after the delivery of the product to the initial user or consumer except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

33-1-1.5-6 Indemnity

Sec. 6. Indemnity. Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.

33-1-1.5-7 Severability

Sec. 7. If a provision of this act or its application to a person or circumstances is held invalid, the invalidity does not affect other provisions or applications, and to this end the provisions of this act are severable.

33-1-1.5-8 Effective date; saving clause

Sec. 8. (a) Because an emergency exists, IC 33-1-1.5 takes effect June 1, 1978.

(b) IC 33-1-1.5 does not apply to a cause of action that accrues before June 1, 1978.

XIII. Professional Responsibility*

A. Lawyer Advertising

In response to the United States Supreme Court's decision in *Bates v. State Bar*,[1] which declared the Arizona ban against lawyer advertising to be a violation of the first amendment, the Indiana Supreme Court revised Canon 2 of the Code of Professional Responsibility.[2] The revisions, which became effective January 1, 1978,

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*For a discussion of attorney-client privilege, see Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 51-52 (1978).

[1]433 U.S. 350 (1977) (5-4 decision). For a discussion of this decision and its effect on lawyer advertising, see Kelso, *Professional Responsibility, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 219, 219-22 (1977).

[2]1978 IND. CT. R. 335. The Indiana Code of Professional Responsibility, adopted in 1971, [hereinafter cited as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility.

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

were taken from the recommendations of the Indiana State Bar Association House of Delegates.[3]

Of the fourteen Ethical Considerations[4] and five Disciplinary Rules[5] changed by the supreme court's amendments, DR 2-101, which details advertising controls, is of particular interest to Indiana attorneys. The rule allows advertising in print media, including newspapers and telephone directories, and on radio.[6] Restrictions on printed advertising preclude photographs and other pictorial matter and require that printed advertising be dignified and not contain "a false, fraudulent, misleading, deceptive, self laudatory or unfair statement or claim."[7] In addition to the basic information about the attorney or firm,[8] the advertisement may include rates and fees; however, this information, if included, must adhere to specific guidelines that describe the time period during which the lawyer is bound by the fee representation. A firm or lawyer may also indicate areas of practice, but cannot indicate a speciality other than the traditional areas of patent, trademark, and admiralty law.[9]

B. Solicitation

In recent companion cases, *In re Primus*[10] and *Ohralik v. State Bar*,[11] the United States Supreme Court answered a question expressly reserved in *Bates* concerning constitutionally acceptable methods a lawyer may utilize to advise the public that legal counsel is available.[12] The cases involved lawyer solicitations, and the

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[3]The State Bar recommendations conformed with the American Bar Association House of Delegates' proposals. *See House of Delegates Adopts Advertising Policy*, 21 RES GESTAE 486 (1977); *Indiana Supreme Court Adopts Lawyer Advertising Rules*, 22 RES GESTAE 14 (1978).

[4]ECs 2-2 to -5, 2-7, 2-8, 2-8(A), 2-8(B), 2-9, 2-9(A), 2-10, 2-10(A), 2-11, 2-14.

[5]*Id.* DR 2-101 to 105.

[6]Radio advertising may not include any background music or other sound effects and must be prerecorded, approved for broadcast by the lawyer, and retained by the lawyer. DR 2-101(B), (C). Television advertising is not authorized.

[7]DR 2-101(A).

[8]*See* DRs 2-101(B)(1) to (18).

[9]DR 2-105. For a discussion of lawyer's reaction to the new advertising rules, see *Is Advertising Laying an Egg? Lawyers May Be More Interested In Solicitation*, 64 A.B.A.J. 673 (1978). The article cites a LawPoll survey stating that only 3% of all lawyers have advertised since the decision in *Bates*, 89% do not plan on advertising, and, although 46% support advertising in theory, most find no practical need to advertise. For an analysis of lawyer advertising and specialization, especially as it relates to the Indiana attorney, *see* Staton, *Access to Legal Services through Advertising and Specialization*, 53 IND. L.J. 247 (1978).

[10]98 S. Ct. 1893 (1978).

[11]98 S. Ct. 1912 (1978).

