XIII. Professional Responsibility and Liability

DONALD L. JACKSON*

A. Professional Responsibility

1. Enforcement of the Code.—a. Jurisdiction of the supreme court in disciplinary matters.—During the survey period, the Indiana Supreme Court in *In re Kesler*[1] reaffirmed the nature of its jurisdiction in disciplinary proceedings. In particular, the court held that article 7, section 4 of the Indiana Constitution vested with Indiana Supreme Court "exclusive jurisdiction in matters involving the admission and discipline of attorneys."[2]

The court in *Kesler* also distinguished between its authority in disciplinary matters and the authority of other courts to act in "criminal or civil matters out of which allegations of misconduct may arise."[3] Kesler argued that the allegations of professional misconduct against him had been the subject matter of an earlier proceeding before the Vigo Circuit Court; consequently, relitigation of these allegations was precluded by the doctrines of res judicata and estoppel by judgment. Rejecting this argument, the court indicated that criminal or civil matters may be adjudicated by trial courts, but only the supreme court may pass on matters "embracing professional misconduct."[4]

In *McQueen v. State*,[5] the supreme court was faced with the question of whether a trial court had the authority to suspend an attorney from the practice of law in the trial court. McQueen was the defense attorney in the criminal prosecution of Alan Dale Hicks. After the jury convicted Hicks, Shelby Superior Court Judge Tolen allegedly made a comment "to the effect that people, such as defendant, who are hooked on drugs, are not in fact human beings because

---

*Mr. Jackson is a partner in the Indianapolis law firm of Bingham, Summers, Welsh and Spilman.

The author wishes to express his appreciation to Robert D. MacGill for his assistance in the preparation of this Article.

[1]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[2]397 N.E.2d at 575. IND. CONST. art. 7, § 4, provides in pertinent part:

> The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

[3]397 N.E.2d at 575.

[4]*Id.* at 576.

[5]396 N.E.2d 903 (Ind. 1979).

they don't function as human beings."[6] McQueen subsequently filed a motion for change of venue asserting that Judge Tolen should not sentence Hicks due to his bias and prejudice against Hicks. To support his motion, McQueen filed the affidavits of six jurors which set out their understanding of Judge Tolen's remarks. During the hearing on his motion for change of venue, McQueen supported the allegations of Judge Tolen's bias and prejudice by testimony of the prosecutor, the defendant, a deputy sheriff, and a local attorney.

After hearing this evidence, Judge Tolen ruled that McQueen had intentionally misrepresented the court's remarks and suspended McQueen from practicing law in his court for ninety days. McQueen appealed to the supreme court asking it to vacate his suspension by Judge Tolen.

The supreme court began its analysis of McQueen's appeal by presenting an historical view of the power of Indiana trial courts to suspend attorneys from the practice of law. The court noted that a statute in effect in the late 1800's[7] empowered "any court of record" to suspend an attorney from the practice of law. However, the court noted a steady erosion of the disciplinary powers of trial courts that began with a 1931 act of the Indiana legislature[8] that conferred upon the supreme court the exclusive jurisdiction to admit attorneys to practice law in all state courts. The court did observe, however, that this amendment did not affect the trial courts' concurrent jurisdiction with the supreme court "to discipline the members of *its own* bar and those practicing before it."[9] The court concluded its historical sketch by noting that the supreme court currently has exclusive jurisdiction in actions to discipline members of the Indiana bar by virtue of the 1970 amendment to article 7, section 4 of the Indiana Constitution[10] and the adoption of Disciplinary Rule 23.[11]

The court concluded that under current Indiana law the suspension of McQueen was an *ultra vires* act by the trial court due to "the clear language of Article 7, § 4 of the Indiana Constitution and the implementing rules adopted thereunder."[12] However, the court was careful to point out that a trial court is still empowered to punish

---

[6]*Id.*

[7]2 G. & H. § DCCLXXVII, p. 329 (1870) (J. GAVIN & O. HORD, STATUTES OF INDIANA (1870)).

[8]IND. CODE ANN. § 4-3605 (Burns 1933).

[9]396 N.E.2d at 904 (quoting Beamer v. Waddell, 221 Ind. 232, 240, 45 N.E.2d 1020, 1022 (1943)) (emphasis added by *McQueen* court).

[10]*See* note 1 *supra.*

[11]The current version of IND. R. ADMISS. & DISCP. 23(1) provides: "This Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this Court or who practices law in this State . . . is charged with misconduct."

[12]396 N.E.2d at 906.

the misconduct of attorneys to protect itself "against insult and gross violations of decorum by the infliction of summary punishment by fine, imprisonment or both via a contempt citation."[13] The court clarified its position by stating that the suspension of an attorney from the practice of law may not be imposed by the trial court as punishment for contempt.[14]

However, this decision was not a unanimous one. Justice Pivarnik, with whom Chief Justice Givan joined, concurred in only the result of the majority. Justice Pivarnik took a different view of the historical developments relating to a trial court's power to suspend attorneys from the practice of law. He viewed the recent amendment to Indiana's constitution[15] and the implementing rule thereunder[16] as providing that the supreme court should have "original and exclusive jurisdiction to discipline, suspend and disbar attorneys *from the practice of law.*"[17] He coupled this interpretation with what he regarded as a long-standing Indiana rule that a trial judge may exercise his "sound legal discretion" to insure the orderly procedure of the trial court.[18] Justice Pivarnik's opinion distinguishes between the power to suspend an attorney from the practice of law and the power to suspend an attorney from the practice of law in a particular court. Justice Pivarnik concluded that the power to suspend an attorney from a *particular court* should be within the trial judge's "sound legal discretion" and should be exercised when an attorney "violate[s] accepted standards of decency, decorum and ethics."[19] Adoption of Justice Pivarnik's distinction, however, could cause differing disciplinary standards and sanctions to develop in the various counties throughout the state.

b. Constitutional challenges to enforcement of the Code.—In several disciplinary proceedings during the survey period, the respondents argued that certain constitutional doctrines protected their circumspect conduct from disciplinary action. These arguments met with little success.

In *In re Terry*,[20] Terry was charged, *inter alia*, with knowingly making an untrue statement about a judge in violation of Disciplinary Rule [hereinafter referred to as DR] 8-102(B) of the

---

[13]*Id.* at 904.

[14]*Id.* at 906.

[15]IND. CONST. art. 7, § 4.

[16]IND. R. ADMISS. & DISCP. 23(1).

[17]396 N.E.2d at 907 (Pivarnik, J., concurring) (emphasis added).

[18]*Id.* at 906. In support of this proposition, Justice Pivarnik cited State *ex rel.* Rooney v. Lake Circuit Court, 236 Ind. 345, 140 N.E.2d 217 (1957); Brown v. Brown, 4 Ind. 627 (1853).

[19]396 N.E.2d at 907.

[20]394 N.E.2d 94 (Ind. 1979), *cert. denied*, 100 S. Ct. 1025 (1980).

