XII. Professional Responsibility

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A. Professional Responsibility

1. Sanctions for Legal Misconduct.—The Indiana Constitution grants the Indiana Supreme Court exclusive jurisdiction in matters involving the admission and discipline of attorneys.[1] Although the court is vested with broad discretion in imposing sanctions for legal misconduct, the sanctions imposed by the supreme court during the past survey period reveal a degree of predictability.

Of the seven disciplinary proceedings during the survey period that resulted in disbarment, five involved the conversion, commingling, or unethical retention of clients' funds.[2] Disbarment was not ordered in only one proceeding in which an attorney was found to have commingled or converted clients' funds.[3] In these disbarment proceedings, the supreme court repeatedly emphasized the necessity for the presence of "trust and fiduciary responsibility" in the attorney-client relationship.[4] In this regard, it may be concluded that the fraudulent conversion or commingling of funds will generally bring about the imposition of disbarment, the supreme court's most severe sanction.

Disbarment also was ordered in two proceedings not involving the

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[1]IND. CONST. art. 7, § 4, provides, in part, that:

> 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 justice 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.

Id.

[2]*In re* Martinez, 431 N.E.2d 490 (Ind. 1982) (disbarment ordered because respondent converted proposed settlement funds); *In re* Davis, 429 N.E.2d 938 (Ind. 1982) (disbarment ordered because respondent refused to return unearned portion of his fee); *In re* Walton, 427 N.E.2d 654 (Ind. 1981) (disbarment ordered because respondent purported to return the retainer fee by issuing a check that was subsequently dishonored due to insufficient funds); *In re* McCain, 425 N.E.2d 645 (Ind. 1981) (disbarment ordered because respondent converted interest payments due the client under a land sale contract); *In re* Slenker, 424 N.E.2d 1005 (Ind. 1981) (disbarment ordered because respondent converted funds from an estate while serving both as attorney for the estate and as executor).

[3]*See In re* Mendez, 427 N.E.2d 652 (Ind. 1981). For mitigating circumstances which may have contributed to the imposition of a more lenient sanction, see *infra* notes 31-32 and accompanying text.

[4]*See, e.g., In re* Martinez, 431 N.E.2d 490, 493 (Ind. 1982); *In re* McCain, 425 N.E.2d 645, 649 (Ind. 1981).

conversion or the commingling of clients' funds. In *In re Moody*,[5] an attorney was found to have engaged in abusive and bizarre conduct directed towards the Honorable Alfred J. Pivarnik while Pivarnick was serving as judge of the Porter County Superior Court;[6] therefore, disbarment was ordered.[7]

In *In re McKenna*,[8] the attorney, McKenna, had given to a client a business card which indicated that McKenna's office was located in a certain office building; however, McKenna's office equipment and files had been taken into possession by the building manager due to McKenna's failure to pay his rent. After McKenna was retained by the client to initiate a lawsuit, McKenna repeatedly assured the client that the case had been filed. After discovering that the action had not been filed by McKenna, the client filed the action pro se.

On another occasion, McKenna had been paid a retainer to file a petition for adoption. Although McKenna filed the petition, he failed to submit a final order for the judge's signature as requested by the court. McKenna falsely assured his client that the order had been tendered to the court. Eventually, another attorney prepared the order without charge, and the petition was granted. From these facts, the court concluded that disbarment was warranted.[9]

Somewhat unpredictable is the sanction which will be imposed for mere neglect. During the past survey period, disciplinary proceedings involving an attorney's neglect of legal matters entrusted to him resulted in two disbarments,[10] four suspensions,[11] and one public

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[5]428 N.E.2d 1257 (Ind. 1981).

[6]Indiana Supreme Court Justice Pivarnik did not participate in the *Moody* disciplinary proceeding.

[7]428 N.E.2d at 1262. The *Moody* court did not discuss Judge Pivarnik's failure to hold Moody in contempt at the time of Moody's misconduct. Obviously, a question is raised as to why Moody's conduct was found to warrant disbarment but was not found to warrant a contempt citation at the time it occurred.

[8]422 N.E.2d 287 (Ind. 1981).

[9]*Id.* at 289.

[10]*In re* Walton, 427 N.E.2d 654 (Ind. 1981), *modified*, 431 N.E.2d 474 (Ind. 1982) (respondent allowed the statute of limitations to expire on clients' claims, failed to appear at the trial of his clients' action, settled a claim without the consent or authorization of his client, failed to file a petition in bankruptcy, and failed to adequately represent a client in a small claims proceeding); *In re* McKenna, 422 N.E.2d 287 (Ind. 1981) (respondent failed to file suit and failed to tender an order to the court after being requested to do so by the judge). It should be noted that the court's order of disbarment in *Walton* was subsequently modified to a two-year suspension. *In re* Walton, 431 N.E.2d 474 (Ind. 1982).