[12]Canon 2 of the Code provides: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available."

Supreme Court distinguished the two cases in order to establish that, in some situations, solicitation may be acceptable.

Primus concerned an attorney who, in cooperation with the American Civil Liberties Union (ACLU), had written a letter offering free legal counsel to a woman who had undergone a sterilization operation as a condition to continued "Medicaid" assistance. Although the letter itself prompted no litigation, the South Carolina Supreme Court found that Primus had violated the state's disciplinary rules because she had solicited legal business on behalf of the ACLU.[13]

On appeal, the United States Supreme Court, relying on its earlier decision in *NAACP v. Button*,[14] held that a lawyer may offer free counsel by letter in potential litigation having political or ideological ramifications, and that it was a violation of the first and fourteenth amendments to interpret the Code of Professional Responsibility otherwise. In both *Primus* and *Button* the Court based its analysis on the premise that, although states have the power to regulate members of any licensed profession,[15] if the act sought to be regulated involves an individual's freedom of association and expression, then the state must show a compelling and subordinating state interest.[16] South Carolina's interests in prohibiting lawyer solicitation were to avoid the evil of a lawyer giving priority to her own personal and pecuniary interest rather than to her client's interest and to prohibit solicitation accompanied by coercion or overreaching.[17] The Court felt that, in this case, Primus did not stand to gain monetarily from the litigation[18] and that, since the solicitation was by mail, there was little chance of overreaching or coercion.[19]

Ohralik offered a solicitation situation on the other side of the spectrum from *Primus*. There were no first amendment rights of political expression or associational freedom involved in *Ohralik*. The solicitation was a purely commercial one, primarily motivated by the attorney's desire for his own pecuniary gain. Ohralik, seeking

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[13]The South Carolina Supreme Court held that Primus violated DRs 2-103(D)(5)(a), (c) and 2-104(A)(5). 98 S. Ct. at 1898-99.

[14]371 U.S. 415 (1963).

[15]"The States enjoy broad power to regulate 'the practices of professions within their boundaries,' and '[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." ' " 98 S. Ct. at 1899 (quoting Goldfarb v. State Bar, 421 U.S. 773, 792 (1975)). *See also* 371 U.S. at 438-39.

[16]98 S. Ct. at 1905 (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)); 371 U.S. at 438.

[17]98 S. Ct. at 1908.

[18]*Id.* at 1903-04.

[19]*Id.* at 1906-07.

to be employed by two automobile accident victims, solicited one woman, Carol McClintock, in the hospital and the other woman in her home. At times, the attorney concealed a tape recorder under his raincoat. Both women were unsophisticated in legal matters and initially agreed to allow Ohralik to represent them in any matters resulting from the accident. Later, when they tried to discharge him, Ohralik sued for breach of contract and succeeded in reaching part of McClintock's damage award. Both women filed disciplinary charges against Ohralik with the county bar association. The Ohio State Supreme Court held that Ohralik had violated the disciplinary rules and subjected him to public reprimand and indefinite suspension.[20] The United States Supreme Court upheld this decision.

Justice Powell, writing for the Court in both *Primus* and *Ohralik*, distinguished the rights to be protected in each of the two situations. First, the Court considered the coerciveness of the method of solicitation. In *Primus*, the solicitation by letter allowed time for thought and reflection by the potential client. On the other hand, the *Ohralik* in-person solicitation, initiated less than two weeks after the accident, with a visit to one woman in a hospital room, may have exerted pressure without providing the recipient an opportunity for comparison or reflection.[21] In comparing the *Ohralik* type of in-person solicitation to the type of solicitation by truthful advertising of routine legal services permitted in *Bates*, the Court noted that public advertising, which basically provides information to a person who is "free to act upon it or not"[22] must be distinguished from an in-person solicitation where a prospective client may be distraught and easily influenced by a persuasive attorney.[23]

Of equal, if not greater, importance was the distinction the Court made between the rights of political speech in *Primus* and the rights of commercial speech in *Ohralik*. The Court extends a lesser degree of protection to the rights of commercial speech,[24] thus, in *Ohralik* it applied low level scrunity.[25] In reviewing the protection to be afforded Ohralik's commercial speech, the Court indicated that speech was merely a subordinate component of the activity involved. The Court upheld the traditional view that the state, through the bar, may regulate in-person solicitation for pecuniary gain and

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[20]98 S. Ct. at 1917. The Ohio Supreme Court held that Ohralik violated DRs 2-103(A) and 2-104(A) of the Ohio Code of Professional Responsibility.

