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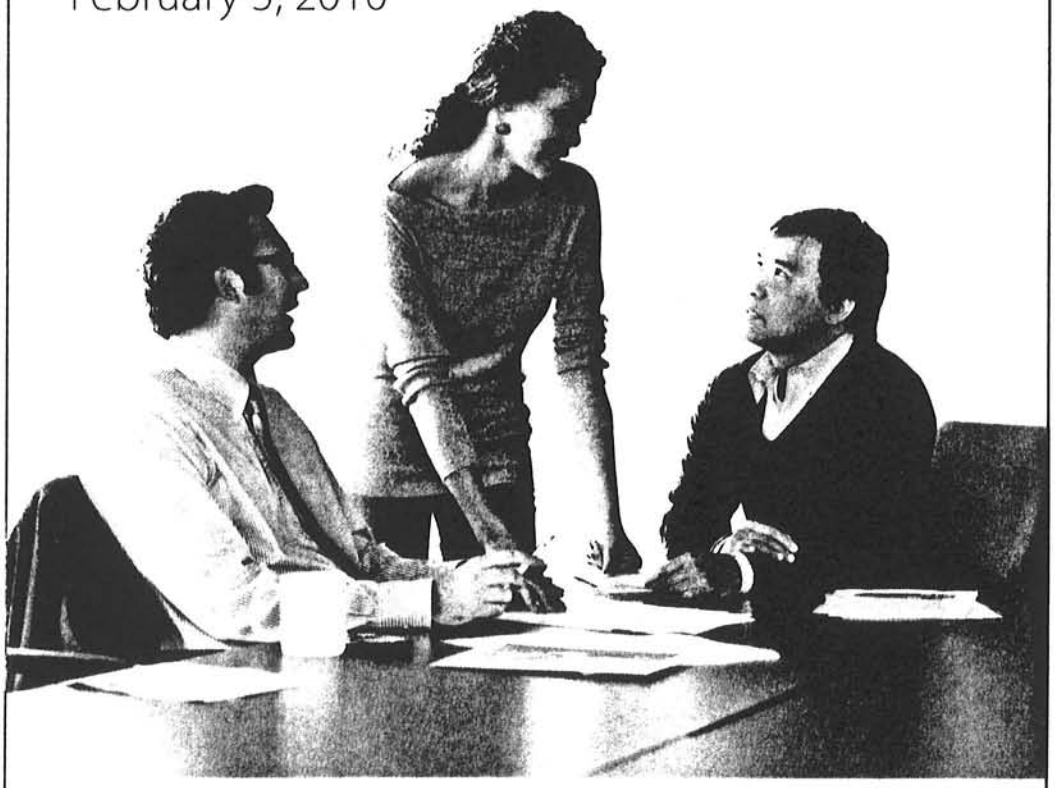

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CREDIT INFORMATION

Continuing Mediation Education - 6.0 (pending)

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Advanced Issues in Divorce

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February 2010

Advanced Issues in Divorce

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Ethical Dilemmas

Submitted by Bryan Lee Ciyou

ETHICAL DILEMMAS

A. Determining and Collecting Attorneys' Fees.

1. Introduction.

According to the Altman National Survey, law firms on average intend to increase their rates 3.2% in 2010.

Fee related matters account for 97, or 4.3% of the grievances filed against lawyers for the Disciplinary Commission 2007-08 reporting year. **EXHIBIT "I"** (2007-2008 Annual Report of the Disciplinary Commission of the Supreme Court of Indiana). If the lawyer is to ethically charge and collect his/her fee, and avoid unnecessary liability, the rules must be understood and practically applied.

In complicated and complex domestic cases, which may embody several companion matters, legal fees and expenses may range in the tens of thousands of dollars. Consistent with the advanced nature of this NBI seminar, some of the thornier issues are addressed.

To begin, these materials start with the ethical rule (it is well to note the commentary to the rules provides a substantial amount of supplemental material and should be considered.

2. Controlling Rule of Professional Conduct (Rule 1.5).

The Rule of Professional Conduct governing fee arrangements is Rule 1.5, which is set forth, in full, as follows:

> "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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 services properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (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;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expense to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or upon the amount of maintenance, support, or property settlement, or obtaining custody of a child; or

(2) a contingent fee for representing a defendant in a criminal case.

This provision does not preclude a contract for a contingent fee for legal representation in a domestic relations post-judgment collection action, provided the attorney clearly advised his or her client in writing of the alternative measures available for the collection of such debt and, in all other particulars, complies with Professional Conduct Rule 1.5(c).

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

3. Ethical Rule on Attorneys' Fees Applied in Domestic Practice.

A number of important ethical concepts may be distilled from Rule 1.5; and a practitioner is handling complex and/or protracted domestic litigation would do well to carefully consider applying these in his/her practice. These are enumerated as follows:

- Reasonableness of fee.

The reasonableness of the legal fee is determined by the elements set forth in Rule 1.5(a). In the right circumstances, this language or considerations may or should be explained to the client in detail, such as in emergency circumstances.

- A lawyer shall not charge an unreasonable amount of expenses. Rule 1.5(a).

This relatively new addition to Rule 1.5 focuses on in-house expenses. Computerized legal research, postage, long-distance, and the like are common examples.

- Oral notification of fee permissible (but not advisable). Rule 1.5(b).

A legal fee in a domestic case may be communicated to the client orally, although same is not preferable or advisable. Rule 1.5(b). Given the complexities of domestic cases, the preferred method is to have the representation agreement in writing **EXHIBIT "II"** (Sample Contract).

- Scope of representation. Rule 1.5(b).

In domestic practice, the scope of the representation is often unclear or unknown to the client in one of two (2) key ways. First, the duration the lawyer may stay in the case, such as through appeal.

Second, in may circumstances, domestic cases may have "spin off" companion matters, such as criminal cases, CHINS matters, protective orders, bankruptcies, guardianships, and the like. If and when the dissolution lawyer will become involved in such may be specified in the contract.

- Basis or rate of legal fees and expenses. Rule 1.5 (b).

Under the Rule, the basis or rate of legal fees and expenses shall be communicated, preferably in writing, within a reasonable time after commencing the representation. The commentary to Rule 1.5 directs that it is desirable to furnish that client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of representation. This is as a written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

A lawyer shall communicate with the client in the event of a change in the basis or rate of fees. Rule 1.5(b).

- Domestic contingent fees generally prohibited.

A lawyer shall not enter into a contingent fee in a domestic matter, save for a post-judgment collection action, and this must be in writing. Rule 1.5(d).

4. Selected Reported Disciplinary Decisions on Fees.

- *In the Matter of Michael C. Kendall*, 804 N.E.2d 1152 (Ind. 2004): Advanced fees are not earned and must be maintained in a trust account. No portion of a contract can contain a "non-refundable" clause, as this is an unreasonable fee. However, flat fees are permissible and earned when paid.

- *In the Matter of Harry W. Foster*, 809 N.E.330 (Ind. 2004): This case is significant because it seems to cast doubt on the fact that even a flat-fee is in all ways non-refundable. Here, on stipulated facts, the attorney charged a $10,000.00 flat-fee for a criminal matter. Shortly into the representation, the client terminated the lawyer's services. The client demanded his money back, and the lawyer did not reply. Later, after a disciplinary action was filed, the lawyer provided an itemization of time expended and refunded $2,700 to the client as "unearned and unreasonable". These stipulated facts were the basis of a public reprimand, and all the Supreme Court justices concurred with same.

- *In the Matter of Richie Douglas Hailey*, 792 N.E.2d 851 (Ind.2003): In this case, the attorney was publicly reprimanded under the following holdings of the Supreme Court: First, the attorney's recovery of a contingent fee on settlement funds that were not to be received until the future, without discounting future settlement payments to present value, amount to collecting an unreasonable fee. Second, the attorney's recovery of the entire contingent fee from the first payment of a structured settlement was unreasonable. Third, the attorney's division of a contingency fee with an out-of-state attorney violated the rules of professional conduct applicable to fee divisions. Fourth, the attorney's delays in disbursing settlement proceeds to subrogated insurers and medical provider claimants violated rules requiring due diligence and promptness and prompt delivery of funds. Fifth, the attorney violated the rules by failing to provide an adequate settlement statement.

- *In the Matter of Robert E. Stochel*, 792 N.E.2d 874 (Ind.2003): The attorney was publicly reprimanded for dividing a fee with a referring attorney out of proportion to the services performed by the referring attorney, and without the client's consent, and by failing to reduce the contingent fee to writing and advise the client of the rate or basis of fee.

5. Companion case related to liability of law firm for fees.

Domestic cases provide many potential practice traps for practitioners. An example of this is found in a case for discussion at this NBI seminar on advanced family law. In *McClure & O'Farrell, P.C. v. Grigsby*, 2009 WL 4824726 (Ind.Ct.App.2009), the firm was sued by former client's wife. The basis of the legal contention was that the firm had acted unreasonably in opposing the wife's petition for an accounting of the firm's services to her deceased and estranged husband in their divorce proceedings. The trial court awarded fees, but the Court of Appeals reversed.

6. Other fee cases.

In re Marriage of Reader, the Court of Appeals affirmed at $245,000 attorney fee award. 2009 WL 4667386.

In re Marriage of Vandenberg (November 16, 2009), the Court of Appeals discusses the elements of an attorney fee award in the context of domestic litigation and the elements a trial court should consider in awarding such.

[Good reported decision at 2009 WL 4927876, unreported, on topic of attorney's fees]

- Client's attorney fee is not protected by the attorney-client privilege.

An important and advanced legal concept regarding legal fees is set forth in this case. This is that as a general rule, information regarding a client's attorney fees is not protected by the attorney-client privilege. This is as the payment of fees is not considered a confidential communication. However, depending upon the facts of the each case, the identity or fee arrangements may be privileged where revealing the third party's identity or the fee arrangement would be tantamount to the disclosure of a confidential communication.

7. Local Rules.

Local rules are playing an ever-increasing role in all facets of civil practice, including attorney fees. The attorney must know the local rules in order to comply with the ethics rules. These local rules are on-line. The local rules for all Indiana counties are available at www.IN.gov . The particular county's local rules in question maybe accessed by clicking on the county on an Indiana map. In addition, proposed rule changes are related matters are available.

8. Conclusion.

Determining and collecting legal fees is rooted in the Rules of Professional Conduct. There are many potential pitfalls that may be avoided by understanding the rules and interpretational cases. Ultimately, a written contract should be utilized to address these rules and minimize risk of violation of the ethical rules.

1. Introduction.

The attorney-client confidences, enforced by a near absolute evidentiary privilege is a, if not ***the***, hallmark of the American legal system. The place to start with any issue of attorney confidentiality is with understanding the ethical rule along with the corresponding bodies of law that give same force and effect: attorney-client privilege and work product doctrine. Although a topic of a seminar itself, these materials will focus on advanced, practical problems confronting family law practitioners. 1.4% of grievances, or 31, related to disclosure of confidentiality in 2008.

2. Controlling Rule of Professional Conduct (Rule 1.6).

The controlling Rule of Professional Conduct is enumerated, in full, as follows:

"(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or serious bodily injury;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claims against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of an client's name and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files."

- Support Staff.

The discussion of this topic will focus on the ethical rules governing use of non-lawyer assistants. **EXHIBIT "III"** (Ethical Rule 9).

- Administrative Rule 9.

The discussion of this topic will focus on the Public Access to Court Records Handbook, which explains application of Indiana Administrative Rule 9. **EXHIBIT "IV"** (Handbook).

- Third Parties.

Given the financial realities of domestic litigation, and sometimes the client's need for emotional support and a sounding board for the case outside the lawyer, it is somewhat common for third-parties to be involved in the case.

Perhaps the most common is a third-party payor. In this circumstance, the lawyer must account for maintaining client confidentiality. This is addressed in Rule 1.8(f). This requires that a lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information related to representation of a client is protected as required by Rule 1.6.

- Protected Medical Records.

4. Conclusion.

The question of whether any act or omission of the lawyer may be confidential in nature must be a constant filter through which the lawyer operates. It is impacted and driven by other ethical rules, administrative rules, and state and federal laws.

C. When Doing Everything You Can for the Child is Too Much.

1. Introduction.

As a matter of legal ethics, the author does not have any form of communication with the children unless in extraordinary circumstances. And, in fact, the author has little contact with children even in the presence of all of the parties and counsel even in contested custody and visitation matters. The author also tries to avoid calling children as witnesses in contested matters. Why this position?

There are several ethical risks to attorney contact with the children, particularly outside the

First, there is always the risk that in discussing a matter with a child, the lawyer might become a witness by information he learns from the child and be precluded from representing his or her client. Rule 3.7.

Second, there is the corresponding ethical risk in discussing a case with a child that the child might come to believe the attorney represents his or her interests because of their tender years, which could cause a violation of the ethical rule addressing lawyer's contact with unrepresented parties (see commentary). Rule 4.3.

However, children do have to be heard in the legal system. There are a number of mechanisms to effectuate this without running afoul of the ethical rules.

2. How children may be heard in the legal system.

- Child's private counsel.

In rare circumstances, a child may have an attorney-client relationship. If this is the case, the limitations of minority may be addressed through the ethical rule on client's with a diminished capacity (discussed *infra*). Rule 1.14. Otherwise, a child's attorney shall abide by the child's objectives and consult with the child-client as to the means by which they are to be pursued. Rule 1.2.

- GAL/CASA.

Most importantly, there is ample ability to obtain a voice and representation for a child, and representing his/her best interests, by appointment of a GAL or CASA. This is governed by local rules and Ind.Code § 31-17-6-1 *et. seq.*

- In-camera interview.

In lieu of calling a child as a witness, the Code provides for the child to be interviewed by the judge. Ind.Code 31-17-2-9(dissolution); Ind.Code 31-14-13-3 (paternity).

- Professional evaluation and report.

Although not necessarily a direct voice to a trial court, a child may be heard by recommendations as to the child's best interests by professional evaluation and report. There are at least three (3) mechanisms to accomplish this: (1) Trial Rule 35; (2) Ind.Code § 31-17-2-12 (dissolution); Ind.Code § 31-14-10-2 (paternity); and (3) the local rule provisions.

3. Conclusion.

The critical distinction to having a child heard is between the child-client and advocating

D. Where Does the Line Between Legal and Mental Health Counsel Lie for You.

To be a successful domestic lawyer capable of properly handling complex cases, one must have working relationships with a number of experts, marriage counselors, child and adult therapists, psychologists to name a few of those relevant to this topic.

This is a serious professional undertaking. The point of departure with determining where to draw this line is with the controlling ethical rule. This is Rule 1.14, addressing a client with a diminished capacity (f/k/a client with a disability).

The Rule of Professional Conduct governing representing a client with a diminished capacity, is Rule 1.14, which is set forth, in full, as follows:

> "(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may reasonably take protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
>
> (d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule."

The Supreme Court addressed the lawyer's duty for self-interested transactions with a client with a disability in *In the Matter of Merrill L. Smith and Gregory B. Smith*, 572 N.E.2d 1280: In this case, the Court ordered suspensions of the attorneys. This was for making gifts to one's self, son, secretary, and law firm from entrusted assets of a mentally incompetent, elderly client.

E. When You Suspect Your Client is Lying.

In the event the client is lying about the substance of his or her case, the Rules provide remedy through permissive or mandatory withdrawal. Mandatory withdrawal is required if the representation will result in violation of the Rules of Professional Conduct or other law. Rule

lawyer's services to perpetrate a crime of fraud. Rule 1.16(b).

F. Accepting Referral Fees From Investment Advisors.

Notwithstanding other law, under the Rule 1.7 (Comment 10), it appears to be a personal interests conflict for the lawyer to accept a referral fee from investment advisors or related referral fees. This is because the lawyer would be impaired from giving detached advice or have an undisclosed financial interest. In any circumstance where a conflict of interest arises, if such can be addressed, it must be by "informed consent". Ultimately, this must be reduced to and "confirmed in writing". These terms of art are defined in Rule 1.0.

ETHICAL DILEMMAS: EXHIBIT I (2007/08 Disciplinary Commission Report)

2007-2008
ANNUAL REPORT

OF THE

DISCIPLINARY COMMISSION

OF THE

SUPREME COURT OF INDIANA

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I. INTRODUCTION

This is the annual report of the activities of the Disciplinary Commission of the Supreme Court of Indiana for the period beginning July 1, 2007 and ending June 30, 2008. The Disciplinary Commission is the agency of the Supreme Court of the State of Indiana charged with responsibility for investigation and prosecution of charges of lawyer misconduct. The Indiana Rules of Professional Conduct set forth the substantive law to which lawyers are held accountable by the Indiana lawyer discipline system. The procedures governing the Indiana lawyer discipline system are set forth in Indiana Supreme Court Admission and Discipline Rule 23. The broad purposes of the Disciplinary Commission are to "protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct." Admission and Discipline Rule 23, section 1.

The Disciplinary Commission is not a tax-supported agency. It is funded through an annual fee that each lawyer admitted to practice law in the State of Indiana must pay in order to keep his or her license in good standing. The current annual registration fee for lawyers in active status is $115.00. After paying the costs of collecting annual fees, the Clerk of the Supreme Court distributes the balance of fees to the Disciplinary Commission, the Commission for Continuing Legal Education and the Indiana Judges and Lawyers Assistance Committee to support the work of those Court agencies. In this fiscal year, of each $115 annual registration fee, approximately $79.72 was distributed to the Disciplinary Commission, $18.95 to the Continuing Legal Education Commission and $16.33 to the Judges and Lawyers Assistance Committee.

The annual registration fee for lawyers in inactive status is $57.50. The annual registration fee is due on or before October 1st of each year. Failure to pay the required fee within the established time subjects the delinquent lawyer to suspension of his or her license to practice law until such time as the fee and any delinquency penalties are paid.

Out-of-state lawyers who received court permission to practice law temporarily in the state of Indiana are required to pay a $115 registration fee for each year they are participating as counsel in an Indiana case.

On May 21, 2008, the Supreme Court issued an order suspending **205** lawyers on active and inactive status, effective June 20, 2008, for failure to pay their annual attorney registration fees.

II. HISTORY AND STRUCTURE OF THE DISCIPLINARY COMMISSION

The Indiana Supreme Court has original and exclusive jurisdiction over the discipline of lawyers admitted to practice law in the State of Indiana. Ind.Const. art. 7, § 4. On June 23, 1971, the Indiana Supreme Court created the Disciplinary Commission to function in an investigatory and prosecutorial capacity in lawyer discipline matters.

The Disciplinary Commission is governed by a board of commissioners, each of whom is appointed by the Supreme Court to serve a term of five years. The Disciplinary Commission consists of seven lawyers and two lay appointees.

The Commission meets monthly in Indianapolis, generally on the second Friday of each month. In addition to acting as the governing board of the agency, the Disciplinary Commission

considers staff reports on claims of misconduct against lawyers and must make a determination that there is reasonable cause to believe that a lawyer is guilty of misconduct which would warrant disciplinary action before formal disciplinary charges can be filed against a lawyer.

The officers and members of the Disciplinary Commission during the reporting year were:

Name	*Hometown*	*First Appointed*	*Current Term Expires*
Anthony M. Zappia, Chair	South Bend	September 9, 2001	June 30, 2011
Sally Franklin Zweig, Vice-Chair	Indianapolis	September 2, 2001	June 30, 2011
Corinne R. Finnerty, Secretary	North Vernon	July 1, 2003	June 30, 2008
J. Mark Robinson	New Albany	April 11, 2001	June 30, 2011
Robert L. Lewis	Gary	July 1, 1999	June 30, 2009
Diane L. Bender	Evansville	July 1, 1999	June 30, 2009
Fred Austerman	Richmond	July 1, 2003	June 30, 2008
R. Anthony Prather	Indianapolis	July 1, 2004	June 30, 2009
Maureen Grinsfelder	Fort Wayne	July 1, 2005	June 30, 2010

Biographies of Commission members who served during this reporting year are included in **Appendix A**.

The Disciplinary Commission's work is administered and supervised by its Executive Secretary, who is appointed by the Commission with the approval of the Supreme Court. The Executive Secretary of the Commission is Donald R. Lundberg.

The staff of the Disciplinary Commission during this year included:

Greg N. Anderson, Staff Attorney
Allison S. Avery, Staff Attorney
Rom Byron, Staff Attorney
David B. Hughes, Trial Counsel (part-time)
Laura B. Iosue, Staff Attorney
Charles M. Kidd, Staff Attorney
Carol Kirk, Staff Attorney/Investigator
Dennis K. McKinney, Staff Attorney
Seth T. Pruden, Staff Attorney
Fredrick L. Rice, Staff Attorney
Robert C. Shook, Staff Attorney
Robert D. Holland, Investigator
Sharon F. Scholl, Office Manager
Judy E. Whittaker, Secretary
Ronda Johnson, Secretary

In addition, the Disciplinary Commission employs law students as part-time clerks to assist in the work of the Commission. Law clerks employed during this reporting period included Dea C. Lott, Donald E. Thomas, Jr. and Caroline Richardson.

The Disciplinary Commission relocated its offices on January 1, 2008 from 115 West Washington Street to 30 South Meridian Street, Suite 850, Indianapolis, Indiana 46204.

III. THE DISCIPLINARY PROCESS

A. The Grievance Process

The purpose of the Disciplinary Commission is to inquire into claims of attorney misconduct, protect lawyers against unwarranted claims of misconduct, and prosecute cases seeking attorney discipline when merited. Action by the Disciplinary Commission is not a mechanism for the resolution of private disputes between clients and attorneys, but rather is independent of private remedies that may be available through civil litigation.

An investigation into lawyer misconduct is initiated through the filing of a grievance with the Disciplinary Commission. Any member of the bench, the bar or the public may file a grievance by submitting to the Disciplinary Commission a written statement on a form prescribed by the Disciplinary Commission. There are no formal standing requirements for the filing of a grievance. Any individual having knowledge about the facts relating to the complaint may submit a grievance. A form for submission of grievances approved by the Disciplinary Commission is readily available from the Commission's office, from bar associations throughout the state, and on the Internet.

The Disciplinary Commission may also initiate an inquiry into alleged lawyer misconduct in the absence of a grievance from a third party. Acting upon information that is brought to its attention from any credible source, the Disciplinary Commission may authorize the Executive Secretary to prepare a grievance to be signed and issued by the Executive Secretary in the name of the Commission.