[11]*In re* Snyder, 428 N.E.2d 17 (Ind. 1981) (respondent failed to commence a dissolution proceeding after being retained to do so); *In re* Deardorff, 426 N.E.2d 689 (Ind. 1981) (respondent failed to take any action on behalf of his clients for over three years, resulting in the dismissal of his clients' claims); *In re* Darby, 426 N.E.2d 683 (Ind. 1981) (respondent failed to appear at a hearing, failed to file a lawsuit, and failed

reprimand and admonishment.[12]

In originally imposing the sanction of disbarment in *In re Walton*,[13] the supreme court placed primary emphasis on the *effect* of the respondent's neglect stating:

> Unfortunately, as in most human endeavors, neglect, procrastination and non-accomplishment are present in the legal profession. But in the legal profession, neglect produces a particularly pernicious consequence and it is for this reason that the Diciplinary Rules of this Court proscribe such conduct.
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> The present case epitomizes the harmful results of neglect. Statutes of Limitations expired, lay parties were required to appear without the assistance of counsel, and parties' interests were abandoned through the unwanted settlement of claims. The findings in this cause indicate that the Respondent had a total disregard for the prejudicial consequences of his inaction. His clients were the victims of this disregard.[14]

In light of the rationale used in *Walton*, it is difficult to understand why the court in *McKenna* imposed the sanction of disbarment, especially in light of the supreme court's subsequent modification of Walton's disbarment to a two-year suspension. Although McKenna neglected to file a small claims complaint as requested and neglected to prepare a final adoption order after representing that he would do so, neither instance of neglect proved to be irremediable. A possible explanation for the severity of the sanction imposed in *McKenna* may be the simplicity of the tasks which McKenna failed to perform.[15]

It appears that simple neglect, unaccompanied by aggravating circumstances, will not bring about the imposition of the most severe sanctions. Nonetheless, where an attorney's neglect is accompanied by deceit and misreprensentation aimed at "covering up" neglect or incompetence, stricter sanctions will be imposed. This is illustrated in *McKenna* and *Walton*.[16] In each of these diciplinary proceedings, which involved serious neglect and resulted in disbarment, the court

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to return the client's papers upon demand); *In re* Shea, 425 N.E.2d 76 (Ind. 1981) (suspension ordered due to respondent's six-year delay in filing an action on behalf of a client).

[12]*In re* Brown, 429 N.E.2d 966 (Ind. 1982) (respondent failed to complete his obligations as the attorney for an estate in a timely manner).

[13]427 N.E.2d 654 (Ind. 1981), *modified*, 431 N.E.2d 474 (Ind. 1982).

[14]*Id.* at 657.

[15]In this regard, the court in *McKenna* stated that the "[r]espondent's misconduct relates to uncomplicated, routine matters which can and should be expeditiously accomplished by any attorney. A client should be able to anticipate prompt resolution of legal questions of this nature." 422 N.E.2d at 289. The court also noted that McKenna had repeatedly misrepresented to his client that the tasks had been completed.

[16]*See In re* McKenna, 422 N.E.2d 287 (Ind. 1981); *In re* Walton, 427 N.E.2d 654 (Ind. 1981).

relied on the fact that misrepresentations regarding the status of the clients' cases had been made.[17] *In re Deardorff*[18] also exemplifies this situation. In ordering Deardorff's suspension, the court placed primary emphasis on Deardorff's deceitful conduct, which was designed to camouflage his inability to further his clients' interest rather than his neglect of his clients' claim. The court stated:

> [Deardorff's conduct] was not merely negligence; Respondent engaged in a conscious, elaborate process whereby events lending credence to his misrepresentations were staged.
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> . . . .
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> There is no place in the practice of law for deceiving one's client. Deception of a client strikes at the very heart of the oath taken by each person who assumes the position of attorney.[19]

In re Seely[20] involved an attorney's obvious intoxication during a criminal trial in which he represented the defendant. The court found such conduct to be "undignified, discourteous and degrading to a tribunal."[21] Recognizing its responsibility "to protect the public from attorneys who, for whatever reason, cannot meet the obligations imposed by the [legal] profession,"[22] the court suspended the respondent from the practice of law for a period of ninety days.[23]

In *In re Price*,[24] an attorney was suspended for a period of not less than one year for engaging in conduct involving misrepresentation before a grand jury and for failing to reveal the settlement of a client's lawsuit to welfare officials as required by law. The primary importance of the *Price* decision lies in the court's finding that the scienter element of a disciplinary charge "may be analogized to what constitutes 'knowlingly' in a criminal charge."[25]

Two cases arising from somewhat unusual circumstances resulted in public reprimands for the attorneys involved. In *In re Lantz*,[26] the respondent was a part-time prosecuting attorney who also initiated numerous civil actions based upon "bad checks" tendered to his clients.

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[17]*In re* McKenna, 422 N.E.2d 287, 289 (Ind. 1981); *In re* Walton, 427 N.E.2d 654, 655 (Ind. 1981).

[18]426 N.E.2d 689 (Ind. 1981).

[19]*Id.* at 692.

[20]427 N.E.2d 879 (Ind. 1981).

[21]*Id.* at 879.

[22]*Id.* at 880.

[23]*Id.*

[24]429 N.E.2d 961 (Ind. 1982).

[25]*Id.* at 964. With respect to criminal intent, IND. CODE § 35-41-2-2(b) (1982) states that "[a] person engages in conduct 'knowingly' if, when he engages in conduct, he is aware of a high probability that he is doing so." IND. CODE § 35-41-2-2(b) (1982).

