Recent Developments in Professional Responsibility

CORY BRUNDAGE*

I. INTRODUCTION

The United States Supreme Court, the Indiana Supreme Court and Court of Appeals, and the Indiana Legislature addressed professional responsibility issues during the survey period. This Article examines developments that are of significance to Indiana lawyers.

II. ATTORNEY TRUST ACCOUNT ACT

The Indiana Supreme Court took action twice during the survey period on a matter of significance to practically all practicing lawyers in the state — the Interest-Bearing Attorney Trust Accounts Act[1] (the "Act"). Previously, in 1983 and 1987, the Indiana State Bar Association and the Indiana Bar Foundation petitioned the court for approval of a program that would allow client funds that are presently held in lawyers' trust accounts without earning interest to be placed in accounts that would generate interest revenues dedicated to such purposes as legal services to the poor.[2] Under similar programs, adopted in all of the other forty-nine states and the District of Columbia,[3] the pooled funds are typically comprised of advances for costs and expenses, collections, and settlement proceeds in amounts too small or held for too short a time to justify the administrative expenses of tracking, accounting for, and paying the interest thereon to the client.[4] Under present law, attorneys must keep such funds separate from their own and make them available to the client on demand.[5] Historically, client's funds were held in non-interest bearing accounts because federal law forbade the payment of interest on accounts that were available on demand.[6] Congress lifted these constraints for individuals, certain charitable non-profit organizations, and certain public entities in 1980.[7]

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* Partner, Ice Miller Donadio & Ryan. B.S., Indiana University, 1969; J.D., Indiana University School of Law—Bloomington, 1972; LL.M., Harvard University, 1973.

1. IND. CODE §§ 33-20-1-1 to -9-2 (Supp. 1990).

2. *Delegates Act on Law Student Exams, Trust Account Plan*, 33 RES GESTAE 256, 257 (Dec. 1989) [hereinafter *Delegates*].

3. *In re* Indiana State Bar, 500 N.E.2d 311, 311 (Ind. 1990).

4. *Id.* at 313.

5. *Id.*

6. *Id.*

7. *Id.* at 314 (citing the Consumer Checking Account Equity Act of 1980, 12 U.S.C. § 226 (1988)).

Having failed twice to convince the supreme court to adopt such a program, the Bar Association House of Delegates, at its annual meeting in October 1989, voted to seek legislation approving such a program.[8] On January 18, 1990, the Indiana House of Representatives passed its version of the Act. While the Act was before the Senate in February 1990, the supreme court, characterizing the notice it received from the Bar Association of its intention to seek legislative action as a "petition," considered the issue a third time.[9] Once again, the court rejected such a program, saying that it was "in conflict with the duties, responsibilities and obligations of the legal profession and each lawyer member in this jurisdiction."[10] Noting the great weight of contrary precedent, the court felt compelled to explain its reasoning.[11]

First, the court explained that the program was in conflict with the legal principle that interest belongs to the one who owns the money, that is, the client.[12] Attorneys should not divert the interest on clients' money for their own use or anyone else's. "Indeed," the court stated, "commingling . . . funds is the source of the greatest number of disciplinary proceedings brought in this state."[13]

Further, an attorney's first and highest duty is to protect the rights and property of his or her client; therefore, although the program's goals to serve the public interest may be laudatory, "they must be secondary"[14] to the duty to the client. Lawyers may serve the public good by donating their own time, effort, and money, but to use paying clients' money to finance legal assistance to other indigent clients "is nothing more than a transfer of wealth among clients."[15]

The court also noted that the recent changes in federal law may make it possible for an attorney to hold trust funds collectively in an interest bearing account in the lawyer's name.[16] If so, and if not impractical with present technology, attorneys "may consider depositing such funds accordingly and including proportionate accrued interest with each remittance to the client."[17] Thus, virtually all non-interest bearing client accounts would be eliminated and the interest earned would properly reach the client.[18]

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8. *Delegates*, *supra* note 2, at 257.
9. *Indiana State Bar*, 550 N.E.2d at 316.
10. *Id.* at 311.
11. *Id.*
12. *Id.* at 312.
13. *Id.*
14. *Id.* at 313.
15. *Id.*
16. *Id.* at 314.
17. *Id.*
18. *Id.*

Interestingly, after reciting these arguments, the court disavowed them as the basis for its decision because the facts had not been made "sufficiently well known to us."[19] Instead, the court reasoned:

> [I]f there is a problem here regarding the manner in which banks operate as to lawyers' trust accounts, or any accounts, that problem may need to be addressed in some manner on its own merits. It does not justify this Court in using it as a reason to authorize the diversion of these funds to the not-for-profit organization suggested. It does not matter where, to whom, or for what purpose the funds would be diverted. The truth of the matter is that clients' funds would be diverted.[20]

Finally, the court noted that other state supreme courts had approved provisions that prospectively absolve attorneys from charges of ethical impropriety for exercising, in good faith, their discretion in putting a client's money into the program.[21] The court reacted strongly to such provisions:

> Lawyers must not be immune from disciplinary proceedings, especially when it comes to administering their clients' accounts. A lawyer's fiduciary duty to his client must be held in the highest regard and subject to strict scrutiny. To hold lawyers harmless when they handle so-called "nominal" funds or even greater funds held for a "short" period of time, is to give the members of the bar a free pass where none should exist. . . . It is the responsibility and the duty of this Court to set the rules for attorney discipline and see to it that they are applied in a just and evenhanded manner. Indiana lawyers deserve a clear mandate from this Court regarding the Rules of Professional Conduct. Therefore, in order to avoid any possible misunderstanding by the lawyers of this state, let there be no question that the . . . program currently promoted by the Indiana Bar Association violates our Rules for the Discipline of Attorneys and Rules of Professional Conduct.[22]

Over the dissent of Chief Justice Shepard, the State Bar Association's "petition" to authorize the program was denied. The Bar Association was not, however, content to abandon the cause.

Within four weeks after the Indiana Supreme Court's rejection of the proposal, a bill establishing such a program was passed by the

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19. *Id.*
20. *Id.* at 315.
21. *Id.*
22. *Id.*

Indiana Senate and was signed into law by the Governor.[23] The stage was set for a challenge to the constitutionality of such a legislatively imposed program to regulate the conduct of attorneys.

That challenge quickly materialized in the form of a test case decided on November 2, 1990, entitled *In re Public Law No. 154-1990 (H.E.A. 1044)*.[24] The petitioner was a practicing attorney acting on behalf of himself and all others similarly situated. The issue, the court said, was "whether a particular legislative enactment is valid notwithstanding a provision in the Constitution of Indiana that assigns to the judicial branch a subject matter central to the enactment."[25]

Forewarned of the court's view of provisions for immunity from disciplinary proceedings, the petitioner sought a declaratory judgment that the "immunity clause,"[26] shielding attorneys from disciplinary action for participation in the program, did not contravene article 3, section 1, of the Indiana Constitution which provides for the separation of powers among the legislative, executive, and judicial branches of government.[27] Article 7, section 4, provides further that the Supreme Court of Indiana has original jurisdiction over matters of attorney discipline.[28] Under this section, the supreme court had previously held that it is the exclusive province of the court to "regulate professional legal activity."[29]

The court found that by declaring absolute immunity from judicial disciplinary rules, the drafters of the Act clearly overstepped the boundaries of article 3, section 1.[30] In an obvious attempt to escape such a ruling, the drafters had included a provision that the program did not

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23. Attorney Trust Account Act, Pub. L. No. 154-1990 (H.E.A. 1044) (codified at IND. CODE § 33-20-1-1 to -9-2 (Supp. 1990)).

24. 561 N.E.2d 791 (Ind. 1990).

25. *Id.*

26. The clause provided: "An attorney is not subject to disciplinary action as a result of any action taken in accordance with this article." IND. CODE § 33-20-2-1 (1988).