[21]98 S. Ct. at 1919.

[22]*Id.*

[23]*Id.* at 1923.

[24]*See* 433 U.S. 350, 363-64; Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 758-61, 770-73 (1976), Bigelow v. Virginia, 421 U.S. 809, 818-26 (1975).

[25]98 S. Ct. at 1918-19.

discipline a deviating attorney if there is potential harm to the client, regardless of whether any harm has in fact occurred.[26]

C. *Attorney Suit for Collection of Fees*

The Code, in an Ethical Consideration states: "A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."[27]

In *Kizer v. Davis*,[28] however, the Indiana Court of Appeals, reasoning that the Ethical Considerations do not have the force and effect of either case law or statute,[29] allowed an attorney to bring suit against a client for fees even though his action was not consistent with EC 2-23. The lower court had stated that *but for* EC 2-23, the attorney would have been able to recover and the court, therefore, had denied the attorney's quantum meruit suit because he failed to show that he had been a victim of fraud or the object of flagrant client imposition. The court of appeals rejected this reasoning, stating that the trial court had interpreted the law incorrectly.[30] Although the Ethical Considerations and Disciplinary Rules are evidence of the proper standard of conduct for the legal profession, the Ethical Considerations are not compulsory and the Disciplinary Rules operate as rules of law only in matters of attorney discipline. The court concluded that EC 2-23 was never intended to be a rule of law and, therefore, could not be applied to bar an action for collection of fees.[31] The attorney would only be subject to disciplinary ac-

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[26]*Id.* at 1922-24. The dissent in *Primus* stated that the two cases are not distinguishable: "I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved." 98 S. Ct. at 1911 (Rehnquist, J., dissenting). Further, Justice Rehnquist said that the solicitation in *Primus* involved the same degree of potential harm to an unsuspecting or unsophisticated lay person as the solicitation in *Ohralik* and that the states are not violating the United States Constitution by regulating conduct which involves uninvited solicitation on an individual basis. *Id.* at 1909-10 (Rehnquist, J., dissenting).

[27]EC 2-23.

[28]369 N.E.2d 439 (Ind. Ct. App. 1977).

[29]*Id.* at 444.

[30]*Id.*

[31]*Id.* at 444-45. The Indiana State Bar issued an opinion which considered the rights of attorneys in disputes or potential disputes over fees with clients. Opinion Number Five of 1977 states: (1) An attorney does not have an automatic retaining lien on his client's papers and must consider the ethical aspects of their retention, and (2) in certain circumstances, an attorney may be acting unethically if he refrains from accepting employment for the sole reason that the prior lawyer has not been paid. *Attorneys and Their Ethics*, 21 RES GESTAE 528 (1977).

tion if DR 2-106 was breached by a demand for a fee which proved to be "illegal or clearly excessive."[32]

D. Withdrawal of Counsel

In *Ashbrook v. Ashbrook*,[33] the court of appeals held that an attorney may withdraw from a case when a conflict of interest exists, even though his request is untimely and granted over objection.[34] In *Ashbrook* an attorney, Hooper, had served both as counsel to the husband in a divorce proceeding and as co-commissioner of a partition sale of real property which was jointly owned by Ashbrook and his wife. After the sale, Ashbrook, as purchaser, concluded that improprieties had occurred which would warrant having the sale modified or set aside. After Ashbrook complained to Hooper concerning the sale, Hooper refused to contest the sale[35] but made no effort to withdraw as Ashbrook's attorney.