Code of Professional Responsibility.[21] Terry argued that such statements were protected under the first amendment and "that the cases sounding in libel and slander are persuasive and instructive in determining the standard of misconduct to be applied."[22]

The Indiana Supreme Court did not agree with Terry's contentions. The court distinguished professional misconduct from defamation on the basis of "[t]he societal interests protected by these two bodies of law"[23]: professional misconduct is a wrong against society while defamation constitutes a wrong against an individual.[24]

The court concluded that conduct such as Terry's "does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."[25] Therefore, the court found that such conduct by Terry violated the Code of Professional Responsibility despite Terry's argument for first amendment protection.[26]

The supreme court was faced with another first amendment defense in *In re Perrello*.[27] Perrello was charged with violating the Code of Professional Responsibility by soliciting clients, giving unsolicited advice to laymen to retain counsel, suggesting himself as counsel, and accepting employment from the solicited laymen.

The supreme court more directly addressed the first amendment claim in *Perrello* than it did in *Terry*. The court held that the rules which prohibit the conduct in which the respondent engaged "protect and serve legitimate public interests by penalizing undue influence, overreaching, and misrepresentations."[28] The court in *Perrello* did not cite either of two prior United States Supreme Court decisions[29] dealing with solicitation and first amendment protection. In one of these cases,[30] the respondent made first amendment claims strikingly similar to those made by Perrello.

Perrello also challenged certain sections[31] of the Code of Professional Responsibility as being unconstitutionally vague because they

---

[21]1980 IND. CT. R. 341. The Code contains the conduct-regulative Disciplinary Rules [hereinafter referred to as DRs], which establish the minimum professional standards below which no attorney may fall.

[22]394 N.E.2d at 95.

[23]*Id.*

[24]*Id.*

[25]*Id.* at 96.

[26]*Id.*

[27]394 N.E.2d 127 (Ind. 1979).

[28]*Id.* at 130-31.

[29]Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978).

[30]Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978). The United States Supreme Court found that Ohralik's in-person solicitation was not protected by the first amendment. *Id.* at 468.

[31]DRs 2-103(A), -104(A).

failed "to set a clear line of demarcation between permitted and proscribed speech."[32] The court rejected this due process challenge and held the rules were not overbroad or vague because they are "commonly understood by reasonable men and particularly by attorneys."[33]

The supreme court was faced with another due process challenge in *In re Kesler*.[34] Kesler claimed that a violation of the due process clause occurred because he was not given an opportunity to appear before the Disciplinary Commission before it decided to file a complaint against him.[35] The court, however, found no due process violation because Kesler failed to show that he was prejudiced by the lack of a hearing before the Disciplinary Commission filed its complaint. Furthermore, Admission and Discipline Rule 23 provides for a later hearing before a hearing judge in which the respondent can confront those making allegations against him.[36]

Kesler also argued that he was placed in double jeopardy by the prosecution of the Disciplinary Commission's complaint. The foundation of this argument was the trial court's previous dismissal of objections brought to an estate's final report prepared by Kesler. Kesler reasoned that the disciplinary proceeding against him placed him in jeopardy for a second time since the trial court had previously dismissed objections to the final report. The supreme court rejected this argument. The court held that double jeopardy is a constitutional doctrine applicable only in criminal proceedings and that proceedings under Admission and Discipline Rule 23 are not criminal in nature.[37]

c. Specific violations of the Code.—In 1976, the Indiana Supreme Court made the following declaration of policy:

> 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.[38]

---

[32]394 N.E.2d at 130.

[33]*Id.* at 131.

[34]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[35]397 N.E.2d at 576.

[36]*Id.*

[37]*Id.* at 575-76.

[38]*In re* Fuchs, 264 Ind. 173, 176, 340 N.E.2d 762, 764 (1976).

Since this declaration, enforcement of the Code has become less lax. The survey period covered by this article was no exception. In published opinions during the survey period, the supreme court disbarred five attorneys, suspended three attorneys, reinstated one attorney, and gave two public reprimands. Additionally, the Disciplinary Commission had fifty-nine pending cases in which verified complaints had been filed with the clerk of the supreme court as of July 25, 1980.[39]

(i) Conduct warranting disbarment.—In *In re Kesler*,[40] the evidence showed that Kesler commingled partial distributions from the estate of Elsie M. Grammer with his own funds and made no accounting of the funds to either the estate's primary beneficiary or the estate.[41] The Disciplinary Commission filed a verified complaint in which Kesler was charged with failing to preserve the identity of his client's funds[42] and with "filing and swearing to a false and misleading 'Petition for Partial Distribution.' "[43] The court concluded that Kesler had engaged in the unprofessional and unethical conduct alleged in the Disciplinary Commission's complaint.[44]

---

[39]The pending cases were summarized by the Disciplinary Commission as follows:

CATEGORY OF	NUMBER CASES
Neglect	17
Conflict of Interest	11
Trial Conduct	6
Solicitation and Trade Names	1
Out-of-Court Statements	5
Criminal Misconduct	—
Conversion of Client's Assets	1
Other Crimes (Including tax, bribery, drugs, morals, fraud, and illegal payoff)	12
Disability Hearing	1
Reinstatement Hearing	3
Unauthorized Practice of Law	2
TOTAL CASES	59

[40]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[41]397 N.E.2d at 579.

[42]*Id.* at 577. Such conduct is a violation of DR 9-102(A) which provides in part: All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . . .

[43]397 N.E.2d at 577. Such conduct is a violation of DR 1-102(A)(4) and DR 1-102(A)(6) which provide: "A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

[44]397 N.E.2d at 579.

The court made several important observations about how it determined the appropriate disciplinary sanction. After the court acknowledged that it had heard the testimony of several citizens and members of the bar concerning Kesler's past accomplishments, it noted that "past performance and accomplishments cannot, by themselves, determine the sanction to be imposed."[45] Additionally, the court stated: "The interests protected by enforcement of professional conduct are much greater and extend to broad social concerns. This Court must weigh these broader considerations as well as the impact discipline will have on an individual."[46]

The court analyzed the circumstances of the case and concluded that the commingling of funds by Kesler was not a case involving poor accounting practices; instead, the case involved a course of conduct in which Kesler tried to secure an advantage at his client's expense. This conduct struck the court as illustrating "a shocking lack of understanding of the fiduciary responsibilities placed on all the members of the Bar of this State."[47] As a result, the court ordered that Kesler be disbarred.[48]

In re Castello also involved the improper handling of the funds of an estate.[49] The supreme court found that Castello "failed to keep his clients' funds in separate identifiable bank accounts . . . ; identify, label and protect property belonging to clients . . . ; maintain records or to render an appropriate accounting of such funds . . . ; [and] promptly pay and deliver such funds to his clients" in violation of DR 9-102.[50] As a result of the findings, the court held that Castello had engaged in dishonest and deceitful conduct which was "prejudicial to the administration of justice" and which called into question his fitness as an attorney.[51]