27. *In re Public Law No. 154-1990*, 561 N.E.2d at 791-92. The court acknowledged that it was recognizing an "unconventional procedural process" in the resolution of the petition before it. *Id.* at 792. By separate order of June 20, 1990, the court ordered the establishment of the Indiana Attorney Trust Account Fund held in abeyance and invited any interested attorney to file a response in opposition to the petition for declaratory relief. *Id.* (The majority opinion recited that "several" responses were submitted, *id.* at 793, and Chief Justice Shepard, in his dissent, stated that "the resulting letters in opposition can be counted on one hand." *Id.* at 796.) After noting that the time for input had expired, the court stated that because the constitutionality of the immunity clause was solely a question of law, the presentation of factual evidence was not necessary and the issues were closed and ripe for adjudication. *Id.* at 792.

28. IND. CONST. art. 7, § 4.

29. *In re Public Law No. 154-1990*, 561 N.E.2d at 792 (quoting *In re* Mann, 270 Ind. 358, 361, 385 N.E.2d 1139, 1141 (1979)).

30. *Id.* at 793.

apply to any activity that was the practice of law and regulated by the judicial department of state government.[31] The court, however, was unwilling to accept that simple declaration as valid, stating that an attorney's duties and obligations with respect to clients' funds are, by both "existing standards and past enforcement," subject to judicial regulation.[32] Thus, "[t]he immunity provisions of the Attorney Trust Account Act clearly and literally attempt to limit the attorney disciplinary function of the judicial department."[33]

The court thus found the Act void in its entirety,[34] solely as a matter of state constitutional law.[35] Consistent with its statement made eight months earlier that it did not have sufficient facts before it to form an opinion on the merits of such programs,[36] the court did not foreclose the possibility of future consideration "of new factual matters supporting review of our prior disapproval" of such programs.[37] Accordingly, its holding was expressly limited to the proposition that attorney discipline is exclusively a matter for the court. Thus, Indiana may yet join the position of all other states on the issue of interest on attorneys' trust accounts.

III. Disciplinary Cases

A. Advertising

The United States Supreme Court delivered yet another opinion involving attorney advertising in June 1990. *Peel v. Illinois Attorney Registration and Disciplinary Commission*[38] involved an attorney who used a professional letterhead that carried the notations "Certified Civil Trial Specialist by the National Board of Trial Advocacy" and "Licensed: Illinois, Missouri, Arizona."[39] The National Board of Trial Advocacy (NBTA) "offers periodic certification to applicants who meet exacting standards of experience and competence in trial work."[40] The Commission claimed that Peel was holding himself out as a certified legal specialist in violation of the Code of Professional Responsibility. The Illinois Supreme Court agreed, concluding that the first amendment did not

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31. *Id.* (citing Ind. Code § 33-20-2-2 (1988)).
32. *Id.*
33. *Id.*
34. *Id.* at 794.
35. *Id.* at 792.
36. *Id.* (citing *Indiana State Bar*, 550 N.E.2d at 314).
37. *Id.* at 794.
38. 110 S. Ct. 2281 (1990).
39. *Id.* at 2292.
40. *Id.*

protect the right to make such representations on letterhead because the public could confuse the state and the NBTA as the sources of Peel's certification and his license to practice.[41] Further, the claim of certification could be interpreted as a representation of superior quality.[42]

The United States Supreme Court reversed and held that a "lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his . . . certification as a trial specialist by the NBTA."[43] The subject letterhead was neither actually nor inherently misleading because the facts stated were both true and verifiable. Further, there was no finding of actual deception or misunderstanding.[44] Thus, the state's interest in avoiding potential misunderstandings was insufficient to justify a categorical ban on the use of the letterhead, and the state supreme court's inherent authority to supervise its own bar did not insulate its judgment from review for constitutional infirmity by the United States Supreme Court.[45]

B. Judicial Discipline

Three cases of interest involving judicial discipline were reported during the survey period. The results varied in all three cases. Considered together, however, they may signal a more intense degree of supervision over the judiciary by the Indiana Supreme Court and a more severe level of sanctions imposed for violations.

In June of 1990, the court's opinion in *In re Boles*[46] was published. The court found that a circuit court judge violated numerous Canons of Judicial Conduct and engaged in judicial misconduct. By entering orders that he knew were contrary to law and carrying an ongoing political dispute with the county commissioners, the judge had engaged in willful misconduct in office, acted in a manner prejudicial to the administration of justice, and abused his powers so as to destroy the public's confidence in the integrity and impartiality of the judiciary.[47] The judge appeared to have been motivated by a "crusade to portray himself as a 'taxpayers' hero,"[48] and, in the process "became completely embroiled . . . and lost all semblance of impartiality, independence, dignity and distance from public clamor."[49]

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41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 2283.
45. *Id.*
46. 555 N.E.2d 1284 (Ind. 1990).
47. *Id.* at 1287-88.
48. *Id.* at 1288.
49. *Id.* The court stated that "[j]udges are certainly entitled to political views."

While weighing the appropriate sanctions, the court noted a mitigating factor; the charges did not involve allegations of dishonesty or criminal conduct. However, the court also exhaustively detailed the judge's other instances of past misconduct which had not resulted in sanctions.[50] This "aggravating information," was said to demonstrate that the type of misconduct before the court was "no mere aberration," and had actually gone on for years.[51]

Accordingly, the court said that, in approving an agreement for a sixty-day suspension without pay from the bench and the practice of law with automatic reinstatement, it was ordering the "highest sanction actually imposed by this Court in fifteen years."[52] Furthermore, but for the judge's public apology and the Commission's recommendation of the agreement, the court "would be inclined toward a stiffer penalty."[53]

Two months later, the supreme court decided *In re Hammond*,[54] in which a circuit court judge had engaged in misconduct both prior to taking the bench and as a sitting judge. The court held that her actions in drafting several wills while giving the impression that she was subject to influence by one of the beneficiaries was improper,[55] as was the exercise of a power of attorney for the beneficiary, a non-family member, after assuming the bench.[56]

In *Hammond*, the Indiana Supreme Court showed no reluctance to impose penalties that were even more severe than the penalties imposed in *Boles*. It approved an agreement requiring suspension from the bench and bar for ninety days without pay, with automatic reinstatement.[57] In addition, the judge was barred from seeking re-election.[58]

Interestingly, unlike the *Boles* decision, the court in *Hammond* spent no time weighing other "aggravating information."[59] Although it is unclear from the decision whether such information existed,[60] it is likely

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Id. at 1289. However, it appears they are not free to express them on all subjects. *See* Indiana Commission on Judicial Qualifications, *Advisory Opinion No. 2-90*, 34 RES GESTAE 86, 95 (Aug. 1990). "A judge or candidate for judge should not publicly express personal views on the abortion issue." *Id.*

50. *In re Boles*, 555 N.E.2d at 1289-90.

51. *Id.* at 1289.

52. *Id.* at 1285. The court noted that "[i]n the past a number of judges have chosen to resign in the face of charges brought by the Commission rather than run the risk of suspension or removal." *Id.*

53. *Id.*

54. 559 N.E.2d 310 (Ind. 1990).

55. *Id.* at 312.

56. *Id.*

57. *Id.* at 312-13.

58. *Id.*

59. *See supra* notes 50-51 and accompanying text.

60. The charges were more extensive than the agreed facts; therefore, it is likely the court could have considered other information.

that, given the prohibition against re-election, the court found such an inquiry unnecessary.