Prior to the hearing to determine distribution of the proceeds of the sale, Ashbrook hired another attorney, Pactor, to represent him. Subsequently, Pactor filed both a petition to modify or set aside the sale and a motion for a continuance of the hearing. The court denied the motion for continuance. At the hearing, Hooper was granted formal permission to withdraw from the case, but Pactor was again denied a continuance.

The court of appeals reasoned that, while Hooper had an affirmative duty to withdraw,[36] the tardiness of Hooper's withdrawal had been detrimental to his client.[37] The court determined Hooper's withdrawal on the day of the hearing was good cause for a continuance to be granted in order to allow the new attorney an opportunity to prepare for trial.[38] The court of appeals held that the trial court had abused its discretion by not allowing a continuance; the case was reversed and remanded.[39]

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[32]369 N.E.2d at 444.

[33]366 N.E.2d 667 (Ind. Ct. App. 1977).

[34]*Id.* at 672.

[35]Hooper was "placed in the perplexing position of being asked to challenge a partition sale for which he served as . . . co-commissioner . . . ." *Id.* at 671.

[36]*Id.* Because of the animosity that had developed between Hooper and Ashbrook and the incongruous nature of the roles which had devolved upon Hooper, the court agreed with Hooper's duty to withdraw. *Id.*

[37]*Id.* The court cited EC 2-32 which states that when an attorney justifiably withdraws he must endeavor to protect the interest of his client. *Id.*

[38]IND. R. TR. P. 53.4 provides in part: "Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon agreement of all the parties or *upon a showing of good cause* established by affidavit or other evidence." (Emphasis added).

[39]366 N.E.2d at 672.

E. Enforcement of the Code

During the survey period, the Indiana Supreme Court decided five cases in the area of lawyer discipline. As a result of these decisions, two attorneys were suspended and three attorneys were disbarred.[40]

1. Suspensions.—The two cases which resulted in the disciplinary action of suspension included situations in which the attorneys failed to represent their clients competently and zealously by neglecting legal matters entrusted to them. *In re Turner*[41] involved three separate situations: a workmen's compensation claim, a breach of contract suit, and a bankruptcy petition. The *Turner* attorney had neglected his duty to timely file the proper papers and fraudulently advised his clients as to the status of their respective claims.[42] *In re Snyder*[43] involved situations in which the attorney failed to timely file a bankruptcy petition and neglected to file a discrimination suit after he had assured his client that such a suit had been filed.[44] In both cases the sentence was suspension from the practice of law for not less than two years.[45] In *Turner*, the court recognized that although the attorney's acts were a serious violation of the Code of Professional Responsibility, there were mitigating circumstances which included the attorney's high degree of skill, respect within the community, and recent personal hardship.[46] In both *Turner* and *Snyder*, the court emphasized the need for trust between lawyer and client and the duty of an attorney to be conscientious and deliberate in the handling of all legal matters agreed to be performed. The court's concern in regard to an attorney's un-

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[40]The Indiana Disciplinary Commission's Annual Report for the period covering October 1, 1976, to June 30, 1977 (a shortened period due to a change in the fiscal year), appears in the period in INDIANA STATE BAR ASSOCIATION, INDIANA SUPREME COURT DISCIPLINARY COMMISSION ANNUAL REPORT, *reprinted in* 22 RES GESTAE 532 (1977). The summary of the Commission's activities shows that of 274 Requests for Investigations filed during the period the majority involved actions for collection, criminal matters, divorce matters, tort matters, and wills and estates. The most common complaint lodged against a practicing attorney was neglect or failure to communicate with the client. Disciplinary action imposed by the supreme court included two private reprimands, two suspensions, and four disbarments; two reinstatements were allowed.

[41]366 N.E.2d 166 (Ind. 1977).

[42]The supreme court held Turner violated DRs 1-102(A)(4)-(6), 6-101(A)(3), and 7-101(A)(1)-(3). *Id.* at 167-68.

[43]370 N.E.2d 899 (Ind. 1977), *modified on rehearing*, 373 N.E.2d 1108 (Ind. 1978).

[44]The supreme court held Snyder violated DRs 1-102(A)(4)-(5), 6-101(A)(3), and 7-101(A)(1)-(3). *Id.* at 900-01.

