a strict products liability context since section 402A supposedly has eclipsed duty principles and rejected fault concepts as a basis of liability.

XIV. Professional Responsibility

*Charles D. Kelso**

The Indiana Supreme Court continues active development of this area. During the survey period the court (1) elaborated procedures for Disciplinary Commission investigations and for dealing with the aftermath of suspension or disbarment; (2) made several amendments to the Indiana Code of Professional Responsibility;[1] (3) identified detailed sanctions for lawyer misconduct and circumstances constituting mitigation; and, (4) perhaps most importantly, announced its determination to enforce the Code rigorously.

A. Enforcement of the Code

1. General Policy

As the supreme court has begun more frequently to impose sanctions short of disbarment, such as public reprimand, it has also begun to insist that lawyers follow Code provisions strictly, rather than rely on conscience or good intentions for guidance. A landmark declaration of policy was announced in *In re Gerald*

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[1]The Indiana Code of Professional Responsibility [hereinafter referred to as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA CODE]. Indiana adopted this version of the ABA Code in 1971.

The Code contains Ethical Considerations [hereinafter referred to as ECs], which represent the objectives toward which every member of the profession should strive and Disciplinary Rules [hereinafter referred to as DRs], which are mandatory in character and state the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action.

G. Fuchs,[2] a case involving commingling of client funds in an attorney's personal account. The court said,

> [W]e are not unmindful of reality, and we know that notwithstanding ethical proscriptions against such conduct, the commingling and temporary borrowing of clients' funds, although not a common practice, has nevertheless been engaged in by a considerable number of otherwise competent and ethical lawyers. We attribute this to carelessness and arrogance rather than dishonesty. Until recently, the enforcement of professional ethics has been lax, and doubtlessly many lawyers have been lulled into a sense of false security, believing that one's own conscience and good intentions are sufficient guides for the conduct of his professional affairs. We are determined to improve the public image of the legal profession in this state through the rigorous enforcement of the Code of Professional Responsibility adopted in 1971.[3]

Respondent attorney had commingled client funds with his own, depositing settlement checks in an account he used for both personal and professional affairs. During the period between deposit and eventual return of the funds to the client, the attorney's account had dropped substantially below the amount of the proceeds he had received for the client. Checks written to the client during this period were returned for insufficient funds.

The supreme court, holding that respondent had violated his oath as an attorney and Disciplinary Rules 9-102(A) and (B),[4] suspended the attorney for not less than ninety days and assessed costs.

The court indicated that the sanction was substantially less severe than called for by respondent's conduct and warned that such misconduct will be dealt with more severely in the future. Explaining its leniency, the court said:

> Since the adoption of [the] Code and the establishment of our Disciplinary Commission . . . this is the first case of this nature to come before us; and while we will not hesitate to invoke more severe sanctions for such conduct in the future, we believe that disbarment or a lengthy suspension in this case would be unwarranted in view of

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[2]340 N.E.2d 762 (Ind. 1976).

[3]*Id.* at 764.

[4]DRs 9-102(A) and (B) prohibit commingling and require prompt accounting and payment.

both our prior laxity and the Respondent's prior good record.[5]

2. *Conflict of Interest; Public Reprimands Ordered in Multiple Client Cases*

In *In re Farr*,[6] a case decided the same day as *Fuchs*, the court also ordered a public reprimand, but indicated that only the presence of mitigating circumstances had prevented imposition of a more severe penalty. The case involved multiple clients and conflict of interest. To carry forward its policy of giving the bar adequate warning about future severity, the court presented the full report of the hearing officer, explaining that practitioners need to consider very carefully the problems which arise in representing clients who may have conflicting interests. The court said:

> The very complicated circumstances of this case present classic and intricate questions of conflicts of interest and the impropriety and appearance of impropriety that may flow therefrom, which this Court believes are matters frequently overlooked by otherwise highly ethical lawyers. In view of the recent origin of our program for the discipline of lawyers of this state and the improvement of the public image of the legal profession, the publication of the adopted findings and conclusion in full is warranted, in order that all may be adequately forewarned of the delicate balance often obtaining between ethical and unethical practices and the attitude of this Court regarding sanctions for violations.[7]

The mitigating circumstances which restrained the court from invoking a sanction more severe than public reprimand were substantial: The misconduct was not motivated by a desire for personal gain; respondents had years of reputable practice; they had withdrawn from the complainants' case when they had "second thoughts" about the propriety of representing multiple clients; there was no indication that the clients were detrimentally affected by the lawyers' misconduct; respondents had cooperated fully in making every bit of evidence available to the Disciplinary Commission and the hearing officer.