The third significant case concerning judicial discipline during the survey period was *In re Sauce*.[61] Sauce, a county court judge, was charged with violations of the Codes of Professional and Judicial Conduct for making ex parte contact with the judge presiding over a custody dispute involving Sauce's son. After obtaining an order granting himself custody, without notice to his ex-wife, Sauce became enraged when the wife's attorney had the order vacated.[62] He stated to his ex-wife's new husband:

> I will nut him for an *ex parte* communication. I will serve their nuts up like beef stew. Your lawyer won't get away with this because I will nut him too when this is over. I'm going to f. . . him up real bad if at all possible. I'm going to f. . . him up just like he's trying to f. . . up my kid.[63]

Sauce was charged with willful misconduct in office, conduct prejudicial to the administration of justice, and conduct bringing the judicial office into disrepute.

The court called it "highly unethical" that Sauce used his judicial position to gain an unfair advantage in a personal case.[64] Despite the implied level of condemnation, the court approved an agreement between Sauce and the Judicial Qualifications Commission, which required only a public reprimand and which foreclosed any further disciplinary action against Sauce as a lawyer or as a judge.[65]

While the *Boles* and *Sauce* cases are similar in that both respondents publicly apologized for their actions, a fact the court said was important, the cases also differ significantly. In *Boles*, the court noted that the judge was apparently motivated by a misdirected desire to serve the public good. Sauce, on the other hand, was acting out of self-interest and yet, received a lighter sanction. The Court suggested a reason for the seeming inconsistency when it noted that Sauce would not be re-elected to serve the next term, which began in sixty-seven days, and admitted that fact "played a role in [the] decision to accept only a public reprimand."[66] It also seems likely that the years of "aggravating information"[67] in *Boles* played some role in the differing results.

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61. 561 N.E.2d 751 (Ind. 1990).
62. *Id.* at 753.
63. *Id.*
64. *Id.*
65. *Id.* at 754.
66. *Id.*
67. *See supra* notes 50-51 and accompanying text.

C. Conflicts of Interest

In *In re Kern*,[68] the Supreme Court of Indiana provided some insight into the court's role in the disciplinary system in a case involving conflicts of interest. Attorney Kern had represented a chiropractor who was battling what he believed were conspiracies designed to interfere with the practice of chiropractic medicine. Eventually, a grand jury issued target subpoenas to the attorney and to an investigator hired by the chiropractor because of the investigator's questionable activities in obtaining documents and information from various public offices.[69] The subpoena was later withdrawn against the attorney; however, the investigator was charged with impersonating a public servant, conversion, and theft.[70]

The attorney entered his appearance for the investigator in the criminal prosecution. The prosecutor gave notice that the attorney would be a state's witness against the investigator and filed a motion to disqualify the attorney. The trial court denied the motion. The prosecutor next offered an advantageous plea bargain to the investigator if he would testify against the attorney and others. The offer was later improved to include full immunity. The investigator still refused. Once again, the prosecutor moved to disqualify the attorney, and once again the motion was denied. Subsequently, the attorney was released as a witness against the investigator.[71]

Ultimately, the investigator pled guilty to one charge and received a one-year suspended sentence and a $500 fine.[72] At the prosecutor's request, the investigator testified on the record that he consented to attorney Kern's representation.[73] The attorney was subsequently charged with a two-count disciplinary complaint alleging various violations of the Rules of Professional Conduct.[74] The appointed hearing officer[75] found that the attorney had violated Rule 1.7(b) which prohibits a lawyer from representing a client if the representation "may be materially limited by the lawyer's own interests, unless (1) the lawyer reasonably believes that representation of the client will not be adversely affected; and (2) the client consents after consultation."[76]

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68. 555 N.E.2d 479 (Ind. 1990).
69. *Id.* at 482.
70. *Id.*
71. *Id.*
72. *Id.* at 483.
73. *Id.*
74. *Id.* at 482.
75. The hearing officer was appointed according to Admission and Discipline Rule 23.
76. *In re Kern*, 555 N.E.2d at 483 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)).

The attorney petitioned the Indiana Supreme Court for a review of the findings.[77] The court noted that the review process employed in disciplinary cases is a *de novo* examination of all matters presented, which includes an examination of both the hearing officer's report and the entire record of the case,[78] including the Disciplinary Commission's brief.

The court prefaced its review by stating that the hearing officer's assessment of the evidence and her judgment in reconciling conflicting testimony carry "great weight"[79] and are entitled to deference. Accordingly, it noted the hearing officer's finding that the attorney's own interests in the outcome of the investigator's case were both real and evident from the time the criminal investigation began and continued throughout the proceedings.[80]

The attorney denied, however, that there was any conflict of interest in his continued representation even after the offer of immunity. He maintained that he communicated all offers and presented a vigorous defense. He claimed that since both he and the investigator knew that he had not directed the investigator's activities, he could have no direct interest in the investigator's case and thus there was no conflict with his interests.[81]

The court found the attorney's arguments unpersuasive, noting that he was always aware that he was a primary focus of the investigation and that the investigator could "walk away" from the criminal proceedings if he would implicate the attorney.[82] Clearly, the attorney's own interests were in direct conflict with those of his client, who was entitled to objective advice. The attorney's own subjective interpretation of the incident and his determination that a conflict did not exist only further displayed his "distorted perception of what was at stake."[83]

The attorney also argued that, if a conflict existed, the investigator waived it as permitted by Rule of Professional Conduct 1.7(b).[84] The court noted that the Comment following the Rule provides insight as to the effect of consultation and consent in conflict situations:

> It states that when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot provide representation

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77. *Id.* at 480.
78. *Id.*
79. *Id.*
80. *Id.* at 483.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

> on the basis of the client's consent. No disinterested lawyer could ethically conclude that . . . [the investigator] should be represented by the very person against whom the Prosecution was seeking information in exchange for . . . [the investigator's] immunity. Respondent's belief that his continued representation of . . . [the investigator] under these circumstances would not be affected by Respondent's own interests is patently unreasonable.[85]

The attorney maintained that because the trial court denied the prosecutor's attempts to disqualify him, he should not later be subjected to disciplinary review. The supreme court disagreed, however, stating that the discipline of an Indiana Bar member is determined independently from any other proceeding, and the trial court's failure to grant the motion to disqualify was not determinative of whether the attorney had breached the Rules of Professional Conduct.[86]

The court was unswayed by the fact that the investigator consented to the attorney's representation. Rather, it focused exclusively on the reasonableness of the attorney's belief that no conflict existed, and held that reasonableness must be judged within the context of the facts existing at the time the conduct occurred.[87] The fact that the investigator's and the attorney's interests were diametrically opposed during the representation convinced the court that the attorney was entirely unreasonable in his belief that the investigator's representation would not be adversely affected. Instead, the court found that such a belief was "telling evidence of the risk and poor judgment that can result from the loss of objectivity" which is "absolutely essential in the attorney-client relationship."[88]

Thus, the Indiana Supreme Court established in *Kern* that client consent is not enough to avoid a conflict of interest when the lawyer lacks a reasonable belief that his representation of the client will not be adversely affected. The test is an objective one. If a disinterested lawyer would conclude that a client should not agree to waive the conflict, the lawyer involved cannot go forward on the basis of consent.