B. Preliminary Investigation

The Commission staff reviews each newly filed grievance to initially determine whether the allegations contained therein raise a substantial question of misconduct. If a grievance does not present a substantial question of misconduct, it may be dismissed by the Executive Secretary with the approval of the Commission, and written notice of dismissal is mailed to the grievant and the lawyer.

A grievance that is not dismissed on its face is sent to the lawyer involved, and a demand is made for the lawyer to submit a mandatory written response within twenty days of receipt. Additional time for response is allotted in appropriate circumstances. Other investigation as appropriate is conducted in order to develop the facts related to a grievance. The Executive Secretary may call upon the assistance of bar associations in the state to aid in the preliminary investigation of grievances. The bar associations that maintain Grievance Committees of volunteer lawyers to assist the Disciplinary Commission with preliminary investigations are: the Allen County Bar Association, the Evansville Bar Association, the Indianapolis Bar Association, the Lake County Bar Association, and the St. Joseph County Bar Association. Upon petition by the Commission, the Supreme Court may suspend the law license of a lawyer who fails to respond in writing to a grievance that has been opened for investigation.

Upon completion of the preliminary investigation and consideration of the grievance and the lawyer's response, the Executive Secretary, with the approval of the Commission, may dismiss the grievance upon a determination that there is not reasonable cause to believe that the lawyer is guilty of misconduct. The grievant and the lawyer are notified in writing of the dismissal.

Lawyers must cooperate with the Commission's investigation by answering grievances in writing and responding to other demands for information from the Commission. The Commission may seek an order from the Supreme Court suspending a non-cooperating lawyer's license to practice until such time as he or she cooperates. If after being suspended for non-cooperation, the lawyer does not cooperate for a period of six months, the Court may indefinitely suspend the lawyer's license. An indefinitely suspended lawyer will be reinstated only after successfully completing the reinstatement process described in paragraph K below.

C. Further Investigation

Those grievances that the Executive Secretary determines present reasonable cause are docketed for further investigation and, ultimately, for full consideration by the Disciplinary Commission. Both the grievant and the lawyer are notified of this step in the process. Upon completion of the investigation, the results of the investigation are summarized in written form by Commission staff, and the matter is presented to the Disciplinary Commission for its consideration at one of its monthly meetings.

D. Authorizing Charges of Misconduct

After a grievance has been investigated, the Executive Secretary reports on it to the Disciplinary Commission, together with his recommendation about the disposition of the matter. The Commission makes a determination whether or not there is reasonable cause to believe the lawyer is guilty of misconduct that would warrant disciplinary action. If the Commission finds that there is not reasonable cause, the matter is dismissed with written notice to the grievant and the lawyer. If the Commission finds that reasonable cause exists, it directs the Executive Secretary to prepare and file with the Clerk of the Supreme Court a verified complaint charging the lawyer with misconduct.

E. Filing Formal Disciplinary Charges

Upon a finding by the Disciplinary Commission that there is reasonable cause to believe the lawyer is guilty of misconduct that would warrant disciplinary action, the Executive Secretary files a verified complaint with the Clerk of the Supreme Court setting forth the facts related to the alleged misconduct and identifying those provisions of the Rules of Professional Conduct that are alleged to have been violated by the lawyer's conduct. The respondent must file an answer to the verified complaint, or else the allegations set forth in the complaint will be taken as true.

F. The Evidentiary Hearing

Upon the filing of a verified complaint, the Supreme Court appoints a hearing officer who will preside over the case and who will submit recommended findings to the Supreme Court. The hearing officer must be an attorney admitted to practice law in the State of Indiana and is frequently a sitting or retired judge. Typically, the hearing officer is from a county close to the county in which the respondent lawyer practices law. The hearing officer's responsibilities include supervising the pre-hearing development of the case including discovery, conducting an evidentiary hearing, and reporting the results of the hearing to the Supreme Court by way of written findings of fact, conclusions of law and recommendations. A hearing may be held at any location determined to be appropriate by the hearing officer.

G. Supreme Court Review

After the hearing officer has issued a report to the Supreme Court, either or both of the parties may petition the Court for a review of any or all of the hearing officer's findings, conclusions and recommendations. In every case, even in the absence of a petition for review by one of the parties, the Court independently reviews the matter and issues its final order in the case.

H. Final Orders of Discipline

The conclusion of a lawyer discipline proceeding is an order from the Supreme Court setting out the facts of the case, determining the violations (if any) of the Rules of Professional Conduct that are supported by the facts, and assessing a sanction in each case where it finds misconduct. The sanction ordered by the Court is related to the seriousness of the violation and the presence or absence of mitigating or aggravating circumstances. The available disciplinary sanctions include:

- **Private Administrative Admonition.** A private administrative admonition is a disciplinary sanction that is issued by the Disciplinary Commission as an administrative resolution of cases involving minor misconduct. A private administrative admonition is issued as a sanction only when the Disciplinary Commission and the respondent lawyer agree to that disposition of a case. Unlike other disciplinary sanctions, the Supreme Court does not directly issue the admonition. However, the Court receives advance notice of the parties' intent to resolve a case by way of a private administrative admonition and may act within a period of 30 days to set aside such a proposed agreement. There is a public record made in the Office of the Clerk of the Supreme Court of every case resolved by a private administrative admonition, although the facts of the matter are not included in the public record.

- **Private Reprimand.** A private reprimand consists of a private letter of reprimand from the Supreme Court to the offending lawyer. The case does not result in a publicly disseminated opinion describing the facts of the case. The Court's brief order resolving the case by way of a private reprimand is a public record that is available through the office of the Clerk of the Supreme Court. In rare cases where a private reprimand is assessed, the Court may issue a *per curiam* opinion for publication styled *In the Matter of Anonymous*. While the published opinion does not identify the offending lawyer by name, the opinion sets out the facts of the case and the violations of the Rules of Professional Conduct involved for the edification of the bench, the bar and the public.

- **Public Reprimand.** A public reprimand is issued in the form of a publicly disseminated opinion or order by the Supreme Court setting forth the facts of the case and identifying the applicable Rule violations. A public reprimand does not result in any direct limitation upon the offending lawyer's license to practice law.

- **Short Term Suspension.** The Court may assess a short-term suspension of a lawyer's license to practice law as the sanction in a case. When the term of suspension is six months or less, the lawyer's reinstatement to the practice of law is generally automatic upon the completion of the term of suspension. The Court may, and does from time to

time, require that a lawyer who is suspended for a period of six months or less be reinstated to practice only after petitioning for reinstatement and proving fitness to practice law. The procedures associated with reinstatement upon petition are described later in this report. Even in cases of suspension with automatic reinstatement, for proper cause, the Disciplinary Commission may enter objections to the automatic reinstatement of the lawyer's license to practice law.

- **Long Term Suspension.** The Court may assess a longer term of suspension, which is a suspension for a period of time greater than six months. Every lawyer who is suspended for more than six months must petition the Court for reinstatement and prove fitness to re-enter the practice of law before a long-term suspension will be terminated.

- **Disbarment.** In the most serious cases of misconduct, the Court will issue a sanction of disbarment. Disbarment revokes a lawyer's license to practice law permanently, and it is not subject to being reinstated at any time in the future.

The lawyer discipline process in Indiana is not a substitute for private and other public remedies that may be available, including criminal sanctions in appropriate cases and civil liability for damages caused by lawyer negligence or other misconduct. Accordingly, the sanctions that are issued in lawyer discipline cases do not generally provide for the resolution of disputed claims of liability for money damages between the grievant and the offending lawyer. However, a suspended lawyer's willingness to make restitution may be considered by the Court to be a substantial factor in determining whether or not the lawyer will be reinstated to the practice of law at the conclusion of a term of suspension.

From time to time, the Court includes in a sanction order additional provisions that address aspects of the lawyer's misconduct in the particular case. Examples of these conditions include participation in substance abuse or mental health recovery programs, specific continuing legal education requirements, and periodic audits of trust accounts.

I. Resolution By Agreement

In cases of minor misconduct, if the Disciplinary Commission and the respondent lawyer agree before the filing of a formal complaint charging misconduct, a case may be disposed of by way of the issuance of a private administrative admonition. Unlike other disciplinary sanctions, this is an administrative sanction that is issued by the Disciplinary Commission rather than by the Supreme Court, although the Supreme Court does receive notice of a proposed administrative admonition and may act to set it aside.

In some cases that have resulted in the filing of a formal complaint charging misconduct, the respondent lawyer and the Disciplinary Commission are able to reach an agreement concerning the facts of a case, the applicable rule violations and an appropriate sanction for the misconduct in question. In these instances, the parties submit their agreement to the Supreme Court for its consideration. Any such agreement must include an affidavit from the lawyer accepting full responsibility for the agreed misconduct. The Court is free to accept the agreement of the parties and issue a final order of discipline in conformity with the agreement, or reject the agreement if the Court does not concur with the proposed sanction.

A lawyer charged with misconduct may also tender his or her written resignation from the practice of law. A resignation is not effective unless the lawyer fully admits his or her misconduct and the Court accepts the resignation as tendered. A lawyer who has resigned with misconduct allegations pending may not seek reinstatement of his or her license until a period of at least five years has elapsed and only after successfully petitioning the Court.

J. Temporary Suspension

While a disciplinary complaint is pending against a lawyer, the Disciplinary Commission may seek the temporary suspension of the lawyer's license to practice law pending the outcome of the proceeding. Temporary suspensions are generally reserved for cases of serious misconduct or on-going risk to clients or the integrity of client funds. The hearing officer is responsible for taking evidence on a petition for temporary suspension and making a recommendation to the Supreme Court. The Court then issues an order granting or denying the petition for temporary suspension.

In addition to the temporary suspension procedure described above, whenever a lawyer licensed to practice law in Indiana is found guilty of a crime punishable as a felony, the Executive Secretary must report the finding of guilt to the Supreme Court and request an immediate temporary suspension from the practice of law. The Court may order the temporary suspension without a hearing, but the affected lawyer has the opportunity to submit to the Court reasons why the temporary suspension should be vacated. A temporary suspension granted under these circumstances is effective until such time as there is a resolution of related disciplinary charges or further order of the Court. Trial judges are required to send a certified copy of the order adjudicating criminal guilt of any lawyer to the Executive Secretary of the Commission within ten days of the date of the order.

Finally, the Executive Secretary is required to report to the Supreme Court any time he receives notice that a lawyer has been found to be delinquent in the payment of child support as a result of an intentional violation of a support order. After being given an opportunity to respond, the Supreme Court may suspend the lawyer's license to practice law until the lawyer is no longer in intentional violation of the support order.

K. The License Reinstatement Process

When any lawyer resigns or is suspended without provision for automatic reinstatement, the lawyer may not be reinstated into the practice of law until he or she successfully petitions the Supreme Court. The petitioning lawyer must successfully complete the Multi-State Professional Responsibility Examination, a standardized examination on legal ethics, prove by clear and convincing evidence that the causes of the underlying misconduct have been successfully addressed, and demonstrate that he or she is otherwise fit to re-enter the practice of law.

Lawyer reinstatement proceedings are heard in the first instance by a member of the Disciplinary Commission appointed as hearing officer by the Court, who after hearing evidence, makes a recommendation to the full Disciplinary Commission. The Disciplinary Commission, acting upon the recommendation of the hearing officer, makes its recommendation to the Supreme Court. The Court reviews the recommendation of the Disciplinary Commission and ultimately issues its order granting or denying the petition for reinstatement.

L. Lawyer Disability Proceedings

Any member of the public, the bar, the Disciplinary Commission, or the Executive Secretary may file with the Commission a petition alleging that a lawyer is disabled by reason of physical or mental illness or chemical dependency. The Executive Secretary is charged with investigating allegations of disability and, if justified under the circumstances, prosecuting a disability proceeding before the Disciplinary Commission or a hearing officer appointed by the Court. The Court ultimately reviews the recommendation of the Commission and may suspend the lawyer from the practice of law until such time as the disability has been remediated.

IV. COMMISSION ACTIVITY IN 2007-2008

A. Grievances and Investigations

An investigation into allegations of lawyer misconduct is commenced by the filing of a grievance with the Disciplinary Commission. During the reporting period, the Commission directly provided **3,180** grievance forms to members of the public. Additionally, forms are made available for distribution through local bar associations, service organizations, governmental offices and on the Commission's web site: www.in.gov/judiciary/discipline.

During the reporting period, **1,582** grievances were filed with the Disciplinary Commission. Of this number, the Disciplinary Commission initiated **58** grievances. The total number of grievances filed was slightly less than the number filed the previous year. **Appendix B** presents in graphical form the number of grievances filed for each of the past ten years.

There were **16,950** Indiana lawyers in active, good-standing status and **2,673** lawyers in inactive, good-standing as of June 30, 2008. In addition, **1,126** lawyers regularly admitted to practice in other jurisdictions were granted temporary admission to practice law by trial court orders in specific cases during the year, pursuant to the provisions of Indiana Admission and Discipline Rule 3. The total grievances filed represent **10.7** grievances for every one-hundred actively practicing lawyers. **Appendix C** presents in graphical form the grievance rate for each of the past ten years.

Distribution of grievances is not even. Far fewer than 1,582 separate lawyers received grievances during the reporting period, because many lawyers were the recipients of multiple grievances. It is important to note that the mere filing of a grievance is not, in and of itself, an indication of misconduct on the part of a lawyer.

During the reporting period, **939** of the grievances received were dismissed without further investigation upon a determination that, on their face, they presented no substantial question of misconduct.

Upon receipt, each grievance that is not initially dismissed is classified according to the type of legal matter out of which the grievance arose and the type of misconduct alleged by the grievant. The table in **Appendix D** sets forth the classification by legal matter and by misconduct alleged of all grievances that were pending on June 30, 2008, or that were dismissed during the reporting year after investigation. Many grievances arise out of more than one type of legal matter or present claims of more than one type of alleged misconduct. Accordingly, the total numbers presented in Appendix D represent a smaller number of actual grievances.

Ranked in order of complaint frequency, the legal matters most often giving rise to grievances involve *Criminal, Domestic Relations, Tort, Personal Misconduct, Bankruptcy, Probate, and Administrative Law*. To understand the significance of this data, it is important to keep in mind that criminal cases make up, by far, the largest single category of cases filed in our trial courts. With the exception of civil plenary filings, domestic relations cases account for the next highest category of cases filed. Thus, in part, the high rates of grievances filed that pertain to criminal and domestic relations matters merely reflect the high number of cases of those types handled by lawyers in Indiana. The predominant types of legal matters out of which grievances arose during the reporting period are presented graphically in **Appendix E**.

Ranked in order of complaint frequency, the alleged misconduct types most often giving rise to grievances are *Poor Communications or Non-Diligence, Improper Withdrawal, Not Acting With Competence, Exercising Improper Influence, Misinforming and Conflicts of Interest*, with complaints about poor communications or non-diligence being more than twice as frequent as the next category of alleged misconduct. The predominant types of misconduct alleged in grievances during the reporting period are presented graphically in **Appendix F**.

The following is the status of all grievances that were pending before the Disciplinary Commission on June 30, 2008, or that had been dismissed during the reporting period:

	DISMISSED	OPEN
Grievances filed before July 1, 2007	292	559
Grievances filed on or after July 1, 2007	1,183	379
Total carried over from preceding year:		972
Total carried over to next year:		938

B. Non-Cooperation

A lawyer's law license may be suspended if the lawyer has failed to cooperate with the disciplinary process. The purpose of this is to promote lawyer cooperation to aid in the effective and efficient functioning of the disciplinary system. The Commission brings allegations of non-cooperation before the Court by filing petitions to show cause. During the reporting year, the Disciplinary Commission filed **32** petitions to suspend the law licenses of **23** lawyers with the Supreme Court for failing to cooperate with investigations. The following are the dispositions of the non-cooperation matters that the Commission filed with the Court during the reporting year or that were carried over from the prior year:

Show cause petitions filed.....32

Name	City of Practice	Date of Admission
Banik, Michael K.	Elkhart	Jun3 8, 1987
Beach, Steven A., Jr.	Anderson	May 20, 2005
Beach, Steven A., Jr.	Anderson	May 20, 2005
Brenman, Jeremy S.	Merrillville	September 28, 2001
Burch, Mark A.	Greenwood	June 9, 2000
Burch, Mark A.	Greenwood	June 9, 2000
Burkett, Bradley K.	Portland	January 24, 1984

Burkett, Bradley K.	Portland	January 24, 1984
Chamberlain, Philip H.	Indianapolis	October 15, 1990
Clark, Andrew E.	Indianapolis	October 16, 2000
Clark-Reynolds, Heather	Columbus, OH	June 15, 2990
Doyle, Timothy A.	Indianapolis	December 21, 1999
Fulkerson, Anna E.	Fort Wayne	November 8, 2001
Harshey, Kenneth A.	Indianapolis	May 26, 1999
Johnson, Theodore J.	Valparaiso	October 22, 1993
Johnson, Theodore J.	Valparaiso	October 22, 1993
Kias, Michael J.	Greenwood	September 19, 1962
Kilburn, James R.	Austin	October 9, 1981
Kniess, October S.	Indianapolis	November 16, 1982
Molin, Emil J.	Tucson, AZ	October 14, 1988
Moss, John O., III	Indianapolis	June 4, 1999
Moss, John O., III	Indianapolis	June 4, 1999
Perry, Teresa L.	Evansville	November 13, 2000
Powell, Kimberly O.	Indianapolis	May 19, 2003
Powell, Kimberly O.	Indianapolis	May 19, 2003
Powell, Kimberly O.	Indianapolis	May 19, 2003
Powell, Kimberly O.	Indianapolis	May 19, 2003
Roberts, Robert E.	New Castle	November 3, 1997
Schrems, Patrick M.	Bloomington	October 7, 1983
Schrems, Patrick M.	Bloomington	October 7, 1983
Smith, Michael Jay	Wabash	October 8, 1993
Wolfe, Stephen P.	Marion	October 10, 1980

Dismissed as moot after cooperation without show cause order 0

Petition pending on June 30, 2008 without show cause order 0

Show cause orders with no suspension.....21

Dismissed after show cause order due to compliance 17

Banik, Michael K.
Beach, Steven A, Jr.
Brenman, Jeremy S.
Chamberlain, Philip H.
Clark-Reynolds, Heather
Fulkerson, Anna E.
Kias, Michael J.
Kilburn, James R.
Moss, John O., III
Moss, John O., III
Perry, Teresa L.
Powell, Kimberly O.
Ryan, Mark A. (from prior year petition

Schrems, Patrick M.
Schrems, Patrick M.
Schrems, Patrick M. (from prior year petition)
Wolfe, Stephen P.

Dismissed due to resignation from practice.....1

Kniess, October S.

Show cause orders pending on June 30, 2008 3

Clark, Andrew E.
Doyle, Timothy A.
Smith, Michael Jay

Suspensions for non-cooperation.....19

Suspensions still in effect on June 30, 2008 12

Burch, Mark
Burch, Mark
Burkett, Bradley K.
Burkett, Bradley K.
Harshey, Kenneth A.
Johnson, Theodore J.
Johnson, Theodore J.
Johnson, Theodore J. (from prior year petition)
Molin, Emil J.
Powell, Kimberly O.
Powell, Kimberly O.
Roberts, Robert E.

Reinstatements due to cooperation after suspension 7

Beach, Steven A., Jr.
Eley, Derrick D. (from prior year petition)
Eley, Derrick D. (from prior year petition)
Eley, Derrick D. (from prior year petition)
Hosinski, John S. (from prior year petition)
Powell, Kimberly O.
Rawls, William J. (from prior year petition)

Non-Cooperation Suspensions Converted to Indefinite Suspensions 3

Name	City of Practice	Date of Admission
Burch, Mark A. (from prior year petition)	Greenwood	June 9, 2000
Johnson, Theodore J. (from prior year petition)	Valparaiso	October 22, 1993
Miller, Timothy J. (from prior year petition)	Indianapolis	June 6, 1997

C. Trust Account Overdraft Reporting

Pursuant to Admis.Disc.R. 23, section 29, all Indiana lawyers must maintain their client trust accounts in financial institutions that have agreed to report any trust account overdrafts to the Disciplinary Commission. Upon receipt of a trust account overdraft report, the Disciplinary Commission sends an inquiry letter to the lawyer directing that the lawyer supply a documented, written explanation for the overdraft. After review of the circumstances surrounding the overdraft, the investigation is either closed or referred to the Disciplinary Commission for consideration of filing a disciplinary grievance.

The results of inquiries into overdraft reports received during the reporting year are:

Inquiries Carried Over From Prior Year	26
Overdraft Reports Received In Current Year	128
Inquiries Closed In Current Year	118
Reasons for Closing:	
Bank Error	27
Deposit of Trust Funds to Wrong Trust Account	2
Disbursement From Trust Before Deposited Funds Collected	8
Referral for Disciplinary Investigation	24
Disbursement From Trust Before Trust Funds Deposited	10
Overdraft Due to Bank Charges Assessed Against Account	6
Inadvertent Deposit of Trust Funds to Non-Trust Account	8
Overdraft Due to Refused Deposit for Bad Endorsement	4
Law Office Math or Record-Keeping Error	20
Death, Disbarment or Resignation of Lawyer	3
Inadvertent Disbursement of Operating Obligation From Trust	4
Non-Trust Account Inadvertently Misidentified as Trust Account	2
Inquiries Carried Over Into Following Year	36

D. Litigation

1. Overview

In 2007-2008, the Commission filed **47** Verified Complaints for Disciplinary Action with the Supreme Court. These Verified Complaints, together with amendments to pending Verified Complaints, represented findings of reasonable cause by the Commission in **91** separate counts of misconduct during the reporting year.

Including dismissals and findings for the respondent, in 2007-2008, the Supreme Court issued **53** final dispositive orders, compared to 60 in the previous year, representing the completion of **66** separate discipline files compared to the completion of 89 discipline files by court order in the previous year. Including private administrative admonitions, **55** lawyers received final discipline in the reporting year, compared to 63 in the previous year. **Appendix G** provides a comparison of disciplinary sanctions entered for each of the past ten years.

