of this conduct is worth reading:

Respondent expends much effort in trying to defend his responses to the [requests for admissions]. For example, he argues that he was justified in denying a RFA that he "composed" the email because he interpreted "composed" to mean preparing the email that was actually transmitted, that he was justified in denying that he asked or directed another person to send the email because he did not select the recipients or the email

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23. *Smith*, 991 N.E.2d at 109.

24. IND. R. PROF'L CONDUCT 8.4(e) (2013).

25. *In re Usher*, 987 N.E.2d 1080, 1083 (Ind. 2013).

26. *Id.*

27. *Id.* at 1083-85.

28. *Id.* at 1085.

29. *Id.*

30. *Id.* at 1089. Although the lawyer was charged with a violation of Professional Conduct Rule 8.4(g) (conduct "in a professional capacity, manifesting bias or prejudice based upon gender"), the supreme court held that the Commission did not meet its burden on this charge because the e-mail was "motivated by personal anger at [the associate attorney] in particular rather than by bias or prejudice in general." It is notable that the court did not sanction the lawyer for what one commentator has described as "slut shaming" despite its readiness to acknowledge that his speech wasn't necessarily protected by the First Amendment. *See infra* note 32.

31. *In re Usher*, 987 N.E.2d at 1085-86.

account name, and that he was justified in denying that he knew who sent the email because [the paralegal] might have asked someone else to send it. In defense of his disclaimer of any knowledge about whether the email was sent at his “suggestion,” he testified that he “merely put the idea out there for” [the paralegal], and whether this was a “suggestion” went to [the paralegal’s] mental state, which he could not know. Respondent asserts he was entitled to “exploit the infirmities of the discovery requests.”

Hyper-technical parsing of ordinary English words and sentences has been rejected in prior cases. Respondent’s hide-and-seek approach to the RFAs reflects a gaming view of the legal system, which this court has soundly rejected.<sup>32</sup>

Although the Rules of Professional Conduct are broad enough to capture a wide variety of dishonest activity,<sup>33</sup> it is unusual to see the supreme court devote disciplinary attention to a discovery dispute. The trial court, after all, had powers under Trial Rule 37 (or its federal equivalent) to impose sanctions upon the lawyer.

*In re Usher* demonstrates the supreme court’s and Commission’s willingness to act upon untruthful statements. Common sense tells us that civil litigants are often tempted to “exploit the infirmities” of opposing requests when they respond to written discovery. This ruling suggests lawyers who verify pleadings or discover responses risk more than just sanctions from the trial court.

### III. FREE SPEECH

*In re Usher* also introduces an area of repeated and recent probing in the Indiana Supreme Court. Usher argued that while his e-mail was intended to shame, it was speech protected from government regulation under the First Amendment of the U.S. Constitution.<sup>34</sup> This argument, apparently unsupported by precedent, was not well-taken. The supreme court announced that speech and other unethical activities “outside the professional arena” were not beyond its disciplinary orbit.<sup>35</sup>

*In re Dempsey*, another factually-striking case, saw a lawyer personally enter

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32. *Id.* at 1088 (internal citations omitted).

33. *E.g.*, IND. R. PROF’L CONDUCT 8.4(c) (2013) (prohibiting conduct “involving dishonesty, fraud, deceit or misrepresentation”).

34. *In re Usher*, 987 N.E.2d at 1086. Usher’s story was picked up by USA Today and a few other national outlets. The most incendiary headline predictably came from the online legal tabloid *Above The Law*. See Staci Zaretsky, *Lawyer Claims His ‘Slut-Shaming’ Is Protected By the First Amendment—Just Like the Founders Intended*, ABOVE THE LAW (May 20, 2013, 1:15 PM), <http://abovethelaw.com/2013/05/lawyer-claims-his-slut-shaming-is-protected-by-the-first-amendment-just-like-the-founders-intended/>.