What was the misconduct that required all this mitigation to restrain the court from a severe sanction? The Code provisions

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[5]340 N.E.2d at 764.

[6]340 N.E.2d 777 (Ind. 1976).

[7]*Id.* at 779.

which give the facts meaning are Disciplinary Rules 5-105(B) and (C):

> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each.[8]

Respondents undertook to represent Mrs. Smiley and her fourteen-year old son Michael, who had been seriously injured as a guest passenger in an automobile driven by "Crooks I." Crooks I was a nonlicensed driver with a poor driving record and a predilection for intoxicating beverages. He had been drinking on the evening of the accident, and appeared drunk to Michael. The owner of the car was "Crooks II," who had entrusted his car to Crooks I, his son. The accident occurred when the car driven by Crooks I collided with a car driven by a town marshal who was travelling at a high rate of speed at night without headlights or emergency lights. Shortly before the accident, he had been on the left hand side of the road.

The problem of conflicting interests arose from the fact that respondents undertook to represent not only Mrs. Smiley and Michael, but also Crooks I (in a criminal action for driving a vehicle under the influence, etc., in which he was found guilty by a jury, though the decision was reversed on appeal); and Crooks I, Crooks II, and their insurance company (in civil actions brought by the marshal and the town which owned the car he had been driving).

Michael and his mother were told by respondents that Michael did not have a case for negligence or for wanton and willful misconduct against Crooks I because Michael had stated it did not appear that Crooks I had been driving in a drunken manner and Crooks I had swerved to the left to avoid the oncoming police car. Michael was told that it was "all right" to give a statement to the insurance company.

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[8] INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DRs 5-105(B) and (C).

It appeared that respondents were quite diligent in their representation of the insurance company, giving it more than thirty written reports in connection with representing Crooks I. These reports analyzed and discussed matters bearing upon Michael's case. There was some discussion between respondents and Mrs. Smiley regarding their dual representation, but there was no discussion about the significance of disclosing confidences to Crooks I or to the insurance company. Nor did the attorneys ever reveal to or discuss with Mrs. Smiley the possibility of a suit against Crooks II for negligent entrustment—a theory to which the attorneys had devoted much attention in their written reports to the insurance company made in connection with defending suits brought by the marshal.

Thus, Mrs. Smiley was not made aware of the possibility of an action for negligent entrustment or given an opportunity to decide whether to forego it, as she had on the guest case theory against Crooks. Nor was she ever made aware of the conflict of interest between herself and Crooks II.

The hearing officer (and, ultimately, the court) found that this was a violation of DR 5-105(C). In supporting the conclusion that this failure to disclose was misconduct, the court quoted EC 7-8 in full.[9] Thus, its detailed explanation of the advising process was imported into the disclosure requirements of DR 5-105(C).

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[9]The Code provides:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8.

Another case in which ethical considerations were used as something more than mere aspirational guidelines was Pierce v. Yochum, 330 N.E.2d 102 (Ind. Ct. App. 1975). The court, cautioning attorneys against an incomplete recitation of the facts in an appellate brief, said:

The *Farr* case surely cautions lawyers to be quite thorough in handling situations where there are conflicts of interest. That caution was underscored on July 7, 1976, when the court decided *In re Smith.*[10] In *Smith,* the respondent was employed by the Pittmans to collect an unliquidated claim owed them. An arrangement was entered into whereby their debtor was to pay respondent $40 a month, which he would pay over, minus his fee, to the Pittmans until they had been paid in full. While that arrangement was still in effect, respondent was employed by a Mr. Larr to collect all outstanding unpaid accounts of an elevator and feed company. One of those claims was against Mr. Pittman, although respondent did not know this at the time.

Respondent's secretary sent a form letter to all the debtors, including Mr. Pittman, stating that if satisfactory arrangements were not made for collection it would be necessary to bring suit. Respondent's first actual knowledge of the conflict came when Mrs. Pitmann telephoned him about the matter. Respondent explained that he could not represent the feed company in any formal proceedings against the Pittmans with regard to the account. However, he negotiated an oral agreement whereby he would take the proceeds being received monthly on the Pittmans' behalf and apply them to the feed company account. This agreement was terminated a few days later by the Pittmans and respondent notified Larr that he could not represent him in the matter. No proceeds were actually paid over to Larr, and the Pittmans were paid in full under the prior agreement.