2. Verified Complaints for Disciplinary Action

a. Status of Verified Complaints Filed During the Reporting Period

The following reports the status of all verified complaints filed during the reporting period:

Verified Complaints Filed During Reporting Period.....47
Number Disposed Of By End Of Year 16
Number Pending At End Of Year.....31

In addition, the Disciplinary Commission authorized the filing of **15** verified complaints during the reporting period that had not yet been filed by June 30, 2008.

The Commission also filed **5** Notices of Foreign Discipline and Requests for Reciprocal Discipline with the Supreme Court pursuant to Admission and Discipline Rule 23, §28(b).

During the reporting year, the Disciplinary Commission filed Notices of Felony Guilty Findings and Requests for Suspension pursuant to Admission and Discipline Rule 23, Sec. 11.1(a) in **3** cases.

b. Status of All Pending Verified Complaints

The following reports the status of all formal disciplinary proceedings pending as of June 30, 2008:

Cases Filed; Appointment of Hearing Officer Pending.....9
Cases Pending Before Hearing Officers 29
Cases Pending On Review Before the Supreme Court.....10
Total Verified Complaints Pending on June 30, 2008.....48

During the course of the reporting year, **12** cases were tried on the merits to hearing officers at final hearings, **27** cases were submitted to the Supreme Court for resolution by way of Conditional Agreement for Discipline, and **1** case was submitted by hearing officer findings on an Application for Judgment on the Complaint.

3. Final Dispositions

During the reporting period, the Disciplinary Commission imposed administrative sanctions and the Supreme Court imposed disciplinary sanctions, made reinstatement determinations, or took other actions as follows:

Dismissals of Verified Complaint **1**

Findings for Respondent After Trial **1**

Private Administrative Admonitions **2**

Private Reprimands.....**4**

Public Reprimands.....**9**

Name	City of Practice	Date of Admission
Barrett, Bryan E.	Rushville	October 18, 1985
DeVane, Kimberly A.	Indianapolis	June 14, 1996
Doty, Mark W.	Elkhart	June 3, 1985
Doyle, Timothy A.	Indianapolis	December 21, 1999
Humphrey, Mary J.	Evansville	October 10, 1980
[illegible]	Anderson	November 4, 1996

Kinnard, Terrance L.	Indianapolis	October 16, 2000
Meisenhelder, Jay	Indianapolis	October 21, 1997
Schuyler, Stephen W.	Anderson	June 4, 1982

Suspensions With Automatic Reinstatement.....7

Name	City of Practice	Date of Admission	Suspension
Foster, Michael T.	Fort Myers, FL	May 15, 1990	30 days
Raquet, Steven K.	Kokomo	June 3, 1983	30 days
Richardson, Scott I.	Indianapolis	August 13, 1982	90 days
Sniadecki, Rodney P.	Mishawaka	October 26, 1992	6 months
Staggs, Timothy E.	Indianapolis	October 18, 2005	90 days
Toth, Gregory D.	South Bend	October 10, 1986	60 days
Woods, James A.	Franklin	October 26, 1992	120 days

Suspensions With Reinstatement on Conditions.....7

Name	City of Practice	Date of Admission	Suspension
Bergdoll, John C.	Whiteland	May 30, 1980	30 days[1]
Boulac, Patrick G.	South Bend	January 11, 2004	6 months[2]
Cueller, Daniel	Indianapolis	October 10, 1986	6 months[3]
Gambill, Janice R.	Portage	October 23, 1995	6 months[4]
Haynie, Kenneth G.	Fort Wayne	October 21, 1975	90 days[5]
McClellan, Donald K.	Muncie	October 9, 1981	180 days[6]
Zoeller, Christopher C.	Indianapolis	October 9, 1974	180 days[7]

[1] 30-day suspension, all stayed conditioned on compliance with terms of probation for 1 year.
[2] 6-month suspension, all stayed conditioned on compliance with terms of probation for 2 years.
[3] 6-month suspension, 30 days active, with balance stayed with terms of probation for 18 months.
[4] Six-month suspension, 60 days served, balance stayed with terms of probation for 18 months.
[5] 90-day suspension, stayed conditioned on compliance with terms of probation for 24 months.
[6] 180-day suspension, 30 days served, balance stayed with terms of probation for 2 years.
[7] 180-day suspension, 90 days served, balance stayed with terms of probation for 180 days.

Suspensions Without Automatic Reinstatement.....17

Name	City of Practice	Date of Admission	Suspension
Bash, Richard M.	Pendleton	May 30, 2000	180 days
Beerbower, Douglas O.	Fort Wayne	May 5, 1976	2 years
Burch, Mark A.	Greenwood	June 9, 2000	Indefinite
Colman, David J.	Bloomington	September 16, 1970	3 years
Garvin, Mark A.	Fort Wayne	October 18, 1985	6 months
Durham, Vanessa M.	Louisville, KY	June 4, 1999	Indefinite[8]
Graddick, Charles H.	Gary	April 9, 1974	1 year
Haigh, Christopher E.	Indianapolis	June 9, 2000	2 years
Harper, Paul, Jr.	Indianapolis	April 4, 2001	12 months
Hutchinson, Alan D.	Chicago, IL	June 8, 1987	Indefinite[9]

[8] Not eligible to seek reinstatement until readmitted in Illinois.
[9] Not eligible to seek reinstatement until readmitted in Kentucky.

Johnson, Theodore	Valparaiso	October 22, 1993	Indefinite
Knuth, Randall J.	Murfreesboro, TN	October 25, 1991	Indefinite[10]
McCartney, R. Allen	Louisville, KY	May 30, 1986	Indefinite[11]
Miller, Timothy J.	Indianapolis	June 6, 1997	Indefinite
Moss, John O., III	Indianapolis	June 4, 1999	6 months
Patterson, Douglas W.	Evansville	June 9, 1989	3 years
Shula, Timothy A.	Indianapolis	May 31, 1977	90 days

[10] Not eligible to seek reinstatement until readmitted before U.S. Office of Patent and Trademark.
[11] Not eligible to seek reinstatement until readmitted in Kentucky.

Accepted Resignations **6**

Name	City of Practice	Date of Admission
Adams, Darrell	Charlestown	October 13, 1976
Ault, Kevin S.	Rushville	June 3, 1985
Carlock, Steve	Greenfield	October 9, 1981
Kniess, October S.	Indianapolis	November 16, 1982
Kummerer, James M.	Columbus	May 1, 1974
Leung, David W.	Fort Wayne	December 31, 2003
Nehrig, Brian L.	Indianapolis	June 7, 1991

Disbarments **0**

Other **1**

Name	City of Practice	Date of Admission
Fieger, Geoffrey N.[12]	Southfield, MI	Pro Hac Vice

[12] Barred from applying for temporary admission in Indiana for two years.

Reinstatement Proceedings

Disposed of by Final Order 12

Granted 9

Carl, Christopher, Evansville
Cheslek, James A., Michigan City
Drook, Jerry T., Marion
Gotkin, Jonathan S., Indianapolis (with 2 years probation)
Gowdy, Robert L., Terre Haute
Jones, Richard A., Indianapolis
Partenheimer, Robert S. (with 2 years probation)
Ragland, Michael A., Indianapolis
Stanton, Dennis J., Schererville

Denied 0

Petition Withdrawn 0

Dismissed 3

Brown, Thomas A., Hartford City
Hoogland, Eric S., Indianapolis
Kirke, James D., McKinney, TX

Emergency Interim Suspension 1

Name	City of Practice	Date of Admission
Kummerer, James M.	Columbus	May 1, 1974

Temporary Suspensions (Guilty of Felony) 3

Name	City of Practice	Date of Admission
Carlock, Steve	Greenfield	October 9, 1981
Harris, Willie	Gary	October 4, 1979
Stites, Michael G.	Rockville	November 8, 2002

V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES

	2007-08	2006-07	2005-06	2004-05	2003-04
Matters Completed	1,541	1,463	1,599	1,692	1,765
Complaints Filed	47	34	42	41	54
Final Hearings	12	10	15	8	10
Final Orders	53	60	52	60	54
Reinstatement Petitions Filed	5	11	8	4	4
Reinstatement Hearings	6	6	3	4	3
Reinstatements Ordered	9	1	1	4	0
Reinstatements Deny/Dismiss	3	7	2	2	2
Income	$1,765,488	$1,984,450	$1,870,208	$1,785,247	$1,731,521
Expenses	$1,706,111	$1,814,736	$1,766,748	$1,629,153	$1,638,797

VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE

A. Admission and Discipline Rules

Admission and Discipline Rule 3: On September 10, 2007, effective January 1, 2008, the Supreme Court amended Admission and Discipline 3 to add a new section 2(f), pertaining to temporary admission to practice by foreign attorneys. It provides that when a temporarily admitted attorney fails to keep his or her registration current and is automatically excluded from practice in Indiana as a result, any further law practice in Indiana constitutes the unauthorized practice of law. It goes on to set out a readmission procedure for automatically excluded temporary attorneys.

Admission and Discipline Rule 23, Section 27: On September 10, 2007, effective January 1, 2008, the Supreme Court amended Admission and Discipline Rule 23, Section 27, to provide

that all non-exempt lawyers should designate an attorney surrogate on their annual registration statement. If they fail to do so, they are deemed to have agreed to the appointment of a lawyer or senior judge as surrogate by the judge of the circuit court. An attorney surrogate is appointed to step in and handle the orderly wind-down of the law practice of a lawyer who has died, become disabled or disappeared. A detailed discussion of the attorney surrogate rule can be found at: Lundberg, *My Brother's Keeper: The New Attorney Surrogate Rule*, Vol. 51, No. 9 RES GESTAE 29 (May 2008).

Admission and Discipline Rule 23, Section 10(f)(5): On August 15, 2006, effective January 1, 2007, the Supreme Court amended Admission and Discipline Rule 10(f)(5) to add a provision requiring a lawyer who is suspended for not paying the costs taxed in a non-cooperation proceeding to pay a $200 administrative fee in addition to payment of the delinquent costs in order to get reinstated.

Admission and Discipline Rule 23, Section 16: On August 15, 2006, effective January 1, 2007, the Supreme Court amended Admission and Discipline Rule 16 to add a provision requiring a lawyer who is suspended for not paying the costs taxed in a lawyer discipline proceeding to pay a $200 administrative fee in addition to payment of the delinquent costs in order to get reinstated.

Admission and Discipline Rule 23, Section 21: Much of the rule content of Indiana Admission and Discipline Rule 23(21) pertaining to annual registration fees was moved to Indiana Admission and Discipline Rule 2, described above, which is now titled "Registration and Fees."

The other change effected by the Admission and Discipline Rule 2 amendments was to integrate the annual registration fees for the Disciplinary and Continuing Legal Education Commissions. The single integrated fee will now be allocated among the Disciplinary Commission, the Continuing Legal Education Commission and the Judges and Lawyers Assistance Committee as the Supreme Court decides from time-to-time.

VII. OTHER DISCIPLINARY COMMISSION ACTIVITIES

Members of the Disciplinary Commission and its staff spent many hours during the reporting year engaged in education efforts related to the lawyer discipline process and professional responsibility. Some of those activities are highlighted in **Appendix H**.

VIII. FINANCIAL REPORT OF THE DISCIPLINARY COMMISSION

A report setting forth the financial condition of the Disciplinary Commission Fund is attached as **Appendix I**.

IX. APPENDICES

BIOGRAPHIES OF DISCIPLINARY COMMISSION MEMBERS

Fred Austerman is from Wayne County, Indiana. He is one of two non-lawyer members of the Disciplinary Commission. He is the President and CEO of Optical Disc Solutions, Inc. in Richmond, a company that provides DVD and compact disc replicating services and project management for a wide variety of media developers. Mr. Austerman attended Indiana University East and graduated from Indiana University/Purdue University in Indianapolis in 1983 receiving an undergraduate degree in business, specializing in accounting. He is married and has twin sons. He is serving his first five-year term on the Commission, ending on June 30, 2008.

Diane L. (Wolf) Bender is a sole practitioner in Evansville, Indiana. She received a B.B.A. degree, with highest honors, from the University of Notre Dame in 1977. She received her law degree, cum laude, from the Notre Dame Law School in 1980. Ms. Bender was admitted to practice law in the State of Indiana in 1980 and is also admitted to practice in the United States District Court for the Southern District of Indiana and the Supreme Court of the United States. She is a member of the Evansville Bar, Indiana State Bar, and American Bar Associations. She served as president of the Evansville Bar Association in 1992 and was recipient of the Evansville Bar Association's James Bethel Gresham Freedom Award in 1991. She served as Chair of the Probate, Trust and Real Property Section of the Indiana State Bar Association in 1996. Ms. Bender is a Fellow of the Indiana Bar Foundation and a Fellow of the American College of Trust and Estate Counsel. She was initially appointed to a five-year term on the Disciplinary Commission effective July 1, 1999 and was reappointed to a second term expiring on June 30, 2009. She has previously served as Secretary, Vice-Chair and Chair of the Commission.

Corinne R. Finnerty, a Jennings County native, practices law in the partnership of McConnell Finnerty Waggoner PC in North Vernon. She received her undergraduate degree from Indiana University in Bloomington. In 1981, she graduated magna cum laude from Indiana University School of Law in Bloomington, where she was selected for membership in the Order of the Coif. She was admitted to practice law in Indiana that same year. She is also admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Seventh Circuit, and the United States District Courts for the Northern and Southern Districts of Indiana. Her bar association memberships include the Jennings County Bar Association, of which she is a past president, the Indiana State Bar Association, and the American Bar Association. Other professional memberships include the Indiana Bar Foundation, of which she is a Patron Fellow, the Indiana Trial Lawyers Association, and the American Association for Justice. Ms. Finnerty has previously been employed as Chief Deputy Prosecuting Attorney for Jennings County and the city attorney for North Vernon. In 1993, she was selected as one of forty-three outstanding women in the law at the annual meeting of the Indiana State Bar Association. Effective July 1, 2003, she was appointed by the Indiana Supreme Court to serve a five-year term on the Indiana Supreme Court Disciplinary Commission. Ms. Finnerty served as Secretary of the Disciplinary Commission during this reporting year.

Maureen I. Grinsfelder, a native of Whitley County, is Executive Director of the Questa Foundation for Education, Inc., a non-profit foundation that helps finance college for Allen County students. She is a graduate of the University of Michigan, where she was selected for membership in Scroll and Wyvern women's honor societies. For twenty-two years, she was employed by NBD Bank, NA and its predecessor banks in Fort Wayne, administering trusts,

guardianships and estates. She was appointed to the Board of Trustees of the Indiana State Museum and Memorials and has served numerous boards of social service and arts organizations in Fort Wayne. She is a past president of Congregation Achduth Vesholom in Fort Wayne and a past vice-president of the Union for Reform Judaism Northeast Lakes Regional Council. She and her husband, Alan Grinsfelder, have four sons and nine grandchildren. She is serving her first five-year term on the Disciplinary Commission, which will expire on June 30, 2010.

Robert L. Lewis is a member of the three-person law firm of Robert L. Lewis & Associates, in Gary, Indiana. Two other attorneys in the office are of counsel. He attended Indiana University in Bloomington where he received his B.A. in 1970 and his law degree in 1973. He also obtained a Masters in Public Administration from Western Kentucky University in 1980. He is a retired JAG Corps Lieutenant Colonel in the U.S. Army Reserves with prior active duty service in Viet Nam as a U.S. Marine. He is admitted to practice before the U.S. Supreme Court, the U.S. Seventh Circuit Court of Appeals, the Northern and Southern U.S. District Courts of Indiana, and the U.S. Court of Military Appeals. He is also a member of the Indiana and Kentucky Bars. He served as a part-time public defender in the Lake Superior Court, Criminal Division, for nine years before becoming a Magistrate in the same Superior Court system. He served there for four years and is currently a civil referee in the Gary City Court. He is a life member of the NAACP, Phi Alpha Delta Legal Fraternity, Omega Psi Phi Fraternity, Indiana University Alumni Association and the U.S. Reserve Officer's Association. Mr. Lewis is also a member of the American Bar Association, National Bar Association, Indiana State Bar Association, Lake County Bar Association, the James Kimbrough Bar Association, and the American and Indiana Trial Lawyers Associations. He was commissioned a Kentucky Colonel by former Kentucky Governor Julian Carroll. He was initially appointed to a five-year term on the Disciplinary Commission effective July 1, 1999 and was reappointed to a second term expiring June 30, 2009. He has previously served as Secretary, Vice-Chair and Chair of the Disciplinary Commission.

R. Anthony Prather is a partner in the Indianapolis office of Barnes & Thornburg LLP. He represents management interests exclusively in both labor and employment law and litigation matters in state courts and federal courts, including charges of employment discrimination. He handles matters that include alternative dispute resolution, discovery, bench and jury trials, and appeals. He also advises employers on various employment laws. Prior to joining Barnes & Thornburg, Mr. Prather was in-house counsel for Ameritech Corporation, Firestone Building Products Company, Firestone Industrial Products Company, and Firestone Polymers. Additionally, Mr. Prather served as the media relations spokesperson for Bridgestone/Firestone, Inc., in all federal class action and personal injury litigation against Bridgestone/Firestone, Inc. consolidated before Judge Sarah Evans Barker, and Ford Motor Company in the United States District Court for the Southern District of Indiana. Mr. Prather received his B.A. from Indiana University in 1980 and his J.D. from Indiana University School of Law–Bloomington in 1983. He is admitted to practice before the U.S. District Courts for the Northern and Southern Districts of Indiana and the U.S. Court of Appeals for the Seventh Circuit. He is a member of the American Corporate Counsel Association, the Indiana State Bar Association, and the National Bar Association. He was appointed to a five-year term on the Disciplinary Commission effective July 1, 2004.

J. Mark Robinson is the managing attorney of the New Albany office of Indiana Legal Services, Inc. He received his B.S. in Civil Engineering from Purdue University in 1969, his law degree

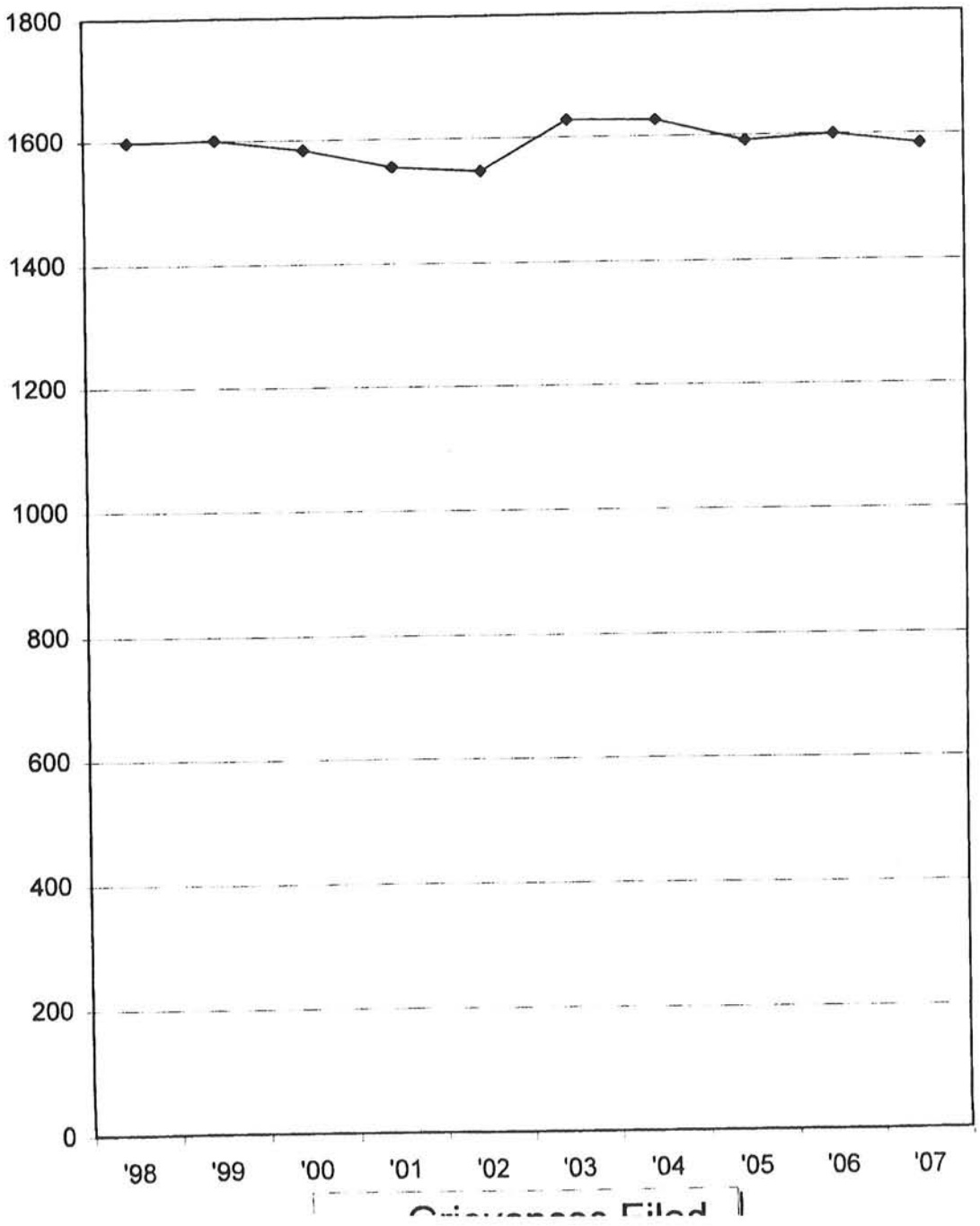
from the University of Louisville School of Law in 1973, and a Master of Divinity from the Louisville Presbyterian Theological Seminary in 1974. He was admitted to practice in the Commonwealth of Kentucky in 1974, the State of Indiana in 1975, and the United States District Courts for the Southern District of Indiana and the Western District of Kentucky. Mr. Robinson has served as in-house counsel to Chemetron Corporation, a staff attorney for the U.S. Army Corps of Engineers, and has spent the past twenty-nine years with Indiana Legal Services. His professional memberships include the Clark and Floyd County Bar Associations; the Indiana State, Kentucky, and American Bar Associations. He is the current president of the Clark County Bar Association, past president of the Clark County Board of Public Defenders, has served Clark County in the Indiana State Bar Association House of Delegates for the past ten years, and has served on the Indiana State Bar Association Board of Governors (2004-2006). He is also a Master Fellow of the Indiana Bar Foundation and present member of its board of directors. He was appointed a Sagamore of the Wabash in 1999. In his civic life, he serves as President of the Board of Directors of the River Ridge Development Authority, and is past trustee of the Southern Indiana Economic Development Council. As a Presbyterian minister, Mr. Robinson served small rural parishes in southeastern Indiana for thirty-two years. He served for six years on the Indiana Pro Bono Commission, and was appointed to a five-year term as a member of the Disciplinary Commission that expired on June 30, 2006. He was re-appointed to a second term on the Commission beginning July 1, 2006. He has previously served as Secretary, Vice-Chair and Chair of the Disciplinary Commission.