35. *In re Usher*, 987 N.E.2d at 1086-87 (collecting authorities).

into a land contract with a pair of sellers.<sup>36</sup> After Dempsey defaulted, the sellers wanted foreclosure, and Dempsey sought bankruptcy protection.<sup>37</sup> Dempsey objected to the proceedings in the foreclosure and bankruptcy actions and initiated four appeals. After receiving unfavorable results, Dempsey embarked on a grass-roots campaign:

In 2009, Respondent handed out flyers entitled “Stop the Plunder in Bankruptcy Court” in downtown Indianapolis. The flyer, which was based upon Respondent’s Chapter 13 bankruptcy case, called Sellers (without naming them) “slumlords,” called their attorneys (naming the firm) “bloodsucking shylocks” who were part of a “heavily Jewish (sic) . . . reorganization cartel,” and made free-ranging disparaging remarks about Jews generally, from the fall of Jericho, through 1925 Berlin, to their alleged involvement in the 9/11 attacks.<sup>38</sup>

During his disciplinary prosecution, Dempsey sent discovery to determine whether members of the Disciplinary Commission had any Jewish affiliations. The supreme court summarily concluded that no part of his “virulent bigotry” fell “within Respondent’s broad constitutional right to freedom of speech and expression.”<sup>39</sup> Dempsey violated Professional Conduct Rule 8.4(g), which prohibits a lawyer from “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.”<sup>40</sup> The court did not reach the question of when a lawyer’s self-representation is in

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36. *In re Dempsey*, 986 N.E.2d 816 (Ind. 2013).

37. *Id.*

38. *Id.*

39. *Id.* at 817.

40. The “manifesting bias” provision is somewhat anomalous. The ABA includes this warning only in a comment to Model Rule 8.4. Several states make the warning a visible part of the rule, like Indiana does, but the wording is not consistent from state to state. Am. Bar Ass’n CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct* (Aug. 16, 2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf).

For example, Maryland has a “knowingly manifest” element—which presumably means the conduct must be subjectively prejudicial or biased. Washington State prohibits any conduct “that a reasonable person would interpret as manifesting prejudice or bias,” which suggests an objective test.

The American Bar Association recommends that a lawyer should steer clear of prejudice based upon the traditional suspect classifications of strict-scrutiny review: “race,” “religion,” and “national origin.” To that list, the ABA adds “sex,” “disability,” and “age” (all of which are subject to significant federal protections), as well as the more progressive “sexual orientation” and “socioeconomic status.” Minnesota also prohibits discrimination based on “marital status,” but only if the lawyer is “harass[ing] a person” on that basis. New Jersey adds the classification of “language,” which is probably intended to protect non-English speakers. Indiana’s rule also prohibits bias based upon “similar factors.”

a professional versus personal capacity.<sup>41</sup>

Another case with First Amendment implication is *In re Davis*. Davis, a lawyer in private practice, ran as a candidate to be judge of the Franklin Circuit Court.<sup>42</sup> Candidates for judicial office fall within the jurisdiction of the Judicial Qualifications Commission,<sup>43</sup> whose members are elected and appointed as provided by the Indiana Constitution.<sup>44</sup> Davis made several statements about her opponent and his relationship to and treatment of a felon he sentenced (who murdered five people after being released from prison).<sup>45</sup> The Commission argued that these statements were untrue. Notably, it criticized Davis for failing to request a retraction or correction of a statement incorrectly attributed to her during a newspaper interview.<sup>46</sup> The Commission also informed Davis that it believed statements in her campaign literature about the criminal's release date were incorrect (the supreme court's order does not state whether this was formal or informal notice).<sup>47</sup> The order continues: "Rather than complying with the Commission's request, from late August through late October 2012, Respondent continued to post information on her campaign website implying that [the criminal] would have been in jail and could not have committed the Ohio crimes if [the judge] had not issued his July 15, 2010 sentence modification order."<sup>48</sup>

The disciplinary case against Davis ended with an agreed resolution. The supreme court did not reach potential questions with First Amendment significance, such as "When is a lawyer responsible for a statement made by a third party?" or "Is non-compliance with a Commission directive a fact that will lead to a more severe sanction if the lawyer disagrees with the Commission's position?" The short order is nevertheless worth reading for lawyers who are contemplating or assisting with a judicial campaign.

The scope of permissible "lawyer speech" would continue to confront the court. After the survey year, it issued a sixteen-page opinion in *In re Dixon*<sup>49</sup> and a shorter, recent opinion in *In re Ogden*.<sup>50</sup> In both cases, the lawyer was alleged to have made statements about the qualifications or integrity of a judge "with reckless disregard as to [their] truth or falsity."<sup>51</sup> Unlike the lawyers in the survey

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41. *In re Kelly*, approaches this same issue. There a female lawyer was disciplined for inappropriately taunting a telemarketer by calling him "gay" and asking if he was "sweet," who called her home asking to speak with her husband. The lawyer indicated that she represented her husband, bringing the conversation into the realm of professional communication. 925 N.E.2d 1279 (Ind. 2010).