The hearing officer in *Castello* concluded that Castello's misconduct resulted from his lack of familiarlity with accounting procedures and disciplinary rules. However, the supreme court held that "[s]tate of mind, lack of skills or lack of understanding of the disciplinary rules cannot be considered as a defense of misconduct."[52]

Castello asked the court to limit any suspension imposed upon him in a manner that would allow him to continue to serve as an administrative hearing officer. However, the court held that ethical

---

[45]*Id.*
[46]*Id.*
[47]*Id.* at 579-80.
[48]*Id.* at 580.
[49]402 N.E.2d 970 (Ind. 1980).
[50]*Id.* at 972.
[51]*Id.*
[52]*Id.*

standards apply equally to all attorneys, regardless of their form of professional employment.[53] The court concluded its opinion by disbarring Castello.[54]

In re Perrello[55] involved the supreme court's review of the respondent's practice of approaching strangers in the hallways surrounding Marion County's municipal courts and offering them unsolicited legal advice and then offering to serve as their attorney. The court found that this conduct violated the Code of Professional Responsibility.[56]

Additionally, the court found that Perrello "engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation."[57] Such conduct was held by the court to adversely reflect on his fitness to practice law.[58] This fraudulent and deceitful conduct occurred when Perrello was trying to gain reinstatement to the Indiana bar after he had been suspended for a two-year period which began in 1973.[59] Perrello stated during a hearing on his second petition for reinstatement from the 1973 suspension that his practice of unethically soliciting clients was "injurious to the public and bar, and that he would never engage in such conduct if reinstated to the practice of law."[60] The court reinstated Perrello on March 16, 1977.[61] After his reinstatement, Perrello engaged in the same conduct that gave rise to his original two-year suspension. This caused the court to regard the representations Perrello gave during the hearings on his reinstatement petition as deliberate misrepresentations "designed to gain readmission to the practice of law."[62] In light of Perrello's previous suspension for the same conduct, the court concluded that only disbarment could effectively protect the "unsuspecting public from such highly unethical behavior."[63]

---

[53]*Id.* at 973.

[54]*Id.*

[55]394 N.E.2d 127 (Ind. 1979).

[56]*Id.* at 131. The Respondent was charged with violating DR 2-103(A) and DR 2-104(A). DR 2-103(A) provides: "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." DR 2-104(A), with certain exceptions, generally prohibits a lawyer from accepting employment from one to whom he had given the unsolicited advice to obtain counsel.

[57]394 N.E.2d at 132.

[58]*Id.*

[59]*In re* Perrello, 260 Ind. 254, 295 N.E.2d 357 (1973). Perrello's suspension in 1973 was imposed for the same type of conduct that was the subject of the 1979 disciplinary proceedings against him.

[60]394 N.E.2d at 131.

[61]*Id.* at 132.

[62]*Id.*

[63]*Id.*

In *In re Terry*,[64] a former judge of the Ripley Circuit Court, Terry, was disbarred. Initially, the supreme court had suspended Terry without pay as Judge of Ripley Circuit Court.[65] Subsequently, the court found that Terry had, subsequent to his suspension, sent correspondence to public officials which alleged that Justice Hunter had conspired with others to cover up the criminal activity of a certain individual. Moreover, Terry alleged in such correspondence that this "cover up" was the motivation behind his suspension. The court found that Terry's allegations were made without any basis.[66] On the basis of these findings the court concluded that Terry had violated his oath as an attorney, had knowingly made a false statement against a judge, and had engaged in conduct which adversely reflected on his ability to practice law.[67]

Additionally, the court was presented with evidence that Terry had given a packet of documents to prospective grand jurors in Ripley Circuit Court. Included in this packet of documents was a letter signed by Terry which alleged that a Ripley County attorney was involved in criminal activity and that the judge pro tempore of the Ripley Circuit Court and the prosecutor had covered up this criminal activity. The court held that these acts by Terry "constituted communication with a person known to be a member of the venire from which a jury was to be selected and conduct prejudicial to the administration of justice adversely reflecting on the Respondent's [Terry's] fitness to practice law."[68]

In disbarring Terry, the court seemed to focus on the fact that Terry's conduct "seriously challenged the integrity of the court system and its officers."[69] In addition, the court noted that Terry's conduct demonstrated "that he [didn't] deserve the respect of his profession and . . . that he [was] not capable of meeting the ethical restraints placed on all members of the Bar."[70]

In re Weaver[71] involved the supreme court's disbarment of an attorney on the basis of his disbarment in Florida. Weaver was disbarred in Florida due to his failure to comport with that state's professional standards. The report given by the referee appointed by the Florida Supreme Court served as the basis of the Indiana Supreme Court's finding that Weaver had engaged in conduct in-

---

[64]394 N.E.2d 94 (Ind. 1979), *cert. denied*, 100 S. Ct. 1025 (1980).

[65]*In re* Terry, 262 Ind. 667, 323 N.E.2d 192 (1975), *cert. denied*, 423 U.S. 867 (1975).

[66]394 N.E.2d at 95.

[67]*Id.* at 95, 96. Such conduct was held to violate DRs 1-102(A)(1) & (6) and 8-102(B).

[68]394 N.E.2d at 96. Such conduct was held to violate DRs 1-102(A)(1), (5) & (6) and 7-108(A).

[69]394 N.E.2d at 96.

[70]*Id.*

[71]399 N.E.2d 748 (Ind. 1980).

volving dishonesty and moral turpitude, failed to return a client's funds, neglected legal matters entrusted to him, refused to carry out his contract of employment, engaged in the unauthorized practice of law, prejudiced his client, and engaged in conduct reflecting adversely on his ability to practice law.[72]

The Indiana Supreme Court held that Weaver's conduct also violated Indiana's Code of Professional Responsibility.[73] In assessing the appropriate sanction, the court considered the misconduct which caused Weaver's disbarment in Florida and concluded that he "flagrantly abused the trust of his clients, and disregarded his professional obligations."[74] The court ordered Weaver's disbarment.[75]

(ii) Conduct Warranting Suspension.—In *In re Neal*,[76] Neal and the Disciplinary Commission submitted a joint stipulation of facts to the supreme court in which Neal admitted that he had informed an employee of Delaware County's Superior Court that the judge had authorized the civil docket to be backdated in order to reflect a timely filing of a praecipe. Such an authorization had not, in fact, been given. Subsequently, Neal was charged "with engaging in conduct involving dishonesty, fraud, and misrepresentation . . . , with engaging in conduct prejudicial to the administration of justice adversely reflecting on [his] fitness to practice law . . . , and with circumventing the . . . Disciplinary Rules through the actions of another."[77]

The supreme court concluded that the stipulations of fact submitted by the parties established that Neal "intentionally attempted to perpetrate a fraud upon the Delaware Superior Court."[78] Consequently, the court held that Neal was guilty of each Code violation with which he was charged.[79]

The court regarded as mitigating circumstances the facts that Neal seemed remorseful about his conduct, that he voluntarily

---

[72]*Id.* at 751.