The supreme court found that the conflict of interest was so apparent and irreconcilable that the attorney had no alternative but to decline to represent his second-acquired client, Larr, in the collection matter against the Pittmans. He should have declined representation immediately upon learning of the multiple client situation. Negotiating settlement of the Larr claim was held to be misconduct. Said the court:

> A lawyer's fiduciary obligation is not met by making temporary arrangements to mold the needs of a particular

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> [W]e find it disturbing that too often phrases or parts of testimony are lifted from context to support a particular argument. This procedure we do not condone. We realize that not all of what one witness may say will be supportive, and that, therefore, not all of the testimony will be included in the brief. However, when testimony is included in the brief it should be set out *as it is in the record.* Also, in the facts portion of the brief, personal opinion or comment should be kept to a minimum, if necessary at all. See, Code of Professional Responsibility, Ethical Considerations 7-19, et. seq.

Id. at 112 (emphasis in original).

[10] 351 N.E.2d 1 (Ind. 1976).

> client into the ethical structures that are established by the Code of Professional Responsibility. The respondent attempted to do this through an intra-office transfer of funds. This falls far short of the duty owed a client.[11]

The attorney was given a public reprimand and apparently was saved from more severe sanctions only by mitigating circumstances, including the fact that the multiple representation eventually was terminated, there was no other impropriety, the attorney had a fine reputation in his community, and the incident appeared to be an isolated event for which the attorney was sincererly apologetic.[12]

3. Sanctions More Severe Than Reprimand

Respondent in *In re Lewis*[13] had been convicted for failing to file an income tax return. He had pled guilty, paid a fine, filed the return, paid all taxes and penalties, and been respectful, cooperative and genuinely contrite concerning his misconduct. Also, no client had been harmed by the misconduct. The court ordered suspension for not less than thirty days. It indicated that a petition for reinstatement would be granted after that time unless objections were filed thereto by the Disciplinary Commission.

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[11] *Id.* at 3.

[12] Other public censures were administered by the court. The failure to file a bankruptcy petition or to make any arrangements concerning it, despite an agreement to do so, was held to constitute a violation of the oath of an attorney and a violation of DR 6-101(A)(3) (neglecting a legal matter entrusted to a lawyer); DR 7-101(A)(1), (2), and (3) (failing to seek a client's lawful objectives by reasonably available means and to carry out a contract of employment); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); and DR 1-102(A)(6) (conduct reflecting adversely upon fitness to practice law). *In re* Ackerman, 330 N.E.2d 322 (Ind. 1975). With respect to a fee, part of which was paid in advance, the court reversed its previous holding in *In re* Case, 311 N.E.2d 797 (Ind. 1974), and adopted the dissenting view of Justice DeBruler to the effect that restitution cannot properly be ordered in a disciplinary proceeding (though the court added that in good conscience restitution ought to be made). The theory of the majority was that in a civil action for restitution the attorney would have defenses, including setoff, that would not be available in disciplinary proceedings. Damages and restitution were held not essential to the main purpose of disciplinary proceedings, which is to regulate the conduct of lawyers in the public interest.

In *In re* Kuzman, 335 N.E.2d 210 (Ind. 1975), the court based its decision on the old Canons rather than the Code because the misconduct occurred before adoption of the Code. That distinction was a factor limiting the sanction to reprimand.

[13] 329 N.E.2d 571 (Ind. 1975).

In another case, respondent was suspended for not less than ninety days and required to pay costs for commingling client funds with his own and for failing to file a divorce though he had accepted and not returned a retainer fee to do so.[14] The penalty would have been more severe, said the court, were it not for mitigating circumstances. Respondent had had severe alcoholic problems stemming from the hospitalization and death of his wife, but, having remarried, was coping successfully.

In *In re Long*,[15] respondent had closed his law office and was attempting to dispose of all the business he then had, including a number of overdue probate matters. The court suspended respondent until he could prove that all overdue matters had been turned over to a practicing attorney for final disposition.