42. *In re Davis*, 2013 Ind. LEXIS 345 (Ind. May 7, 2013).

43. ADM. DISC. R. 25(I)(E).

44. IND. CONST. art. 7, § 9.

45. *In re Davis*, 2013 Ind. LEXIS 345.

46. *Id.*

47. *Id.*

48. *Id.*

49. *In re Dixon*, 994 N.E.2d 1129 (Ind. 2013).

50. *In re Ogden*, 10 N.E.3d 499. (Ind. 2014)

51. IND. R. PROF'L CONDUCT 8.2(a) (2013).



year, Dixon was cleared of misconduct and Ogden was partially-cleared for statements with some basis in fact.<sup>52</sup>

#### IV. LIMITS ON ADVOCACY

A divorced father reported that the mother was refusing to share time with their children. The father's lawyer composed the following letter:

[Father] told me this week that he has only seen his baby . . . one day all year. Your client doesn't understand what laws and court orders mean I guess. Probably because she's an illegal alien to begin with.

I want you to repeat to her in whatever language she understands that we'll be demanding she be put in JAIL for contempt of court.

I'm filing a copy of this letter with the Court to document the seriousness of this problem.<sup>53</sup>

On TV shows about lawyers, hard-nosed litigators frequently make intimidating statements like this one. The Respondent was charged with a violation of Rule 8.4(g).<sup>54</sup> The Respondent argued that his letter effectively connected the mother's violation of immigration laws with her current violation of the parenting-time arrangement.<sup>55</sup> The supreme court disagreed: "regardless of the frustration Respondent might have felt in the circumstances, we conclude that accusing Mother of being in the country illegally is not legitimate advocacy concerning the legal matter at issue and served no purpose other than to embarrass or burden Mother."<sup>56</sup>

Using a perceived violation of other criminal or civil law need not always create a disciplinary violation. In an unpublished decision, the Court approved a hearing officer's finding in favor of the lawyer under the following circumstances:

In 2009, Respondent represented a client who wished to end a relationship with his girlfriend. After the girlfriend reported an incident of domestic violence, the client was arrested for battery and a court entered a no-contact order prohibiting him from any contact with the girlfriend.

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52. The court found that the Commission had not met its burden of proof with respect to 3 of the 4 charged statements made by Ogden. It also found that Ogden had not committed misconduct by distributing information to judges about a perceived change in forfeiture law. Ogden was disciplined for accusing a judge of malfeasance during the early stage of a proceeding. The court found that the accusations "were impossible because [the judge] was not even presiding over the Estate at this time—a fact Respondent could easily have determined." *Id.*

53. *In re Barker*, 993 N.E.2d 1138, 1139 (Ind. 2013).

54. *Id.*

55. *Id.*

56. *Id.*

The client had personal property, including tools of his auto mechanics business, at the home owned by the girlfriend. Because the client was concerned that she was damaging his property, Respondent filed a motion to modify the no-contact order to permit the client to retrieve his property. After a telephonic conference, the judge refused the modification request but encouraged the parties to cooperate to resolve the personal property issues.

The client discovered that the girlfriend had written checks on his account of close to \$1,000, forging the client's signature. With the client present, Respondent called the girlfriend and told her that he would press for theft and forgery charges unless she agreed to: (1) repay the money represented by the checks; and (2) request the prosecutor to dismiss the battery charge and to dismiss the non-contact order. The girlfriend denied forging the checks or taking the client's funds and refused to further discuss a possible resolution of all issues. Once the girlfriend indicated she was not interested in Respondent's proposal, he ended the conversation.

Respondent's purpose in making the phone call was to try to resolve all pending issues between the parties to avoid unnecessary civil and criminal litigation. When the girlfriend refused the request, the client, on the Respondent's advice, filed a criminal complaint against the girlfriend.<sup>57</sup>

A potential fact distinguishing this case, *In re R.W.G.*, from *In re Barker* is the relationship between the threat of action and the issues on the table. In *R.W.G.*, "the client and the girlfriend were facing intertwined civil and criminal issues, all of which had emerged since their breakup in July 2009."<sup>58</sup> It is not clear that the same connection existed between the perceived violation of immigration law and violation of a parenting-time arrangement in *Matter of Barker*.