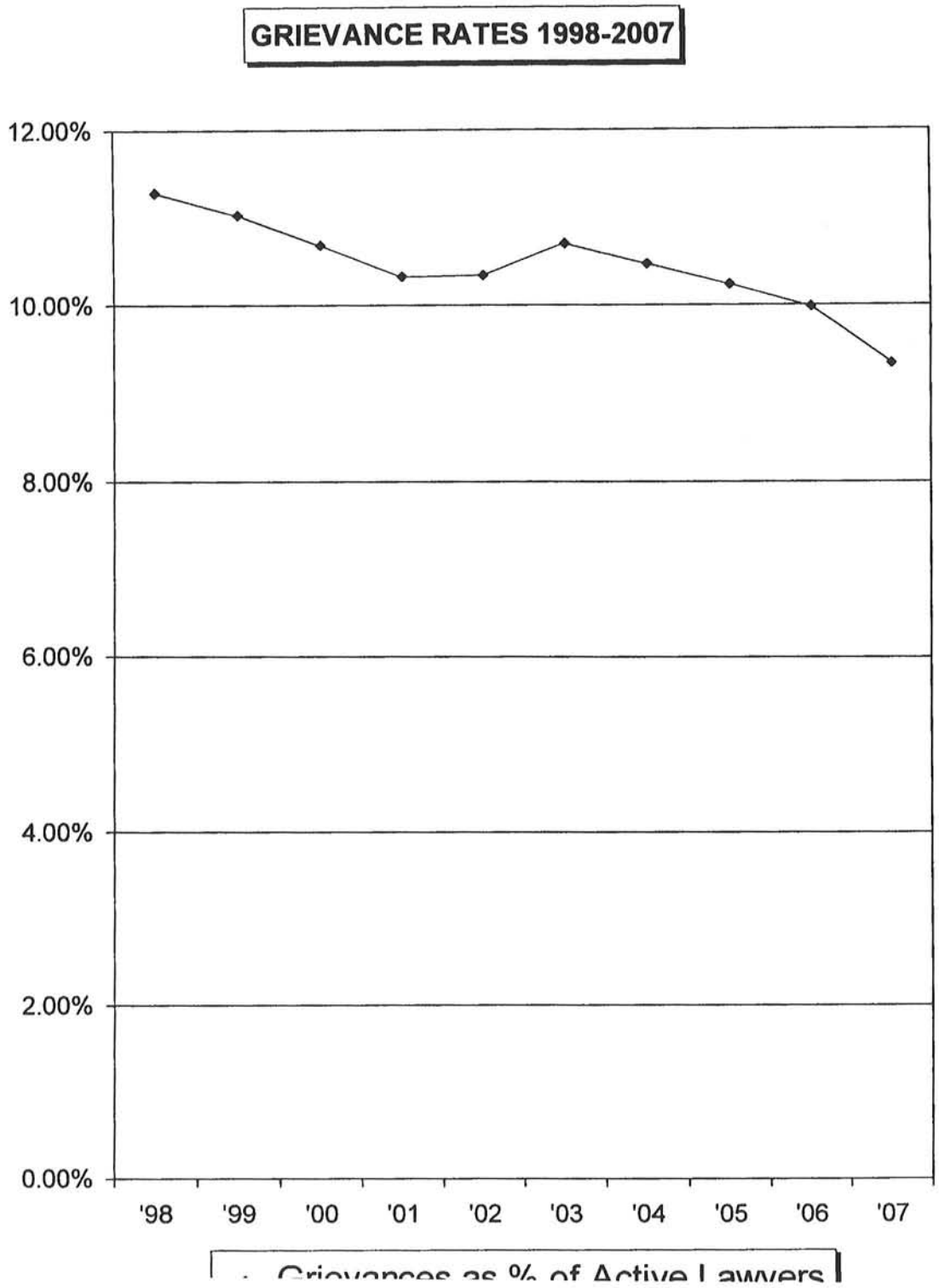
Anthony M. Zappia is the senior member of the 4-person law firm of Zappia Zappia & Stipp, located in South Bend, Indiana. He attended the University of Notre Dame where he received his B.A. in 1972, cum laude, in the School of Economics, and earned his law degree in 1976 from Valparaiso University. He is admitted to practice before the Supreme Court of Indiana and the United States District Court for the Northern District of Indiana. Mr. Zappia was a Deputy Prosecuting Attorney in St. Joseph County from 1976 to 1986. He was also the attorney for the Mishawaka City Council from 1981 to 1986. He has served St. Joseph County as its County Attorney from 1986 until the present. He has been a member of the St. Joseph County Judicial Nominating Committee on two separate occasions, and presently serves on the St. Joseph County Public Defender's Advisory Committee, and is a member of the Indiana Supreme Court Committee on Character and Fitness. Mr. Zappia was President-Elect in 1989-1990 and President in 1990-1991 of the St. Joseph County Bar Association. He is a member of the Indiana State and American Bar Associations, Indiana Trial Lawyers Association, and Association of Trial Lawyers of America. Mr. Zappia's principal areas of practice are personal injury, criminal defense, domestic relations and civil litigation. He was appointed to an initial five-year term on the Disciplinary Commission that expired on June 30, 2006, and was reappointed to a second term beginning July 1, 2006. A former Secretary and Vice-Chair of the Disciplinary Commission, Mr. Zappia served as Chair of the Commission in this reporting year.

Sally Franklin Zweig is a partner of the law firm of Katz & Korin P.C. in Indianapolis. She obtained her undergraduate degree from Washington University in St. Louis in 1971 and received her law degree from Indiana University School of Law at Indianapolis in 1986 and was admitted to practice that same year. Prior to her current affiliation she was a partner at Johnson Smith LLP where she chaired the Health Care Practice Group. She is admitted to practice in all Indiana state courts and both Indiana federal court districts, as well as the Seventh Circuit Court of Appeals and the Supreme Court of the United States. Ms. Zweig is a past President of the Board of

Directors of the Indiana University-Indianapolis Law School Alumni Association and a past President of the Indianapolis Chapter of the American Inns of Court. She has been recognized as a Distinguished Fellow of the Indianapolis Bar Foundation and has served as a lecturer for the Bar Review presented by the Indianapolis Bar Association. She is also a Fellow of the Aspen Institute [1997] and the Oxford Center for Social Justice [1998]. Her civic service includes mayoral appointments to the Executive Board of the Greater Indianapolis Progress Committee and as past co-chair of the Race Relations Leadership Counsel of Indianapolis. She also presently serves on the boards of directors of the Festival Musical Society and At Your School Services. She was appointed to a first five-year term as a member of the Disciplinary Commission expiring on June 30, 2006, and reappointed to a second term beginning July 1, 2006. A former Secretary of the Disciplinary Commission, Ms. Zweig served as Vice-Chair of the Commission in this reporting year.

NUMBER OF GRIEVANCES FILED 1997-2007



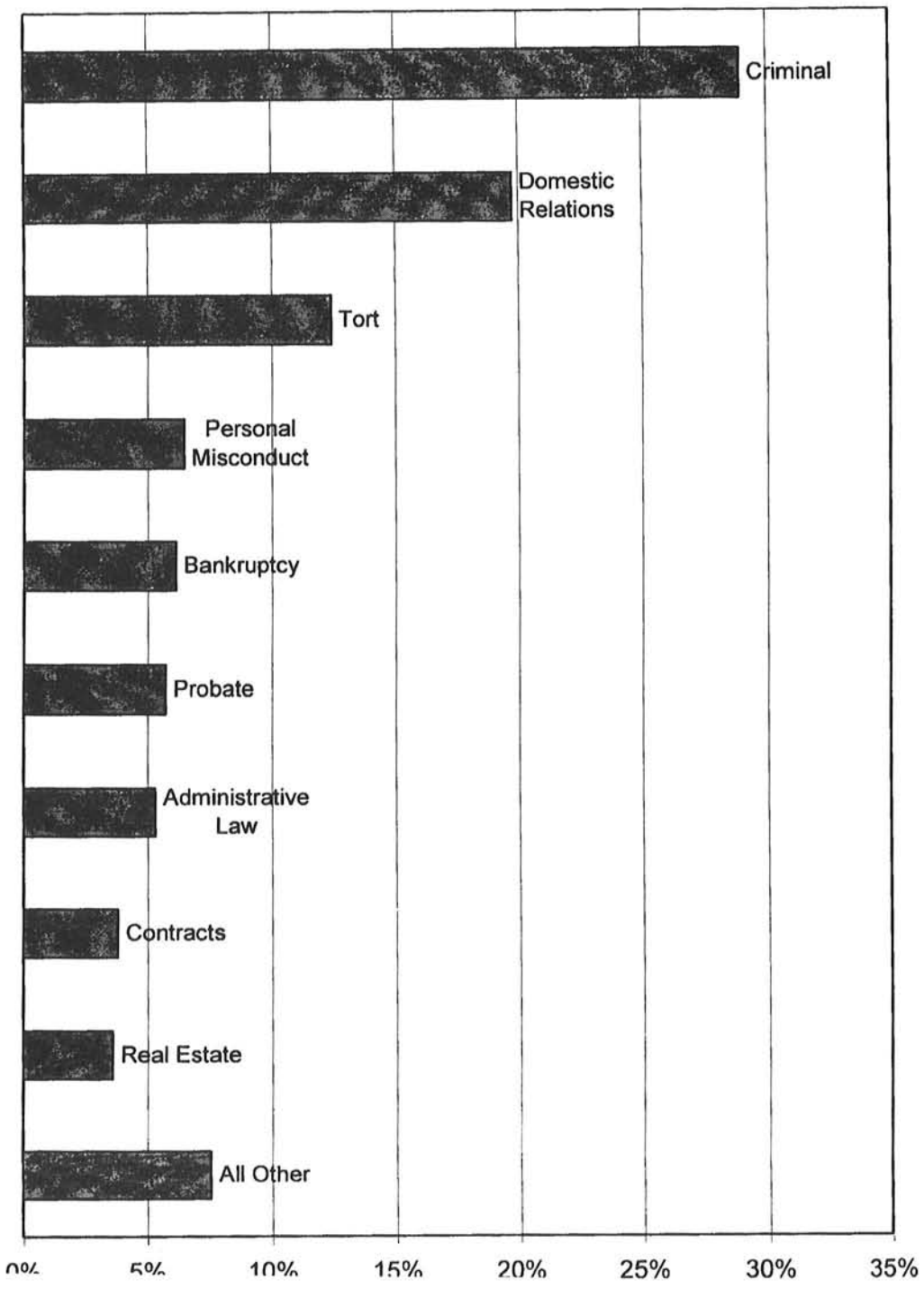

GRIEVANCE RATES 1998-2007
12.00%
10.00%
8.00%
6.00%
4.00%
2.00%
0.00%
'98
'99
'00
'01
'02
'03
'04
'05
'06
'07
Grievances as % of Active Lawyers

GRIEVANCES BY CASE TYPE AND MISCONDUCT ALLEGED (2007-2008)

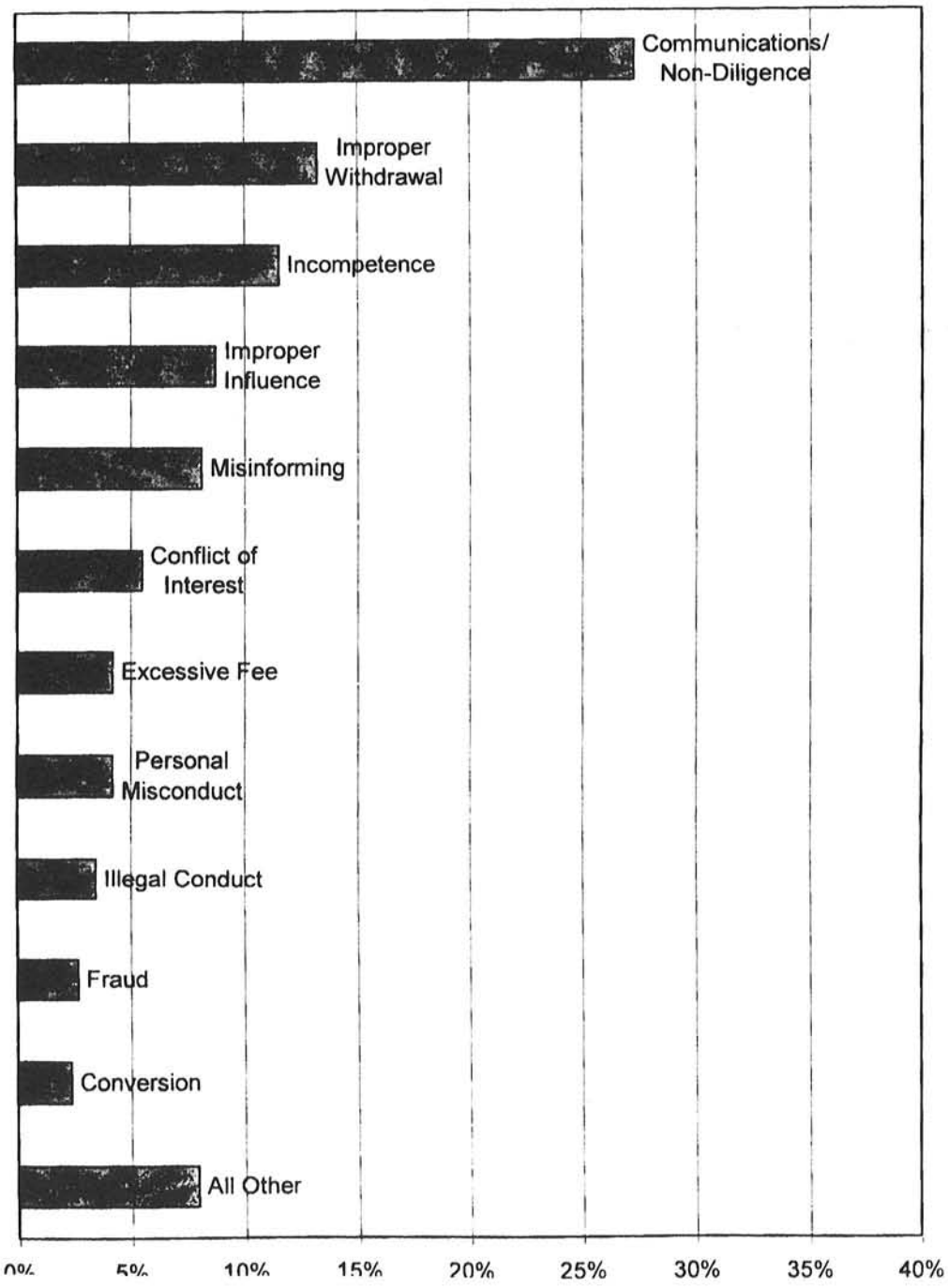
Type of Legal Matter	Number	% of Total
Administrative Law	79	5.3%
Adoption	14	0.9%
Bankruptcy	91	6.1%
Collection	28	1.9%
Condemnation	0	0.0%
Contracts	57	3.9%
Corporate	24	1.6%
Criminal	429	29.0%
Domestic Relations	293	19.8%
Guardianship	14	0.9%
Other Judicial Action	3	0.2%
Patent, Copyright	1	0.1%
Personal Misconduct	96	6.5%
Real Estate	54	3.6%
Tort	184	12.4%
Probate	85	5.7%
Worker's Compensation	20	1.4%
Zoning	1	0.1%
Other	7	0.5%
TOTAL	1480	100.0%

Alleged Misconduct	Number	% of Total
Action in Bad Faith	17	0.8%
Advertising	31	1.4%
Bypassing Other Attorney	23	1.0%
Communications/ Non-Diligence	620	27.4%
Conflict of Interest	126	5.6%
Conversion	55	2.4%
Disclosure of Confidences	31	1.4%
Excessive Fee	97	4.3%
Fraud	62	2.7%
Illegal Conduct	80	3.5%
Improper Influence	199	8.8%
Improper Withdrawal	301	13.3%
Incompetence	262	11.6%
Minor Disagreement	7	0.3%
Minor Fee Dispute	28	1.2%
Misinforming	185	8.2%
Overreaching	36	1.6%
Personal Misconduct	97	4.3%
Solicitation	8	0.4%

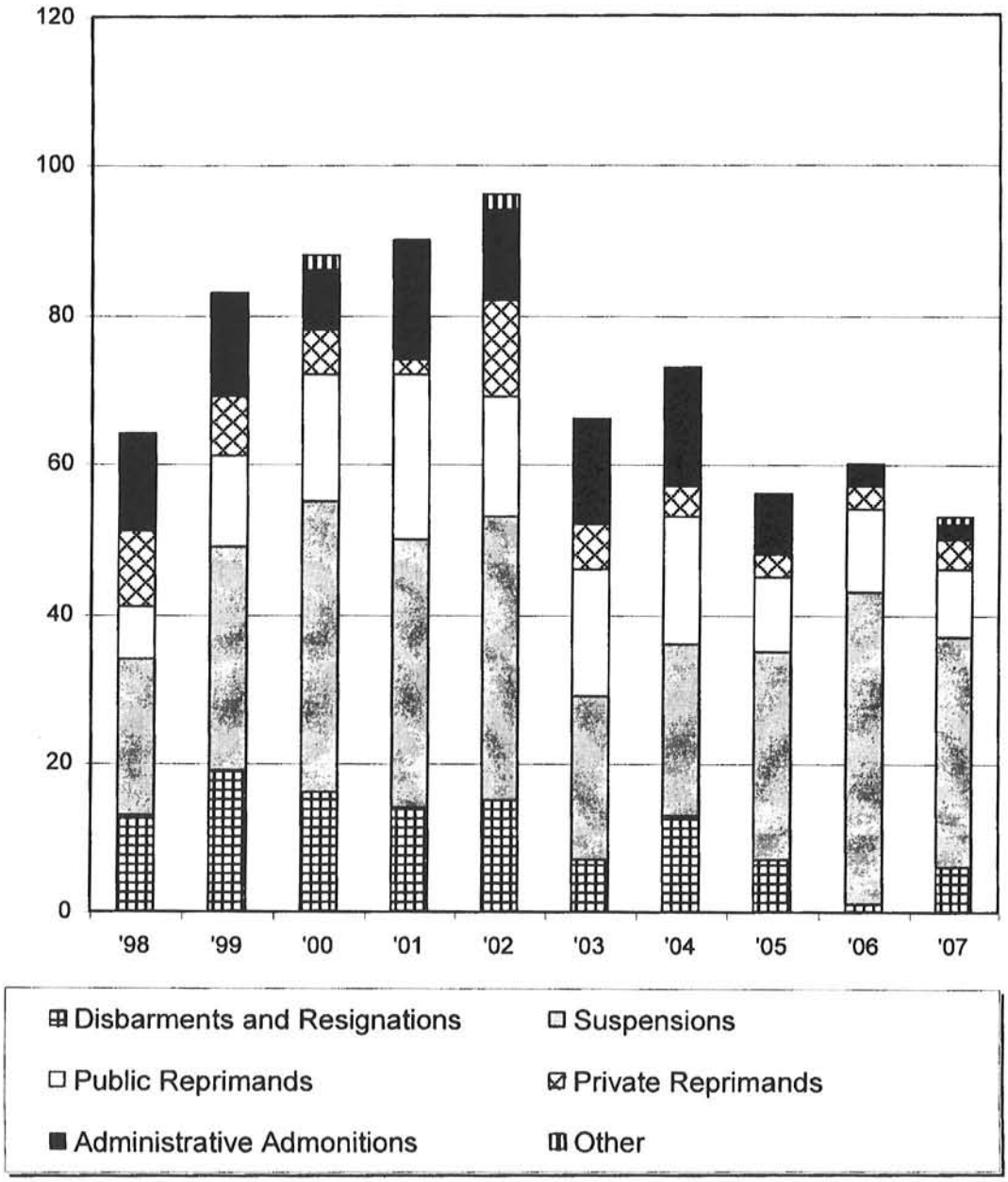
GRIEVANCES BY CASE TYPE 2007-2008



GRIEVANCES BY MISCONDUCT ALLEGED 2007-2008



SANCTIONS ORDERED 1998-2007



PUBLIC AND BAR IMPROVEMENT AND EDUCATION ACTIVITIES
2007-2008

Author	*Survey of the Law of Professional Responsibility*, 41 INDIANA LAW REVIEW 1213 (2008)	Anderson
Author	*Making the World Safe for Medical Malpractice Cases*, Vol. 51, No. 1 RES GESTAE 22 (July/August 2007)	Lundberg
Author	*File, File, Who's Got the File? Client Rights to Return of Property*, Vol. 51, No. 2 RES GESTAE 29 (September 2007)	Lundberg
Author	*The Graying of the Legal Profession*, Vol. 51, No. 3 RES GESTAE 26 (October 2007)	Lundberg
Author	*Sale of Living Trusts and the Role of Lawyers*, Vol. 51, No. 4 RES GESTAE 38 (November 2007)	Lundberg
Author	*Zealotry v. Zeal: Thoughts About Lawyer Civility*, Vol. 51, No. 5 RES GESTAE 32 (December 2007)	Lundberg
Author	*Neither Fish Nor Fowl: The Prospective Client*, Vol. 51, No. 6 RES GESTAE 32 (January/February 2008)	Lundberg
Author	*Top Ten 2007 Professional Responsibility Stories*, Vol. 51, No. 7 RES GESTAE 22 (March 2008)	Lundberg
Author	*Economic Entanglements Between Lawyers and Clients*, Vol. 51, No. 8 RES GESTAE 36 (April 2008)	Lundberg
Author	*My Brother's Keeper: The New Attorney Surrogate Rule*, Vol. 51, No. 9 RES GESTAE 29 (May 2008)	Lundberg
Author	*Unbundled Legal Services or Limited Scope Representation*, Vol. 51, No. 10 RES GESTAE 19 (June 2008)	Lundberg
JUL 20, 2007	Presenter: "Ethics Update," Indiana Civil Rights Commission, Indianapolis	Kidd
AUG 8, 2007	Co-Presenter: "What Judges Want," Indianapolis Bar Association, Indianapolis	Kidd
AUG 30, 2007	Panelist: "Indiana Ethics: The Top Five," Indiana Continuing Legal Education Forum & Indiana Conference for Legal Education Opportunity, Indianapolis	Lundberg & Prather
SEP 20, 200	Presenter: "Ethical Issues Involving Office Succession, the Surrogate Rule & Current Ethics Concerns," Senior Counsel Division, Indianapolis Bar Association, Indianapolis	Lundberg
SEP 21, 2007	Panelist: "Ethical Considerations for Bankruptcy Trustees," Bankruptcy Institute for Trustees, Indianapolis	Pruden
SEP 27, 2007	Co-Presenter: "Professional Responsibility," Annual Law Update, Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
OCT 5, 2007	Presenter: "Trust Account Management," Applied Professionalism Course, Indianapolis Bar Association, Indianapolis	Pruden
OCT 7, 2007	Presenter: "Avoiding Trouble in the First Place," Applied Professionalism Seminar, Indiana Bar Association	Iosue
OCT 16, 2007	Presenter: "Ethics Update," In-house seminar Kreig DeVault LLP, Indianapolis	Kidd