[73]*Id.* The court made this holding after stating, "Disbarment in another state can be the basis for disbarment proceedings in Indiana." *Id.* at 750. In support of this statement the court cited Nolan v. Brawley, 251 Ind. 697, 244 N.E.2d 918 (1969) and IND. R. ADMISS. & DISCP. 23(2)(b), which provides:

> If an attorney admitted to practice in this State who is also admitted to practice in any other state should be disbarred or suspended by the proper authority of such other state, such disbarment or suspension shall constitute sufficient grounds for disbarment or suspension of said attorney in this State.

[74]399 N.E.2d at 751.

[75]*Id.*

[76]397 N.E.2d 967 (Ind. 1979).

[77]*Id.* at 967. Such conduct violates DRs 1-102(A)(2), (4)-(6).

[78]397 N.E.2d at 968.

[79]*Id. See* note 69 *supra.*

withdrew from the practice of law after this incident, and that this unethical conduct was an "isolated and solitary" incident which was occasioned by a "deep emotional disturbance" involving his personal life.[80] In light of these mitigating circumstances, the court suspended Neal from the practice of law for two years and credited him with the time that he had voluntarily withdrawn from the practice of law.[81]

In re Darby[82] also involved an attorney's misrepresentations to court employees. The supreme court found that Darby had made misrepresentations to courts in several Indiana counties. In particular, the court found that Darby avoided various court appearances over a period of fifteen months by "intentionally misrepresenting the status of his calendar."[83]

In assessing the magnitude of Darby's misconduct, the court stated:

> As demonstrated by the conduct present in this case, the effective, efficient administration of the judiciary forces judges and all parties to rely on the factual assertions of an attorney. In this day of crowded calendars, multiple settings, and complex, time-consuming pretrial procedures, the judicial system has little room for the participant whose word does not warrant the respect of his profession. A court simply must be able to rely on an attorney's representations; otherwise, it cannot function.[84]

The court noted that these misrepresentations involved a pattern of conduct rather than an isolated event.[85] As a result, the court suspended Darby from the practice of law for a period of not less than one year.

In re Craven[86] presented an interesting set of facts. Craven represented the plaintiff in a medical malpractice action. The case was set for trial on March 11, 1974. Craven instructed his secretary to prepare and file a motion for a continuance in the case. However, no such motion was filed with the court. Counsel for the defendants appeared on the morning of trial, but Craven did not. Consequently, the trial judge dismissed the prospective jurors and the cause of action.

---

[80]397 N.E.2d at 968.
[81]*Id.* at 969.
[82]403 N.E.2d 1074 (Ind. 1980).
[83]*Id.* at 1077.
[84]*Id.*
[85]*Id.*
[86]390 N.E.2d 163 (Ind. 1979).

After Craven filed his motion to correct errors, he contacted his legal malpractice insurer. For several months Craven avoided any contact with the clients on whose behalf he brought the medical malpractice claim. In December of 1974, Craven informed his clients that their claim had been dismissed. However, he explained to them that he would contact the insurance carrier of one of the defendants and attempt to negotiate a $3,000 settlement. Craven at no time mentioned to his clients his contact with his own legal malpractice carrier.

On January 8, 1975, Craven's legal malpractice carrier issued a draft which was jointly payable to Craven's law firm and to his clients. Craven then met with his clients and informed them that the defendants had agreed to settle their medical malpractice claim for $3,000. Craven's clients accepted this payment, less Craven's attorney's fees, as the settlement for their medical malpractice action.

The supreme court held that Craven's conduct constituted neglect of a legal matter entrusted to him and involved dishonesty, deceit, and misrepresentation.[87] Additionally, the court held that Craven failed to disclose a flagrant conflict of interest and generally engaged in conduct which adversely reflected on his fitness to practice law.[88]

The court summarized the nature of Craven's misconduct in the following way:

> Throughout the entire course of events, at each crucial decision, the Respondent abandoned his ethical responsibilities and compounded his professional dilemma. The Respondent first neglected his clients, then represented these clients under circumstances wherein the Respondent's own personal and business interests were in direct and obvious conflict, and, lastly, misrepresented crucial and material facts to these individuals who had sought his professional services.[89]

The court continued by stating that the essence of an attorney-client relationship is trust and that conduct like Craven's "casts a negative impression upon the entire legal profession."[90] After castigating his conduct with this strong language, the court imposed upon Craven a suspension of not less than one year.

In re Riley[91] involved, *inter alia*, the respondent's failure to return fees to clients who paid in advance for legal services which

---

[87] *Id.* at 167. Such conduct violates DRs 1-102(A)(4) & 6-101(A)(3).

[88] 390 N.E.2d at 167. Such conduct violates DRs 1-102(A)(1), (6) & 5-101(A).

[89] 390 N.E.2d at 167.

[90] *Id.*

[91] 73 Ind. Dec. 172 (Ind. 1979).

were never rendered. As a result, the supreme court suspended Riley, without automatic reinstatement, for ninety days.[92]

(iii) Offenses justifying public reprimands.—In re Garrett[93] involved Garrett's failure to prosecute an appeal from an administrative ruling after accepting a fee from his client for this purpose. Garrett's inaction resulted in the inability of his client to obtain a judicial review of the administrative process. Consequently, the court found Garrett "neglected a legal matter entrusted to him, engaged in conduct prejudicial to the administration of justice and engaged in conduct adversely reflecting on his fitness to practice law."[94]

For purposes of determining the appropriate sanction to be imposed, the court took judicial notice of a prior proceeding against the respondent[95] which resulted in his suspension from the practice of law for a period of one year. The court also noted that the misconduct found in the current case was similar in nature and in time of occurrence to that involved in the prior proceeding.[96] The court reasoned that Garrett had not petitioned for reinstatement from his prior suspension at the time of the current opinion due to the pendancy of the current complaint.

The court stated that Garrett's suspension had, in effect, been extended due to the prosecution of this complaint.[97] Due to this special circumstance, the court decided that no further suspension was warranted. The court reprimanded and admonished Garrett.[98]

The court also issued a public reprimand in *In re Fisher.*[99] The reprimand was issued to a deputy prosecutor who had accepted private employment from a client involved in several legal proceedings in the same county. The court held that this violated the Code[100] because Fisher had "accepted private employment in a matter in which he had substantial responsibility."[101]

d. Discretion on sanctions.—Perhaps the most uncertain aspect of a disciplinary proceeding is gauging the type of discipline that

---

[92]*Id.* at 173. It should be noted that Riley was reinstated by the supreme court on April 11, 1980. However, Justice Hunter dissented to his reinstatement by stating that Riley failed to establish by clear and convincing evidence that he was eligible for complete reinstatement. *In re* Riley, 402 N.E.2d 975 (Ind. 1980).