[26]420 N.E.2d 1236 (Ind. 1981).

The court held that such a practice gave the appearance of using the pressure of a public office to collect civil debts for private clients,[27] in violation of Disciplinary Rules 9-101(B), 5-104(B), and 1-102(A)(5) and (6) of the Code of Professional Responsibility.[28] In *In re Adams*,[29] the attorney was publicly admonished and reprimanded for making overt sexual advances[30] toward a female client.

During the survey period, the supreme court discussed two types of mitigating circumstances that it will consider when imposing disciplinary sanctions. In the only case decided during the survey period involving the commingling of a client's funds that did not result in disbarment,[31] the court weighed heavily the civic contributions of the respondent.[32] In addition, youth and inexperience were discussed twice during the survey period as possible mitigating circumstances. Although youth and inexperience were not sufficient to avoid discipline in either *Price* or *Deardorff*,[33] the court strongly implied in *Price* that a more experienced attorney would have suffered the imposition of a much stricter sanction. The court stated that "[w]ere it not for his inexperience, Respondent's conduct would easily be viewed as a intolerable attempt at personal gain through the exploitation of an unknowing client. But we will not project such improper motivations."[34]

During the survey period, the supreme court offered some guidance as to the various factors that it will take into consideration when determining an appropriate disciplinary sanction. In *Walton*, the court stated that it will examine

> the nature of the violation, the specific acts of misconduct, [the supreme court's] responsibility to preserve the integrity of the Bar, and the risk, if any, to which [the court] will subject the

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[27]*Id.* at 1237.

[28]MODEL CODE OF PROFESSIONAL RESPONSIBILITY DRs 9-101(B), 5-104(B), 1-102(A)(5) and (6) (1979). The Model Code of Professional Responsibility is reproduced in the INDIANA RULES OF COURT (1982).

[29]428 N.E.2d 786 (Ind. 1981).

[30]The court found that Adams grabbed a female client, "kissing her and raising her blouse." *Id.* at 787.

[31]*In re* Mendez, 427 N.E.2d 652 (Ind. 1981). *See supra* note 3 and accompanying text.

[32]427 N.E.2d at 653. In this regard, the court stated:

> In our determination of an appropriate disciplinary sanction, we have considered the evidence and argument of record relating to Respondent's extensive gratis work for the Hispanic-American Multi-Center and many indigent clients. Professional service of this nature enhances the legal profession and brings credit to those who serve so willingly.

Id.

[33]*In re* Price, 429 N.E.2d 961, 965-66 (Ind. 1982); *In re* Deardorff, 426 N.E.2d 689, 692 (Ind. 1981).

[34]429 N.E.2d at 966.

public by permitting the Respondent to continue in the profession or be reinstated at some future date.[35]

The court also considered an attorney's voluntary withdrawal from practice in determining the effective date of a disciplinary sanction. In *In re Thomas*,[36] an attorney had voluntarily withdrawn from the practice of law after a criminal conviction,[37] and, approximately 18 months later, the attorney was disbarred by order of the supreme court.[38] The court allowed the effective date of discipline to run from the time of the respondent's voluntary withdrawal for purposes of the five-year waiting period for reinstatement.[39]

2. Claims of Inadequate Counsel.—During the survey period, numerous criminal defendants based appeals, at least in part, on the denial of effective legal representation at trial. In most instances, the appellate courts rejected the appellants' arguments and affirmed the convictions, applying established legal principles. For example, Indiana has long held to a presumption that legal counsel has acted effectively and competently.[40] Moreover, a criminal conviction will not be reversed on the basis of ineffective counsel, unless counsel's representation rendered the defendant's trial a "mockery of justice."[41] During the past survey period, the supreme court consistently upheld the "mockery of justice" standard as modified by the "adequate legal representation" standard.[42] In addition, the courts continued their reluctance to "second guess" defense counsel's trial tactics.[43]

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[35]427 N.E.2d at 657.

[36]420 N.E.2d 1237 (Ind. 1981).

[37]The attorney was convicted of violating 21 U.S.C. § 843(b) (1976), which prohibits the use of a public communication facility to distribute cocaine.

[38]420 N.E.2d at 1239.

[39]*Id.*

[40]*See, e.g.*, Field v. State, 426 N.E.2d 671, 673 (Ind. 1981); Lindley v. State, 426 N.E.2d 398, 401 (Ind. 1981); Harrison v. State, 424 N.E.2d 1065, 1070 (Ind. Ct. App. 1981); Myers v. State, 422 N.E.2d 745, 752 (Ind. Ct. App. 1981).

[41]*E.g.*, Rice v. State, 426 N.E.2d 680 (Ind. 1981); Wilkins v. State, 426 N.E.2d 61, 62 (Ind. Ct. App. 1981); Roberts v. State, 419 N.E.2d 803, 810 (Ind. Ct. App. 1981). *See also* cases cited *supra* note 40.

[42]*See, e.g.*, Rice v. State, 426 N.E.2d 680, 682 (Ind. 1981); Lindley v. State 426 N.E.2d 398, 409 (Ind. 1981). The "adequate legal representation" standard was described in Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969).