In re Herbert[89] is another recent case that strongly suggests that the supreme court is becoming increasingly reluctant to excuse conflicts of interest on the basis of consent and waiver. In *Herbert*, disciplinary proceedings were brought against an attorney who prepared a will for a client that named the attorney as both personal representative and as

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85. *Id.* at 483-84.
86. *Id.* at 484.
87. *Id.*
88. *Id.*
89. 553 N.E.2d 130 (Ind. 1990).

the beneficiary of a substantial bequest. The attorney was charged with violating Rule 5-101(A) of the Code of Professional Responsibility.[90]

Rule 5-101(A) provided: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."[91]

Although the attorney had advised the client to seek independent counsel, he did not explain to the client that by including a bequest to himself in the will he prepared for her, the exercise of his independent professional judgment could be affected by his own interests.[92] The court stated that Rule 5-101(A) required this explanation and imposed a public reprimand.[93] The court further noted that Rule 1.8(c) of the Rules of Professional Conduct "clarifies any misconception as to the intent of this prohibition" and now provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."[94]

Rule 1.8(c) is, however, more than just a clarification of the old requirement of full disclosure. Its terms completely prohibit an attorney from preparing such an instrument. Full disclosure is no remedy for conflicts under the new rule. As the Comment to Rule 1.8 explains:

> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a Will or conveyance, however, the client should have the detached advice that another lawyer can provide.[95]

Thus, the new Rules appear to make less of an accommodation for waiver of, and consent to, conflicts of interest. The cases interpreting these Rules also reflect this change. As the court in *Herbert* stated: "The free exercise of independent professional judgment on behalf of a client is a cornerstone of any attorney-client relationship. The subtle

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90. *Id.* at 131. The Code of Professional Responsibility was superceded by the Rules of Professional Conduct on January 20, 1987.

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-101(A) (1983).

92. *In re Herbert*, 553 N.E.2d at 131.

93. *Id.*

94. *Id.*

95. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8 comment (West 1987).

pressures inherently present when a lawyer represents conflicting interests erode away the element of trust which must exist in such a relationship."[96]

In re Matz[97] involved conflicts of interest between clients as well as between the attorney and the client. In *Matz*, an inexperienced attorney had previously represented a client on two occasions; first, in acquiring complete ownership of a business and later, in protecting its trademark.[98] Upon settlement of the last matter, the attorney believed that he no longer represented the client. The client, however, believed to the contrary.

While the client was out of state, the attorney consulted with an employee of the business about forming a competing business. His subsequent investment in that competing business and conversations with other employees resulted in their defection from the client's company. Ultimately, in reliance on the attorney's unfavorable assessment of the client's business, the client sold it to the competing business established by the attorney. He believed the attorney still represented him at the time.[99]

The court found misconduct, and approved an agreed sanction of public reprimand, citing the attorney's inexperience as a mitigating circumstance.[100] The court said that the attorney's conduct brought into question his "understanding of the duties and responsibilities incumbent upon an attorney representing the interests of another."[101] Although the *Matz* decision did not expressly address the pitfalls involved in terminating representation, it is clear that the attorney's belief about whether the attorney-client relationship exists is not determinative.

The Rules of Professional Conduct do not clearly provide what constitutes the formation or the termination of the attorney-client relationship. Instead, the Rules primarily address the duties that arise while the relationship is in existence. The preamble to the Rules states that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."[102] Thus, the authors of the Rules deferred to the courts to establish on a case-by-case basis when the relationship exists because "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."[103]

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96. *In re Herbert*, 553 N.E.2d at 131.
97. 560 N.E.2d 66 (Ind. 1990).
98. *Id.* at 67.
99. *Id.*
100. *Id.*
101. *Id.*
102. INDIANA RULES OF PROFESSIONAL CONDUCT preamble (West 1990).
103. *Id.* The preamble further states that there are "some duties," such as con-

Thus, it is necessary to look to case law, rather than the Rules, to determine whether the relationship and its concomitant duties exist. In Indiana, it is clear that the existence of the attorney-client relationship does not depend on the existence of a written contract.[104] In *Newman v. Kizer*,[105] the Indiana Supreme Court held that although only one of two plaintiffs actually contracted for the services of an attorney, an attorney-client relationship was also created with the plaintiff who did not expressly contract because he "freely recognized and treated the attorney as his representative throughout the entire proceedings."[106] Thus, the absence of a written contract does not preclude the creation of an attorney-client relationship if the putative client regards the attorney as his representative throughout the subject transaction.[107] Obviously, the inquiry is entirely fact-sensitive, and unless the attorney acted conclusively to make a record that he did not represent someone, he will be at the mercy of the "client's" testimony.[108]

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fidentiality under Rule 1.6, that "may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established." Westinghouse Elec. Corp. v. Kerr-McGee, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (mere consultation was sufficient to create a fiduciary relationship requiring confidentiality if the purpose of the client's approach was to seek legal advice from the attorney in his professional capacity).

104. Newman v. Kizer, 128 Ind. 258, 260, 26 N.E. 1006, 1007 (1891). A minority of jurisdictions require an express contract in order to create an attorney-client relationship. *See* Keller v. LeBlanc, 368 So. 2d 193 (La. Ct. App. 1979). And, one jurisdiction, while stating that the contract may be express or implied, held that a retainer, an offer to retain, or a fee paid is required in order to create an attorney-client relationship. *See* Zych v. Jones, 84 Ill. App. 3d 647, 406 N.E.2d 70 (1980). An attorney may also have a duty to a third party beneficiary of a contract for legal services. A third party beneficiary contract arises when "two parties enter an agreement with the intent to confer a direct benefit on a third party, allowing the third party to sue on the contract despite the lack of privity." Hermann v. Frey, 537 N.E.2d 529, 530 (Ind. Ct. App. 1989) (citing Flaherty v. Weinberg, 303 Md. 166, 492 A.2d 618, 622 (1984)). In *Hermann*, a sole beneficiary of an estate recovered against an attorney appointed to represent the estate. The other situations in which courts are most likely to impose liability, regardless of an attorney-client relationship, are will drafting and title examination. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CA. W.L. REV. 209, 215 (1986).

105. 128 Ind. 258, 26 N.E. 1006 (1891).

106. *Id.* at 260, 26 N.E. at 1007.

107. The supreme court has also ruled that the attorney-client relationship may exist if an attorney "minister[s] to the legal problems of another." *In re* Perello, 270 Ind. 390, 398, 386 N.E.2d 174, 179 (1979). In *Perello*, an attorney was held in contempt for continuing to practice law in violation of a suspension by the Supreme Court Disciplinary Commission. The Court stated that the "[u]ndertaking to minister to the legal problems of another creates an attorney-client relationship without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another." *Id.* It should be noted that the *Perello* court may not have intended its definition of the attorney-client relationship to apply in all situations. The court was dealing with a difficult disciplinary problem and its primary holding was that the act of delegating legal work to another constituted the "practice of law." *Id.*

108. *See* Board of Overseers of Bar v. Dineen, 500 A.2d 262 (Me. 1985), *cert.*

If the person claiming to be a client subjectively believes that he consulted the attorney in a professional capacity and is at all credible, a court is likely to find that the attorney entered into an attorney-client relationship.[109] At the least, a duty of confidentiality under Rule of Professional Conduct 1.6 may arise, which will in turn prohibit the attorney from acting in an adverse capacity.

Although the attorney's inexperience may have been a mitigating factor in *Matz*, it is the client's inexperience that may cause a court to conclude that the client's subjective belief that an attorney-client relationship existed was justified. Under such circumstances, even disclosure that the attorney represents another party in the case or transaction may not prohibit the existence of the relationship.[110]

Judging by the sanctions imposed by the Indiana Supreme Court in *In re Sabato*,[111] inexperience was not a plea the attorney could have made in defense of his actions in representing the interests of several clients in the same transactions. Indeed, the complicated nature of the various real estate sales, corporate entity formations, financing plan structuring, partnership dissolutions, settlement negotiations, and, ultimately, claims against his own former clients over a transaction in which he had represented those same clients, led the court to conclude that the attorney intentionally damaged his clients.[112]

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denied, 476 U.S. 1141 (1986). In *Dineen*, an attorney was suspended for six months for representing both parties to a divorce proceeding. He maintained he did not represent the wife, but testified that he did not take any steps to prevent her from believing that he did because he did not think it was necessary. The wife had a serious problem with alcohol abuse and while the attorney had made some statements that might have given rise to doubts about whom he represented, she did not grasp or understand his mild disclaimers.