[45]Upon rehearing and review, the period of suspension in *Snyder* was modified by the supreme court to not less than one year. 373 N.E.2d 1108 (Ind. 1978).

[46]366 N.E.2d at 168.

conscientious conduct as represented in these two cases was emphasized by the *Snyder* holding which characterized such conduct as leading to "the tarnishing of the entire legal profession."[47]

2. Disbarments.—In the three situations which resulted in the severe sanction of disbarment, the supreme court found the conduct of the attorneys to be extremely grievous, causing irreparable harm to the entire legal profession.

In *In re Vincent*,[48] the attorney was found guilty of neglecting legal matters entrusted to him by intentionally failing to carry out a contract of employment, by drafting a title insurance policy which was intended to, and, in fact, did mislead the insured, by commingling of a client's funds with personal funds, and by using a client's funds to pay a personal debt.[49] Although the attorney admitted that he had violated the Code and had committed these acts, he defended himself on the grounds that his diminished physical and mental well-being, which resulted from health problems and alcoholism, had forced him to unintentionally neglect legal matters "during the crucial period."[50] The supreme court determined from the facts that, contrary to the attorney's claim, at least as far as the matter of the title insurance policy was concerned, there had been a conscious effort to mislead. Regardless of the cause of the neglect, the supreme court declared: "[T]his Court must safeguard the public from unfit attorneys, whatever the cause of the unfitness may be."[51]

In re Wireman,[52] a case in which the attorney asserted numerous procedural errors, provided the supreme court with an opportunity to reaffirm its position that, in a disciplinary hearing, due process requires only that procedures be complied with in substance and not necessarily in the exact form required by the procedural rules. Assuming there has not been strict procedural compliance by the complainant,[53] an attorney may still be subject to discipline

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[47]370 N.E.2d at 902.

[48]374 N.E.2d 40 (Ind. 1978).

[49]The supreme court held that Vincent violated DRs 1-102(A)(4)-(5), 6-101(A)(3), 7-101(A)(2)-(3), and 9-102(A). *Id.* at 42-44. Opinion Number Four of 1977 issued by the Indiana State Bar Association considered the question of commingling funds where the monetary advances of all clients were put into a general account from which any attorney in the firm could withdraw money for personal use. The association held that the Code, in DR 9-102(A), mandates separation of funds and as such the firm's procedure was considered unethical. *Attorneys and Their Ethics*, 22 RES GESTAE 402 (1977).

[50]374 N.E.2d at 43.

[51]*Id.*

[52]367 N.E.2d 1368 (Ind. 1977), *cert. denied*, 98 S. Ct. 2234 (1978).

[53]*Id.* at 1370. The court noted, however, that if there is a deviation from the disciplinary rules' time standards, which would destroy the fundamental fairness of the disciplinary process, then a dismissal of all charges may be warranted. *Id.*

when the attorney has been given notice of charges and an adequate opportunity to be heard.[54] The *Wireman* attorney was charged with six separate counts of misconduct. Four of these counts involved situations in which the attorney, who was also a city court judge, presided at judicial proceedings involving parties he had formerly counseled as an attorney. He had neither disqualified himself nor informed the parties that they could request a change of judge. The court found this conduct to be a violation of the codes of Professional Responsibility and Judicial Conduct:[55] "He has blurred the function of an attorney into his acts as a judicial officer."[56] In additional counts, the attorney was found to have influenced judicial decisions and to have encouraged the theft of property which he subsequently purchased. In order to protect the public, preserve the integrity of the bar, and show the court's "total abhorrence" to the grievous nature of the attorney's conduct, the court imposed the maximum disciplinary sanction of disbarment.[57]

Five separate counts of misconduct were found in *In re DeWitt*,[58] in which the attorney was held to have neglected legal matters entrusted to him. DeWitt was accused of acting in a fraudulent and deceitful manner, failing to seek the lawful objectives of a client, misrepresenting legal matters, failing to carry out a contract of employment, failing to preserve the identity of a client's funds, and appropriating client's funds to his own benefit.[59] The attorney did not appear at the hearing, and the court found no circumstances which might mitigate such "extremely grave" conduct. "The respondent has not merely transgressed the disciplinary rules; his conduct appears deliberate and without extenuation."[60]