[93]399 N.E.2d 369 (Ind. 1980).

[94]*Id.* at 370. Such conduct violated DRs 1-102(A)(5), (6) & 6-101(A)(3).

[95]*In re* Garrett, 377 N.E.2d 1368 (Ind. 1978).

[96]399 N.E.2d at 370.

[97]*Id.*

[98]*Id.*

[99]400 N.E.2d 1127 (Ind. 1980).

[100]This conduct constituted a violation of DR 9-101(B).

[101]400 N.E.2d at 1127.

will be imposed. The supreme court has broad discretion as to the type of discipline it may impose upon an attorney found guilty of misconduct.[102] However, the cases decided during the survey period provide helpful guidance to the practitioner who needs to assess the type of sanction that is likely to be imposed.

When considered with other recently decided cases,[103] the supreme court's opinions in *Kesler*[104] and *Perrello*[105] seem to suggest that the supreme court's primary interest in enforcing the Code of Professional Responsibility is to protect the public from unscrupulous attorneys. Each of the recent opinions addressing serious violations of the Code have carefully weighed this interest when determining the appropriate sanction to impose.

Other factors that the supreme court will consider in assessing the appropriate sanction were revealed in cases decided during the survey period. One of these factors is the impact the punishment will have on the disciplined attorney.[106] The court also held that past performances and accomplishments of the attorney will be considered.[107]

The court will also consider the nature of the misconduct in assessing which sanction is necessary to protect the public. The court's consideration of the nature of the misconduct is demonstrated by contrasting the sanction imposed in *Terry*[108] with that imposed in *Darby*.[109] Both cases involved an attorney's lack of respect for the integrity of the court system. In *Darby*, the court found that Darby had intentionally made misrepresentations to the court regarding the status of his calendar. The court concluded that the judicial system cannot function if the representations of attorneys cannot be relied upon. The court suspended Darby for a period not less than one year.[110] The court felt it was faced with a more serious challenge to the integrity of the judicial system in *Terry*. Terry was found to have made false allegations that Justice Hunter had tried to "cover up" the criminal activity of a certain individual by suspending Terry from his job as Judge of the Ripley

---

[102]IND. R. ADMISS. & DISCP. 23(3).

[103]*In re* Vincent, 374 N.E.2d 40 (Ind. 1978); *In re* Tabak, 266 Ind. 271, 362 N.E.2d 475 (1977); *In re* Murray, 266 Ind. 221, 362 N.E.2d 128 (1977), *appeal dismissed*, 434 U.S. 1029 (1978); *See generally* Bubalo, *Professional Responsibility, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 325 (1980).

[104]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[105]394 N.E.2d 127 (Ind. 1979).

[106]397 N.E.2d at 579.

[107]*Id.* The court will also consider previous disciplinary proceedings. *In re* Garrett, 399 N.E.2d 369 (Ind. 1980).

[108]394 N.E.2d 94 (Ind. 1979), *cert. denied*, 100 S. Ct. 1025 (1980).

[109]403 N.E.2d 1074 (Ind. 1980).

[110]*Id.* at 1077.

Circuit Court.[111] The court concluded that this serious challenge to the integrity of the judicial system warranted disbarring Terry.[112]

During the survey period, the court revealed a factor that it would not consider in assessing which sanction to impose. The form of an attorney's employment will not be considered in determining the appropriate sanction.[113]

The court also delineated circumstances which mitigate the need for severe discipline. These circumstances include the attorney's remorseful feelings about the misconduct and voluntary withdrawal from the practice of law.[114] Additionally, findings that the misconduct was occasioned by a "deep emotional disturbance" or that it was an "isolated and solitary incident" will serve to mitigate the sanction imposed.[115]

Predicting the severity of the sanction that the court will impose in a disciplinary proceeding will continue to be a difficult task. However, the court's recent decisions have set forth important guideposts for attorneys needing to ascertain the probable consequences of professional misconduct.

2. Claims of Incompetent Counsel.—During the survey period, several petitions for post conviction relief were filed which alleged that the denial of effective assistance of counsel had resulted in a violation of the sixth amendment to the United States Constitution.[116] In each of these cases, the court adhered to essentially the same standard of review summarized by the Indiana Supreme Court:

> When a defendant challenges the adequacy or competency of his trial counsel, he labors under a great burden. *Rector v. State*, (1976) 264 Ind. 78, 339 N.E.2d 551. As we have consistently held, there is a strong presumption that counsel has performed competently. To overcome this presumtion, appellant must show that what the attorney did or did not do made the proceedings a mockery of justice shocking to the conscience of the reviewing court.[117]

---

[111]394 N.E.2d at 95.

[112]*Id.* at 96.

[113]*In re* Castello, 402 N.E.2d 970, 973 (Ind. 1980). *See* text accompanying notes 41-46 *supra.*

[114]*In re* Neal, 397 N.E.2d 967 (Ind. 1979).

[115]*Id.* at 968.

[116]Willis v. State, 401 N.E.2d 683 (Ind. 1980); Nelson v. State, 401 N.E.2d 666 (Ind. 1980); Moffett v. State, 401 N.E.2d 340 (Ind. 1980); Rector v. State, 389 N.E.2d 279 (Ind. 1980); Duncan v. State, 400 N.E.2d 1112 (Ind. 1980); Smith v. State, 396 N.E.2d 898 (Ind. 1979); Herman v. State, 395 N.E.2d 249 (Ind. 1979); Keys v. State, 390 N.E.2d 148 (Ind. 1979).

[117]Duncan v. State, 400 N.E.2d at 1113-14.

In *Rector v. State*,[118] the supreme court, noting that there is a presumption of competent counsel, held that abandoning a questionable issue on appeal does not reflect imcompetence of counsel.[119] "Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience does not necessarily amount to ineffective counsel unless, taken as a whole, the trial was a mockery of justice."[120]

Cases decided after *Rector* gave some general indications about what must be shown in order to prove one was denied the effective assistance of counsel.[121] In *Moffett v. State*, the court held that the petitioner must demonstrate by a preponderance of the evidence that "taken as a whole, assistance of counsel in the criminal proceeding amounted to a mockery of justice."[122] In *Duncan v. State*,[123] the supreme court reiterated an earlier holding[124] by stating that "[a] determination of counsel's adequacy can be made only on the facts and circumstances of each case."[125]

Other cases recently decided by the supreme court have helped define which circumstances may and may not be a denial of effective assistance of counsel.[126] The court in *Duncan* held that incidents at trial which may reflect a lack of experience in trying criminal cases will not support a finding of inadequate representation.[127] The incidents which allegedly reflected a lack of experience in *Duncan* included a request by defense counsel for the "seclusion of witnesses" instead of a request for the "separation of witnesses" and the questionable expertise of defense counsel on certain questions of evidence.[128] The court noted that the petitioner had failed to show any real prejudice due to these incidents.[129] Consequently, the court concluded that these isolated mistakes did not constitute inadequate representation because the trial was not reduced to a mockery of justice.[130] In *Nelson v. State*,[131] the supreme court noted that in determining whether the defendant's representation was adequate

---

[118]389 N.E.2d 279 (Ind. 1979).