109. On April 30, 1991, after the end of the time period covered by this Article, the Court of Appeals for the First District delivered its opinion in Hacker v. Holland, 570 N.E.2d 951, 955 (Ind. App. 1991), wherein the court held: "A would-be client's unilateral belief cannot create an attorney-client relationship." Thus, the court, at long last, moved to a more objective standard of proof on the issue. The court stated that because the relationship is necessarily a consensual one, the putative client must demonstrate that "both attorney and client have consented to its formation." *Id.* Publishing schedules do not allow for further elaboration on this decision; however, it is commended to the reader's attention.

110. *See In re* Petrie, 154 Ariz. 295, 299-300, 742 P.2d 796, 800 (1987); *In re* Irons, 684 P.2d 332, 339 (Kan. 1984). A "client's" age, coupled with a lack of experience with the legal system, are factors that may persuade a court that an attorney-client relationship existed. *Irons*, 684 P.2d at 340. According to the recent Indiana case of Hacker v. Holland, 570 N.E.2d 951, if the attorney has issued a written disclaimer, either separately or incorporated into the documents evidencing the subject transaction, which states that he is acting "solely" on behalf of a specific party's interests *and* advising all others to seek independent legal counsel to protect their own interests, the issue of whether the attorney-client relationship existed with those others will be conclusively foreclosed. *Id.* at 956.

111. 560 N.E.2d 62 (Ind. 1990).

112. *Id.* at 65.

Calling the matter a "total financial disaster," the court noted that all of the individuals who relied on the attorney were harmed.[113] The financial outcome of the transaction was not, however, the test the court used to measure ethical standards.[114] Noting that it was possible that economic factors could have produced the same result even if all parties had independent representation, or that in a different financial atmosphere all may have benefited, the court stated that the issue of ethical representation was not simply a question of damages.[115]

> Where there are conflicting interests, each party possessing a unique stake in the outcome of a transaction deserves independent professional representation. As displayed in this case, this cannot be accomplished merely by identifying a common purpose and then working toward such objective. Each party deserves individual advice not tempered by general advice for the good of all.[116]

Clients must have confidence that their attorney works only for them in order to assure faith in the legal profession. Client confidence, said the court, "is the essence of the rules and . . . the failure of the Respondent."[117] Accordingly, the attorney was suspended from practice for six months.[118] Although *Sabato* is an extreme example of potential ethical violations inherent in representing clients with conflicting interests, it should be noted that some, although certainly not all, of the conflicts involved in that case could have been avoided by making full disclosure and obtaining consent, as is permitted in some circumstances by the Rules of Professional Conduct.[119] The *Kern* decision serves as a reminder, however, that disclosure and consent are not panaceas for all the ills conflicts can create.[120]

D. Disclosure and Candor to Tribunals, Dishonesty, Deceit, and Misrepresentation

In re Steininger[121] concerned an attorney charged with engaging in conduct involving moral turpitude, dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice, and

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113. *Id.*
114. *Id.*
115. *Id.* at 65-66.
116. *Id.* at 65.
117. *Id.* at 66.
118. *Id.*
119. *See supra* note 76 and accompanying text.
120. *Kern*, 560 N.E.2d at 66.
121. 546 N.E.2d 823 (Ind. 1989).

conduct adversely reflecting on the attorney's fitness to practice law.[122] The attorney purchased some real property. Before recording the deed, he had the legal description, which had been prepared by the seller's attorney, altered without the seller's knowledge or approval. Later, after realizing that the recorded description was incorrect, the attorney, again without the consent of the seller, obtained the recorded deed, detached the legal description as filed, reattached the legal description originally prepared by the seller's attorney, and re-recorded the deed.

The Disciplinary Commission disagreed with the hearing officer's recommendation for a private reprimand and maintained that the character of an act involving the alteration of a recorded document suggested dishonesty and justified more severe sanctions.[123] The court disagreed and noted that both parties benefited by the attorney's actions, and the alteration did not appear to be motivated by evil design.[124] Even though the attorney was "wrong" in taking a "short-cut," his act was not found to "rise to the level which warrants a severe sanction."[125] Accordingly, the court held that a public reprimand and admonishment were sufficient.[126]

The supreme court's leniency in *Steininger* is interesting in light of its decision two months earlier in *In re Crapo*.[127] In *Crapo*, the attorney was also charged with altering a document, although his actions involved forgery and false notification.[128]

The attorney had filed a petition to modify visitation and support in a Marion County Superior Court. He represented that the petition was signed by his client and notarized by himself. In fact, the client had not signed the petition. Although he had reviewed and approved it, the client had left the attorney's office on the day of filing without remembering to sign the document. The client could not be reached by telephone. Wishing to expedite the contemplated proceeding, the attorney forged the client's signature and fraudulently represented that he, as a Notary Public, had witnessed the signing.[129]

The supreme court concluded that the attorney committed a criminal act which reflected adversely on his honesty, trustworthiness, and fitness as a lawyer because he engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation.[130] Noting that the attorney's acts of forgery

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122. *Id.* at 823-24.
123. *Id.* at 824.
124. *Id.*
125. *Id.*
126. *Id.*
127. 542 N.E.2d 1334 (Ind. 1989).
128. *Id.* at 1334-35.
129. *Id.*
130. *Id.* at 1335.

and false notarization warranted "severe scrutiny," the court approved an agreement between the Disciplinary Commission and the attorney for a ninety-day suspension with automatic reinstatement.[131] When contrasted with the *Steininger* sanctions, *Crapo* arguably provides an incentive to avoid such agreements in cases involving similar facts.

Of course, if an agreement is rejected as an alternative, the question of sanctions is left entirely to the court. Some insight into the supreme court's method of analysis in evaluating and assessing appropriate sanctions was provided in a disciplinary case decided in July 1990 and discussed below. A review of that case and its predecessors helps somewhat in an attempt to understand how seemingly similar factual circumstances, as in *Steininger* and *Crapo*, can result in sanctions of significantly different degrees of severity.

E. Misappropriation of Funds

In re Glanzman[132] involved an attorney who kept cashing social security checks erroneously paid to his deceased mother well after her death. In total, he received and spent for his own use $13,784.00 in benefits. After he was charged with a crime, but before he successfully plea bargained the charge down to converting $100.00 belonging to the government, he repaid the full amount.[133]

The assessment of the appropriate sanctions, the court said, involved: "an examination of the nature of the incident, the specific acts of the respondent, the impact on the public, [the] court's responsibility to preserve the integrity of the Bar, and the risk to which the public will be subjected if the respondent is permitted to continue in the profession."[134]

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131. *Id.*

132. 555 N.E.2d 1295 (Ind. 1990).

133. *Id.*

134. *Id.* at 1296. This same basic list of factors has been repeated by the court over the last several years, with occasional modifications or deletions of no apparent significance. For example, of the three cases cited by the court in *Glanzman* in support of the proposition that the appropriate analysis involves the factors recited in the text above, *In re* Olsen, 547 N.E.2d 849 (Ind. 1989); *In re* Hampton, 533 N.E.2d 122 (Ind. 1989), and *In re* Moerlein, 520 N.E.2d 1275 (Ind. 1988), the *Olsen* case completely deleted the factor of "the impact on the public." *See Olsen*, 547 N.E.2d 849, 850. Because that factor was resurrected by the court in *Glanzman*, apparently no significance should be attributed to its absence from *Olsen*. Other cases reciting the relevant factors, with minor variations, are *In re* Briggs, 502 N.E.2d 890 (Ind. 1987); *In re* Stanton, 492 N.E.2d 1056 (Ind. 1986); *In re* Duffey, 482 N.E.2d 1137 (Ind. 1985); *In re* Hailey, 473 N.E.2d 616 (Ind. 1985); *In re* Ewers, 467 N.E.2d 1184 (Ind. 1984); *In re* Aungst, 467 N.E.2d 698 (Ind. 1984).