[43]*See* Lindley v. State, 426 N.E.2d 398, 401 (Ind. 1981); Roberts v. State, 419 N.E.2d 803, 810 (Ind. Ct. App. 1981). In *Lindley*, the supreme court stated that it "will not speculate as to what may have been the most advantageous strategy in a particular case. Isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective counsel." 426 N.E.2d at 401. Similarly, in *Roberts*, the court of appeals stated that "[d]eliberate choices of attorneys for some tactical or strategic reason does not establish ineffective representation even though such choice may be subject to some criticism or even if it does turn out to be detrimental to the defendant." 419 N.E.2d at 810.

Nonetheless, post-conviction relief was granted twice during the survey period, based upon claims of ineffective representation by counsel. In *Shull v. State*,[44] the defense counsel had sought to impeach the testimony of the victim[45] by attempting to disclose a basis for negative feelings towards the accused or a motive for revenge.[46] Instead, the defense counsel "destroyed the credibility of his client much like a successful prosecution would have tried to do."[47]

In reversing the defendant's conviction, the court of appeals emphasized the cumulative effect of the defense counsel's errors, stating:

> We initially note that each error of counsel individually may not be sufficient to prove ineffective representation; however, the errors collectively illustrate the denial of his right to effective assistance of counsel. In applying the mockery of justice adequacy standard this Court must always look to the totality of the circumstances, [citations omitted] which would include consideration of the cumulative effect of counsel's errors. [citations omitted] Here, we have reviewed the entire record and conclude Shull was denied effective assistance of counsel based upon the totality of counsel's mistakes. While individual isolated mistakes may not be grounds for reversal, the totality of these circumstances requires reversal.[48]

In *Cowell v. Duckworth*,[49] the petitioner sought a writ of habeus corpus after he had been tried and convicted of first-degree murder in state court and sentenced to life imprisonment. As one basis for his petition, the prisoner alleged that he had received ineffective legal representation at trial because his attorney had a conflict of interest. This allegation was based on the fact that the petitioner's attorney also represented two prosecution witnesses. The district court found that this was a conflict of interest that violated the petitioner's sixth amendment rights.[50] The court described the nature of this conflict as follows:

> "The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney

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[44]421 N.E.2d 1 (Ind. Ct. App. 1981).

[45]The defendant had been convicted of child molesting.

[46]Defense counsel asked such questions as: "How many times did he hit your mom?"; "How many times did he get drunk while he was staying at your house"; and, "Was the beer cold when he poured the beer on your brothers?" 421 N.E.2d at 2-3.

[47]*Id.* at 3.

[48]*Id.* at 2.

[49]512 F. Supp. 371 (N.D. Ind. 1981).

[50]*Id.* at 375. In this regard, the court held that "unconstitutional multiple representation is never harmless error." *Id.*

> may have privileged imformation obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. *See* Code of Professional Responsibility, Can 4 & DR 4-101(B)(2). 'The more difficult problem which may arise is the danger that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information.' "[51]

Thus, the court held that the writ of habeas corpus would be issued unless the state retried Cowell within 180 days.[52]

3. Prosecutorial Misconduct.—It has been firmly established in Indiana that the trial court is justified in granting a mistrial only where prosecutorial misconduct places a criminal defendant in a position of grave peril of conviction to which he should not have been subjected.[53]

During the survey period, the "grave peril" standard was reaffirmed by the courts in several criminal cases where the appeal was based upon the denial of a motion for mistrial.[54] The court consistently rejected, however, the argument that a mistrial is the only appropriate remedy for prosecutorial misconduct. In *White v. State*,[55] the supreme court upheld the denial of a motion for mistrial because the appellant failed to demonstrate any adverse effect resulting from the alleged misconduct.[56] Similarly, in *Riley v. State*,[57] the court found that a prosecutor's failure to confine the content of his final argument to the facts of the case was improper; nonetheless, the court held that such conduct did not warrant reversal.[58]

It may be generally concluded that absent a showing of harm resulting from the prosecutor's misconduct, the trial court's refusal to grant a mistrial for prosecutorial misconduct will not constitute reversible error.[59] Furthermore, "overwhelming direct evidence of . . . guilt" will be taken into consideration in determining the extent to

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[51]*Id.* (quoting Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980)) (quoting United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976)).

[52]512 F. Supp. at 375.

[53]*See, e.g.*, Drollinger v. State, 408 N.E.2d 1228, 1240 (Ind. 1980).

[54]*See* Riley v. State, 427 N.E.2d 1074, 1076 (Ind. 1981); Brock v. State, 423 N.E.2d 302, 305 (Ind. 1981); Smith v. State, 420 N.E.2d 1225, 1231 (Ind. 1981).

[55]431 N.E.2d 488 (Ind. 1982).

[56]*Id.* at 490.

[57]427 N.E.2d 1074 (Ind. 1981).

[58]*Id.* at 1076.