[119]*Id.* at 281.

[120]*Id.* (quoting Blackburn v. State, 260 Ind. 5, 22, 291 N.E.2d 686, 696 (1973)).

[121]*See* Moffett v. State, 401 N.E.2d 340 (Ind. 1980); Duncan v. State, 400 N.E.2d 1112 (Ind. 1980).

[122]401 N.E.2d 340 (Ind. 1980).

[123]400 N.E.2d 1112 (Ind. 1980).

[124]*See* Skinner v. State, 383 N.E.2d 307 (Ind. 1978).

[125]400 N.E.2d at 1114.

[126]*See* Nelson v. State, 401 N.E.2d 666 (Ind. 1980); Duncan v. State, 400 N.E.2d at 1112 (Ind. 1980); Rector v. State, 389 N.E.2d 279 (Ind. 1979).

[127]400 N.E.2d at 1114.

[128]*Id.*

[129]*Id.*

[130]*Id.* at 1115.

[131]401 N.E.2d 666 (Ind. 1980).

under the sixth amendment, it "will not second guess counsel's trial tactics or strategy."[132]

Other post-conviction relief petitions[133] argued that effective assistance of counsel had been denied because the co-defendants were represented by one attorney. Joint representation of co-defendants has been held not to be *per se* evidence of ineffective representation; therefore, the one seeking relief from a resulting conviction must demonstrate that actual prejudice resulted from the joint representations.[134]

In *George v. State*,[135] the court of appeals held that two of the four co-defendants who were represented by the same attorney had demonstrated actual prejudice.[136] The prejudice was found to stem from the defense attorney's inability to cross-examine one of his own clients. Testimony that the attorney might have elicited from this client could have exculpated two of his other clients, Mark Wilbur and Timothy George. Therefore, the court reversed the convictions of Wilbur and George and issued the caveat that representation of both Wilbur and George at the new trial might give rise to another prejudicial conflict of interest.[137]

In *Smith v. State*,[138] the supreme court again granted a new trial on the basis of Smith's contention that he was denied the effective assistance of counsel. Counsel in *Smith* had decided to have the defendant appear in civilian clothes, but the attendant deputy refused to accept the clothes counsel had sent to the defendant who was in jail. Consequently, the defendant appeared before the jury in jail uniform. Counsel in *Smith* did not object to his client's attire at trial because he believed the law gave the trial judge the discretion to determine the attire in which the defendant appear. This perception by Smith's counsel was incorrect. More than six months before the trial, the United States Supreme Court held in *Estelle v. Williams*[139] that requiring one to stand trial in jail clothes impairs the right to a fair trial and thus violates the fourteenth amendment's equal protection and due process clauses.[140]

The Indiana Supreme Court relied on the reasoning of Chief

---

[132]*Id.* at 669.

[133]Riner v. State, 394 N.E.2d 140 (Ind. 1979); George v. State, 395 N.E.2d 263 (Ind. Ct. App. 1979).

[134]Riner v. State, 394 N.E.2d 140 (Ind. 1979). *Accord*, Stoehr v. State, 263 Ind. 208, 328 N.E.2d 422 (1975); Martin v. State, 262 Ind. 232, 314 N.E.2d 60 (1974).

[135]395 N.E.2d 263 (Ind. Ct. App. 1979).

[136]*Id.* at 267.

[137]*Id.*

[138]396 N.E.2d 898 (Ind. 1979).

[139]425 U.S. 501 (1976).

[140]*Id.* at 505-06.

Justice Burger in *Estelle* when it considered whether Smith's counsel had committed an error which caused the trial to be a "farce and mockery of justice."[141] The court pointed out that the magnitude of the prejudice that could have accrued to the defendant by way of his counsel's error was clearly summarized by Chief Justice Burger in his opinion in *Estelle*:

> "Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system . . . . This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play."[142]

The Indiana Supreme Court concluded that Smith's appearance at trial in jail clothes "had a pervasive influence on the trial."[143] The court held that Smith had been denied the effective assistance of counsel required under the sixth amendment.[144] However, the court cautioned:

> We do not hold that every time a defendant appears at trial in jail garb and his attorney fails to object that defendant has been denied the effective assistance of counsel. However, where, as here, it can be shown that trial counsel is incapable of carrying out his trial strategy on so fundamental a point because of ignorance of the law, that attorney has been ineffective in his assistance of the defendant.[145]

In a strongly worded dissenting opinion, Justice Pivarnik, with whom Justice Prentice joined, argued that the defendant's appearance at trial in jail clothing did not unerringly cause the jury to be prejudiced to the extent the trial became a mockery of justice.[146] Additionally, Justice Pivarnik contended that the defendant had failed to carry his burden on his post conviction petition since there

---

[141]396 N.E.2d at 901.

[142]*Id.* (quoting 425 U.S. at 504-05).

[143]396 N.E.2d at 901.

[144]*Id.*

[145]*Id.*

[146]*Id.* at 902 (Pivarnik, J., dissenting).

were no other grounds submitted by the petitioner to show inadequate representation throughout the rest of the trial. Finally, Justice Pivarnik rejected what he regarded as the majority's implication that counsel was incompetent throughout the entire trial in light of his "one mistake in his interpretation of the law."[147]

A final aspect of *Smith* worth noting is the dicta from the majority's opinion which provides helpful insight into the policy considerations involved in the supreme court's review of claims of inadequate representation. In *Smith*, the court stated:

> If every mistake or oversight made in the preparation of a case or at trial, perceived in the leisure of retrospection, should be considered probatory of legal incompetency, then a majority of all criminal defendants might validly assert such a claim. . . . This court has consistently sought to determine if and how a defense attorney's "inadequacies" have harmed the defendant at trial.[148]

The *Smith* dicta and other recently decided cases involving challenges to the competency of counsel demonstrate the court's focus on the actual prejudice that accrued to the defendant through the error of counsel. These recent decisions support the conclusion that *substantial* prejudice must be perceived by the court before it will grant relief to one making a claim of inadequate representation.

B. Professional Liability

1. Attorney's Liability to Third Parties.—In *Meier v. Pearlman*,[149] Meier filed an action against the attorneys who represented him and the attorneys who represented his adversaries in a false imprisonment action which resulted in a jury verdict adverse to him. The complaint alleged that Meier's attorneys and the defendants' attorneys had conspired to deprive Meier of his just compensation by "suppressing evidence, presenting false evidence, distorting the facts and truth of the evidence, producing fake witnesses without challenge, producing false evidence without challenge, and in limiting the scope and reach of Plaintiff's proof and damages."[150] Meier appealed from the grant of a motion for summary judgment in favor of Schilling and McGlone, attorneys for the defendants in the first action.