Applying that analysis, the court found the attorney's actions to be "abhorrent" and noted that if he had been convicted of converting the full amount, he could have been sentenced to up to ten years in prison.[135] After noting that it would be "a travesty to tolerate the entrustment of private legal interests to a person who has so grossly abused the public,"[136] the court imposed the strongest sanction available and disbarred the offending attorney.[137]

IV. Rule 11 and Frivolous Claims

When the United States Supreme Court delivered its opinion in *Cooter & Gell v. Hartmax Corp.*[138] in June 1990, it put further bite into Rule 11 of the Federal Rules of Civil Procedure.[139] The defendants in *Cooter* had moved to dismiss the underlying complaint and for Rule 11 sanctions.[140] The plaintiffs subsequently filed a notice of voluntary dismissal of the complaint under Rule 41(a)(1)(i).[141] Nonetheless, the trial court held that the plaintiffs' prefiling inquiries were grossly inadequate and imposed monetary sanctions on the attorneys and their client.[142] The Supreme Court affirmed and held that a voluntary dismissal of an ill-advised complaint does not divest a trial court of jurisdiction over a Rule 11 motion.[143]

The Indiana Court of Appeals in *Duke v. Wynne*[144] expanded on two previous decisions, *Kahn v. Cundiff*[145] and *General Collections, Inc. v. Decker*,[146] which construed Indiana's Frivolous Claim Statute.[147] The court noted that ordinarily an appeal of an award or denial of fees under the statute presents mixed questions of law and fact.[148] Accordingly, a trial court's factual findings are reviewed under the clearly erroneous standard while its legal conclusions are reviewed *de novo*.[149]

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135. *Glanzman*, 555 N.E.2d at 1296.
136. *Id.*
137. *Id.*
138. 110 S. Ct. 2447 (1990).
139. The Court specifically noted that Rule 11, which provides that an attorney's signature on a pleading constitutes a certificate that he has read the pleading and believes it to be well grounded in fact and in law, also provides that the Court "shall" impose appropriate sanctions for violations. *Id.* at 2449 (citing Fed. Rule Civ. P. 11).
140. *Id.* at 2452.
141. *Id.*
142. *Id.* at 2452-53.
143. *Id.* at 2455.
144. 552 N.E.2d 504 (Ind. Ct. App. 1990).
145. 543 N.E.2d 627 (Ind. 1989).
146. 545 N.E.2d 18 (Ind. Ct. App. 1989).
147. Ind. Code § 34-1-32-1 (1988).
148. *Duke*, 552 N.E.2d at 505.
149. *Id.*

Unlike *Kahn* and *General Collections*, however, the court noted that the case before it did not require factual analysis of the attorney's actions during the development of the case.[150] Rather, the actions that warranted sanctions were matters revealed in the record or which depended upon the development of case law as the case was unfolding.[151] Because it was clear from the record that the attorney was informed by the trial judge of a new case directly contrary to his position, but continued to advocate a contrary theory all the way through appeal with no attempt to distinguish the contrary precedent, the court of appeals imposed sanctions.[152] The attorney was not able to make a good faith, rational argument for an extension, modification, or reversal of existing law and continued to litigate the point after the claim became frivolous.[153]

Although the attorney had argued for an extension of the law, the court said that not all arguments can be made in good faith when recent case law, directly on point, forecloses such an extension.[154] This conclusion was underscored by the attorney's failure to cite or attempt to distinguish the contrary case on appeal.[155]

V. Professional Liability

A. Attorneys' Rights to Fees

Judge Buchanan of the Second District Court of Appeals authored two opinions in April and May of 1990 which, when coupled with a November 1990 decision by Judge Robertson of the First District, greatly clarify the somewhat murky state of the law on an attorney's rights and responsibilities in the payment of fees. In *Community State Bank Royal Center v. O'Neill*,[156] the court held that when an attorney is employed pursuant to an oral employment contract, the statute of limitations in an action for fees earned does not start to run with the conclusion of the matter the attorney was employed to handle, but rather begins to run when the attorney submits the first bill. Although the applicable statute, Indiana Code section 34-1-2-1.5, provides that an action must be brought within two years of the date of "the act or omission complained of," the court found that the act the attorney

150. *Id.*
151. *Id.* at 505-06.
152. *Id.* at 506.
153. *Id.* at 507.
154. *Id.*
155. *Id.*
156. 553 N.E.2d 174 (Ind. Ct. App. 1990).

complained of was the failure of the client to pay the bill.[157] Because payment was not due until demand was made, no breach occurred until the bill was submitted and the client refused to pay. Thus, even though the attorney's claim for payment was not filed for more than two years after the last services were rendered, it was still timely because it occurred less than two years after the client had refused to pay.[158]

The court also found that an award of prejudgment interest was proper even though the client disputed the amount of fees and the trial court did not agree with the attorney on the hourly rate he claimed.[159] The client contended that because it contested the value of the services, the amount owed was not ascertainable in accordance with fixed rules of evidence and known standards of value; thus, prejudgment interest was not recoverable.[160] Also weighing against an award of prejudgment interest was the fact that the trial judge applied a lower hourly rate to the work than that claimed by the attorney.

The court of appeals found that neither of these facts was an obstacle to an award of prejudgment interest. The test, it stated, was not whether the parties have mutually fixed the amount in dispute, but rather "whether the principle amount is ascertainable by mere computation."[161] Because the attorney's evidence of the number of hours he spent on the client's matter was not disputed, the trial court's disagreement about an appropriate rate and the client's disagreement with the value of the services did not alter the fact that the damages were ascertainable by computation.[162] Furthermore, the court noted that the trial court's determination of fees was guided by fixed rules of evidence and known standards of value because Rule 1.5(a) of the Rules of Professional Conduct establishes the guidelines for determining an appropriate award of attorney's fees.[163] Rule 1.5(a) provides:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> 1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> 2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

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157. *Id.* at 177 (citing IND. CODE § 34-1-2-1.5 (1988)).
158. *Id.*
159. *Id.* at 177-78. The attorney claimed $45,000 in fees for 288 hours of work.
160. *Id.*
161. *Id.* at 177.
162. *Id.* at 177-78.
163. *Id.* at 178.

3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.[164]

The court noted that the attorney had explicitly relied upon this rule and presented evidence on each factor.[165] Thus, the damages awarded were ascertainable by computation in accordance with fixed rules of evidence and known standards of value; therefore, prejudgment interest was appropriate.[166] The client prevailed, however, on its objection that the interest should not be calculated from the date of the last service rendered, which was eight months prior to the receipt of the attorney's first bill. Because payment was not due until it was demanded, the court held that prejudgment interest should not begin to run until that date.[167]

Less than a month after *O'Neill*, Judge Buchanan wrote the opinion in *Bennett v. NSR, Inc.*,[168] which clarified other issues arising when an attorney is engaged in a fee dispute with a client. Attorney Bennett had previously represented NSR but had not been paid. In a previous action, Bennett had brought suit for his fee.[169] In the action on appeal, NSR sought from Bennett the return of documents and records entrusted to him which NSR needed in litigation with a third party. The trial court in the latter action had issued a subpoena duces tecum to Bennett for the production of the documents and Bennett resisted, responding first with a motion to modify the subpoena and asserting an attorney's retaining lien over the documents and later with a motion to quash the subpoena.[170] Both motions were denied.[171]

On appeal, NSR argued that if such a lien existed, it should be limited to the lawyer's work product alone and not apply to the documents and records of the client.[172] The court of appeals disagreed and concluded