[59]*See, e.g.*, Hines v. State, 424 N.E.2d 161, 163 (Ind. Ct. App. 1981) (holding prosecutorial misconduct did not warrant granting of mistrial even though such conduct may violate the Code of Professional Responsibility).

which prosecutorial misconduct has placed a defendant "in a position of grave peril to which he should have not been subjected."[60]

4. Appellate Advocacy.—During the survey period, the appellate courts of Indiana felt compelled to comment on the issues of competency and ethics as they relate to appellate advocacy. In *Moore v. State*,[61] the court of appeals resorted to the extraordinary remedy of ordering the rewriting of an appellant's brief.[62] Although the court refused to address the merits of the case, Judge Chipman, in reviewing the appellant's brief, authored a four-page opinion which outlined the counsel's most significant errors. The court found that the counsel for the appellant had committed mechanical errors and had failed to comply with several of the Indiana Rules of Appellate Procedure. In ordering a rebriefing, the court recognized the extraordinary nature of that remedy.[63] Nonetheless, the court found that such a remedy was "a more expedient method to guarantee appellant's constitutional right to effective assistance of counsel than perhaps future post conviction remedies."[64]

Gibbs v. State[65] involved a more blatant breach of advocacy. In *Gibbs*, the court of appeals addressed the deficiencies of an appellate brief that was submitted by a public defender. In the brief, the public defender had reproduced a large portion of a co-defendant's brief, some of which was entirely adverse to his client's interest. The appellate court affirmed the defendant's conviction and referred the matter of the public defender's misconduct to the Supreme Court Disciplinary Commission for investigation.[66]

In *Manns v. State*,[67] the court commented on the wholly inadequate brief submitted by the appellant's counsel. The court noted that appellant's counsel referred to various facts without a supporting citation to the record and failed to cite legal authority in support of the arguments presented. Nonetheless, the court undertook a review of the issues raised and subsequently affirmed the defendant's conviction.[68]

The supreme court addressed another ethical aspect of appellate

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[60]Smith v. State, 420 N.E.2d 1225, 1231 (Ind. 1981) (quoting Drollinger v. State, 408 N.E.2d 1228, 1240 (Ind. 1980)).

[61]426 N.E.2d 86 (Ind. Ct. App. 1981).

[62]*Id.* at 90.

[63]*Id.* As to its authority to order a rebriefing, the court cited Frances v. State, 261 Ind. 461, 305 N.E.2d 883 (1974).

[64]426 N.E.2d at 90.

[65]426 N.E.2d 1150 (Ind. Ct. App. 1981).

[66]*Id.* at 1159.

[67]419 N.E.2d 1313 (Ind. Ct. App. 1981).

[68]*Id.* at 1318. For an interesting comparison with *Manns*, see *Moore*, 426 N.E.2d 86 (Ind. Ct. App. 1981). *See supra* notes 61-64 and accompanying text.

advocacy in *Lance v. State*.[69] In *Lance*, the central issue was whether certain blood-stained clothing had been improperly seized. The state sought to defend the seizure under the "plain view" doctrine. In its brief, the state recited, as "fact," that a police officer "saw the defendant notice blood on the pants he picked up to put on and toss them aside nervously."[70] The supreme court found, however, that such a fact did not appear on the pages of the transcript cited by the state, "nor at any other location in the transcript."[71] Citing the Code of Professional Responsibility, the court admonished the state's counsel by stating that "[p]ractitioners may properly place the facts in a light most favorable to their client. Zealous representation, however, does not include a license to misrepresent or embellish the facts."[72]

In *Tippecanoe Education Association v. Board of School Trustees of Tippecanoe School Corp.*,[73] the court chose to use a footnote to emphasize an attorney's ethical obligation to disclose adverse authority in an appellate brief.[74] The court stated:

> Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.[75]

The court acknowledged that neither party cited the case that the court characterized as directly adverse to one of the party's position, thus raising the question as to whether the case was "directly adverse" as required by the Disciplinary Rules. The court's statement in *Tippecanoe* illustrates the need for care when an appellate tribunal seeks to substitute its judgment for that of the parties' counsel. The proper course of action would be to allow purported violations of the Code of Professional Responsibility to be determined by the Indiana Supreme Court Disciplinary Commission, and not by the court of appeals.

A significant development in the area of appellate advocacy is the supreme court's recent amendment of Appellate Rule 2 of the Indiana Rules of Appellate Procedure. The rule has been amended to provide

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[69]425 N.E.2d 77 (Ind. 1981).

[70]*Id.* at 81.

[71]*Id.*

[72]*Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1979)).

[73]429 N.E.2d 967 (Ind. Ct. App. 1982). The author's law firm represented the appellant in *Tippecanoe*.

[74]*Id.* at 972 n.5.

[75]*Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-23, DR 7-106(B)(1) (1979)).

for a pre-appeal conference.[76] Paragraph four of the amended rule states the following:

> (4) If, without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party at the pre-appeal conference, or if an attorney is grossly unprepared to participate in the conference, or unreasonably refuses to stipulate relevant record or facts necessary for the appeal, the Court of Appeals may order one of the following:
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> (i) the payment by delinquent attorney or the party of the reasonable expense, including attorney fees and the cost of the transcript, to the aggrieved party;
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> (ii) take such other action as may be appropriate under the circumstances.[77]

The new rule thus places obvious responsibilities on the shoulders of appellate counsel, and it grants a great deal of discretion to the court of appeals in prescribing sanctions for the failure to meet those responsibilities.