In their motion for summary judgment, Schilling and McGlone

---

[147] *Id.*

[148] *Id.* at 900 (citations omitted).

[149] 401 N.E.2d 31 (Ind. Ct. App. 1980).

[150] *Id.* at 33.

argued that Meier's action against them was an "impermissible collateral attack on the judgment in Meier's first action for false imprisonment."[151] The court reviewed several decisions which involved impermissible collateral attacks on judgments and concluded by stating: *"[I]t has long been the law in Indiana that a litigant defeated in a tribunal of competent jurisdiction may not maintain an action for damages against his adversary or adverse witnesses on the ground that the judgment was obtained by false and fraudulent practices or by false evidence."*[152]

The court held that this rule which prevents an unsuccessful litigant from bringing a subsequent action against an adverse party or witness should also apply to the attorneys who represent the successful litigant in a previous action.[153] The court stated that the adoption of such a rule will advance the public policies of preventing the "unwarranted collateral attacks upon judgments which have not been vacated" and the "multiplication of vexatious litigation."[154]

The court's rejection of two arguments advanced by Meier provides additional insight into professional liability law in Indiana. Meier claimed that the Indiana Supreme Court's decision in *Ayres v. Smith*[155] gave him a right of action against Schilling and McGlone. In *Ayres*, an attorney prepared a claim for a claimant against an estate that he represented. The judgment received by the claimant was less than she thought she deserved. As a result, the claimant filed an amended claim and a motion to vacate the judgment due to what she alleged to be a fraudulent procurement. The supreme court held that an attack on a prior judgment for fraud in its procurement constitutes a direct attack and therefore is permissible.[156]

The Indiana Court of Appeals distinguished the *Ayres* case from the situation presented in *Meier* by stating that the attack in *Ayres* "was by an amended claim in the same proceeding . . . [which] sought recovery *on the basis of the merits of the claim itself*, not by way of action for damages against the attorney for the estate."[157] Thus, the court concluded that Meier's position was not supported by *Ayres*.

Meier also argued that Indiana Code section 34-1-60-9[158] authorized his cause of action against Schilling and McGlone. The court noted

---

[151]*Id.* at 35.

[152]*Id.* at 38-39 (court's emphasis).

[153]*Id.* at 39.

[154]*Id.*

[155]227 Ind. 82, 84 N.E.2d 185 (1949).

[156]*Id.* at 90, 84 N.E.2d at 189.

[157]401 N.E.2d at 39 (court's emphasis).

[158]IND. CODE § 34-1-60-9 (Supp. 1980) provides in part:

An attorney who is guilty of deceit or collusion, or consents thereto, with in-

that the Indiana decisions which have considered this code section have involved actions against one's own attorney and direct attacks on judgments that were procured by fraud.[159] Moreover, the court took notice of the fact that cases decided in other jurisdictions have generally held that an attorney is not liable to third parties unless he engages in fraud, collusion, or a malicious or tortious act.[160] A review of these decisions from other jurisdictions convinced the Indiana Court of Appeals that: "IC 34-1-60-9 is but a legislative statement of the general rule, and affords no remedy against Schilling and McGlone in this case unless there is some showing of fraud, collusion, malicious or tortious conduct on their part toward Meier."[161]

The court concluded its opinion by holding that the record contained nothing which would even inferentially support a finding that Schilling and McGlone were guilty of fraud, collusion, or conduct which was malicious or tortious.[162]

Indiana Code section 34-1-60-9 was also the focus of another recently decided case. The Indiana Court of Appeals in *Anderson v. Anderson*[163] held that in order to sustain an action for attorney deceit the plaintiff must show that the defendant-attorney practiced the deceit in his role as an attorney.[164] Furthermore, the court held that section 34-1-60-9 does not create a new cause of action but merely trebles the damages recoverable for attorney deceit.[165] An attorney will not be liable for treble damages if the deceit was practiced in his "individual capacity as a citizen or party-litigant."[166]

The court in *Anderson* delineated what a plaintiff must prove in order to prevail on a claim under this statute. It held that the plaintiff must show that it was actually the attorney's fraudulent representations that caused him to suffer his damages.[167] On the issue of damages in deceit actions, the court noted that the measure

---

tent to deceive a court or judge or a party to an action or judicial proceeding, commits a Class B misdemeanor, and he shall also forfeit to the party injured treble damages, recoverable in a civil action.

[159]401 N.E.2d at 40. *See* Barelli v. Levin, 480 F.2d 1207 (7th Cir. 1973); Trigg v. Criminal Court, 234 Ind. 609, 130 N.E.2d 461 (1955); Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979); Whitesell v. Study, 37 Ind. App. 429, 76 N.E. 1010 (1906).

[160]*See* Scavello v. Scott, 549 P.2d 1337 (Colo. Ct. App. 1976); McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970).

[161]401 N.E.2d at 41 (citing Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979)).

[162]401 N.E.2d at 41.

[163]399 N.E.2d 391 (Ind. Ct. App. 1979).

[164]*Id.* at 403.

[165]*Id.*

[166]*Id.*

[167]*Id.*

of damages is the difference between what the plaintiff actually parted with and what he received.[168]

2. Imputation of an Attorney's Negligence.—Since the nineteenth century, Indiana appellate courts have consistently held that the negligence of an attorney will be imputed to his client.[169] This rule has frequently been enunciated without elaboration. In 1975 the Indiana Court of Appeals held that a client should not have his attorney's negligence imputed to him when such negligence is excusable.[170] However, this statement by the court did nothing more than integrate Indiana Trial Rule 60[171] into Indiana's rule on imputation of an attorney's negligence.

In *Rose v. Rose*,[172] however, the Indiana Court of Appeals carved out an exception to this general rule of imputation. The court held that "where the uncontradicted evidence discloses that the client exercised diligence but whose rights were forfeited by attorney misconduct, the latter's negligence should not be imputed to the client."[173] The court in *Rose* indicated that it was persuaded by language from a California case[174] which stated:

> As a general rule the accident or mistake authorizing relief may not be predicted upon the neglect of the party's attorney unless shown to be excusable [citations omitted], because the negligence of the attorney in the premises is imputed to his client and may not be offered by the latter as a basis for relief. [Citations omitted]. However, excepted from the rule are those instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. [Citations omitted]. The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship and for this reason his negligence should not be imputed to the client.[175]

---

[166]*Id. Accord*, Rochester Bridge Co. v. McNeill, 188 Ind. 432, 122 N.E. 662 (1919). *But see* Hysewander v. Lowman, 124 Ind. 584, 24 N.E. 355 (1890).

[169]Indianapolis, D. & W. Ry. Co., v. Hood, 130 Ind. 594, 30 N.E. 705 (1892); Frazier v. Williams, 18 Ind. 16 (1862).