OCT 17-19, 2007	Faculty: 2007 Mid Central Region Program, National Institute for Trail Advocacy, Indianapolis	Rice
OCT 18, 2007	Co-Presenter: "Vignettes of Legal Ethics," Indiana Continuing Legal Education Forum, Indianapolis	Kidd
OCT 29, 2007	Presenter: "The Rules of Professional Conduct and the CHINS/TPR Lawyer," Marion County Public Defender Agency	Iosue
NOV 2, 2007	Presenter, "New Disciplinary Rule Amendments," Johnson County Bar Association, Franklin, Indiana	Shook
NOV 8, 2007	Presenter: "Two Year (Plus) of Ethics Curbstone: The Highlights and the Lowlights," St. Joseph County Bar Association, South Bend	Lundberg
NOV 8, 2007	Panelist: "Ethical Considerations," Practical Skills Summit, Indiana State Bar Association, Indianapolis	Pruden
NOV9, 2007	Presenter: "Two Year (Plus) of Ethics Curbstone: The Highlights and the Lowlights," Boone County Bar Association, Lebanon	Lundberg
NOV 14, 2007	Co-Presenter: "Vignettes of Legal Ethics," Indiana Commission on Continuing Legal Education, Lafayette	Lundberg
NOV 20, 2007	Presenter: "Lawyers and Law Students and Alcohol," University of Notre Dame School of Law, South Bend	Lundberg
NOV 28, 2007	Presenter: "Two Year (Plus) of Ethics Curbstone: The Highlights and the Lowlights," District XIV Pro Bono Committee, New Albany	Lundberg
NOV 29, 2007	Co-Presenter: "Vignettes of Legal Ethics," Indiana Commission on Continuing Legal Education, Muncie	Lundberg
NOV 30, 2007	Presenter: "Unbundling of Legal Services," Access to Justice Conference, Indiana Legal Services, Indianapolis	Lundberg
NOV 30, 2007	Presenter: "Ethics Questions About Metadata," Access to Justice Conference, Indiana Legal Services, Indianapolis	Lundberg
DEC 4, 2007	Presenter: "Trust Account Management," Applied Professionalism Course, Lake County Bar Association, Merrillville	Pruden
DEC 4, 2007	Presenter, "Top 10 Litigation Practice Tips For Young Lawyers," Indianapolis Bar Association, Indianapolis	Shook
DEC 5, 2007	Presenter: "Trust Account Management," Applied Professionalism Course, Allen County Bar Association, Fort Wayne	Pruden
NOV 30, 2007	Presenter: "The Rules of Professional Conduct and the Mortgage Foreclosure Lawyer," Heartland Pro Bono Counsel	Iosue
DEC 7, 2007	Presenter: "Ethics Issues in Representing Same Sex Families," American Civil Liberties Union of Indiana, Indianapolis	Lundberg
DEC 7, 2007	Panelist: Lake County Bar Association Ethics Luncheon, Merrillville, Indiana	McKinney

DEC 12, 2007	Presenter: "Keeping Your Client and the Disciplinary Commission Happy," Marion County Bar Association, Indianapolis	Lundberg
DEC 14, 2007	Co-Presenter: "Ethics," Federal Criminal Defense Update, Federal Community Defenders, Indianapolis	Lundberg
JAN 7, 2008	Presenter: "Program on Law and State Government," Indiana University School of Law Indianapolis	Kidd
FEB 20, 2008	Guest Lecturer, Criminal Practice Clinic, Prof. Lancaster, Indiana University School of Law, Indianapolis	Lundberg
FEB 29, 2008	Presenter: "Lawyer Advertising," Women In The Law Conference, Culver Cove	Kidd
MAR 4, 2008	Guest Lecturer, Civil Practice Clinic, Prof. Wolf, Indiana University School of Law, Indianapolis	Lundberg
MAR 18, 2008	Presenter: "Issues Related to Legal Ethics in Elections," Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
MAR 18, 2008	Co-Presenter: "The Hazard of 'Harmless' Cocktail Banter," Sagamore American Inn of Court, Warren Team, Indianapolis	Rice
APR 18, 2008	Presenter: "Trust Accounting and Ethics Issues for Prosecutors," Applied Professionalism for Prosecutors, Indiana Prosecuting Attorneys Council, Indianapolis	Lundberg
APR 18, 2008	Panelist: "If I Knew Then What I Know Now," Applied Professionalism, Indianapolis Bar Association, Indianapolis	Lundberg
APR 24, 2008	Presenter: "Ethical Issues Regarding Attorney Fees," Allen County Bar Association, Fort Wayne	Pruden
MAY 14, 2008	Presenter: "Civility," Ratliff-Cox American Inn of Court, Muncie	Lundberg
MAY 23, 2008	Presenter: "Staying Out of Trouble With Your Clients and the Disciplinary Commission," Litigation Department, Bose McKinney, LLP, Indianapolis	Lundberg
MAY 31, 2008	Panelist: "Regulating 21st Century Advertising: Time to Throw in the Towel?" 34th ABA National Conference on Professional Responsibility, Boston, MA	Lundberg
JUN 20, 2008	Panelist: "Collecting Your Attorney's Fees," Bench- Bar Conference, Indianapolis Bar Association, Louisville, KY	Rice
JUN 20, 2008	Presenter: "Lawyer and Judge Civility," Bench-Bar Conference, Indianapolis Bar Association, Louisville, KY	Lundberg

INDIANA SUPREME COURT DISCIPLINARY COMMISSION FUND
Statement of Revenues and Expenses (Unaudited)
Fiscal Year Ending June 30, 2008

BEGINNING DISCIPLINARY FUND BALANCE		$1,283,802
REVENUES:		
TOTAL REGISTRATION FEES COLLECTED		$1,686,637
REVENUE FROM OTHER SOURCES:		
Court Costs	$23,973	
Reinstatement Fees	2,000	
Investment Income	41,773	
Rule 7.3 Filing Fees	10,300	
Other	805	
TOTAL REVENUE FROM OTHER SOURCES		$78,851
TOTAL REVENUE		$1,765,488
EXPENSES:		
OPERATING EXPENSES:		
Personnel	$1,399,000	
Investigations/Hearings	33,501	
Postage and Supplies	24,141	
Utilities and Rent	141,809	
Travel	47,453	
Equipment	25,416	
Other Expenses	34,801	
TOTAL OPERATING EXPENSES		$1,706,121
TOTAL EXPENSES		$1,706,121
NET INCREASE (DECREASE) IN FUND BALANCE		$59,367
ENDING DISCIPLINARY FUND BALANCE		$1,343,169

ETHICAL DILEMMAS: EXHIBIT II (Sample Contract)

[SAMPLE]

HOURLY CONTRACT FOR LEGAL SERVICES

I,_____, hereby engage the firm of _____to represent me in connection with a _____ action in _____County, Indiana: Cause No: _____. This representation includes no collateral representation, and it is subject to limitations and otherwise as the parties have discussed prior to entry herein, which may be memorialized in contemporaneous letters herewith, particularly the initial client letter, if any. Any collateral representation requires separate contractual arrangements or an addendum hereto.

I, understand that the firm will charge me at the following rates: _____per hour for time expended by _____, $_____ for other attorneys, _____per hour for time law clerk time, _____ per hour for paralegal time, and _____for legal secretarial time. I understand that all time expended will be billed in .05 minute increments, which includes, but is not limited to, travel time, waiting, court time, research, drafting, telephone calls, review and drafting of e-mails, reviewing messages, and the like. This said, _____ will be the lead attorney in this case and will utilize team approach with these professionals noted herein, or as otherwise are necessary to effectuate the representation, as deemed most cost effective, given time constraints that the case may raise.

I, understand that any time the firm expended before entry herein, such as initial telephone calls and meetings or other services will be charged against this initial retainer and are fully billable and owed. I further understand that any and all services and time incurred by the firm after completion of the matter, termination, or the like will also be billed against this retainer. Thus, I will be billed for time spent on withdrawal.

I, understand that I will be charged for any and all expenses incurred by the firm in connection with the representation, including but not limited to, postage, long distance, travel at the prevailing IRS rate per mile, computerized legal research, which will be billed as actual costs thereof, photocopies at $.20 each, fees charged by the firm's credit card processor for acceptance of my credit card, if applicable. I further understand that if expenses over _____ are expected to be incurred, I may be required to pay these in advance; such expenses include, but are not limited to, filing fees, experts, depositions, mediation, and the like.

I, understand that the firm will charge me a retainer of _____, which will be billed and drawn against as services are preformed and expenses incurred. When this retainer diminishes to _____, I will be required to provide a replenishment retainer in the same amount within ten (10) days of notice. I understand that if this is not paid within ten (10) days, the firm will move to withdraw from my representation. Finally, any unpaid balance over thirty (30) days will accrue interest eight percent annually.

I understand that depending upon the work load of my case, while I may be billed on a monthly basis, the billing may more or less frequent. This is at the firm's election, unless a written

the firm. I understand that I will not be charged for this call, or other communication means thereof, as the firm wants all clients to be comfortable with and understanding of their billing statements. If the firm does not hear from a client within two (2) weeks within receipt of a statement, it will assume there are no questions or problems.

I, understand and agree that any variance of the terms hereof by the firm shall not constitute waiver of the express terms hereof thereby.

I, understand that any potential legal fee cost ranges provided are merely professional estimates based on hypothetical circumstances, or comparable cases the firm has handled in the past. Such estimates should not be relied upon in any way of the potential actual costs of any specific legal fees. Instead, they are benchmarks sometimes provided to allow a client to have an idea of typical costs of such litigation for budgeting purposes. I understand my case may be more or less. Likewise any time estimates to handle the litigation are merely such benchmarks. The case may be concluded in a much shorter time or continue much longer.

In addition, I understand that both in respect to costs and time, there are a number of variables that are completely outside the direct or indirect control of the firm. For instance, the opposing party or counsel may have different perspectives on the case and cause significant legal fees associated with defending against his/her position, as well as causing the case to continue in litigation or otherwise longer than the typical such case.

I, understand that to the extent reasonably practical, the firm will copy me with any documents it sends or receives related to may matter. Likewise, I am expected to copy the firm with any documents or otherwise I have or receive related to the case so that the firm can represent me effectively. I understand that some copied materials, will not have explanatory information, but I am encouraged to contact the firm at any time with questions or concerns.

I understand that by entry herein, I am accepting an affirmative duty to keep the firm advised of my current contact information, including e-mail, if any, telephone numbers, and, at a minimum, a current address at all time. I understand that the firm will use the address I provide, until changed, to send official correspondence, requests for information, and time sensitive materials. I accept these at this address, and act at my peril if I do not provide the firm with a replacement address or check the mail at such address on a daily basis.

With regard to communications, the firm reserves the right to copy and communicate with any client by e-mail if such is available. This also includes scanned copies of filing and other papers, as such it more time and cost effective. However, the firm shall not be limited by this. By entry herein, the client accepts all responsibility for maintaining security software to protect such confidential and legally privileged information.

I, understand that in addition to retainer provisions set out in the foregoing paragraph, in the event any trial or hearing comes to be set in my case, the firm retains the right to require a

I, understand that if a third party is paying for my representation, they are not entitled to any confidential information or able to control the representation in any way. I further understand and agree to so inform any third-party payor about this. I fully understand that the firm will in no manner discuss my case with any third party, payor or otherwise, save as inherent or impliedly authorized by the representation.

I, understand that if an emergency matter exists or comes to exist in my case, that emergencies by nature preclude the orderly flow of work and may cause multiple attorneys to work on the matter or otherwise, all of which will result in more expensive legal services.

I, understand that this Contract for Legal Services may not be modified in any manner as to the fee rate, including, but not limited to, fee rate, flat fee, lump-sum payments, fee caps, or otherwise through any conversation of the parties, or any document, letter, e-mail, or otherwise, and this is the only controlling fee agreement, even if such modification sought is communicated in any manner with any _____ attorney. The terms of this Contract for Legal Services may only be modified by a subsequent, single written contract originally signed by both an attorney of _____ and the Client. I, understand that in accordance with market standards and conditions, the firm may give me ninety (90) days written notice of increase of fees, which will not exceed five percent (5%).

I, understand that as the firm will copy me with all documents sent or received throughout the representation and will not maintain my file for me to contact the firm at times after representation concludes for copies from this file. If these are available, at the firm's sole discretion, the firm will charge me a $_____ retrieval fee, payable in advance, for copies from same, unless required more than 100 pages of copies, sorting or otherwise, for which the firm reserves the right to send same to an outside copy source and required pre-payment of the actual costs of such.

I, understand and agree to any terms set out on the case specific addendum annexed hereto if any. Finally, I understand and acknowledge again that the firm made no guarantees regarding the disposition of any phase of this case. All of our expressions related to the case are merely opinions based on likely outcomes, and are not in any way a guarantee of any outcome.

Dated:_____

_____
Signature

_____
Printed Full Legal Name

ETHICAL DILEMMAS: EXHIBIT III (Ethical Rule 9 Text)

USE OF NON-LAWYER ASSISTANTS

Introduction

Subject to the provisions in Rule 5.3, all lawyers may use non-lawyer assistants in accordance with the following guidelines.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.1. Supervision

A non-lawyer assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana and in the employ of the lawyer or the lawyer's employer. Independent non-lawyer assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited. A lawyer is responsible for all of the professional actions of a non-lawyer assistant performing services at the lawyer's direction and should take reasonable measures to insure that the non-lawyer assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.2. Permissible Delegation

Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a non-lawyer assistant or paralegal any task normally performed by the lawyer; however, any task prohibited by statute, court rule, administrative rule or regulation, controlling authority, or the *Indiana Rules of Professional Conduct* may not be assigned to a non-lawyer.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.3. Prohibited Delegation

A lawyer may not delegate to a non-lawyer assistant:

(a) responsibility for establishing an attorney-client relationship;

(b) responsibility for establishing the amount of a fee to be charged for a legal service; or

(c) responsibility for a legal opinion rendered to a client.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.5. Identification on Letterhead

A lawyer may identify non-lawyer assistants by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.6. Client Confidences

It is the responsibility of a lawyer to take reasonable measures to ensure that all client confidences are preserved by non-lawyer assistants.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.7. Charge for Services

A lawyer may charge for the work performed by non-lawyer assistants.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.8. Compensation

A lawyer may not split legal fees with a non lawyer assistant nor pay a non-lawyer assistant for the referral of legal business. A lawyer may compensate a non-lawyer assistant based on the quantity and quality of the non-lawyer assistant's work and the value of that work to a law practice, but the non-lawyer assistant's compensation may not be contingent, by advance agreement, upon the profitability of the lawyer's practice.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.9. Continuing Legal Education

A lawyer who employs a non-lawyer assistant should facilitate the non-lawyer assistant's participation in appropriate continuing education and pro bono publico activities.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

Guideline 9.10. Legal Assistant Ethics

full professional responsibility for the work product.

(b) A non-lawyer assistant shall not engage in the unauthorized practice of law.

(c) A non-lawyer assistant shall serve the public interest by contributing to the delivery of quality legal services and the improvement of the legal system.

(d) A non-lawyer assistant shall achieve and maintain a high level of competence, as well as a high level of personal and professional integrity and conduct.

(e) A non-lawyer assistant's title shall be fully disclosed in all business and professional communications.

(f) A non-lawyer assistant shall preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship.

(g) A non-lawyer assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.

(h) A non-lawyer assistant shall act within the bounds of the law, uncompromisingly for the benefit of the client.

(i) A non-lawyer assistant shall do all things incidental, necessary, or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

(j) A non-lawyer assistant shall be governed by the Indiana Rules of Professional Conduct.

(k) For purposes of this Guideline, a non-lawyer assistant includes but shall not be limited to: paralegals, legal assistants, investigators, law students and paraprofessionals.

Adopted effective Jan. 1, 1994; amended Sep. 30, 2004, effective Jan. 1, 2005.

ETHICAL DILEMMAS: EXHIBIT IV (Adm. 9 Handbook)

PUBLIC ACCESS TO COURT RECORDS HANDBOOK

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STATE COURT ADMINISTRATION

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http://www.in.gov/judiciary/admin/pubs.html and

http://www.in.gov/judiciary/admin/courtmgmt/bulk-data/bulkreq-forms.html

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Introduction to Public Access and Privacy Issues

Historically, court records in Indiana have been presumed to be open for public access, unless those records fell into certain exceptions that were deemed confidential. The philosophy of open records is that government and the public interest are better served when records are open for public inspection.

In addition to the inherent authority of the Indiana Supreme Court to oversee the operation of trial courts throughout the state, Indiana Code §5-14-3-4(a)(8) specifically recognizes the authority of the Indiana Supreme Court to promulgate rules governing access to court records. In accordance with this authority, Administrative Rule 9 was promulgated. Administrative Rule 9 expresses the general premise that records are publicly accessible unless they are explicitly excluded from access. This rule seeks to assure full public access to court records while protecting important privacy interests and while assisting court staff and clerks' offices in providing helpful customer service.

The Rule is the culmination of an intense ten-month effort of a special Task Force on Access to Court Records organized by the Supreme Court Records Management Committee in January 2003. The task force was chaired by Justice Brent Dickson of the Indiana Supreme Court and included a broad representation of numerous constituencies, including the media, victim advocacy groups, judges, private attorneys, clerks, the Indiana Attorney General's office, and the Indiana Civil Liberties Union. The Division of State Court Administration provided staff support to the task force, and the Division will ultimately assist courts and clerks' offices in the implementation of this rule.

The Rule, which was formally adopted by the Indiana Supreme Court on February 25, 2004, takes effect on January 1, 2005, at which time all new case filings and public access requests must comply with the Rule. Court and clerk offices need not redact protected information from, or restrict access to, documents or records created prior to January 1, 2005. Administrative Rule 9 governs confidentiality and access issues for both administrative and case records in all Indiana courts. Although this handbook attempts to answer some practical questions and situations users may encounter with Administrative Rule 9, it should be read in conjunction with the original text of the rule.

Questions pertaining to Administrative Rule 9, access or confidentiality may be directed to the Division of State Court Administration at (317) 232-2542. Individuals involved in the drafting of this Rule and handbook have included Ron Miller, John Newman, Tom Jones, and Lilia Judson. More information can also be found at the Division's website at http://www.in.gov/judiciary.

Who has access under this Rule?

The general presumption under this Rule is that all court records are open to any person, unless the records fall into a particular type or category that has been deemed to be excluded from public access by this Rule or unless they involve a particular individual circumstance that excludes them from public access.

Court staff and clerk staff, however, may at times have a greater level of access than would the general public. For example, juvenile records or adoption records that are not generally accessible by the public must be accessed by the court and clerk staffs who work with those records. By the same token, the parties themselves as well as their legal counsel may have access to records that are ordinarily excluded from general public access. Entities that assist courts in providing court services, and other governmental or public agencies may also at times have greater levels of access to certain records than would the general public. This might include providers of psychological or psychiatric services, GAL/CASA providers, social workers, or others.

At times, records that are otherwise excluded from public access may also need to be shared with other governmental agencies, such as law enforcement, administrative agencies, or schools. More particularly, specific data contained within records, such as Social Security Numbers or addresses, may need to be shared with these other governmental agencies to maximize the effectiveness of the court proceeding. Another instance of information sharing would include account numbers or Social Security Numbers that may need to be included in court orders submitted to banks or employers for garnishment purposes. Despite these particular instances when non-public information must be shared with other agencies or entities to give effect to court orders or other official proceedings, Administrative Rule 9 still requires that non-public information such as Social Security Numbers and account numbers, or in the instance of certain causes of action, dates of birth, address, and other identifying information be excluded from public access to the court file. In instances where a court order contains non-public information, the full order should be produced on green paper for inclusion in the non-public case file and a redacted copy made available for general public access.

> ***Example:***
> *An individual petitions a court for an order of protection. The court grants the petition and issues an order. As part of the order process, the court generates a protective order cover sheet, which contains the Social Security Number of all protected parties covered by the order. It also contains the date of birth of the petitioner. Social Security Numbers and dates of birth are excluded from public access; however, to maximize the effectiveness of the protective order, it is necessary to share this information with law enforcement agencies and other governmental agencies who may be involved in the protective order process. While the Social Security Number would not be available to the general public, law enforcement and other court agencies who help execute the order of protection fall within the scope of "other governmental agencies or agencies assisting the court. The court must ensure that the Social Security Numbers and*

other information excluded from public access are not available in the public case file, and this in turn may result in the need for a redacted order in the public file and a complete order with all information in the confidential file.

Definitions

The Rule provides definitions to help clarify what is meant by particular sections of the rule. A brief synopsis of these terms is provided below.

Court Record. A court record is considered to include both case records and administrative records.