In the 1970s and 1980s, the ABA promulgated and many states adopted an outright ban on such activity. The old model code instructed: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."<sup>59</sup> The ABA intentionally abandoned this provision in the newer Model Rules of Professional Conduct,<sup>60</sup> and when Indiana adopted the Model Rules of Professional Conduct, it also abandoned its version of this prohibition.

The new ABA regime recognizes that calling attention to potential criminal charges is often a "legitimate negotiation technique."<sup>61</sup> "In reality, many

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57. *In re R.W.G.*, Supreme Court Cause No. 21S00-1206-DI-362 (Ind. Jun. 28, 2013).

58. *Id.*

59. AM. BAR ASSOC., MODEL CODE OF PROF'L RESPONSIBILITY, DR 7-105(A) (1983).

60. See GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 40.4 (2008 Supp.).

61. See AM. BAR ASSOC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL

situations arise in which a lawyer's communications on behalf of a client cannot avoid addressing conduct by another party that is both criminal and tortious.<sup>62</sup> An example is the child-support context, in which a lawyer for an aggrieved spouse might tell the non-supporting spouse that he or she faces criminal non-support charges if he fails to comply with a support order. Another example involves a business that has discovered an employee embezzling and wishes to make clear its position that it will pursue criminal charges if the funds are not returned. "In these circumstances it is counterproductive to prohibit the lawyer from [discussing criminal charges]. Indeed, competent representation would seem to *require* the lawyer to press ahead with such full-ranging negotiations."<sup>63</sup> Despite the softened ABA position,<sup>64</sup> the Indiana Supreme Court has not comprehensively addressed the law in this area.

It is clear that all threats are not created equal. While *Barker* and *R.W.G.* stake out opposite positions with respect to threats of criminal reporting, the case *In re Dimick* shows that the Disciplinary Commission frowns upon threats to refer another lawyer to the Commission itself.<sup>65</sup> Lawyer Dimick believed her opposing counsel had committed misconduct and, in part, had converted money that belonged to her client. She sent the opposing lawyer a letter laying out these charges, and gave him a set amount of time to resolve the matter. "Respondent stated that if she did not hear from him within that time, 'I will file [the client's] claims with the Indiana Disciplinary Commission and in state court.' Thus, the letter implied that Respondent would file a grievance against [the opposing lawyer] unless [he] made a settlement offer."<sup>66</sup> Like many cases, *Dimick's* was resolved by agreement with the Disciplinary Commission and with approval from the court. It contains limited legal analysis. The law on lawyer threats continues to develop in Indiana.

A final case on the limits of responsible advocacy is *In re Schalk*.<sup>67</sup> Schalk represented a criminal defendant charged with possession of methamphetamine. He wanted to discredit the government's confidential information by showing that the informant was himself dealing drugs.<sup>68</sup> The defendant put Schalk in touch with two of his friends. Schalk gave the friends \$200 and a tape recorder and told them to set up a drug buy with the informant, and he also promised the friends would encounter no legal trouble as a result of their actions.<sup>69</sup> Perhaps predictably, the friends testified that they purchased \$50 worth of marijuana,

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RESPONSIBILITY § 71:603 (Supp. 2012).

62. HAZARD ET AL., *supra* note 61, § 40.4.

63. *Id.* § 40.4 (emphasis in original).

64. See AM. BAR ASS'N STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 92-363 (1992).

65. *In re Dimick*, 969 N.E.2d 17 (Ind. 2012).

66. *Id.* at 18.

67. *In re Schalk*, 985 N.E.2d 1092 (Ind. 2013).

68. *Id.* at 1092.

69. *Id.*

smoked it themselves, and kept the remaining \$150.<sup>70</sup> Schalk was disqualified from representing the criminal defendant and was personally charged with and convicted of attempted possession of marijuana.<sup>71</sup>

Schalk's actions were no doubt intended to benefit his client and seem like the type of creative lawyering that would play well in Hollywood. Without intending disrespect to the courts or Respondent Schalk, the whole event calls to mind the movie cliché of the rogue police detective. The sergeant calls the detective to his office and orders him off the big case. The detective turns in his badge and gun, but heroically defies protocol to pursue the villains. In the end, justice is done, and the grizzled sergeant forgives the detective's unauthorized activities.