B. Professional Liability

1. Malicious Prosecution.—An attorney's liability for malicious prosecution was addressed by the court of appeals in *Wong v. Tabor*.[78] Although the Indiana courts have recently restated the elements which are necessary to establish an action for malicious prosecution,[79] *Wong* represents the first discussion by an Indiana court of an action for malicious prosecution based upon an attorney's professional conduct.

In *Wong*, a physician, Wong, brought a malicious prosecution action against an attorney, Tabor, who had instituted a medical malpractice action against Wong on behalf of a client who had been severely injured during medical surgery. Tabor had filed the original action against the hospital, where the surgery was performed, and against

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[76]*In re* the Adoption of Rules of Appellate Procedure, Order of the Supreme Court of Indiana, June 23, 1982. The rule providing for a pre-appeal conference became effective on July 1, 1982. *Id.*

[77]*Id.*

[78]422 N.E.2d 1279 (Ind. Ct. App. 1981). For further discussion of this case, see Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 407 (1983).

[79]*See* Satz v. Koplow, 397 N.E.2d 1082 (Ind. Ct. App. 1979); Yerkes v. Washington Mfg. Co., 163 Ind. App. 692, 326 N.E.2d 629 (1975). These cases hold that a plaintiff has the burden of establishing the following elements in an action for malicious prosecution: (a) the defendant instituted, or caused to be instituted, a prosecution against the plaintiff; (b) the defendant acted maliciously in doing so; (c) the prosecution was initiated without probable cause; and (d) the prosecution terminated in plaintiff's favor.

a number of doctors, including Wong. Although Wong had diagnosed the client's problem and had referred her to the performing surgeon, he had not taken part in the surgery that had caused the client's injuries.[80]

During the malpractice litigation, Wong had applied to the trial court for summary judgment. Immediately prior to the hearing on the motion, one of Tabor's associates had advised Wong's attorney "that there would be no objection to the entry of summary judgment and to have the record merely reflect his presence at the hearing."[81] After the hearing, summary judgment on the medical malpractice claim was granted in Wong's favor.

In Wong's subsequent malicious prosecution action against Tabor, the jury awarded Wong $25,000 in damages. In his motion to correct errors, Tabor moved for judgment on the evidence. The trial court granted Tabor's motion, finding that the malpractice proceedings had not been terminated in plaintiff's favor, a favorable termination being a requisite element of an action for malicious prosecution, but had been terminated by agreement of the parties.[82]

On appeal, Wong argued that the trial court erred in setting the verdict aside because the malpractice action had been terminated in Wong's favor; conversely, Tabor argued that the court was correct in its ruling.[83] The court of appeals found that the trial court erred in determining that the malpractice action had been terminated by agreement.[84] The court stated that Tabor's associate's decision to forego the opportunity to contest Wong's motion for summary judgment did not constitute a compromise and settlement.[85] Nonetheless, the court affirmed the trial court's holding for Tabor, "since the evidence is insufficient to support a finding that Tabor lacked probable cause to initiate a suit against Wong."[86]

In addressing the issue of probable cause, the court initially noted that where the facts are uncontroverted, the question of probable cause is one of law to be decided by the court.[87] The court then proceeded to formulate a standard for determining whether there is prob-

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[80]Hospital records reveal that Wong's only involvement in the patient's hospital care was prescribing a laxative. 422 N.E.2d at 1282.

[81]422 N.E.2d at 1282.

[82]*Id.*

[83]Tabor was found to have preserved the following alternative arguments in his original motion to correct errors: (1) there was no evidence of lack of probable cause to bring suit against Wong; (2) no evidence as to malice was shown; (3) certain of the instructions were erroneously given; and (4) the damages were excessive.

[84]422 N.E.2d at 1282.

[85]*Id.* at 1285.

[86]*Id.* at 1282.

[87]*Id.* at 1285 (citing Miller v. Willis, 189 Ind. 664, 128 N.E. 831 (1920)).

able cause for an attorney's decision to bring suit on behalf of a client. The court began by emphasizing "that any standard of probable cause must insure that the attorney's 'duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit' is preserved."[88] The court elaborated by stating:

> While an attorney is under an ethical duty to avoid suit where its only purpose is to harass or injure, if a balance must be struck between the desire of an adversary to be free from unwarranted accusations and the need of a client for undivided loyalty, the client's interests must be paramount.[89]

After examining the competing viewpoints of various scholars and jurisdictions, the court adopted a two-level test for determining the existence of probable cause for instituting a lawsuit. First, an attorney must subjectively believe that a client's claim "merits litigation."[90] In addition, the attorney's belief must be reasonable under an objective standard described by the court as follows:

> We conclude that the objective standard which should govern the reasonableness of an attorney's action in instituting litigation for a client is whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when suit is commenced. The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit.[91]

Applying this new test to the facts at bar, the court found that Wong had failed to prove a lack of probable cause.[92] Based upon the facts available to Tabor prior to the initiation of the lawsuit and the limited time in which he had to prepare and investigate, Tabor was found to have had a reasonable belief that his client's claim was meritorious.[93]

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[88]*Id.* at 1286 (quoting Weaver v. Superior Court, 95 Cal. App. 3d 166, 180, 156 Cal. Rptr. 745, 752 (1979)).

[89]422 N.E.2d at 1286. As to an attorney's duty to avoid instituting unwarranted actions, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1979).