In another matter, the court refused to reinstate an attorney who appeared to the court to lack knowledge of legal procedure or of the rules of evidence, or even a routine knowledge of the substantive law and the essential nature and issues of a hearing. It referred the attorney to the specifics which must be satisfied in a petition for reinstatement, set forth in section 4 of Rule 23 of Indiana Rules for Admission to the Bar and the Discipline of Attorneys.[16]

B. Professional Responsibility Problems in Criminal Cases

1. Claims of Incompetent Counsel

Again this year there were a number of appeals from denial of petitions for post-conviction relief on the ground that defendant had not been provided with effective assistance of counsel. The standard applied by the court in ruling on such a petition is not the same standard it uses to determine misconduct under the Code. Instead, as the court said in *Campbell v. State*,[17] "Instances of poor strategy, improvident tactics, or inexperience do not conclusively amount to ineffective assistance of counsel, unless, when taken in their entirety, the trial was a mockery of justice."[18]

In *Campbell* it was charged that defense counsel failed to discuss possible defenses with petitioner. However, the court said, there was no showing that failure to discuss possible defenses resulted in the denial of effective counsel. The court pointed out that counsel was present at arraignment and two habeas corpus

[14] *In re* Althaus, 348 N.E.2d 407 (Ind. 1976).
[15] 334 N.E.2d 688 (Ind. 1975).
[16] *In re* Perrello, 341 N.E.2d 499 (Ind. 1976).
[17] 329 N.E.2d 55 (Ind. Ct. App. 1975).
[18] *Id.* at 57.

hearings, conducted cross-examination, asked preliminary questions, and filed a motion for a new trial on what he felt were the only viable issues.

The public defender asked the supreme court to abandon the "mockery of justice" and "shocking to the conscience" test in *Bucci v. State*[19] and to use, instead, a standard favored by numerous federal courts—whether counsel's assistance was "reasonably likely to have rendered and did render reasonably effective assistance."[20] The public defender argued that the federal standard was more objective. The court rejected the argument, stating:

> The search for objectivity should not obscure commonsense analysis. Indeed, if objectivity is thought to be that which excludes relativity, we cannot see that the federal standard is objective. From the point of view of a sensible defendant, any and all assistance of counsel which results in a verdict and sentence more severe than he wishes is *ineffective* assistance. We adhere to the standard consistently followed by our courts for many years.[21]

Justice DeBruler, dissenting, was concerned that defense counsel had apparently believed, erroneously, that if they participated in the trial they would waive the right to appeal based on a claim that the trial judge had committed error by reassuming jurisdiction of the case after counsel had failed timely to strike from a change of venue panel appointed by the judge. As a result, said Justice DeBruler, they did not conduct voir dire, made no statement to the jury, made no objections to the introduction of exhibits, cross-examined no witnesses, tendered no instructions, and offered no objections to any instructions. Nor did they present any defense witnesses. Their mistake, concluded Justice DeBruler, effectively denied defendants the representation of counsel to which they were entitled by the Constitution.

Supporting the majority's conclusion to the contrary was the fact that pretrial tactics had resulted in two of the original four charges being dropped; that the prosecutor suggested the case was thoroughly defended; and that he thought the attorneys moved for a change of venue merely for the purpose of creating error in the record. However, the fatal flaw in the defendants' presentation was that they did not establish to the majority's satisfaction how the attorneys' conduct had harmed them: "It has not been alleged

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[19]332 N.E.2d 94 (Ind. 1975).

[20]*Id.* at 95.

[21]*Id.*

or demonstrated that some other reasonably foreseeable defense tactic would have better protected these defendants."[22]

In at least eight other cases, the defendant did not prevail in an effort to show, in post-conviction proceedings, that there had been a denial of effective counsel.[23] In direct appeals, defendants did not fare better. The court found in several cases that the proof offered by the defendant failed to support the charge made against counsel or that, even if the charge were assumed to be fact, it amounted to a trial tactic that did not shock the conscience of the court.[24]

2. *Behavior of Prosecutor and Judge*

The Code, in EC 7-13 and in DR 7-103, calls upon the prosecutor to make timely disclosure to counsel for the defendant any evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Consistent with these principles, the supreme court