Not so in Indiana. While the friends that Schalk recruited apparently succeeded in obtaining drugs from the informant, the court rebuked him for his "illegal attempt at a drug sting without the assistance of law enforcement" and found, in aggravation of the offense, that he "has no appreciation for the wrongfulness of his conduct."<sup>72</sup> The court suspended Schalk from the practice of law for nine months without automatic reinstatement.<sup>73</sup>

#### V. FEE AGREEMENTS

The supreme court has discussed the propriety of flat fees in several opinions, notably in *In re O'Farrell*<sup>74</sup> and *In re Kendall*.<sup>75</sup> In 2013, it issued another development in *In re Canada*.<sup>76</sup> Unlike previous decisions, the court cleared Respondent Canada of the charged misconduct.

Canada represented a client accused of the Class A Felony of conspiracy to deal methamphetamine. The client said he wanted to resolved the matter through a plea agreement. Canada charged a flat fee of \$10,000 that was "non-refundable unless there is a failure to perform the agreed legal services."<sup>77</sup> He spent about 20 hours working on the file and obtained an offer for the client to plead to a Class B Felony. The client said he would try to get a better deal with a new lawyer, but—through new counsel—eventually agreed to a similar plea agreement.<sup>78</sup>

The hearing officer and the supreme court agreed that \$10,000 was a reasonable fee.<sup>79</sup> In this case, the rate worked out to \$500 per hour. While that could be on the high side for the Evansville market, common sense suggests it

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70. *Id.*

71. *Id.*

72. *Id.* 1092-93.

73. *Id.* at 1093.

74. *In re O'Farrell*, 942 N.E.2d 799 (Ind. 2011).

75. *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004).

76. *In re Canada*, 986 N.E.2d 254 (Ind. 2013).

77. *Id.* at 254.

78. *Id.*

79. *Id.*

might easily have taken Canada 30 hours (\$333 per hour) or 40 hours (\$250 per hour) to secure an offer from the State. The precise amount of time needed for a legal representation is necessarily unknown at its beginning.

Under the *O'Farrell* and *Kendall* standards, the remaining issue was whether any part of the fee was unearned.<sup>80</sup> The court found that Canada had earned the entire fee. The opinion reasons that Canada had accomplished the client's goal—*i.e.* to obtain a reasonable plea agreement—and it was the client who chose to turn his back on this result and select new counsel. While the client was free to engage a new lawyer, he could not keep the benefits of Canada's work (the first plea agreement offer) *and* obtain a refund.<sup>81</sup>

## VI. MONITORING AGREEMENTS

JLAP, the Judges and Lawyers Assistance Program, is a regular feature of Indiana disciplinary orders.<sup>82</sup> The mission of JLAP “is assisting impaired members in recovery; educating the bench and bar; and reducing the potential harm caused by impairment to the individual, the public, the profession, and the legal system.”<sup>83</sup> JLAP's website suggests an approximate split of the calls it receives is: 45% substance abuse, 41% mental health, 7% physical impairment, 7% age related or other.<sup>84</sup> Attorneys who reach a conditional plea agreement with the Commission frequently include JLAP monitoring for substance abuse as one of the conditions.

Monitoring, however, need not occur only in the substance-abuse context. During the survey period, a lawyer facing no substance-abuse charges agreed to a more novel “law practice” monitoring agreement to resolve several charges related to client communications, fee agreements, etc.<sup>85</sup> The terms of the lawyer's probation included that he “shall cooperate with a monitor, who will supervise Respondent and submit quarterly reports to the Commission.”<sup>86</sup>

The law-practice monitor has potential to be a helpful solution for conditional agreements resolving charges of poor client communication or management. Those charges may result from (1) a busy, profitable law office, (2) a lawyer who is new to a practice area, or (3) a lawyer who is new to the practice of law and lacks a formal mentor or support structure. In each case, the arrangement has the potential to show the Commission that client interests are being protected while the same time helping the lawyer to avoid a suspension (or a lengthier suspension).

The law-practice monitor is sufficiently unusual to rate as a development in

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80. *Id.* at 255.

81. *See id.*

82. *E.g.*, *In re Stewart*, 973 N.E.2d 563, 564 (Ind. 2012)

83. IND. ADMISSION & DISCIPLINE R. 31, § 2 (2013).

84. *About JLAP*, IND. JUDICIAL BRANCH: JUDGES AND LAWYERS ASSISTANCE PROGRAM, <http://www.in.gov/judiciary/ijlap/2361.htm> (last visited Aug. 10, 2014).

85. *In re Weldy*, 989 N.E.2d 1252, 1255 (Ind. 2013).