[170]Moe v. Koe, 165 Ind. App. 98, 330 N.E.2d 761 (1975).

[171]IND. R. TR. P. 60(B)(1) provides in part: "On motion and upon such terms as are just the court may relieve a party or his legal representative from an order, entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect."

[172]390 N.E.2d 1056 (Ind. Ct. App. 1979).

[173]*Id.* at 1058.

[174]Buckert v. Briggs, 15 Cal. App. 3d 296, 93 Cal. Rptr. 61 (1971).

[175]390 N.E.2d at 1058 (quoting Buckert v. Briggs, 15 Cal. App. 3d at 301, 93 Cal. Rptr. at 63-64).

Thus, in order to avoid having the attorney's negligence imputed to him it seems a client must show that his attorney's conduct amounted to positive misconduct and that he was diligent and relatively free from negligence.

3. Statute of Limitations for Legal Malpractice.—It is not clear in Indiana which statute of limitations applies to legal malpractice actions. Different districts of the Indiana Court of Appeals have reached different results as to which statute of limitations is applicable. Although both statutes which have been approved by the different districts limit timely actions to those brought within a two-year period, they differ as to which actions are considered timely. One statute, Indiana Code section 34-4-19-1,[176] states that an action is timely if it is filed within "two (2) years from the date of the act, omission or neglect complained of." However, the other statute, Indiana Code section 34-1-2-2,[177] states that an action is timely if it's filed within two years of when the cause of action accrued.

The third district of the Indiana Court of Appeals held in *Cordial v. Grimm*[178] that section 34-4-19-1 was intended to apply in legal, as well as medical malpractice cases; thus, the court proceeded to evaluate whether the appellant's cause of action was filed in a timely manner by reviewing section 34-4-19-1. Incidental to the court's evaluation of the plaintiff's cause under this statute was its consideration of whether any fraudulent concealment tolled the statute and whether the statute was precluded from running until the plaintiff's actual discovery of the cause of action. The court concluded that the appellant failed to demonstrate the existence of any fraudulent concealment by the appellee which would toll the statute of limitations.[179] Furthermore, the court refused to accept the appellant's argument that section 34-4-19-1 does not run until the injured party actually discovers his cause of action.[180]

---

[178]IND. CODE § 34-4-19-1 (1976) provides in part:

> No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

[177]IND. CODE § 34-1-2-2 (1976) provides in pertinent part: "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years . . . ."

[178]169 Ind. App. 58, 346 N.E.2d 266 (1976).

[179]*Id.* at 69, 346 N.E.2d at 273.

[180]*Id.* (citing Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975); Merritt v. Economy Dept. Store, Inc., 125 Ind. App. 560, 128 N.E.2d 279 (1955). *Cf.* Ostojic v.

The court of appeals in *Cordial* also had to decide whether a legal malpractice action which included allegations of breach of contract and negligence was controlled by the statute of limitations given by section 34-1-2-1[181] or section 34-1-2-2. To decide this question, the court had to decide whether the nature of the plaintiff's action was *ex contractu* or *ex delicto*. The court concluded that the substance of the appellant's claim was a chose in action and therefore personal property.[182] Consequently, the court stated that "the trial court could have properly concluded" that section 34-1-2-2 was the applicable statute of limitations.[183] The court concluded its opinion by holding that the appellant's cause of action was barred under section 34-1-2-2 and under section 34-4-19-1.[184]

However, the first district of the Indiana Court of Appeals stated in *Shideler v. Dwyer*,[185] a case decided after *Cordial*, that the legislature did not intend for section 34-4-19-1 to apply to cases involving legal malpractice. Instead, the court used section 34-1-2-2 to determine if the plaintiff's action for legal malpractice was filed in a timely manner.

This position gained support from a decision of the Indiana Court of Appeals during the survey period. In *Anderson v. Anderson*,[186] the second district of the Indiana Court of Appeals stated: "A cause of action for legal malpractice, however, does not accrue until the aggrieved party has suffered both an injury to his property and damages."[187] The court cited *Shideler v. Dwyer*[188] as authority for this proposition. Implicit in this statement seems to be the court's opinion that section 34-1-2-2 is the appropriate statute of limitations for legal malpractice actions. Thus, two of four districts of the Indiana Court of Appeals seem to have indicated that section 34-1-2-2 should be the controlling statute of limitations in actions for legal malpractice.

There are several consequences of what may be regarded as a trend towards adopting section 34-1-2-2 as the controlling statute of

---

Brueckmann, 405 F.2d 302 (7th Cir. 1968) (could be used to support the proposition that § 34-4-19-1 does not commence to run until the injured party actually knows of the wrongful act).

[181]IND. CODE § 34-1-2-1 (1976) is the statute of limitations pertaining to contracts in writing and provides in pertinent part: "The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterwards. . . . On accounts and contracts not in writing."

[182]169 Ind. App. at 64, 346 N.E.2d at 270.

[183]*Id.*

[184]*Id.* at 70, 346 N.E.2d at 273.

[185]386 N.E.2d 1211 (Ind. Ct. App. 1979).

[186]399 N.E.2d 391 (Ind. Ct. App. 1979).

[187]*Id.* at 401.

[188]386 N.E.2d 1211 (Ind. Ct. App. 1979).

limitations in legal malpractice cases. Adoption of this statute instead of section 34-4-19-1 may prevent Indiana courts from having to wrestle continually with allegations of fraudulent concealment, factual questions of when the attorney-client relationship terminated, and arguments that the statute is tolled until the plaintiff actually discovers his cause of action.[189]

However, another effect of adopting section 34-1-2-2 as the controlling statute of limitations in legal malpractice cases will be to immerse Indiana courts into the often confusing analysis of when a cause of action accrues. This confusion results from the attempt to pinpoint the time at which the legal injury and resulting damages coalesced so as to give rise to a cause of action.[190] Additionally, the use of section 34-1-2-2 instead of section 34-4-19-1 may in many cases cause the statute of limitations to be lengthened beyond two years from the date of the negligent act because damages often do not result until long after the legal injury is suffered.

Consequently, final determination as to the applicable statute of limitations in a legal malpractice action must await a definitive ruling by the Indiana Supreme Court. Since *Shideler* is presently pending on a petition to transfer, this ruling may come soon. In the interim, Indiana courts should apply careful analysis in determining the applicable statute of limitations and, more importantly, in determining when it begins to run.

---

[189]These issues have been considered in cases construing IND. CODE § 34-4-19-1 (1976). *See* Ostojic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Cordial v. Grimm, 169 Ind. App. 58, 346 N.E.2d 266 (1976) Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975).

[190]*See* Essex Wire Corp. v. M. H. Hilt Co., 263 F.2d 599 (7th Cir. 1959); Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Shideler v. Dwyer, 386 N.E.2d 1211 (Ind. Ct. App. 1979).