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[22]*Id.*

[23]Jackson v. State, 339 N.E.2d 557 (Ind. 1975) (charge of minimal consultation, failure to call two additional witnesses to corroborate alibi already testified to by three witnesses, and failure adequately to discuss with petitioner the handling of plea bargaining in an unrelated case); Hunt v. State, 338 N.E.2d 641 (Ind. 1975) (incompetence not shown by failure to seek a continuance when the state added an unlisted witness who merely identified the body of the decedent); Johnson v. State, 337 N.E.2d 483 (Ind. 1975) (attorney only conferred with his client two or three times prior to trial); Davis v. State, 330 N.E.2d 738 (Ind. 1975) (attorney failed to object when a police detective made reference to prior arrests and did not offer a witness on whether the confession was voluntary); Gross v. State, 338 N.E.2d 663 (Ind. Ct. App. 1975) (counsel failed to move that defendant be allowed to withdraw his plea of guilty when he received an executed sentence); Greentree v. State, 334 N.E.2d 98 (Ind. Ct. App. 1975) (no evidence that subpoenaing a particular witness would have affected the result); Ray v. State, 333 N.E.2d 317 (Ind. Ct. App. 1975) (no indication provided as to why failure to question a bailiff created a mockery, and signing a supplemental transcript in obedience to an order of the court was not shocking to the conscience); Casterlow v. State, 329 N.E.2d 630 (Ind. Ct. App. 1975) (trial attorney did not introduce evidence that the defendant had made a large withdrawal of money from his account on Dec. 6 which could help account for the $670 found on him the day after the robbery, Dec. 28).

[24]Case v. State, 348 N.E.2d 394 (Ind. 1976) (mere fact that defendant had three different attorneys representing him during the proceeding did not establish that he lacked effective assistance of counsel); Wilson v. State, 333 N.E.2d 755, 764 (Ind. 1975) (court found attorney had performed in an "honorable, intelligent and spirited manner"); Delph v. State, 332 N.E.2d 783 (Ind. 1975) (attorney left courtroom on two occasions, failed to subpoena a person who allegedly would have testified in a favorable manner, and failed to call court's attention to an alleged deal made by state's witnesses in return for testimony unfavorable to defendant).

held in *Newman v. State*[25] that defendant was entitled to a reversal in a case in which the prosecutor withheld evidence going to the reliability of a particular witness. Specifically, the evidence indicated that there had been an agreement regarding leniency if the witness, a co-conspirator, would testify against the accused.

However, the court did not find it sufficient for a mistrial in *Chatman v. State*[26] that the prosecutor in his opening statement alluded to evidence whose admissibility was under advisement. The court merely commented, "At best, in most circles, it would be regarded as unprofessional practice—as would a misstatement to the Court of the sequence of events."[27]

Again, the court said in *Clark v. State*[28] that it was highly improper for the prosecutor to have suggested that the jury must disregard certain defense testimony and to have implied that refusal to disregard the testimony would be a failure of civic duty and would bind other juries in criminal cases, as a kind of precedent. The court said that the trial judge should have sustained an objection and instructed the jury to disregard the remarks. However, the court did not reverse because it found that other evidence was sufficient to sustain the conviction.

In *Clark* and *Chatman* the prosecutors' conduct would appear at least to raise questions of compliance with the Code, which provides: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."[29]

In keeping with the court's announced policy to enforce the Code strictly, it would seem that when a prosecutor engages in unprofessional conduct, even if it falls short of reversible error, the court might find opportunities to remind all prosecutors that as lawyers they are bound by the Code.

Similarly, the court had an opportunity to make reference to the Code of Judicial Conduct in *Anderson v. State*,[30] in which the judge became involved in the plea bargaining process and the record did not show that the plea of guilty was entered voluntarily. The conviction was reversed, but no mention was made of the Code of Judicial Conduct.[31]

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[25]334 N.E.2d 684 (Ind. 1975).

[26]334 N.E.2d 673 (Ind. 1975).

[27]*Id.* at 679.

[28]348 N.E.2d 27 (Ind. 1976).

[29]INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(1).

[30]335 N.E.2d 225 (Ind. 1975).