86. *Id.*

the law. But it is not unprecedented. The court approved a similar arrangement in *In re Peoples*, which was not a plea-agreement case.<sup>87</sup> To resolve several counts of client neglect, it ordered a 90-day suspension and two years of probation. The terms included:

1) That prior to resuming the practice of law, the Respondent seek out and arrange for an attorney or attorneys to supervise her practice of law under the terms set forth in this order and advise the Indiana Supreme Court Disciplinary Commission of the name or names of attorneys who agree to supervise her practice.

...

3) That once resuming the practice of law, the Respondent shall prepare and submit to her supervising attorney a quarterly (three month) report detailing, without designation by name, clients, nature of representation, actions taken on behalf of each client, fees charged, pending work, scheduled hearings, and litigation status. Such reports shall be presented to the supervising attorney no later than ten (10) days following the end of the quarter.

4) That within twenty days after the end of the quarter, the supervising attorney shall review the report, counsel Respondent as deemed appropriate, and forward the report with comment to the Disciplinary Commission.

5) That Respondent shall permit the supervising attorney to review any file or other office record at any time to determine compliance with the terms of probation and that the supervising attorney shall review such records in the event the supervising attorney deems it necessary to monitor the Respondent during the period of probation.<sup>88</sup>

In addition to JLAP and law-practice monitors, the court sometimes approves the use of a Certified Public Accountant monitor for attorneys who have had issues with their trust accounts. Like other monitors, the CPAs are expected to report to the Commission as part of probation.<sup>89</sup>

## VII. MISCELLANEOUS DEVELOPMENTS IN INDIANA DISCIPLINARY CASES

Two other orders remind us that, despite the obvious discomfort, lawyers

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87. *In re Peoples*, 614 N.E.2d 555, 558 (Ind. 1993).

88. *Id.*

89. *In re Suarez*, 984 N.E.2d 1233, 1234 (Ind. 2013); *In re Aguilar*, 984 N.E.2d 1235, 1236 (Ind. 2013); see also *In re Bergdoll*, 894 N.E.2d 526, 527 (Ind. 2008); *In re Starkes*, 894 N.E.2d 504, 504 (Ind. 2008); *In re Geller*, 828 N.E.2d 1288, 1288 (Ind. 2005); *In re Cassidy*, 814 N.E.2d 247, 249 (Ind. 2004).

have a duty to alert clients when personal issues will severely limit the representation. In one case, the Commission charged, “Respondent knew he was suffering from depression and other health related issues that interfered with his ability to attend to his clients’ needs.”<sup>90</sup> In another, the lawyer was charged with “failing to inform clients that medical problems would severely limit his ability to represent them.”<sup>91</sup> Similarly, the Professional Conduct Rules require a lawyer to withdraw (or at least seek judicial approval for withdrawal) where “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.”<sup>92</sup>

In *In re Godshalk*, a lawyer represented criminal defendant RM against charges that he battered victim JB.<sup>93</sup> During the same time frame, JB was arrested for operating while intoxicated and went to Godshalk’s office to hire him. A non-lawyer assistant agreed to the representation and filed an appearance for JB using a rubberstamp of Godshalk’s signature (which appearance created a conflict of interest and, ultimately, disqualification).<sup>94</sup> The supreme court observed that Indiana’s Professional Conduct Guidelines regarding the use of non-lawyer assistants prohibited using an assistant for both (1) establishing the attorney-client relationship and (2) establishing the amount of the lawyer’s fee.<sup>95</sup>

Finally, in *In re Robison*, the Respondent was assisting two sisters to administer an estate.<sup>96</sup> While one sister was in his office, Robison gave her a number of forms to sign. He later discovered that the sister had neglected to sign one of the forms; so he signed it and forwarded the stack to the second sister for signature (who then discovered the forgery).<sup>97</sup> The court acknowledged that the lawyer’s misconduct “was not due to a dishonest or selfish motive, but rather was motivated by a desire to avoid inconvenience to a client.”<sup>98</sup> A three-justice majority approved the agreed sanction of a public reprimand. The remaining two (Justices Dickson and Rush) wrote that a “substantial period of suspension” would have been more appropriate for the offense:

Much of our legal system is predicated on the authenticity and reliability

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90. *In re Dittrich*, 980 N.E.2d 836, 836 (Ind. 2013).

91. *In re Engebretsen*, 976 N.E.2d 1225, 1225 (Ind. 2012).

92. IND. R. PROF’L CONDUCT 1.16(a)(2) (2013).

93. *In re Godshalk*, 987 N.E.2d 1095, 1095 (Ind. 2013).