Case Record. Any document, information, data or other item created, collected, received or maintained by a court, court agency, or clerk of court in connection with a particular case. This category would likely include motions, pleadings, orders, evidence accepted by the court, etc.

Administrative Record. Any document, information, data or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government and not associated with any particular case. This category would likely include timesheets, phone records, memoranda, etc.

Court. When used in Administrative Rule 9, this term can refer to any court in Indiana, including the Indiana Supreme Court, the Court of Appeals, the Indiana Tax Court, circuit, superior, probate, county, city, town, and small claims courts. Staff of the court are included in this term.

Clerk of Court. When used in Administrative Rule 9, this term can refer to any clerk of court, including the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court, clerks of the circuit, superior, probate, and county courts; clerks of city and town courts; and clerks of small claims courts. Staff of the clerk's office are included in this term.

Public Access. This term means the process by which a person may inspect and copy the information in a court record.

Remote Access. This refers to the ability of a person to inspect and copy information in a court record in electronic form through an electronic means, such as a computer or the Internet.

In electronic form. This means any information in a court record in a form that is readable through the use of an electronic device, regardless of the manner in which it was created.

Bulk Distribution. This means the distribution of all, or a significant subset of the information in court records in electronic form, as is, and without modification or compilation.

Compiled Information. This means information that is derived from the selection, aggregation or reformulation of some of all or a subset of all the information from more than one individual court record in electronic form.

Providing Remote Access

One of the tremendous advances of modern technology provides courts and clerk's offices with the ability to provide public access to records through electronic means. Although Administrative Rule 9 does not require courts or clerks to provide electronic access to court records, it encourages them to provide remote access.

If remote access is provided, courts and clerks are encouraged to provide the following types of information:

- litigant / party indexes
- listings of new case filings, including party names
- chronological case summaries of cases
- calendars or dockets of court proceedings

In deciding to provide remote access to court records, courts and clerks should be mindful of restrictions on public access and also ensure that any remote access does not expose the court's case management system to unnecessary burden or risk of damage through inappropriate access, hacking, or viruses.

Remote access may increase efficiency in court and clerk offices because many routine questions or requests may be answered by public access to the information through remote means.

Courts and clerks who wish to provide remote access to court information must, pursuant to Trial Rule 77(K), submit a request to the Division of State Court Administration for approval of the form of access and the information to be included.

Administrative Rule 9 contemplates that courts and clerks may wish to post more information than basic indexes and CCS entries to a medium such as the Internet. With that intent in mind, the forms associated with this handbook provide a means for parties and their legal counsel to file information that is otherwise excluded from public access separate from documents, such as pleadings or motions, that may otherwise be available for public access. These companion forms would be kept separate from the publicly accessible portions of a case file in the physical file and would not be available to the general public in an electronic version.

Bulk Distribution and Compiled Information

A request for bulk distribution of records is one that asks for all records from a court's case management system. Under the terms of Administrative Rule 9, bulk record requests are ones that require no manipulation of the data. Rather, it is simply an output that contains all the records and all the data fields contained in those records. These types of requests are frequently made by commercial information providers or by entities conducting research.

Compiled information requests are ones that require some manipulation of data, either through filtering so that only particular records are included, or through editing or redaction of records to provide specific information.

All requests for bulk distribution or compiled information should be forwarded to the Division of State Court Administration. The new provisions of Administrative Rule 9 require that these requests be handled centrally so that they are dealt with in a similar fashion.

The Division of State Court Administration will review the bulk distribution or compiled information request, and if it is possible to accommodate the request the Division will either process the request directly through the Judicial Technology and Automation Committee ("JTAC"), or will forward the request to the appropriate jurisdiction for further action, if fulfilling the request could only be done by a local court or clerk's office.

Standard forms for bulk or compiled information requests may be found in Appendix A of this Handbook. While it is not necessary for a requestor to use the form, the form does call for all the information required by the Division to determine if a request could be fulfilled.

Requests for information that is otherwise publicly available will be granted if it is technically feasible and if resources to generate the information are available. Requests for information that is not publicly accessible require a higher level of scrutiny. The Division may still accommodate these types of requests, but information that is excluded from public access will still be limited.

In all instances the requesting party may be required to pay the reasonable costs of responding to the request for information.

Example:

A national criminal record database submits a request to the Division of State Court Administration for bulk transmission of all criminal records available through the statewide case management system. The Division reviews the request, notes that among the information requested are the Social Security Number of all defendants. Since Social Security Numbers are excluded from public access, the availability of that data will be limited. The Division processes the request, forwards it to JTAC for preparation of the data, and then ultimately transmits the data to the requestor. The data transmission will contain all of the

information requested, with the exception of the Social Security Number field, which will contain only the last four digits of the Social Security Number.

Local courts and clerks' offices may already be receiving requests for bulk or compiled information, and in some cases, may already be providing electronic transmission of information from an existing case management system. Following the effective date of this Rule on January 1, 2005, all such requests for either bulk or compiled data MUST be made to the Division of State Court Administration for further action, even if a court or clerk's office has previously provided data. As a practical matter, the Division may forward the request to the local court or clerk for further action, but in adopting the Rule, the Supreme Court felt that there was some utility and some economy in resources to centralize all requests for this sort of information. Bulk or compiled data requests should not be provided to any requestor until a request has been submitted to and approved by the Division of State Court Administration.

Records Excluded From Public Access

Certain records and data fields or information contained in records that are otherwise publicly accessible may be excluded from public access. Administrative Rule 9 first identifies numerous other confidentiality provisions from elsewhere in the Indiana Code and in the Indiana Rules of Court. These provisions are not new, but merely restatements of confidentiality found elsewhere. Administrative Rule 9 next creates new categories of confidentiality, and specifically excludes from public access certain information including, but not limited to, addresses, complete dates of birth, as well as information other than names which tends to identify witnesses and victims only in criminal, domestic violence, stalking, sexual assault, juvenile, or civil protection order proceedings. Complete Social Security Numbers and complete account numbers of specific assets, liabilities, accounts, and credit cards are always considered excluded from public access by this Rule.

Records that are excluded from public access or are otherwise declared confidential by federal or state law are incorporated into the restrictions of Administrative Rule 9. Some things that are excluded from public access include: certain adoption records, records relating to AIDS, records relating to child abuse that are not admitted into evidence, records relating to drug tests not admitted into evidence, records of grand jury proceedings, records of juvenile proceedings, certain paternity records, pre-sentence reports, and medical/mental health/tax records generally. Administrative Rule 9 specifically excludes the following records from public access:

- Information that is not publicly accessible under federal law;
- All adoption records created after July 8, 1941 [see I.C. 31-19-19-1], unless the records have specifically been declared open under I.C. 31-19-13-2(2);
- All records relating to Acquired Immune Deficiency Syndrome [see I.C. 16-41-8-1];
- All records relating to child abuse that have not been admitted into evidence during a public court proceeding [see I.C. 31-33-18];
- All records relating to drug tests that have not been admitted into evidence as part of a public proceeding pursuant to I.C. 5-14-3-4(a)(9);
- Records of grand jury proceedings [see I.C. 35-34-2-4];
- Records of juvenile proceedings pursuant to I.C. 31-39-1-2, except for certain cases and situations that are open by statute;
- All paternity records created after July 1, 1941 [see I.C. 31-14-11-15, I.C. 31-19-5-23, I.C. 31-29-1-1, and I.C. 31-29-1-2];
- All pre-sentence reports [see I.C. 35-38-1-13];
- Written petitions to permit marriages without consent and orders from the court directing the clerk to issue a marriage license to underage persons [see I.C. 31-11-1-6];
- Arrest warrants, search warrants, indictments and informations that the judge orders confidential prior to the return of service [see I.C. 5-14-3-4(b)(1)];
- All medical, mental health, or tax records unless: the records are released by the subject of those records, ordered open by a judge because the records are essential

to a pending case, or the records are considered open by law or regulation. [see I.C. 16-39-3-10, I.C. 6-4.1-5-10, I.C. 6-4.1-12-12, and I.C. 6-8.1-7-1];

- Personal information of jurors and prospective jurors, other than for use by parties or counsel to the parties in a particular case [see Jury Rule 10];
- Information relating to orders of protection that has not been admitted into evidence as part of a public proceeding [see I.C. 5-2-9-6];
- Mediation proceedings, mini-trial proceedings, and summary jury trials [see Alternative Dispute Resolution Rules 2.11, 4.4(c) and 5.6];
- Information in probation files pursuant to probation standards promulgated by the Judicial Conference of Indiana [see I.C. 11-13-1-8(b)];
- Information deemed confidential pursuant to the Rules for Court Administered Alcohol and Drug Programs promulgated by the Judicial Conference of Indiana [see I.C. 12-23-14-13];
- Information deemed confidential pursuant to the Drug Court Rules promulgated by the Judicial Conference of Indiana [see I.C. 12-23-14.5-9];
- Information that a judge has specifically ordered to be sealed or otherwise limited access;
- Social Security Numbers
- Addresses, phone numbers, dates of birth and other information specifically identifying witnesses or victims in criminal, domestic violence, stalking, sexual assault, juvenile, or civil protection order proceedings. This category does not include the name of the witness or the victim;
- Places of residence of judicial officers, clerks, and other employees of courts and clerks of court;
- Account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINS);
- All personal notes and e-mail, and deliberative material, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDA's) or organizers and personal calendars;
- All orders of expungement entered in criminal or juvenile proceedings;
- Work product of an attorney representing a public agency, the state, or an individual pursuant to I.C. 5-14-3-4(b)(2);
- Test questions, scoring keys, and other examination data used in administering a licensing examination or an examination given for employment pursuant to I.C. 5-14-3-4(b)(3);
- Test scores of a person if a person is identified by name and has not consented to the release of the person's scores pursuant I.C. 5-14-3-4(b)(4);
- Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature and that are communicated for the purpose of decision making [see I.C. 5-14-3-4(b)(6)];
- Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal [see I.C. 5-14-3-4(b)(7)];

- Personnel files of employees and files of applicants for employment, except for the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, and dates of first and last employment; information relating to the status of any formal charges against the employee; and information concerning disciplinary actions in which final action has been taken and that resulted in employee being suspended, demoted, or discharged [see I.C. 5-14-3-4(b)(8)];
- Administrative or technical information that would jeopardize a record keeping or security system [see I.C. 5-14-3-4(b)(10)];
- Computer programs, computer codes, computer filing systems and other software [see I.C. 5-14-3-4(b)(11)];
- Lists of employees of courts, court agencies, or clerks offices, which cannot be disclosed to commercial vendors for commercial purposes [see I.C. 5-14-3-4(c)(1)];
- All information and records obtained and maintained by the Board of Law Examiners [see Admission and Discipline Rule 19];
- Proceedings and papers in attorney discipline matters that relate to matters that have not yet resulted in the filing of a verified complaint [see Admission and Discipline Rule 23];
- Files, records and proceedings of the Continuing Legal Education Commission [see Admission and Discipline Rule 29];
- Information obtained or maintained by the Judges and Lawyers Assistance Program Committee, with the exception of statistical data [see Admission and Discipline Rule 31];
- Information maintained by the Judicial Qualifications Commission prior to the filing of a complaint and service of formal charges [see Admission and Discipline Rule 25].

Records Excluded from Public Access by Court Action

Administrative Rule 9 provides two methods for restricting access to otherwise accessible court records: (1) a petition filed by a person who would be affected by a release of the information and (2) an order to seal records entered pursuant to I.C. 5-14-3-5.5.

An individual who would be affected by the release of court records may file a petition with the court having jurisdiction or control of the record.

The petition must be verified and demonstrate that:

(a) the public interest will be substantially served by prohibiting access;
(b) access or dissemination of the information will create a significant risk of substantial harm to the requestor, other persons or the general public;
(c) a substantial prejudicial effect to on-going proceedings cannot be avoided without prohibiting public access, or
(d) the information should have been excluded from public access under section (G) of the rule.

Additionally, the petitioner must provide notice of the petition to the parties to the case as well as any other persons designated by the Court. Persons receiving notice are entitled to twenty (20) days after receipt of the notice to respond to the petition.

The petitioning person must provide the Court with proof that notice has been given or the reasons why notice could not be given or should not be given. In providing reasons why notice should not be given, the petitioning person must demonstrate to the Court their reasons for prohibiting access to the information.

Upon receipt of a petition to prohibit public access the Court may deny the petition without a hearing. Advance public notice must be posted with regard to a hearing upon a petition.

At the hearing, the petitioning person has the burden of proof by clear and convincing evidence. The petitioner must prove:

(a) the public interest will be substantially served by prohibiting access;
(b) access or dissemination of the information will create a significant risk of substantial harm to the requestor, other persons or the general public;
(c) a substantial prejudicial effect to on-going proceedings cannot be avoided without prohibiting public access, or
(d) the information should have been excluded from public access under section (G) of the rule.

In ruling upon a petition to exclude public access to court records, the Court is required to balance the public access interests served by Administrative Rule 9 and the grounds

demonstrated by the petitioner. The Court is required to state its reasons for granting or denying the petition and, if access is prohibited, use the least restrictive means and duration.

If a petition to prohibit public access is filed when a case is initiated, the petition and the case information will remain confidential for a reasonable period of time so that the Court may rule upon the petition.

If the information subject to the petition is already publicly accessible, the information may be rendered confidential for a reasonable period of time so that the Court may rule upon the petition.

Requests to access bulk or compiled records, or records under the jurisdiction of multiple courts, which records are normally excluded from public access, must be filed with the Supreme Court and are subject to the special requirements of Administrative Rule 9(F)(4).

Administrative Rule 9 does not limit the authority of a Court to seal court records pursuant to Ind. Code § 5-14-3-5.5. Proceedings to seal court records require a publicly noticed hearing in which parties or members of the general public must be permitted to testify and submit written briefs.

In ruling upon the sealing of the records the Court is required to make written findings of fact and conclusions of law showing that the remedial benefits to be gained by effectuating the public policy of the state declared in I.C. 5-14-3-1 are outweighed by proof by a preponderance of the evidence by the person seeking the sealing of the record that:

(1) a public interest will be secured by sealing the record,
(2) dissemination of the information contained in the record will create a serious and imminent danger to that public interest;
(3) any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other than sealing the record;
(4) there is a substantial probability that sealing the record will be effective in protecting the public interest against the perceived danger; and
(5) it is reasonably necessary for the record to remain sealed for a period of time.

All sealed records must be unsealed at the earliest possible time after the circumstances necessitating the sealing of the records end.

Obtaining Access to Information Excluded from Public Access

Administrative Rule 9(G)(3) provides that a Court with jurisdiction over a case may provide access to information in the case record that would otherwise be excluded from public access if the information is essential to resolution of the litigation or the information is released by each person to whom the information pertains.

Access to information in a case record or administrative record excluded from public access can also be sought under the provisions of Administrative Rule 9 (I). Any person may file a verified petition with the Court having jurisdiction of the record. The petition must demonstrate that:

(a) extraordinary circumstances exist that requires deviation from the general provisions of this rule;
(b) the public interest will be served by allowing access;
(c) access or dissemination of the information creates no significant risk of substantial harm to any party, to third parties, or to the general public, and;
(d) the release of information creates no prejudicial effect to on-going proceedings, or;
(e) the information should not be excluded for public access under Section (G) of the rule.

Additionally, the petitioner must provide notice of the petition to the parties to the case as well as any other persons designated by the Court. Persons receiving notice are entitled to twenty (20) days after receipt of the notice to respond to the petition.

The petitioning person must provide the Court with proof that notice has been given or the reasons why notice could not be given or should not be given. In providing reasons why notice should not be given, the petitioning person must demonstrate to the Court their reasons for prohibiting access to the information.

Upon receipt of a petition to permit public access, the Court may deny the petition without a hearing. Should the Court hold a hearing to determine whether to permit access, the petitioner is required to demonstrate by clear and convincing evidence that:

(a) extraordinary circumstances exist which requires deviation from the general provisions of this rule;
(b) the public interest is served by allowing access;
(c) access or dissemination of the information creates no significant risk of substantial harm to any party, to third parties, or to the general public, and;
(d) the release of the information creates no prejudicial effect to on-going proceedings, or;

(e) the information should not be excluded from public access under section (G) of the rule.

In ruling upon a petition to permit access to court records that are not otherwise accessible, the Court is required to balance the public access interests served by Administrative Rule 9 and the grounds demonstrated by the petitioner. The Court is required to state its reasons for granting or denying the petition.

When a request is made for access to information excluded from public access, the information will remain confidential while the court rules on the request.

Restrictions may be placed upon the use or dissemination of the information to preserve confidentiality.

Contracts with Information Technology Vendors

Courts and clerks who are parties to agreements with information technology vendors, whether for case management systems, hardware or network support, or other computer services, and whether such agreements are with private contractors or consultants or another branch of state or county government, are required to abide by certain provisions in Administrative Rule 9 concerning the ownership and handling of court records.

First, any arrangement for information technology services that involves an entity outside the court or clerk's office, must explicitly require that entity to comply with all of the provisions of Administrative Rule 9. This requirement essentially requires the vendor to assume some responsibility for understanding the Rule and complying with it.

Second, each contract or arrangement with an information technology provider must require that the vendor assist the court in its role of educating litigants and the public about their ability to access information. Employees and sub-contractors of the vendor must also be trained by the vendor to understand this Rule and abide by its requirements.

Third, each contract must require vendors to obtain approval before providing any bulk or compiled records or other information transfers.

Finally, each contract or arrangement must contain language so that the vendor acknowledges that the records remain the property of the court and that the use of the information or the records is subject to orders of the court.

The provisions of this rule do not affect current contracts that are currently in force. However, as contracts are renegotiated, or renewed, they must be compliant with this provision. For long-term or on-going contracts that are already in place, a court or clerk may wish to see if the vendor will execute a contract addendum reflecting these provisions, or at a minimum, acknowledge these points in a letter to reflect their compliance.

Immunity for Accidental or Unintentional Disclosure

Administrative Rule 9 (L) provides immunity from liability to any court, court agency, or clerk of court employee, official, or an employee or officer of a contractor or subcontractor of a court, court agency, or clerk of court who unintentionally and unknowingly disclose confidential or erroneous information. The grant of immunity is consistent with the immunity and protections provided by Indiana statute as found at IC 5-14-3-10(c).

Specific Implementation Rules And Filing Procedures

Other Rules Implementing Administrative Rule 9

The Indiana Supreme Court has amended the rules set forth below to include provisions implementing Administrative Rule 9. Each of these amendments is effective January 1, 2005.

Rules of Trial Procedure

Trial Rule 3.1(D) Confidentiality of Information Excluded from Public Access. Any appearance form information or record defined as not accessible to the public pursuant to Administrative Rule 9(G)(1) shall be filed in a manner required by Trial Rule 5.

Trial Rule 5(G) Filing of Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative rule 9(G)(1). Every document prepared by a lawyer or party for filing in a case shall separately identify information excluded from public access pursuant to Administrative Rule 9(G)(1) as follows:

(1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper, marked "Not for Public Access."

(2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

(3) With respect to documents filed in electronic format, the trial court, by order or local rule, may provide for compliance with this rule in a manner that separates and protects access to information excluded from public access.

(4) This rule does not apply to a record sealed by the court pursuant to IC 5-14-3-5.5 or otherwise, nor to records to which public access is prohibited pursuant to Administrative Rule 9(H).

Trial Rule 58(C) Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Every court that issues a judgment or order containing documents or information

excluded from public access pursuant to Administrative Rule 9(G)(1) shall comply with the provisions of Trial Rule 5(G).

Rules of Criminal Procedure

Criminal Rule 1.1 Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Rules for Small Claims

Small Claims Rule 2(E) Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Procedure for Post-Conviction Remedies

Post Conviction Rule 1, Section 3(c). The Clerk shall file documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) in accordance with Trial Rule 5(G).

Tax Court Rules

Rule 3(G). Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Rules of Appellate Procedure

Appellate Procedure Rule 2(N). Case Record and Case Records Excluded From Public Access. The term "Case Record" shall mean a record defined by Administrative Rule 9(C)(2). "Case Records Excluded From Public Access" shall mean records identified in Administrative Rule 9(G)(1).

Appellate Procedure Rule 9(J). Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Procedure for Original Actions

Original Action Rule 3(J). Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Trial De Novo

Rule 4. Documents and Information Excluded from Public Access and Confidential Pursuant to Administrative Rule 9(G)(1). Documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).

Filing Procedures

Prior to its January 1, 2005 effective date, Courts and Clerks need to decide how Administrative Rule 9 will be implemented in their offices in compliance with the requirements of Trial Rule 5(G). Administrative Rule 9 does not prescribe a particular method to be used and has left implementation for local determination.

Decisions will need to be made about how confidential information will be received, entered, stored and made available for review or protected from review by unauthorized persons. Additionally, decisions will be needed concerning the handling of applications for access to confidential information and to prohibit access to information in a court record as both the applications and the information sought remain confidential pending a court ruling.

Each county will need to adopt a process for receipt of confidential information. Some of this information will be tendered upon the initial filing of a case, but some will be received during the pendency of the case. For ease of immediate identification Trial Rule 5 requires the use of a light green form by which a party may tender confidential or identifying information to the Clerk for entry into the case record. Examples of the types of confidential information which will be tendered are: Social Security Numbers, account numbers, and credit card numbers. In certain causes of action, such as protection orders, stalking, domestic violence, and criminal cases, addresses, dates of birth, and telephone numbers of witnesses and victims are also to be excluded from public access.

In order to secure compliance with the filing requirements of Trial Rule 5(G), Courts may want to adopt a Local Rule requiring certification of compliance by all parties and their counsel. A sample rule is contained in Appendix A.

Once received, confidential information must be secured within the system so that access is restricted to those entitled to view the information. Not only must the

information remain confidential but the document containing the information will have to be secured against inappropriate disclosure.

The storage of information related to a case will often be a combination of electronic as well as physical filing as opposed to all electronic or physical storage. Confidentiality will often pertain to multi-page documents, e.g. custody reports or evaluations or pre-sentence reports.