[90]422 N.E.2d at 1288.

[91]*Id.*

[92]*Id.* at 1289.

[93]*Id.* The court found that Tabor had only thirty days to file the action prior to the expiration of the applicable statute of limitations. Taking this time constraint into consideration, the court concluded that there was a reasonable basis for Tabor's belief that Wong had been involved in Tabor's client's surgery and that Wong had negligently referred Tabor's client to the performing surgeon. *Id.*

The court rejected Wong's argument that Tabor should incur liability for wrongfully continuing the action once he discovered, or should have discovered, that Wong did not take an active part in the hospitalization which injured Tabor's client. Although the court chose not to discuss the conduct necessary to trigger liability for wrongful continuation of a civil proceeding, the court discussed two considerations which should be reflected in any rule of liability.[94] First, the court noted that the harm associated with the wrongful continuation of a proceeding differs from the damages suffered through malicious prosecution. In the former, the two principal injuries arising from malicious prosecution, adverse publicity and expense of counsel, "have already occurred and are not a basis for recovering damages."[95] Second, the court observed that the rules of trial procedure have adequate provisions for securing the dismissal of unwarranted claims and that the disciplinary rules vest the Supreme Court Disciplinary Commission with the power to discipline an attorney who unethically initiates or continues litigation.

The court concluded that "the considerations upon which liability may be predicated for wrongfully continuing an action when there existed probable cause for its commencement are quite narrow."[96] Accordingly, the court refused to premise liability on Tabor's failure to dismiss his client's action against Wong.[97]

The ramifications of the *Wong* decision relate primarily to the subjective element of the probable cause test created by the court. While an attorney's subjective belief in the merit of a client's claim must be reasonable under an objective test, the belief need only be reasonable in light of the facts actually known by the attorney. The *Wong* court chose not to impose the "or should have known" standard often incorporated into objective tests. In addition, the court expressly rejected inadequate investigation as the basis for establishing a lack of probable cause, stating that "[w]hile we do not condone slack or shoddy preparation and investigation on an attorney's part in bringing suit, where there is *some factual basis* for bringing a claim, lack of probable cause cannot be based upon a negligent failure to investigate thoroughly."[98]

In establishing the minimal "some factual basis" test, the court obviously weighed the potentially detrimental effect of discouraging thorough investigation against the need to protect the accessibility of the courts, and determined the latter to be the more important consideration.

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[94]422 N.E.2d at 1289.
[95]*Id.* at 1290.
[96]*Id.*
[97]*Id.*
[98]*Id.* at 1289 (emphasis added).

2. Vicarious Liability for Punitive Damages.—Husted v. McCloud[99] represents one of the most important developments in the area of professional liability to occur in recent years. In *Husted*, the Indiana Court of Appeals upheld the trial court's award of punitive damages against a law partnership. This award was made on the basis of an individual partner's misconduct.

The law firm of Husted & Husted[100] was retained to represent the estate of which Herman McCloud was executor. Edgar Husted was found to have converted more than $18,000 from funds that had been advanced to McCloud to meet estate tax liabilities. Thereafter, Edgar entered into a plea agreement with the Montgomery County Prosecutor under which Edgar agreed to plea guilty to three counts of theft and one count of forgery involving three estates unrelated to the estate for which McCloud was executor. In return, the prosecutor agreed not to prosecute on charges arising from Edgar's disclosures of misconduct in any other estates. Edgar subsequently pleaded guilty to the four felony charges and was sentenced to prison. As a result of these previous actions, McCloud was forced to meet the estate tax liability with personal assets; thereafter, he filed an action against Edgar and the partnership of Husted & Husted seeking compensatory and punitive damages.

The court of appeals acknowledged the general rule that "punitive damages are not appropriate where the defendant is or may be subject to criminal prosecution for the same act;"[101] however, the court held that Edgar's plea agreement released him from criminal liability thereby exposing him to liability for punitive damages.[102] In finding that Edgar's conduct warranted an award of punitive damages, the court relied on the established principle that "[p]unitive or exemplary damages may be appropriate where there is a finding of fraud, malice, gross negligence, or malicious or oppressive conduct on the defendant's part."[103]

In upholding a punitive damage award against the partnership, the court relied entirely on the Indiana Uniform Partnership Act which governs partnerships.[104] One section of the Indiana Act states:

> [W]here, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is

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[99]436 N.E.2d 341 (Ind. Ct. App. 1982).

[100]The firm consisted of Edgar and Selwyn Husted.

[101]436 N.E.2d at 344 (citing Taber v. Hutson, 5 Ind. 322, 325-27 (1854); Moore v. Waitt, 157 Ind. App. 1, 7-8, 298 N.E.2d 456, 460 (1973)).

[102]436 N.E.2d at 345 (citing Smith v. Mills, 385 N.E.2d 1205 (Ind. Ct. App. 1979)).

[103]436 N.E.2d at 344 (citing Vaughn v. Peabody Coal Co., 375 N.E.2d 1159, 1163 (Ind. Ct. App. 1978)).

[104]*See* IND. CODE §§ 23-4-1-1 to -43 (1982).

> caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.[105]

The court found that a "penalty" had been imposed against Edgar Husted in the form of punitive damages. Consequently, "[t]he application of the statute is clear—the partnership is liable [for punitive damages] to the same extent as the partner."[106]

Another section of the Indiana Act also served as a basis for the court's decision. Section 23-4-1-14 provides that:

> The partnership is bound to make good the loss: (a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and (b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.[107]

Relying upon this code section, the court found that Edgar Husted's conversion of estate funds had occurred "within the ordinary course of partnership business" thereby subjecting the partnership to liability for punitive damages.[108] The court held that this liability attached regardless of a lack of knowledge on the part of the nonacting partner.[109] Furthermore, the court rejected the partnership's argument that there must be a specific finding that the public interest would be served by awarding punitive damages against the partnership.[110]

The *Husted* court's interpretation of the Indiana Act raises a number of questions. Clearly, the Indiana Act renders a partnership liable for any loss, injury, or penalty where a partner acts in the ordinary course of the business of the partnership or a partnership acts in the course of its business. However, the court found that Edgar Husted's act of criminally converting funds was performed within the ordinary course of that business, without discussing the nature of Husted & Husted's business.[111] Under the Indiana Act, a more

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[105] *Id.* at § 23-4-1-13.

[106] 436 N.E.2d at 347.

[107] IND. CODE § 23-4-1-14 (1982).

[108] 436 N.E.2d at 347. In this regard, the court also found the partnership to be liable for compensatory damages under Indiana Code section 23-4-1-14. 436 N.E.2d at 348.

[109] 436 N.E.2d at 347.

[110] *Id.*

[111] *Id.*

accurate description of Husted's conduct would be that it occurred while he was "acting within the scope of his apparent authority."[112]

Yet, even if the court properly found that Husted was acting within the scope of his apparent authority or in the ordinary course of the partnership's business, the use of either finding as a predicate for imposing punitive damages is extremely questionable. The Indiana Act states that the partnership is liable when, by the wrongful act or omission of a partner, "loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred."[113] The *Husted* court grasps the "any penalty" language as a basis for the imposition of punitive damages against the partnership.[114] However, this language clearly does not refer to a penalty incurred by a *partner* due to his wrongful act or omission, but to a penalty incurred by any person, *not a partner in the partnership.*

Similarly, section 23-4-1-14 cannot be interpreted so as to justify an award of punitive damages against a partnership. This section renders the partnership liable for a party's *loss*, if money is received and misapplied by a partner or partnership. Having found that Edgar Husted converted funds while acting with apparent authority and within the course of the partnership's business, the court relied on section 23-4-1-14 in holding that "the partnership is liable and bound to make good the damages," including *punitive* damages.[115] Obviously, section 23-4-1-14 mandates the partnership's obligation to contribute toward the funds which were misappropriated, or, in other words, "the loss." To find that punitive damages constitute part of "the loss" incurred by one whose funds are converted is contrary to Indiana's rationale for imposing punitive damages.

By establishing the proposition that an innocent, nonparticipating defendant may be held vicariously liable for punitive damages, the court of appeals has created a rule of law entirely inconsistent with current Indiana law. The *Husted* court itself recognized that "[p]unitive damages *are not intended to compensate the claimant*, but rather *are intended to punish the wrongdoer* and thereby deter others from engaging in similar conduct in the future."[116] Punishing one who neither participated in the misconduct nor had any knowledge of it cannot be reconciled with Indiana's well-established rationale for awarding punitive damages.

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[112]*See* IND. CODE § 23-4-1-14(a) (1982).

[113]*Id.* § 23-4-1-13.

[114]Holding that Edgar Husted had incurred "a penalty involving an award of punitive damages," the court held that the partnership was liable therefore to the same extent as the partner. 436 N.E.2d at 347.

[115]*Id.* (emphasis added).

[116]*Id.* at 344 (emphasis added) (citing Hoosier Ins. Co. v. Mancino, 419 N.E.2d 978 (Ind. Ct. App. 1981); Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980)).

Additional ramifications of *Husted* will be far-reaching. Incorporation by lawyers has traditionally failed to affect professional liability. However, it seems that incorporation would significantly weaken reliance upon Indiana's partnership laws as a basis for the imposition of punitive damages against a law firm.[117] It is puzzling why the court in *Husted* utilized a somewhat strained interpretation of the Indiana Act instead of deciding this case within the bounds of established legal malpractice and agency law. Finally, this decision conflicts with established legal principles in another respect. Although courts have refused to allow individuals to contractually avoid or assign liability for punitive damages,[118] *Husted* appears to stand for the proposition that one can contractually *subject* himself to liability for punitive damages via a partnership agreement.

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[117]*See* Indiana Admission and Discipline Rule 27(c) which states:

> Incorporation by two (2) or more lawyers associated in the practice shall not modify any law applicable to the relationship between the person or persons furnishing professional services and the person receiving such service, including, but not limited to, privileged communications which bind all associated, as well as the liability of each for all, arising out of the professional services offered by one (1) lawyer associated with others in the same corporation, as existed in a partnership for the practice of law.

IND. CODE. ANN. Title 34, app. Ind. R. Admiss. & Discp. 27(c) (West 1982).

[118]*See generally* Annot., 20 A.L.R.3d 335 (1968).