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164. *Id.* (citing RULES OF PROFESSIONAL CONDUCT RULE 1.5(a)).
165. *Id.*
166. *Id.*
167. *Id.*
168. 553 N.E.2d 881 (Ind. Ct. App. 1990).
169. *Id.* at 881.
170. *Id.* at 882.
171. *Id.*
172. *Id.* at 882-83.

that the attorney should not be required to return any of the documents and records subject to this retaining lien unless he was given security for the value of his lien.[173] The court minimized the significance of its conclusion, even as it acknowledged that it was unprecedented in Indiana law, by stating that in recognizing such a lien "lawyers are merely afforded the same advantage enjoyed by workmen who labor on behalf of others."[174]

Actually, prior law was less than clear concerning when and to what extent a civil attorney may refuse to return an ex-client's property when confronted with a subpoena. The Indiana Supreme Court had held in *Shannon v. Hendricks Circuit Court*[175] that an attorney had a right to retain his fees out of the monies he had received as his client's share of a property settlement, which had been recovered by his aid and through his efforts as her attorney.[176] The court suggested in dictum that an attorney also has a right to retain a client's documents or other property that comes into the attorney's possession professionally until he is paid for his services.[177] While citing *Shannon*, the court of appeals in *Bennett* acknowledged that Indiana had not previously decided whether an attorney could quash or modify a subpoena duces tecum arising out of litigation between the client and a third party because of a retaining lien held on the subject matter of the subpoena.[178]

The court distinguished the case of *McKim v. State*[179] in *Bennett* on the grounds that it was a criminal case and "wholly inopposite."[180] The more important distinction, however, seems to be that the attorney in *McKim* did not assert a lien. There, the attorney was appointed to defend McKim, which he did, through appeal to the supreme court, which McKim lost. Upon losing, McKim wrote the attorney to inform him of his intention to sue him for malpractice and demanded all documents pertaining to his case. The attorney agreed to provide them only on the condition that McKim pay in advance for the copying costs. McKim then sought a court order compelling their production and claimed he needed the documents in order to institute post-conviction proceedings.[181] The trial court found for the attorney and McKim appealed.[182]

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173. *Id.* at 882.
174. *Id.*
175. 243 Ind. 134, 183 N.E.2d 331 (1962).
176. *Id.* at 139, 183 N.E.2d at 333.
177. *Id.*
178. *Bennett*, 553 N.E.2d at 882 (citing *Shannon*, 243 Ind. 134, 183 N.E.2d 331 (1962)).
179. 528 N.E.2d 484 (Ind. Ct. App. 1988).
180. *Bennett*, 553 N.E.2d at 883.
181. *McKim*, 528 N.E.2d at 485.
182. *Id.*

McKim's motion was filed pursuant to Indiana Code section 34-1-60-10 that provides:

> When an attorney, on request, refuses to deliver over money or papers to a person from whom or for whom he has received them, in the course of his professional employment, whether in an action or not, he may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if no action was prosecuted, then by the order of any court of record, to do so, within a specified time, or show cause why he should not be punished for contempt.[183]

The court of appeals found that the granting of such a motion was "not discretionary" with the trial court.[184] Upon motion, it stated, "[T]he trial court shall require an attorney to deliver all papers . . . to which the client is entitled."[185] The court found no condition of prepayment in the statute.[186] The trial court has discretion to determine which of the many papers an attorney accumulates during the course of a case must be turned over to the client.[187]

Thus, *Shannon* arguably gave attorneys the right to retaining liens; however, *McKim*, which involved no lien, established the client's right to his documents pursuant to a statute that makes no exceptions for liens. Until *Bennett*, no case had attempted to balance lien rights against a subpoena duces tecum issued to protect the client's right to litigate with a third party.

Other jurisdictions have differed on the issue, and the Rules of Professional Conduct provide little, if any, specific guidance. Rule 1.16(d) merely states:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client *to the extent permitted by other law.*[188]

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183. *Id.* (citing IND. CODE § 34-1-60-10 (1988)).
184. *Id.* at 486.
185. *Id.*
186. *Id.*
187. *Id.*
188. RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (West 1986) (emphasis added).

Until *Bennett*, no "other law" existed in Indiana to enable a lawyer to precisely define his rights when confronted by a subpoena duces tecum. Indeed, other states have found the assertion of retaining liens to be "unethical and illegal."[189] The *Bennett* opinion, however, glossed over the contrary precedents and, with an interesting bit of slight of hand, noted that the Indiana Supreme Court has "exclusive jurisdiction of discipline of members of the bar . . . and until it sees fit to change the existing law on the subject, the retaining lien stands."[190] Since *Bennett* was unprecedented in Indiana, *it* is the existing law on the subject. The fact that a court of appeals decision is binding precedent unless reversed by the supreme court does not necessarily demonstrate that a reasoned basis exists for a decision that elevates the right of an attorney to payment over the right of an ex-client to the return of the client's own property, which is needed to wage other litigation successfully.

In fact, there are significant differences between "workmen who labor on behalf of others" and attorneys. The most obvious and perhaps most significant one is that attorneys are in a fiduciary relationship with their clients. They must occupy a position of trust and confidence to function effectively and, it is precisely that trust which allows attorneys to come into possession of their client's property.

The justification for *Bennett* may lie in its balancing of interests between attorney and client. Attorneys may now assert the right to retain "documents, money, or other property which comes into [their] hands . . . professionally" until their fees are paid or until they are given security for the value of their lien.[191] Allowing the client to obtain the property if he or she posts security may somewhat diminish the coercive effect of the lien; however, it is a compromise that reflects the sensitive nature of the relationship which allowed the attorney to come into possession of the property. The client is allowed to regain his or her property and the attorney is given assurance that he or she will be paid if a judgment is obtained.

Thus, *Bennett* clears the way for attorneys to take more aggressive action to collect their fees. Following the Rules of Professional Conduct, an attorney may now know to what extent retention of clients' documents is permitted "by other law."[192] There are, however, other dangers to avoid. Once the ex-client has posted security, the attorney must still pursue a judgment. Perhaps the most predictable response from an ex-client who has refused to pay an attorney's bill is a counterclaim for malpractice seeking damages equal to or in excess of the fee.

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189. *Bennett*, 553 N.E.2d at 884.
190. *Id.*
191. *Id.* at 882.
192. *See supra* note 187 and accompanying text.

The third case in the recent trilogy throws some light on the type of action a discharged attorney seeking compensation may pursue. In *Estate of Forrester v. Dawalt*,[193] the attorney had been retained to handle an estate. He entered into an oral contract with the personal representative whereby he was paid $15,000.00 in advance as a fixed fee for his services. After performing less than thirty hours of service, the attorney was discharged without cause.

The trial court awarded the attorney the full value of the contract.[194] The estate appealed, arguing that the attorney was only entitled to the reasonable value of his services actually rendered under a theory of *quantum meruit*. The Court of Appeals agreed and reversed and remanded for a hearing concerning the value of the attorney's services actually rendered.[195] The court quoted Rule of Professional Conduct 1.16(d) and its official comment:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . *refunding any advance payment of fee that has been earned.* (Emphasis added)

> A pertinent part of the official commentary to the above rule reads as follows:

> A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.[196]

The court agreed with authority from other jurisdictions[197] which posited that "the elements of trust and confidence endemic in an attorney-client relationship add a dimension to the attorney employment agreement beyond the express terms of the contract."[198] Accordingly, contract rights must yield to the court's inherent and statutory power to regulate the practice of law, including the charging of fees.[199] Non-refundable retainers, said the court, can "impose a chilling effect" upon a client's unfettered right to freely discharge an attorney, and may operate to

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193. 562 N.E.2d 1315 (Ind. Ct. App. 1990).

194. *Id.* at 1316.

195. *Id.* at 1318.

196. *Id.* at 1316 (quoting RULES OF PROFESSIONAL CONDUCT RULE 1.16(d) and comment).