[31]In a related development, the court noted in Stein v. State, 334 N.E.2d 698 (Ind. Ct. App. 1975), that a trial judge has discretionary power to disqualify himself sua sponte whenever any semblance of judicial bias or

C. *Amendments to the Code of Professional Responsibility and to Disciplinary Rules*

By adopting Admission and Discipline Rule 26, the supreme court responded to American Bar Association concern about making group legal service plans available to the public.[32] Rule 26 requires annual reporting and specifies what a group legal service plan must include before an attorney may render services pursuant to the plan.[33]

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impropriety in a proceeding in his court comes to his attention. When he has an actual prejudice in reference to a cause or is interested in the litigation or related to a party, justice requires that he refuse to hear the case. The fact arousing concern was that one of appellant's friends had exhorted leniency to the judge in the presence of the appellant. The court said there was a sufficient basis for discretionary self-disqualification, but the record contained no evidence of actual prejudice sufficient to require disqualification.

Related to the sua sponte power of the trial judge is the power of the court on appeal to reverse if it notes an error so fundamental that the defendant could not have received a fair trial. In Winston v. State, 332 N.E.2d 229 (Ind. Ct. App. 1975), the doctrine was discussed but the court held that failure of counsel to object to the introduction of heroin constituted a waiver of an objection based upon an illegal search and seizure claim, and did not call for application of the doctrine of fundamental error.

[32]In February 1975, the American Bar Association amended its Code of Professional Responsibility by adding EC 2-23, which encourages attorneys to cooperate with qualified legal assistance organizations providing prepaid legal services.

[33]Admission and Discipline Rule 26 became effective in Indiana Jan. 31, 1976. It provides that no lawyer may render legal services pursuant to a group legal service plan unless the following conditions are satisfied:

(1) The entire plan shall be reduced to writing and a description of its terms shall be distributed to the members or beneficiaries thereof;

(2) The plan and description shall:

(a) state clearly and in detail the benefits to be provided, exclusions therefrom and conditions thereto;

(b) describe the extent of the undertaking to provide benefits and reveal such facts as will indicate the ability of the plan to meet the undertaking;

(c) provide that there shall be no infringement upon the independent exercise of professional judgment of any lawyer furnishing service under the plan;

(d) specify that a lawyer providing legal service under the plan shall not be required to act in derogation of his professional responsibilities;

(e) set forth procedures for the objective review and resolution of disputes arising under the plan;

(3) There shall be a periodic written report not less often than annually disclosing to members or beneficiaries of the plan, to the executive secretary of the disciplinary commission a summary of the operations of the plan, including, but not limited to, all relevant

The Code of Professional Responsibility allows lawyers to form a professional corporation for the practice of law,[34] but it does not contain guidelines or procedures for incorporators. By adopting Admission and Discipline Rule 27,[35] the court established clear requirements for lawyers who wish to form professional service corporations for the sole purpose of practicing law in Indiana. All shareholders must be persons who (1) are duly licensed by the Indiana Supreme Court to practice law; (2) practice law in Indiana; and (3) at all times own their share in their own right.[36]

Disciplinary Rule 23 was amended this year by adding probation to the list of specified sanctions for misconduct.[37] The other listed sanctions are disbarment, suspension, and public or private reprimand, but the court may not be limited to this growing list of sanctions.[38]

Analogous to the expanding range of sanctions is the expanding scope of authorization granted the Disciplinary Commission to conduct investigations. The executive secretary of the commission, in conducting an investigation of any grievance now may "investigate matters other than those set out in the grievance, including the professional conduct of the attorney generally."[39]

Additional charges of misconduct not contained in a grievance may be included in a complaint filed against the attorney after notice has been given by the executive secretary and the attorney has had an opportunity to reply.[40] It is to be hoped that this

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financial data, the number of members or beneficiaries receiving legal services, and the kinds of benefits provided.

IND. R. ADMISS. & DISCP. 26.

[34]A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a non-lawyer owns any interest therein . . . (2) a non-lawyer is a corporate director or officer thereof; or (3) a non-lawyer has the right to direct or control the professional judgment of the lawyer. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-107(C). *See also* EC 5-24.

[35]The rule became effective Jan. 1, 1976.

[36]IND. R. ADMISS. & DISCP. 27.

[37]*Id.* 23(3)(c) (as amended) became effective Jan. 31, 1976.

[38]*Id.* 23(3)(a) does not purport to contain an exclusive listing. Also, part (1)(d) of this rule allows the commission and respondent to agree upon the discipline to be imposed, subject to court approval.

[39]*Id.* 23(10)(d).