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[54]*Id.* at 1369-70. The court relied on and quoted its earlier opinion in *In re Murray:* "The complaint filed by the Disciplinary Commission in all disciplinary cases is predicated on the grievance filed, but it would be absurd to hold that the grievance must be strictly construed, and the complaint must be narrowly limited to the charges specified in the grievance . . . ." *Id.* (quoting 362 N.E.2d 128, 130 (Ind. 1977)).

[55]The supreme court held Wireman violated DRs 1-102(A)(3)-(6), 7-105, and 9-101(A), (C) of the Code as well as Canon 1 of the Code of Judicial Conduct, as then in effect. 367 N.E.2d at 1374-75.

The Code of Judicial Conduct and Ethics was adopted March 8, 1971, by the supreme court. The court amended the Code and changed the name to the Indiana Code of Judicial Conduct, effective January 1, 1975.

[56]367 N.E.2d at 1376.

[57]*Id.*

[58]374 N.E.2d 514 (Ind. 1978).

[59]The supreme court held DeWitt violated DRs 1-102(A)(3)-(4), (6), 6-101(A)(3), 7-101(A)(1)-(3), and 9-102(A). *Id.* at 518.

[60]*Id.*

F. Professional Responsibility Problems in Criminal Cases

1. Impropriety of Trial Judge.—In *Brannum v. State*,[61] the supreme court held that a trial judge's evaluative comments, expressing an opinion, were so violative of Canon 8 of the Code of Judicial Conduct[62] and prejudicial to the trial of the defendant that the case was reversed and a new trial ordered. In this case the judge had imposed his views by (1) implying that a venireman was weak and perhaps mistaken if he refused to give a life sentence for first degree murder, (2) commenting on the credibility of an important witness' testimony as well as improperly denying a defense witness the opportunity to take the stand, and (3) giving special instructions to the jury while they were deliberating. These instructions seemed to emphasize particular legal issues being considered and, thereby, influenced the jury's decision. The court held the judge's intervention in any one of these three situations alone would have been reversible error. It is the responsibility of the judge, the court emphasized, to remain impartial and insure that the proceedings are conducted properly. Society has given to the prosecuting attorney the responsibility of bringing forth the evidence, and to the jury the duty of making the ultimate decision as to the guilt or innocence of the defendant. A jury of laymen, however, could be easily influenced by the comments made by an awesome, imposing judge.[63]

2. Prosecutorial Misconduct.—The supreme court in *Craig v. State*[64] considered, *inter alia*, four statements made by the prosecutor during closing argument to which the defendant raised objections on appeal. Two of the statements, the court held, were improper and not consistent with the Code of Professional Responsibility. The prosecutor's reference to "the perjured testimony of some of the defense witnesses,"[65] was considered by the court to be improper since it inferred that the prosecutor had "inside" knowledge as to the credibility of the witnesses. DR 7-106(C)(4) states: "[A] lawyer shall not . . . assert his personal opinion . . . as to the credibility of a witness."[66] The statement was not a sufficient basis for reversal, however, since the court concluded that it did not subject the defendant to grave peril.

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[61]366 N.E.2d 1180 (Ind. 1977).

[62]*See* note 64 *supra*.

[63]366 N.E.2d at 1182.

[64]370 N.E.2d 880 (Ind. 1977).

[65]*Id.* at 883.

[66]EC 7-24 and the ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTORIAL FUNCTION § 5.8(b) (Approved 1971 Draft) concur with this situation.