94. *Id.*

95. *Id.* A lawyer also may not delegate the responsibility for a legal opinion to a non-lawyer. IND. R. PROF’L CONDUCT GUIDELINE 9.3(c) (2013). Other tasks normally performed by the lawyer may be delegated to a non-lawyer assistant or paralegal. *Id.* at 9.2. However, the lawyer must take reasonable measures to assure any assistant acts consistently with the lawyer’s duties under the Professional Conduct Rules. *Id.* at 9.1. The lawyer could not, for example, tell his assistant to prepare an entire summary judgment response if that task was beyond the assistant’s abilities. *See* IND. R. PROF’L CONDUCT 1.1 (2013).

96. *In re Robison*, 985 N.E.2d 336, 336 (Ind. 2013).

97. *Id.*

98. *Id.*

of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression.<sup>99</sup>

The difference between a public reprimand and a six-month suspension is monumental in terms of its effect on a lawyer's ability to continue his or her practice. Members of the bar should be wary that—in future cases—Justices Dickson or Rush may be able to sway a third vote to their position although as Justice Dickson is retiring, it is hard to predict the court's tolerance of this behavior.

#### VIII. OTHER DEVELOPMENTS RELATED TO LEGAL ETHICS

The survey period saw only modest changes to Indiana's court rules dealing with legal ethics. The court provided minor clarifications to Professional Conduct Rule 5.5, which governs the multi-state or multi-jurisdictional practice of law.<sup>100</sup> The court modified the Admission and Discipline rules regarding the application for CLE credit.<sup>101</sup> On the national front, the American Bar Association's Commission on Ethics 20/20 finished its work, with the ABA's house of delegates adopting nearly all of the 20/20 Commission's remaining proposals on February 11, 2013. The 20/20 Commission proposed changes to the ABA's model rules to:

- ◆ address the effect of technological changes on client confidentiality (Resolution 105A);
- ◆ clarify the rules of lead-generation, referral services, solicitation, and prospective-client contact (Resolution 105B);
- ◆ identify a position on the use of both lawyer and non-lawyer contract services outside of a law firm (Resolution 105C);
- ◆ improve the multijurisdictional practice rules (Resolution 105D);
- ◆ enable the sharing of client information and detection of conflicts of interest between two firms, in situations such as change of employment, merger, and sale of a law practice (Resolution 105F);

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99. *Id.* (Dickson, C.J., dissenting; Rush, J., joining in the dissent).

100. Order Amending Indiana Rules of Professional Conduct, 94S00-1205-MS-275 (Ind. Oct. 26, 2012).

101. Order Amending Indiana Rules for the Admission to the Bar and the Discipline of Attorneys, 4S00-1301-MS-30 (Ind. Sep. 13, 2013).



- ◆ better regulate the work of foreign lawyers in the United States (Resolutions 107A, 107B, and 107C); and
- ◆ allow lawyers and clients to select the jurisdiction's law that will apply for purposes of conflict-of-interest analysis (Resolution 107D).<sup>102</sup>

The resolutions are the product of three years of work within the American Bar Association. These revisions to the Model Rules may serve as a guide or consideration for future amendments by the Indiana Supreme Court to its rules of practice.

The 2012–2013 period did not include significant developments in Indiana appellate courts in the field of legal malpractice. Several malpractice actions made it to the court of appeals,<sup>103</sup> but most applied established law on the statute of limitations—and all but one were unpublished.<sup>104</sup>

The period did, however, include an unusual case regarding the unauthorized practice of law.<sup>105</sup> In *State ex rel. Indiana Supreme Court Disciplinary Commission v. Farmer*, the Commission lost its bid for a permanent injunction to keep Ohio attorney Farmer from practicing law or soliciting clients in Indiana.<sup>106</sup> A man named Ivy was convicted and sentenced to sixty-five years for murder in Indiana. Ivy's grandparents, who lived in Ohio, retained Farmer to provide certain work on Ivy's case. The work included first a "preliminary

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102. AM. BAR ASS'N, HOUSE OF DELEGATES FILINGS (Aug. 6, 2012 & Feb. 11, 2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/house\\_of\\_delegates\\_filings.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html) (last visited Aug. 10, 2014).