[40]Rule 23 also provides:

In the event that the executive secretary or the commission should consider any charges of misconduct against an attorney not contained in the grievance, the executive secretary shall notify the attorney of the additional charges under consideration, and the attorney shall have the opportunity to make a written response to the additional

flexibility of investigation is not interpreted by the commission or the court to authorize mere "fishing expeditions" into the affairs of an attorney which are not related to a charge of misconduct.

A new section added to Rule 23 imposes additional duties on attorneys who are disbarred or suspended.[41] An attorney who has been disbarred now must promptly notify all clients currently represented by him and advise the clients to obtain legal counsel elsewhere. The disbarred attorney must also move for withdrawal in any pending court proceeding and make available to his clients and their new counsel all papers, documents, files and other information in his possession. Finally, the rule requires a disbarred attorney to file an affidavit with the court, within thirty days, showing that he has complied with the court's order and with the rule. Similar provisions are applicable to attorneys who have been suspended.[42] Proof of compliance with these rules is a condition precedent to reinstatement.[43] If a disbarred or suspended attorney fails or is unable to comply with the rule, the circuit court judge in the county of the attorney's practice is required to appoint another attorney to inventory the files of the disbarred or suspended attorney and to take such action as may be appropriate to protect the interests of the attorney and his clients.[44]

The supreme court still has not created a commission or agency with responsibility to advise the court on a continuing basis concerning desirable amendments to the Code or the Disciplinary Rules. Thus, as pointed out in last year's review of this area,[45] the Code as it now stands in Indiana is different in several important respects from the Code currently approved by the American Bar Association. For example, in Indiana an attorney is still called upon to reveal his client's fraud to an affected person or tribunal, even if the information would otherwise be protected as a privileged communication.[46] Regardless of the court's view on this particular matter, it is to be hoped that the court will someday deal

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charges under consideration within twenty (20) days after the receipt of such notification.

Id. 23 (10) (d).

[41] *Id.* 26(a).

[42] *Id.* 26(b) (1) and (2).

[43] *Id.* 26(a) (5) and (b) (3).

[44] *Id.* 27. This rule also provides that "any attorney so appointed shall not disclose any information contained in such files without the consent of the client to whom such file relates, except as necessary to carry out the order of the court which appointed him."

[45] Kelso, *Professional Responsibility, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 281, 283-86 (1975).

[46] INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B).

with the need for continuing coordination between its efforts in this field and compatible efforts by the American Bar Association and by the Indiana State Bar Association.

Incidentally, in closing it should be noted that the court and other lawyers in Indiana are well served in the area of Professional Responsibility by *Res Gestae,* the monthly magazine of the Indiana State Bar Association. It has regularly printed proposed rules affecting the area of professional responsibility, and almost every issue has carried one or more articles, notices, messages, or features on this important subject.

XV. Property

*Ronald W. Polston**

Several significant cases involving property rights were decided by the Indiana courts during the survey year. Four classes of cases are discussed below: (1) right of a remote vendee to recover on the implied warranty of habitability of a builder-vendor, (2) landlord and tenant relationships, (3) liability for interference with the flow of surface waters, and (4) survivorship rights in personal property held by joint tenants. Other classes of cases decided during the year, but not discussed in detail below, include the following: subdivision covenants,[1] condemnation by state[2] and federal authorities,[3] remedies of the seller under conditional land

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[1]In Highland v. Williams, 336 N.E.2d 846 (Ind. Ct. App. 1975), the appellant was required to remove his home from his subdivision lot because it was deemed to be in violation of a subdivision covenant and he failed to prove that there had been a radical change in the subdivision, an abandonment of the subdivision's general plan, a substantial prior nonconformity, or laches.

[2]In Alabach v. Northern Indiana Pub. Serv. Co., 329 N.E.2d 645 (Ind. Ct. App. 1975), the court held that a public utility with power of eminent domain need not obtain approval from the Public Service Commission of the quantity or location of its land acquisitions. *See also* Harding v. State *ex rel.* Dep't of Natural Resources, 337 N.E.2d 149 (Ind. Ct. App. 1975) (condemnation awards do not include attorney's fees for the defendant).

[3]United States v. 573.88 Acres of Land, 531 F.2d 847 (7th Cir. 1976) (a commission's award will not be held "clearly erroneous" when the record shows that the commission was given adequate instructions, weighed conflicting evidence, and granted awards consistent with the evidence submitted).