Also held to be improper was the prosecutor's statement that it was his responsibility to represent society as a whole, including the accused, thus, placing a duty on him to present evidence both as to the guilt and innocence of the defendant. While the court agreed that the prosecutor had a duty to the entire community, it stated that it was incorrect and misleading for the prosecutor to emphasize his position as a public servant to obtain unfair advantage in a criminal trial. Failure to preserve the error by making an objection at trial prevented reversal, although the court asserted: "This line of argument by the prosecutor was highly improper."[67]

3. Claims of Incompetent Counsel.—In reviewing an appeal from a denial of post conviction relief, based on allegations that the defendant had not received effective assistance from counsel, the Indiana courts use a standard different from the one used to determine misconduct under the Code. Under the Code, *any* conduct which violates a disciplinary rule is grounds for discipline.[68] The supreme court stated the standard in *Lenoir v. State*:[69]

> In a post conviction hearing . . . when incompetency of counsel is alleged, there is a presumption that an attorney has discharged his duty fully . . . . The presumption of competency is overcome only by showing that what the attorney did, or did not do, made the proceedings a mockery and shocking to the conscience of the court.[70]

In *Lenoir*, the defendant had been found guilty of committing a felony while armed. He alleged that the trial counsel had been incompetent in failing to call two witnesses to testify. The court held that the testimony of these two witnesses would have been cumulative and impeaching only, and it was unlikely that calling them would have produced a different result. Denying the appeal, the court stated that the allegations of incompetency were unfounded since the attorney's failure to call the witnesses might well have been a matter of strategy.[71]

Similarly, in *Grimes v. State*,[72] the court followed the same standard in denying an appeal based, *inter alia*, upon a claim that

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[67]*Id.* at 884. *See* EC 7-13; ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTORIAL FUNCTION § 1.1 (Approved 1971 Draft).

[68]*See* IND. R. ADMISS. & DISCP. 23(2)(a).

[69]368 N.E.2d 1356 (Ind. 1977).

[70]*Id.* at 1357-58. Federal courts use a different standard to measure incompetency of counsel. The test is whether counsel's performance met "a minimum standard of professional representation." United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976).

[71]368 N.E.2d at 1358.

[72]366 N.E.2d 639 (Ind. 1977).

counsel had been ineffective by failing to inform the defendant correctly as to the nature of his plea with the result that his guilty plea to second degree murder was not voluntary and intelligent and, further, was the product of coercive threats suggesting possible use of the electric chair upon conviction. The court stated that, by alleging that his guilty plea was not voluntary, knowing, and intelligent, the defendant had raised constitutional questions and, therefore, "the burden of proof by a preponderance of the evidence is relaxed, and petitioner is permitted to withdraw his guilty plea if he raises a reasonable doubt on the issues of his counsel's effectiveness."[73] Looking to the record, the court concluded that the defendant had received adequate counsel and that, although the interviews with the attorney may have been minimal, it did not appear that the defendant had been coerced or that more time in consultation with the attorney would have brought about a different result.[74]

FRANCES J. HONECKER

XIV. Property

*Debra A. Falender**

Several cases involving property rights were decided during the survey period. The most significant cases[1] are discussed under the

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[73] *Id.* at 641.

[74] *Id.* at 641-42. The Indiana State Bar Association in Opinion Number Two considered a plea bargaining agreement form in which the defense attorney must state that he believed the defendant to be guilty of the crime confessed. Such an assertion by an attorney is inconsistent with DR 7-106(C)(3) which provides that an attorney should not state his personal opinion as to the guilt or innocence of the accused. *Attorneys and Their Ethics*, 22 RES GESTAE 234 (1977).

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[1] A case worthy of note, but not discussed in the text, is *In re* Guardianship of Fowler, 371 N.E.2d 1345 (Ind. Ct. App. 1978). In *Fowler*, the court of appeals restated and applied the rule established in Teegarden v. Lewis, 145 Ind. 98, 40 N.E. 1047 (1895), that the mental capacity required to make a valid inter vivos gift is the same capacity as that required to make a valid will.

In addition to the judicial developments during the survey period, one legislative development is worthy of note. The legislature recently amended the statutes regarding the powers and duties of notaries public. *See* IND. CODE §§ 33-16-2-1 to 9 (1976 & Supp. 1978). A notary not only must affix his name, expiration date, and seal to a notarized document, as required under prior law, *id.* §§ 33-16-2-4, -3-1 (1976), but also "must print or type his name immediately beneath his signature" (unless his name is