There are a variety of means that would be acceptable as a means to preserve confidentiality:

1. Partial account numbers and Social Security Numbers may be used, as well as year of birth, in place of the complete number or date. For example, a Social Security Number can be referenced as "xxx-xx-1234" rather than the complete number. To the extent that the full Social Security Number is needed by the court, that one piece of data can be filed on a separate green sheet and segregated from the rest of the public case file. The same would be true of account numbers (listed as "xxxx-xxxx-xxxx-9876" rather than having the full number) or dates of birth (listed as "1970" rather than month, day, and year).
2. If exhibits are filed with a pleading, as in a bank check for a proof of claim in a collections matter, the pleading can shield most of the account number, as demonstrated in #1 above, and the copy of the check can be placed in an envelope or otherwise segregated from the public case file to prevent disclosure of the account number.
3. Attorneys should be encouraged to file as much as possible for public access, and preferably have either a redacted duplicate copy of their complete filing so that the clerk's office can have both a copy for the public case file as well as the complete filing. Another means of accomplishing this is to file only those elements of non-public data (such as Social Security Number, account numbers, etc.) on a separate green sheet, and use generic markers in the original pleading. In either of these instances, the clerk's office must decide whether to keep non-public filings segregated completely from the public case file (essentially having two separate files) or whether to keep the non-public filings in an envelope or sub-folder with the public file.
4. Documents generated by the court, including orders, may contain confidential information. In these circumstances, care should be taken that the original order is placed in the confidential RJO and a redacted version is placed in the case file.
5. Where electronic storage of records is utilized, the court or clerk's office must ensure that non-public data is not accessible at public walk-up terminals, or through any other form of remote access. This requirement will be applicable to any court that maintains traditional paper case files but creates its Chronological Case Summary (CCS), party information and/or Record of Judgments and Orders (RJO) electronically as well as to courts that maintain all of such information by electronic means only.

Petitions under Administrative Rule 9 (H) and (I) to exclude information from public access or obtain information previously excluded from public access are confidential from their filing (including the information itself) until the Court enters a

ruling upon the application. All documents and information related to these applications must be dealt with on a confidential basis and stored accordingly. Once a ruling has been entered on the application, the information will either be returned to public access or remain stored confidentially according to the duration of the order.

The procedures required by Trial Rule 5(G) do not apply to records sealed by court order pursuant to IC-5-14-3-5.5 or otherwise or to records to which public access is prohibited by Administrative Rule 9(H).

Protection Order Proceedings

Protection Order proceedings in all their variety involve the use of confidential forms for the collection and dissemination of that information to the Courts, Clerks, Prosecuting Attorneys and law enforcement officials. Each confidential form must be created on light green paper for appropriate handling within the Court system.

As noted in the Protection Order Deskbook many Clerks have written instructions given to parties who wish to petition for the issuance of a protective order before they begin to fill out the forms. These written instructions should be amended to address what information is confidential under the proceedings and how confidential information must be handled by the Courts.

Pro Se Litigation

Pro se litigants present a unique problem with regard to handling confidential information under Administrative Rule 9 due to their general lack of familiarity with the rules and procedures of the legal system. Clerks, as the initial recipients of the pleadings filed by unrepresented individuals, will need to carefully examine documents received to determine whether they contain information that should have been treated as confidential.

Many Courts provide forms for the use of pro se parties who want to file their own cases. This occurs most frequently in domestic relations cases or in small claims cases. Courts that provide forms for pro se parties should create Administrative Rule 9 compliant forms.

Handling Non-Compliant Filings

It is possible that pro se litigants or attorneys may file documents, pleadings, or exhibits with a court after January 1, 2005, that do not comply with the provisions of Administrative Rule 9. In most cases, it would be helpful to assist and educate litigants and attorneys on the changes required by this Rule; however, at times the filed document, pleading, or exhibit could be in serious violation of the provisions of the Rule. In these hopefully rare circumstances, the best practice would be to note the filing of the pleading on the Chronological Case Summary but impound it as a confidential document that would then be referred to the Court. The Court would then enter an order (see Appendix Form A-5) directed to the filing party to file an amended pleading which would comply with the rule within a limited period of time or suffer the striking of the pleading. During the period of time before the compliant pleading was filed the Court could extend the time for filing a responsive pleading.

Appendix A – Forms

Form A-1 Request for Bulk Data/Compiled Information

STATE OF INDIANA
IN THE _____ COURT
CASE NUMBER _____

REQUEST FOR RELEASE OF
BULK DATA/COMPILED INFORMATION
(NOT EXCLUDED FROM PUBLIC ACCESS)

To the Executive Director of State Court Administration:

Pursuant to Administrative Rule 9(F)(3) the release of bulk data/compiled information that does not contain information excluded from public access pursuant to Administrative Rule 9(G) or (H) is submitted:

Identity of Applicant: _____
Address _____
_____
Telephone (___)-_____ Fax (___)-_____
E-Mail _____

Identification of Bulk Data/Compiled Information sought:
(specify and describe the records sought and the compiler or location)

_____
_____
_____
_____

Identification of Court(s) Exercising Jurisdiction Over the Records:
(List the Court(s)

_____
_____
_____
_____

Purpose for Request: Is release consistent with the purposes of Administrative Rule 9? Are resources available to prepare the information? Is fulfilling the request an appropriate use of public resources?

(Set forth reason)

_____
_____
_____
_____

Applicant is (is not) willing to pay the reasonable cost of responding to the request. If not, why?

_____

_____

_____

_____

Date: _____ _____

(Signature of Applicant)

_____

(Printed Name)

Action by Executive Director of State Court Administration: Application referred to the _____ (Indiana Supreme) Court.

Date: _____ Division of State Court Administration

By _____

_____

(Printed Name)

Court Action:

The Court finds the information sought is (is not) consistent with the purposes of Administrative Rule 9, resources are (are not) available to prepare the information and fulfilling the request is (is not) an appropriate use of public resources.

The request is:

granted. _____

granted contingent upon the applicant paying the reasonable costs of responding to the request. _____

denied. _____

Date: _____ _____Court

By_____

_____

(Printed Name)

Form A-2 Request for Bulk Data/Compiled Information Containing Information Excluded From Public Access

IN THE INDIANA SUPREME COURT
CASE NUMBER _____

VERIFIED REQUEST FOR RELEASE OF BULK DATA/COMPILED INFORMATION CONTAINING INFORMATION EXCLUDED FROM PUBLIC ACCESS

To the Executive Director of State Court Administration:

Pursuant to Administrative Rule 9(F)(4) the release of bulk data/compiled information containing information excluded from public access pursuant to Administrative Rule 9(G) or (H) is submitted:

Identity of Applicant: _____
Address _____
_____
Telephone (___)-_____ Fax (___)-_____
E-Mail _____

Describe your interest in the records sought and the purpose of the inquiry:

_____
_____
_____

Identification of Bulk Data/Compiled Information sought:
(specify and describe the records sought and the compiler or location)

_____
_____
_____

Purpose for Request:
(describe the purpose for requesting the information and explain how the information will benefit the public interest or public education)

_____
_____
_____

Security Provisions:
(explain provisions for the secure protection of any information requested to which public access is restricted or prohibited)

_____
_____
_____

Notice to Affected Persons: Unless notice is waived by the Indiana Supreme Court, the following persons who will be affected by release of the requested information will be given notice of this Request and a reasonable opportunity to respond:
(List Names and Mailing Addresses of Affected Persons)

The public interest will be served by allowing access, denying access will create a serious and imminent danger to the public interest, or denying access will cause a substantial harm to a person or third parties because: (Set forth factual basis)

_____

_____

_____

_____

(I)(We) affirm under the penalties for perjury that the foregoing representations are true.

Date: _____ _____

(Signature of Applicant)

_____

(Printed Name)

Action by Executive Director of State Court Administration: Application referred to the Indiana Supreme Court this ____ day of _____, 20____.

Division of State Court Administration

By _____

_____

(Printed Name)

Action by Indiana Supreme Court:

Notice to Affected Persons shall be provided: _____

Affected Persons shall have until _____ to file objections.

Notice to Affected Persons is waived: _____

Date: _____ Indiana Supreme Court

By _____

_____

(Printed Name)

Form A-3 Bulk Access/Compiled Information Notice to Affected Persons

IN THE INDIANA SUPREME COURT
CASE NUMBER _____

NOTICE OF APPLICATION FOR RELEASE OF BULK DATA/COMPILED INFORMATION CONTAINING INFORMATION EXCLUDED FROM PUBLIC ACCESS

To: _____
(Name of Affected Person)

_____
(Street Address)

_____
(City, State & Zip Code)

Notice is hereby given that an application has been made to the Indiana Supreme Court for release of bulk data/compiled information containing information excluded from public access under Administrative Rule 9 (F)(4). A copy of the application is attached.

Written objections may (may not) be filed.

If objections have been permitted, the deadline for filing an objection with the Indiana Supreme Court is: _____. Objections may be filed with the Clerk of the Indiana Supreme Court, 217 State House, 200 West Washington Street, Indianapolis, IN 46204.

Date: _____ _____
(Name of Applicant)

Form A-4 Clerk/Court Response Letter Regarding Non-Access

Dear (insert name of applicant)

We have received your recent request to obtain court records. We regret to advise you that the records you have sought cannot be provided due to the application of Administrative Rule 9 of the Indiana Supreme Court. Specifically, your request is excluded from public access by section 9 (G)/(H).

If you desire to pursue access to these records, you may seek:

a. an order under section G (3) from the court having jurisdiction of the case declaring the information accessible because it is essential to the resolution of litigation,
b. a release of the information from each person to whom the sought information pertains under section G (3) or
c. an order for release by filing a verified request to obtain access under section I.

If you are successful in obtaining an order or release, you will be provided the information sought upon production of the order or release.

Yours truly,

_____

(Name)
(Title)

Form A-5 Order to Comply with Administrative Rule 9

Order to Comply with Administrative Rule 9 or Suffer Sanctions

The Court has received a pleading filed by (Insert Name of Party) denominated as (Insert Title of Pleading) which has been filed but impounded because it does not comply with the requirements of Administrative Rule 9 of the Indiana Supreme Court.

It is Ordered that (Insert Name of Party) shall file an amended pleading that fully complies with Administrative Rule 9 within (Insert Number) days/on or before (Insert Date). Failure to comply will result in the striking of the pleading from the record. Pending the filing of the amended pleading the time for the filing of responsive pleadings shall be extended for an equal period of time.

The Clerk shall serve a copy of the within order and the impounded pleading upon (Insert Name of Party) or their attorney of record by certified mail and shall serve a copy of this order only upon all other parties of record.

Date: _____

_____

Judge, (Insert Court Name)

Form A-6 Local Rule Certifying Compliance with Trial Rule 5 (G)

Local Rule [Insert Number per TR 81(E)]

Certification of Compliance of Pleadings
With Trial Rule 5 (G)

All pleadings filed by a party shall contain a verification certifying that the pleading complies with the filing requirements of Trial Rule 5 (G) applicable to information excluded from the public record under Administrative Rule 9 (G).

A certification in substantially the following language shall be sufficient:

> I/We hereby certify that the foregoing document complies with the requirements of Trial Rule 5 (G) with regard to information excluded from the public record under Administrative Rule 9 (G).

_____

(Signed by party or counsel of record)

Appendix B – Clerk FAQ's

Q1. How do we handle a pleading that contains confidential information that is not placed on light green paper?

A. Hopefully, through education and some assistance early on, attorneys and litigants will file their pleadings and cases properly. If something is offered for filing that seriously violates Administrative Rule 9, the best practice would be to file the pleading and note the filing in the Chronological Case Summary but impound it as a confidential document which would be referred to the Court. The Court would then enter an order (see Appendix Form A-5) directed to the filing party to file an amended pleading which would comply with the rule within a limited period of time or suffer the striking of the pleading. Pending the expiration of the time given to file the amended pleading the Court could extend the time for filing a responsive pleading.

Q2. Must information that was otherwise publicly available before January 1, 2005, be redacted after January 1, 2005.

A. Administrative Rule 9 places no requirements on the Clerk's office to redact information in court records that was publicly available prior to January 1, 2005. Further, the intent of the rule is that parties filing documents will comply with the basic confidentiality requirements of the rule and place information that the court may need, such as Social Security Numbers and account numbers on a confidential filing form that can then be segregated from other publicly available materials in a case file.

Care should be given so that information that was public when entered into the record but that would be confidential upon implementation of the rule should not be given wider dissemination; e.g. posting on a website.

Q3. How fast must a clerk or a court provide requested information?

A. Courts and clerks should endeavor to provide information as promptly as possible. With very few exceptions, Administrative Rule 9 does not set time limits for providing information or replying to requests for information. The Indiana Public Record law, although not directly applicable to Administrative Rule 9, establishes a timeframe of seven days to respond to requests for public records from governmental agencies or entities. The response period may be observed by actually producing the requested records or by advising the applicant that records will or will not be produced.

Q4. Can we charge a fee for the time involved in responding to a request for information?

A. A court or clerk may charge for actual time and materials expended in responding to a request. These charges may include a reasonable charge for photographic copies, tape recordings, etc.

Charges by Clerks must comply with IC-5-14-3-8 regarding copies from public agencies (counties). The statute specifically exempts from its coverage the judicial department of government. Courts should adopt fee structure substantially in conformance with those authorized by existing statutes.

Q5. Must a clerk or court employee monitor a person examining a record?

A. Changes to Administrative Rule 9 have not changed any requirements relating to procedures that a court or clerk office follows in allowing individuals to examine court documents or files. Court and clerk offices are already responsible to ensure that the court files are not damaged or altered in any way. Confidential material included in the file but maintained in a sealed envelope, or included in the file on confidential filing forms should be removed by a clerk or court employee prior to providing a file for examination. Clerk and court offices are encouraged to control the examination of original court files in such a way as to prevent damage or unauthorized modification of changes to the court records.

Q6. Must we provide a place for the public to review records?

A. Administrative Rule 9 does not make any requirements that space be given to the public to review records. As a practical matter, it is advantageous to provide some space or public terminals for public examination of records so that clerk or court employees may monitor this activity and ensure that records are neither destroyed nor modified.

Q7. Are records that were public and in existence prior to Administrative Rule 9 now confidential?

A. No. Records which were filed or created prior to January 1, 2005, that were open to public access when they were filed or created are public, whether they contain information that is now excluded from public access, such as Social Security Numbers or account numbers. Records that were confidential before January 1, 2005, remain confidential.

Q8. If requested, do we have to provide a list of cases with case numbers filed each day? Judgments entered – civil, criminal?

A. The index of case filings except for case types that are confidential is considered a public record under Administrative Rule 9, and would be a record that could be requested and

should be provided by the court or the clerk's office, or made available for public inspection during normal office hours or on the Internet. Similarly, civil judgments and criminal judgments that are recorded in the Judgment Book are public records that should be provided by the clerk's office or made available for public inspection.

Since civil and criminal judgment records do not exist separately from each other, a court or clerk would not be required to create a list of civil or criminal judgments entered per day for production or public view. However, the judgments entered in individual cases are public records available for viewing or production upon request.

Q9. Which adoption records are confidential?

A. Records of adoptions did not become confidential until 8 July 1941 when Acts 1941, Chapter 146, Section 6 became effective. Legislation concerning adoptions enacted before 1941 focused on the issue of providing legal proof of heirship so that the adopted child became an heir at law of the adoptive parents. The intent of the pre-1941 legislation was to make the adoption a public matter. All adoptions that took place before 8 July 1941 were recorded in the civil or probate order books.

Records of adoptions that took place before 8 July 1941 are not confidential either by statute or under Administrative Rule 9 and should be open to public access.

All records about adoptions taking place after 8 July 1941 are confidential. Chronological Case Summaries, all orders and judgments, the case file, and index entries concerning an adoption should be kept confidential. Judgments and orders concerning an adoption should be placed in the Confidential Record of Judgments and Orders.

Q10. In cases involving child abuse, what is considered confidential and what would be open to public access?

A. According to statutory law and to Administrative Rule 9, the records concerning child abuse that must be kept confidential are the reports and other information found in the case files submitted to the courts by the Division of Family and Children including its county offices that contain local child protection services. Chronological Case Summary entries, as prescribed in Trial Rule 77(B), and entries in the Record of Judgments and Orders, as prescribed by Trial Rule 77(C), are open to public access.

Q11. Do Juvenile CHINS (JC) cases fall under the child abuse category of confidential records?

A. No, but the cases are confidential anyway. Cases that generally fall into the child abuse category are adult criminal cases and some civil matters.

Q12. What if child abuse allegations become part of a divorce case? How should they be handled in the context of divorce proceedings?

A. It is recognized in Administrative Rule 9 that there are situations when a matter deemed confidential by statute will be an issue for public resolution within the context of a judicial proceeding. The language in the rule stating, *"not admitted into evidence as a part of a public proceeding"* is intended to recognize these circumstances. Although child abuse matters are deemed confidential, such matters also could be the issue in a contested domestic relations case in which a party has the right to a public proceeding. Under Administrative Rule 9, the public proceeding prevails and the allegations are considered public unless the court makes an individual ruling on the matter and excludes the information from public access under subsection (H) or seals the records pursuant to IC-5-14-3-5.5.

Q13. What is open to the public in juvenile delinquency cases and what is confidential?

A. Administrative Rule 9 permits the disclosure of those juvenile records specifically deemed open under statute. The statutes involved are found in IC 31-39-2, which is entitled *"Persons Entitled to Access to Juvenile Court Records."* For example, IC 31-39-2-8 discusses public access to records of juvenile delinquency proceedings. Under subsection (a) juvenile records are available to the public *"whenever a petition has been filed alleging that a child is delinquent as the result of any of the following alleged acts or combination of alleged acts:*

(1) An act that would be murder or a felony if committed by an adult.

(2) An aggregate of two (2) unrelated acts that would be misdemeanors if committed by an adult, if the child was at least twelve (12) years of age when the acts were committed.

(3) An aggregate of five (5) unrelated acts that would be misdemeanors if committed by an adult, if the child was less than twelve (12) years of age when the acts were committed."

However, under subsection (b) only certain information and records may be made available to the public even in the three situations discussed above. *Only* the following information may be released to the public:

(1) child's name;

(2) child's age;

(3) nature of the offense;

(4) chronological case summaries;

(5) index entries;

(6) summons;

(7) warrants;

(8) petitions;

(9) orders;

(10) motions ("excluding motions concerning psychological evaluations and motions concerning child abuse and neglect"); and

(11) decrees;

Also, if the child has been adjudicated as a delinquent child for an act or combination of acts as outlined above in IC 31-39-2-8 (a), then the child's photograph also may be released.

It is the duty of the clerk to keep all other records confidential of the child alleged to be or adjudicated as a delinquent child. Most of the confidential records are known as the *"social"* as opposed to the *"legal"* records of the juvenile court, and *"social"* records include, among other things, such items as evaluations from probation officers, case workers, physicians, guardians ad litem, school guidance counselors, and psychologists. The statutory language includes the following instructions to the clerk: *"The clerk of the juvenile court shall place all other records* (excluding the eleven "legal" records listed above) *of the child alleged to be or adjudicated as a delinquent child in an envelope marked "confidential" inside the court's file pertaining to the child."* The confidential information in the envelope may only be released to those authorized to receive such information. In addition, *"the identifying information of any child who is a victim or a witness shall remain confidential."*

Also, IC 31-39-2-10 allows a permissive disclosure of "legal records" if such release best serves the *"interests of the safety and welfare of the community."* When exercising this discretion, the court *"shall consider that the best interests of the safety and welfare of the community are generally served by the public's ability to obtain information about:*

(1) the alleged commission of an act that would be murder or a felony if committed by an adult; or

(2) the alleged commission of an act that would be part of a pattern of less serious offenses."

Q14. In cases where civil judgments occur as a result of a juvenile delinquency case, should the child's name be placed in the Judgment Docket?

A. In situations where civil judgments arise from juvenile cases, the juvenile's name should not be placed in the Judgment Docket unless the clerk is ordered to do so by the presiding judge in the case or unless the court or courts in that particular county have a local rule stating that the clerk should place all civil judgments arising from juvenile delinquency cases in the Judgment Docket.

Q15. Are paternity cases confidential?

A. Paternity records became confidential on July 1, 1941. Before 1941, paternity matters were handled as bastardy proceedings, and the records generated by these proceedings were not and are not confidential. All records concerning paternity cases filed on or after July 1, 1941, are confidential.

Q16. In situations where civil judgments occur as a result of a paternity case, should the names of the parties be placed in the Judgment Docket?

A. In situations where civil judgments arise from paternity cases, the general rule is that the names of the parties should not be placed in the Judgment Docket unless the clerk is ordered to do so by the presiding judge in the case or unless the court or courts in that particular county have a local rule stating that the clerk should place all civil judgments arising from paternity cases in the Judgment Docket.

Q17. How are pre-sentence reports handled with the general court file?

A. By statute (see IC 35-38-1-12 and IC 35-38-1-13) and Administrative Rule 9, pre-sentence reports are confidential. The reports should be produced on light green paper.

The best practice would be to file these reports separately from the case file. If the pre-sentence reports are placed in the case file, then procedures such as placing the pre-sentence report in a sealed evidence envelope should be used.

Q18. Are victims of crimes allowed to view pre-sentence reports and provide input to them?

A. In 1999, the General Assembly enacted legislation to give victims of crimes certain rights. One of these rights was to have greater input into the sentencing process including "the right to make a written or oral statement for use in the preparation of the pre-sentence report" [see IC 35-40-5-6(a)]. In addition, notwithstanding the confidentiality requirements of IC 35-38-1-13, *"the victim has the right to read pre-sentence reports relating to the crime committed against the victim*" with certain exceptions. Victims still may be restricted from seeing the following information included in the pre-sentence report [see IC 35-40-5-6(b)]

- *"The source of the confidential information."*
- *"Information about another victim."*
- *"Other information determined confidential or privileged by the judge in a proceeding."*

Under IC 35-40-6-7(5), the prosecuting attorney has the duty of notifying the victim of *"the victim's right to review the pre-sentence report, except those parts excised or made confidential by"* IC 35-40-5-7.

Q19. What is open to public access and what is confidential in underage marriage petition cases?

A. Pursuant to statute and Administrative Rule 9, underage marriage petitions and the orders resulting from these petitions are confidential. IC 31-11-1-6(c) states, *"A court's authorization granted under subsection (a) [subsection (a) refers to the granting of an underage marriage license by the court] constitutes part of the confidential files of the clerk of the circuit court and may be inspected only by written permission of a circuit, superior, or juvenile court."* Such orders are excellent candidates for inclusion in the

Confidential Records of Judgments and Orders. Case files, Chronological Case Summaries, and court orders concerning underage marriage petitions and orders should be kept confidential. Ironically, the marriage license records created because of the court order are public records.