197. Jacobson v. Sassoner, 122 Misc. 2d 863, 474 N.Y.S.2d 167 (1983); Fox & Associates Co., L.P.A. v. Pordon, 44 Ohio St. 3d 69, 541 N.E.2d 448 (1989).

198. *Estate of Forrester*, 562 N.E.2d at 1316-17.

199. *Id.* at 1317.

hold the client "hostage" to the attorney despite a loss of trust or confidence.[200] Therefore, when an attorney is discharged, "with or without cause," his remedy is limited to the value of his services before discharge on the basis of *quantum meruit*.[201]

The attorney involved in *Estate of Forrester* obviously faced some difficulty on remand because, as the court noted, he had kept no time records due to the fixed fee arrangement.[202] The lesson for Indiana lawyers is clear. Even if employment is by fixed fee, careful records should be kept in anticipation of the necessity of having to prove the value of services actually rendered.

B. Statute of Limitations for Malpractice Based on Constructive Fraud

Despite the fact that the court of appeals stated in a June 1990 citation[203] that transfer has been denied in the 1989 case of *Sanders v. Townsend*,[204] that case is, in fact, still pending transfer. Hearing was held by the supreme court on March 26, 1990, and no ruling has yet been made. That case is potentially significant to attorneys practicing in Indiana because the current court of appeals's decision threatens to lengthen the statute of limitations for attorney malpractice or, at least, substantially confuse the issue.

Sanders involved a malpractice case by a client against her attorney. The court of appeals reversed summary judgment against the client and found that the attorney, in recommending an economically advantageous settlement, may have imposed his will upon his client who wished to proceed to trial regardless of the merits of her case and the advisability of the settlement.[205] Thus, even though the court affirmed the summary judgment in favor of the attorney on the claim of negligence, because the client could not prove damages, it reversed the trial court and remanded the case for trial on the issue of constructive fraud.[206]

The court defined constructive fraud as any breach of a duty arising from a confidential or fiduciary relationship when the party at fault, without any fraudulent intent, gains an advantage at the expense of one to whom he or she owes such a duty.[207] The elements of the tort are:

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200. *Id.*

201. *Id.* at 1317-18. The court disregarded, as out-dated, the 1898 Indiana Supreme Court case French v. Cunningham, 149 Ind. 632, 49 N.E. 797 (1898).

202. *Estate of Forrester*, 562 N.E.2d at 1315.

203. Medtech Corp. v. Indiana Ins. Co., 555 N.E.2d 844, 848 (Ind. Ct. App. 1990).

204. 509 N.E.2d 860 (Ind. Ct. App. 1987).

205. *Id.* at 867.

206. *Id.*

207. *Id.* at 865.

a duty arising out of the relationship between the parties; representations or silence which are deceptive and violative of that duty; proximate cause (reliance); and injury.[208]

Because a client has full authority over the decision to settle a case or to proceed to trial, Sanders's allegations that her attorney forced her into a settlement constituted a prima facie case of constructive fraud, even if the settlement was a good one.[209] Nonetheless, the issue remained whether Sanders could supply evidence of the element that was missing from her tort claim — damages.

The court found that she could.[210] Injuries in constructive fraud, it stated, are "different than the injury in . . . [a] negligence cause of action."[211] In a negligence claim, the injury is the loss of the worth of the claim; but, in constructive fraud, the primary injury is the loss of rights belonging to the weaker party.[212]

Because the client complained of the loss of the right to choose between settlement and trial, the loss of the underlying claim was not "the exclusive measure of damages."[213] Thus, the attorney's evidence that the settlement amount was reasonable did "not negate the existence of a genuine issue of material fact on damages because reasonableness of the settlement amount is not determinative of the question."[214] Indeed, only nominal damages are necessary to support recovery in constructive fraud.[215]

The *Sanders* decision casts doubt on the length of the statute of limitations for attorney malpractice in Indiana. That doubt is created by the court's focus on the difference in the nature of the harm in constructive fraud as opposed to negligence. Arguably, the six-year statute of limitations for fraud now applies to malpractice cases based on construtive fraud. An examination of the Indiana Supreme Court's decisions concerning the statute of limitations in attorney malpractice actions demonstrates how *Sanders* may have inadvertently changed the law.

In *Shideler v. Dwyer*[216] in 1981 and *Whitehouse v. Quinn*[217] in 1985, the supreme court clearly established that the two-year statute for injury to personal property applies to malpractice actions against attorneys. In

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208. *Id.*
209. *Id.* at 866.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 867.
214. *Id.*
215. *Id.*
216. 275 Ind. 270, 417 N.E.2d 281 (1981).
217. 477 N.E.2d 270 (Ind. 1985).

Shideler, the plaintiff raised five theories: breach of contract, negligence, fraud, constructive fraud, and breach of fiduciary duty.[218] After noting that the plaintiff was attempting to avoid a statute of limitations problem by relying on pleading technicalities, the supreme court stated that the "number and variety of plaintiff's technical pleading labels and theories of recovery cannot disguise the obvious fact — apparent even to a layman — that this is a malpractice case . . . ."[219]

Accordingly, the court applied the statute of limitations for injuries to personal property, which is two years.[220] Thus, according to *Shideler*, the six-year statute of limitations for constructive fraud[221] does not apply to malpractice cases.

That conclusion is now in doubt, however, because the rationale behind it was the same rationale used by the *Sanders* court to distinguish constructive fraud from negligence. As the supreme court later elaborated in *Whitehouse v. Quinn*, its *Shideler* decision was grounded on the principle that the applicable statute of limitations is determined "by reference to the nature of the alleged harm" rather than by the theory of recovery.[222] The court of appeals in *Sanders*, however, stated that the nature of the harm in constructive fraud is "different than the injury in . . . [a] negligence cause of action. Accordingly, the measure of damages is different."[223] Thus, if the nature of the harm is different, the statute of limitations for constructive fraud must be different from the statute of limitations for negligence, even though *Shideler* expressly rejected that result, because, under *Whitehouse*, the applicable limitations period is determined by the nature of the harm.

In *Whitehouse*, the supreme court refused to apply a twenty-year statute of limitations merely because a contractual relationship could be alleged. The court held that such application would create an artificial distinction among actions for damage to personal property based on whether there was a contract. *Sanders*, however, appears to create an artificial distinction between those who have actual damages and those who do not. Those who have actual damages, and sue for negligence, must do so in two years. Those who do not may allege constructive fraud and may wait six years to initiate an action. That would make little sense.

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218. *Shideler*, 275 Ind. at 276, 417 N.E.2d at 285.

219. *Id.* at 277, 417 N.E.2d at 286.

220. *Id.* at 280, 417 N.E.2d at 288 (citing IND. CODE § 34-1-2-2).

221. Under IND. CODE § 34-1-2-1, the statute of limitations for fraud is six years. This statute applies to constructive fraud. Ballard v. Drake's Estate, 103 Ind. App. 143, 5 N.E.2d 671 (1937).

222. *Whitehouse*, 477 N.E.2d at 272.

223. *Sanders*, 509 N.E.2d 860, 866 (Ind. Ct. App. 1987).

Nonetheless, because any breach of an attorney's fiduciary duties constitutes constructive fraud,[224] plaintiff malpractice attorneys undoubtedly will contend that the statute of limitations for malpractice based on constructive fraud is now six years. The argument has at least superficial support.

It will be unfortunate if the supreme court allows *Sanders* to change the statute of limitations by implication, especially because it was not a case that directly raised the statute question. It is still possible, however, that the court of appeals will be reversed. If the supreme court does wish to extend the statute, which is doubtful, it would be more appropriate to do so in a case that directly raises a limitations issue rather than one that, like *Sanders*, changes the law by accident.

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224. *See* 7A C.J.S. *Attorney & Client* § 251 (1981).