103. *Dickes v. Felger*, 981 N.E.2d 559 (Ind. Ct. App. 2012); *Edsall v. Benson, Pantello, Morris, James, & Logan*, No. 02A05-1210-SC-508, 2013 Ind. App. Unpub. LEXIS 889 (Ind. Ct. App. July 16, 2013); *Dudley v. Estate of Studtmann*, No. 46A03-1204-PL-147, 2012 Ind. App. Unpub. LEXIS 1403 (Ind. Ct. App. Nov. 7, 2012); *Cecil v. Fisk Excavating, Plumbing and Septic Servs.*, No. 33A05-1112-MI-686, 2012 Ind. App. Unpub. LEXIS 1308 (Ind. Ct. App. Oct. 10, 2012); *Smith v. Williams*, No. 06A01-1201-CT-20, 2012 Ind. App. Unpub. LEXIS 1304 (Ind. Ct. App. Oct. 12, 2012); *Grandview Mem'l Gardens, LLC v. Eckert*, No. 49A02-1111-PL-992, 2012 Ind. App. Unpub. LEXIS 1292 (Ind. Ct. App. Oct. 10, 2012).

104. See IND. APP. R. 65(D) (2013) ("Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.").

105. The supreme court has original jurisdiction over matters involving the unauthorized practice of law. IND. CONST. art. 7, § 4. Original actions to restrain the unauthorized practice of law may be brought by any one of several concerned actors: the Indiana Attorney General, the Disciplinary Commission, the Indiana State Bar Association, or (with leave of court) any local bar association. IND. ADMISSION & DISCIPLINE R. 24 (2013).

106. *State ex rel. Ind. Supreme Court Disciplinary Comm'n v. Farmer*, 978 N.E.2d 409 (Ind. 2012).

review” to determine whether “viable legal avenues” existed for post-conviction relief.<sup>107</sup> Next, the Ivys agreed to hire Farmer to scour reports and interview witnesses to search for new evidence.<sup>108</sup> Farmer visited Indiana to copy court documents, visit the murder scene, and meet with Ivy. Later, after being suspended in Ohio on unrelated grounds, Ivy attempted to drive to Indiana to meet with witnesses—but later discovered the witnesses were unavailable.<sup>109</sup>

The Commission argued that Farmer’s representation was unauthorized because it fell outside the Professional Conduct Rules’ allowance for “temporary services.” Specifically, it argued that providing legal services for three years (as Farmer did before his suspension) was not “temporary.”<sup>110</sup> The court disagreed and observed that “temporary” must be understood as a term of art in the context of the legal profession. A comment in the Professional Conduct Rules explains: “Services may be ‘temporary’ even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.”<sup>111</sup> Farmer’s occasional visits to Indiana involved a single client in a single case and therefore did not run afoul of the unauthorized practice of law rules.

The court also found that Farmer’s activity while suspended—i.e. the attempted witness interview in Indiana—failed to raise to the level of the “practice of law,” as there was no evidence that Farmer actually interviewed the witness or collected an affidavit.<sup>112</sup> The court reiterated that it has the Constitutional power to determine what actions constitute the practice of law. While the phrase resists a precise definition, “it is clear that the core element of practicing law is giving legal advice to a client, and that the practice of law has been described as making it one’s business to act for others in legal formalities, negotiations, or proceedings.”<sup>113</sup>

In sum, the *Farmer* opinion is a boon for out-of-state attorneys (and their in-state colleagues) who wish to engage in pre-litigation activities in the State on a limited basis and without fear of official reprimand.

#### CONCLUSION

Our supreme court is busy. In its July 1, 2012 to June 30, 2013 fiscal year, it disposed of over 1,000 cases, including 137 attorney discipline matters.<sup>114</sup> Its Disciplinary Commission processed almost 1,500 grievances submitted by

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107. *Id.* at 400-11.

108. *Id.* at 411.

109. *Id.* at 411-12.

110. *Id.* at 414.

111. IND. R. PROF’L CONDUCT 5.5(c)(2).

112. *State ex rel. Ind. Supreme Court Disciplinary Comm’n v. Farmer*, 978 N.E.2d 409, 415 (Ind. 2012).

113. *Id.* (quoting *In re Patterson*, 907 N.E.2d 970, 971 (Ind. 2009)).

114. IND. SUPREME COURT, ANNUAL REPORT: 2012-2013, at 16, *available at* <http://www.in.gov/judiciary/supreme/files/1213report.pdf>.

members of the public (including other attorneys).<sup>115</sup> With so much activity, the court will continue to confront new ethics scenarios on a yearly basis, will continue to develop the law, and will continue to provide guidance for members of the Bar.

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115. *Id.* at 49.