Q20. What case type designation under Administrative Rule 8 should be used with underage marriage petition cases?

A. The *Civil Miscellaneous* (MI) case type designation should be used. Some clerks and courts have been using the *Juvenile Miscellaneous* (JM) case type designation in underage marriage petition cases rather than the *Civil Miscellaneous* (MI) case type designation. The use of the *Juvenile Miscellaneous* (JM) case type designation for underage marriage petition cases is incorrect. As stated in IC 31-11-1-6(b), *"a circuit or superior court"* may receive a petition and make an order authorizing the clerk of the circuit court to issue a marriage license to the underage petitioner(s). Only a juvenile court, or a court with juvenile jurisdiction, may handle a *Juvenile Miscellaneous* (JM) case while all circuit and superior courts may handle a *Civil Miscellaneous* (MI) case.

Q21. When do arrest warrants, search warrants, and indictments or informations become open to public access?

A. Administrative Rule 9 has attempted to incorporate the practice of many courts concerning arrest warrants, search warrants, and indictments and informations. Warrants and indictments need to be kept confidential if they are going to accomplish their intended purpose. However, once they have been served and the clerk has knowledge of service, then there is no longer a need for confidentiality. Administrative Rule 9 makes arrest warrants, search warrants, and indictments and informations confidential, if ordered by the court, until the return of duly executed service. To the extent that any of these documents contains complete Social Security Numbers or account numbers, provisions must be made to ensure compliance with the non-public nature of that information, such as filing the warrant, indictment or information on green paper.

Q22. What is confidential and what is open to public access in mental health cases?

A. The main intention of Administrative Rule 9 in dealing with mental health cases is to protect the personal medical records of the person facing a mental health hearing. To be in compliance with state law and Administrative Rule 9, the medical records must be kept confidential.

One area of confusion that has developed concerning mental health cases is how the name of the person involved in a mental health hearing should be entered in the appropriate records. The name of the person involved should be listed on the Chronological Case Summary, and this record would be open to public access.

Because court orders resulting from a mental health hearing contain confidential medical information, orders in mental health cases should be placed in the Confidential Record of Judgments and Orders.

Q23. Since several of the inheritance tax forms are confidential, what are some filing strategies when dealing with inheritance forms within an estate case?

A. Several filing strategies exist on how to manage inheritance tax records, and one of these is to set up a dual filing system for estate case files with the open records being placed in one file and the confidential records being kept in the other. A second strategy would be to place the confidential inheritance records in a separate file drawer with the case number placed on the forms. A third strategy would be to place the confidential inheritance tax forms in a sealed envelope and place them in the estate case file.

Q24. What information concerning jury lists is open to the public?

A. Jury lists were included in Administrative Rule 9 to prevent problems such as the harassment of jurors. Some personal information may be disclosed in the jury selection process, and this information will become part of the public record. However, there is no requirement that addresses, telephone numbers, and other matters of a personal nature be published in the Record of Judgments and Orders. Pursuant to IC 33-4-5-9(b) and IC 33-4-5.5-7, the jury lists (names only) will be placed in the Record of Judgments and Orders that are open to the public.

Q25. How should orders of expungement be handled?

A. Orders of expungement are confidential, and they should be placed in the Confidential Record of Judgments and Orders. It will be necessary for judges to state very clearly in the order whether the records to be expunged are only records dealing with the arrest or whether the court records concerning the case are to be expunged as well. If the court records are ordered to be expunged, then all records pertaining to a case, including the Chronological Case Summary, but with the exception for the order of expungement that is to be placed in the Confidential Record of Judgments and Orders, will be destroyed pursuant to the order of expungement. To replace the original Chronological Case Summary, a replacement CCS should be created containing only the case number, a statement that the case had been expunged, and the date that the order of expungement had been issued. To replace all orders concerning the expunged case in the Criminal Record of Judgments and Orders, a replacement page should be inserted containing only the case number, a statement that the case had been expunged, and the date that the order of expungement had been issued.

Q26. What is the purpose of the Attorney General's Address Confidentiality Program?

A. The Address Confidentiality Program through the Office of the Attorney General has been established under IC 5-26.5, and a person, or a minor or incapacitated person for whom an application has been made, who has been a victim of domestic violence and who has a valid protective order may participate in this program. This program makes the Office of Attorney General an agent for the participant for purposes of service of process and receipt of mail.

Pursuant to IC 5-26.5-2-3(b), for purposes of the Indiana Access to Public Records Law (IC 5-14-3), "*the name, address, telephone number, and any other identifying information relating to the program participant are declared confidential.*"

Q27. What are the clerk's duties concerning confidential materials in a Protection Order case?

A. The duties of the clerk of court concerning the maintenance of a confidential file and the handling of the Confidential Form (confidential under IC 5-2-9-7) are outlined in IC 5-2-9-6(b). Under IC 5-2-9-6(b)(1), the clerk is to "*maintain a confidential file to secure any confidential information about a protected person designated on a uniform statewide form prescribed by the division of state court administration.*"

Under IC 5-2-9-6(b)(2), the clerk of court is to provide a copy of the Confidential Form "*that accompanies the Indiana order to the following:*

(A) The sheriff of the Indiana county in which the order was issued.

(B) The law enforcement agency of the municipality, if any, in which the protected person resides.

(C) Any other sheriff or law enforcement agency designated in the Indiana order that has jurisdiction over the area in which a protected person may be located or protected."

The original of the Confidential Form filed by the petitioner or by the prosecuting attorney is to be placed in the confidential file that the clerk has established.

Q28. Must subpoenas be issued using light green paper?

A. Yes, if the subpoena contains the address, phone number, dates of birth or other information that tends to explicitly identify a natural person who is a witness or victim in a criminal, domestic violence, stalking, sexual assault, juvenile or civil protection order case.

Under IC 5-2-9-6(c), sheriffs and law enforcement agencies, after receiving a copy of the Confidential Form from the clerk, are to establish a confidential file in their Protection Order Depositories in which the Confidential Form is to be kept.

A second item that will be placed in the confidential file will be the "Confidential Page" (page four) for a change of address of the Notice of Extension or Modification form. If either the petitioner's address or the respondent's address changes, then page four (4) of the form must be completed by the petitioner and filed with the clerk, and the clerk should place the original of this page in the confidential file. Please note, however, that the change of address page (page four) will only be completed and filed with the clerk if there is a change of address. The Confidential Page is confidential because it contains the address and the telephone number of the petitioner and an alternate telephone number and address for notification purposes.

If the Confidential Page is filed along with the rest of the Notice of Extension and Modification form, a copy of the Confidential Page will be sent to the Protection Order Depositories listed above along with the rest of the form. The original, as noted, is to be placed in the confidential file as required by IC 5-2-9-6(b)(1).

Q29. Should the petitioner's address and telephone number be placed on the CCS in a Protection Order case?

A. Since the Chronological Case Summary in a protective order case is not confidential, it is recommended that the petitioner's address and telephone number should not be placed on the CCS form. Rather, it is recommended that the following information be used instead: *"The address and the telephone number of the petitioner are confidential pursuant to Administrative Rule 9 of the Supreme Court of Indiana."*

Q30. How should orders to seal records be treated regarding the RJO and the CCS?

A. Orders to seal records are confidential, and they should be placed in the Confidential Record of Judgments and Orders. The case file, all orders and judgments concerning the case in the Records of Judgments and Orders, and the original Chronological Case Summary should be placed in a sealed evidence envelope. The sealed records are to be treated as confidential records, and access to the sealed records will be restricted until an order to unseal the records is given.

The original Chronological Case Summary is to be placed in the sealed evidence envelope with the other sealed records. To replace the original Chronological Case Summary, a replacement CCS should be created containing only the case number, a statement that the case had been ordered sealed, and the date that the order to seal the records of the case had been issued.

Except the order to the seal the records, which is to be placed in the Confidential Record of Judgments and Orders, all orders and judgments pertaining to the case are to be placed in the sealed evidence envelope. To replace all orders and judgments pertaining to the sealed case found in the Records of Judgments and Orders, a replacement page should be inserted containing only the case number, a statement that the case had been ordered sealed, and the date that the order to seal the records of the case had been issued.

Appendix C – Citizen's FAQ

Q1. What is the difference between records "not accessible for public access" and those that have been sealed under statutory authority?

A. Records sealed under statute are more secure because no one is entitled to view the records without court authorization. Records "not accessible for public access" are only secure from public access but may be viewed by court or clerk staff and the parties to the case and their lawyers.

Q2. Can I obtain the mailing address and phone number of a party to a case?

A. Yes, the mailing address and phone number of parties to a case is a record accessible to the general public unless a court order has been issued restricting access.

Q3. Can I obtain the mailing address and phone number of a witness or the judge handling a case?

A. No. These records are not accessible to the public.

Q4. I was adopted in this county. Can I review the adoption file to learn about my natural parents and the reasons for my adoption?

A. Information contained in court adoption files is generally excluded from public access by anyone including the person who was adopted. IC 31-19-24 provides a procedure to seek information related to an adoption and requires the filing of a written petition in a court with probate jurisdiction in the county where the adoption was granted.

Q5. As a victim of a crime can I obtain the pre-sentence report related to the offense committed against me?

A. Pre-sentence reports are confidential court records and are not accessible to the public.

Q6. Can I see an inheritance tax schedule or tax records to see if assets exist that may be transferred to a person against whom I have a judgment? What if the records were entered into evidence in a court proceeding?

A. Court orders determining inheritance tax due regarding a transfer of property to a beneficiary are confidential as required by IC-6-4.1-5-10 but the inheritance tax schedule filed by the personal representative is not. Copies of the tax determination order must be sent to each beneficiary plus any other person who has filed for receipt of notice of court proceedings under IC-6-4.1-5-3.

Evidence presented in court proceedings is not confidential and may be reviewed unless an order has been entered prohibiting public access.

Q7. Are my case records available to the public?

A. All information contained in case records is accessible by the public unless declared confidential by Administrative Rule 9(G) unless a person affected by release of the information has sought or obtained an order prohibiting public access pursuant to Administrative Rule 9(H).

Q8. I want to handle my case without an attorney. What should I know about filing documents with the court?

A. You are subject to the same standards and requirements as an attorney and must comply with the filing requirements of Administrative Rule 9 related to providing confidential information.

Q9. Are all court records available through the Internet?

A. No. At this point very few courts have the ability to provide all records through the internet. In most instances information must be obtained directly from the court or the court clerk offices.

Appendix D – Judge and Court Staff FAQ

Q1. Is a recording of a court proceeding made by a court reporter a public record? If so, does the public have the right to come and listen to the recording as opposed to acquiring a transcript? Would they be entitled to make their own copy of the recording?

A. Recordings of court proceedings made by court reporters are public records regardless of whether they are produced on magnetic recording tape, compact disk, stenotype, shorthand or digitally recorded upon a computer hard drive, unless the specific case type is confidential under Administrative Rule 9. The public has the right to obtain the record within a reasonable period of time after making the request.

A specific means of providing this type of record has not been defined but the time or difficulty of compliance is an important consideration. Allowing the requestor to listen to the recording may be too time consuming to be reasonable for the reporter or a court staff member since the custody and integrity of the original must be continuously maintained.

Providing a copy of the record is probably the most efficient and least time consuming method to provide public access. A reasonable charge for the production of the copy may be made and guidance on this issue may be found in IC-5-14-3-8. Under no circumstances should the original be provided to the requestor in order for them to create their own copy.

Requiring the purchase of a transcript would in many cases be so costly as to constitute a denial of access to the public record unless the requestor desires to obtain the record in that format. Given the time required to produce a transcript and the other duties of reporters, the reasonable time for producing the record may well lead the requestor to ask for a different format. If the case is on appeal a copy of the transcript could be obtained from the Clerk upon its completion and filing.

Q2. Are exhibits offered and/or introduced into evidence in a court proceeding public records? If so, must their review of them be supervised or may copies be created at their cost?

A. Once identified and offered or admitted into evidence all exhibits are part of the public record. If a review of the original is granted, the reporter or staff member should supervise because of their duty to maintain the custody and integrity of the exhibit.

The size, nature and extent of the exhibit will have a significant impact upon the time required by the reporter or staff member to allow their reading or viewing. The constraints of time also impact the reasonable time of and nature of the response. In

many instances the production of copies of large documents at a reasonable charge will be the most efficient manner of responding to the request.

Q3. Are documents that are prepared in the normal course of court administration and that may be used for personnel or administrative purposes public records?

A. All administrative records produced by the court are public except for those listed in Administrative Rule 9(G)(2). Section (2)(b)(vi) deals specifically with personnel records.

Q4. Are juror questionnaires and the responses supplied by prospective jurors public records?

A. Pursuant to Administrative Rule 9(G)(b)(xii) and Jury Rule 10 personal information contained in juror questionnaires is confidential except for the use of the parties and counsel unless the information is disclosed in open court. Otherwise juror questionnaires and the responses of prospective jurors are public records.

Q5. What if the parties waive their rights of confidentiality by filing documents containing information that would be confidential?

A. Under Administrative Rule 9 no party has the right to file a document containing information concerning themselves or third parties deemed confidential under the rule unless they adhere to the requirements of the rule concerning how the information is to be presented.

Q6. Can the parties waive confidentiality and avoid the filing requirements of Administrative Rule 9 or authorize the release of information?

A. Administrative Rule 9 does not contain a provision for a waiver of confidentiality except as stated in section G (3) which allows the release of (previously provided) information if it is released by all parties to whom it pertains. Parties must tender all information excluded from public access in the manner required by the rule.

Q7. Pro se litigation is increasing with the prospect that confidential information will be included in documents filed with the court. Is the court required to examine these documents for compliance with Administrative Rule 9?

A. The responsibility for compliance with Administrative Rule 9 concerning filed documents rests upon the party filing the document. A court is not required to screen documents presented for filing. Section 9(L) provides immunity for unintentional or unknowing disclosure of confidential material. Since the Bar and public must be educated about the requirements of the rule and those that implement it, it would be a good idea to require the Clerk to provide information concerning confidentiality requirements to those who want to initiate a case.

Q8. Is it not futile to make court records confidential since parties often must present the information to other offices to transact business and those offices will not or cannot keep the information confidential?

A. We can only control the information that comes into our systems but it is better that we reduce the access to sensitive information than to add to the number of sources from which the information can be inappropriately obtained.

Q9. Where do judges go when they have questions about issues arising from Administrative Rule 9?

A. Contact Ron Miller at the Office of State Court Administration (317-232-2542) for assistance in dealing with the issue.

Q10. What is the reasonable cost for providing information requested?

A. Standards already exist with respect to the reasonable cost of providing copies of documents by public offices but do not specifically apply to the judicial branch of government. See IC-5-14-3-8.

Courts should adopt fee structure substantially in conformance with those authorized by existing statutes.

Q11. How do we handle questions that ask for more research information about the time cases take to finish, etc.?

A. This really presents a public relations question rather than a question concerning access to public information under Administrative Rule 9. Offices are not required to create a special report to respond to any inquiry or reconfigure things to provide information that is not otherwise created or retained in the ordinary course of the business of the office.

Q12. What do we do with scandalous materials contained in a pleading even if it is true?

A. Unless information contained in a pleading is defined as confidential under Administrative Rule 9 it does not have to be treated in a confidential manner.

Q13. Is information contained in the cover page of a protective order confidential?

A. Administrative Rule 9 defines the information that is confidential and the information that is not. It is important to remember that the identifying information can still be sent to law enforcement.

Q14. Are bank account numbers and Social Security Numbers on supplemental proceedings and warrants confidential?

A. Information entered into evidence in open court is not confidential and, therefore, accessible to the public.

Q15. How do we deal with the need to put specific account numbers and dollar amounts in an order?

A. The recent amendment to Trial Rule 58 requires orders to have confidential information put on separate confidential pages.

Q16. How do we handle the volume of confidential information that will arise in certain types of cases; e.g. small claims cases, and create a burden on staff and courts?

A. Administrative Rule 9 does not create a "one-size fits all" approach. Each county will have its own opportunity to determine the best and most efficient manner to implement the rule and handle confidential information within the general requirements of the rule.

Q17. Does Administrative Rule 9 place a burden on the media or others if they come into possession of materials that should be part of the sealed record?

A. No. Issues such as this would likely have to be handled on a case-by-case hearing basis and would be very dependant upon the position taken, if any, by the person or entity whose information was obtained.

Q18. What can be done if pleadings are filed that are in violation of Administrative Rule 9?

A. The Clerk as the recipient of the pleading offered for filing that does not comply has the first opportunity to address the issue and would be justified in declining to accept the document. Alternatively, the Clerk could immediately treat the document as confidential and provide it to the Court for further action.

Upon examination by the Court an order could be entered impounding the document and ordering the offending party to promptly tender a document in compliance with the rule. A failure to comply could result in the striking of the document from the record or another suitable sanction. (See Form A-5).

Q19. How do you handle exhibits containing inappropriate materials?

A. Administrative Rule 9 does not make any explicit exception for exhibits. However, there is some thought that there is a difference between evidentiary exhibits and exhibits attached to pleadings that may be filed. Although an additional amendment to Administrative Rule 9 is probably necessary to clarify this point, there was a consensus of the Task Force that information contained in exhibits admitted in evidence in an open court proceeding would not require redaction and would be part of the publicly accessible case file. Similarly, there was a consensus of the Task Force that transcripts or audio

recordings of proceedings in which exhibits or testimony reveals information that would otherwise be non-public should be part of the public case file and not require redaction. In contrast to evidence introduced in a public proceeding, documentary attachments to pleadings containing confidential information must comply with the requirements of Administrative Rule 9. In the event that an individual or entity wishes to make evidence introduced in a public proceeding non-public, the burden is upon that person or entity whose information will be disclosed to seek entry of an order prohibiting access under Administrative Rule 9(H). Until such time as the rule is modified, it is necessary to follow the requirements of the rule as written.

Post-Divorce Considerations

Submitted by Bryan Lee Ciyou

POST-DIVORCE CONSIDERATIONS

A. Preserving Issues for Appeal From the Start.

1. Introduction.

The ability to preserve issues for appeal from the start of a case is dynamic and involves an ever-changing spectrum of consideration. With successor appellate counsel, this is effectively not possible because the record is closed.

This caveat noted, in the "advanced" consideration of this topic (appeals themselves are advanced family law), the Author focuses on more technical aspects of preserving issues and the art of case/client handling, all as necessary to effective appellate advocacy, should a trial outcome necessitate appeal.

In addition, it is important to recognize this coverage is generally applicable to a broad umbrella of domestic cases: paternity, divorce, post-decree matters. The central keys to preserving issues for appeal presupposes trial counsel has the following:

- Client control (reasonable objectives, legal versus emotional);
- Clear legal theme(s) and course(s) of action with a position rooted the law (means); and
- Proper balancing of the time value of money, with the contingency of appeal always considered at the beginning of the attorney-client relationship.

These three (3) components are operational elements in all considerations. Clearly, the complexity of such domestic representation does not support a cookie-cutter or singular approach to handling every case (some practitioners rightly adopt a standard approach for simple cases).

In short, the appellate process is one for the attorney who likes to think deeply not only about the facts and law, but the various policies (sometimes competing) driving domestic law. These noted components should be the "filter"under the following considerations of preserving appellate issues:

- Complete, Accurate and Appropriate Evidentiary Record.
- General Judgment Versus Facts Specially Found.
- Filing a Motion to Correct Errors and/or Notice of Appeal.
- Speciality Considerations.

2. Complete, Accurate and Appropriate Evidentiary Record.

With clogged civil, domestic dockets, it is easy for a final hearing to span for portions of several days over a protracted period of time. That said, even the most skilled lawyers can run the risk of failing to present evidence on an issue of the case, object to evidence, or otherwise to the detriment of future appeal.

With property issues, this is a malpractice risk because of the final nature of the division. Equally, in the custody component of litigation, if applicable, it is little solace for a parent that he or she maybe able to revisit the issue in the future. For this reason, cases should be scripted to ensure that if there is interruption, the issues and checklist on the script ensure the record is complete.

A complete and appropriate evidentiary record may be facilitated by the following considerations:

- Child Support Worksheet Summary of Testimony (Caution!).

The Court of Appeals is increasingly focusing on child support worksheets. Two (2) issues are of note. First, the child support worksheets must be tendered at trial and are a document executed under penalty of perjury. Second, if a party disagrees with a worksheet's computation, his/her counsel must object to the admission of the CSW or waive challenge on appeal. (An extensive legal discussion of this topic was engaged in by the Court of Appeals in a Memorandum Decision found at 2009 W 2633744 (Ind.Ct.App.2009), which appears to change child support worksheets from a summary of testimony and proposed computations based on the various pieces of evidence adduced at trial). This is under the invited error doctrine.

- Stipulations to Exhibits (Practice Tip).

Domestic cases have the tendency to generate a substantial number and different types of exhibits that are not easily admissible due to the required evidentiary basis. Classic examples are police reports, as they often contain hearsay statements, and receipts, such as for uninsured medical expenses. The place to learn of the objection is not at trial.

A stipulation with opposing counsel and/or a pre-trial with the Court is a mechanism to determine how to handle admission of evidence. Some courts provide great leeway with such evidence, while others do not. Having a good appellate record should not be impaired because of denial of admission of exhibits. If this situation cannot be handled in this manner, this should be discussed with the client, namely the risk of the issue not being admitted, followed by a memorialization of evidence by written letter.

- Evidence Admitted by Operation of Statute or Local Rule (Caution!).

Depending upon a client's respective position, custody evaluations and related materials are increasingly becoming automatically authenticated and effectively admitted into the evidentiary record. If the report is damaging, the evaluator should be present to be cross-examined and impeached or a second evaluation obtained. Ind.Code § 31-17-2-12(b). Marion County Family Law Rule 508(D).

3. General Judgment Versus Facts and Law Specially Found.

Assuming the evidence is presented in the record in a way best posturing the case for appeal, the way the trial court issues the judgment directly impacts the standard of review on appeal. This, in turn, impacts the trial lawyer's request for the form of the judgment, to the structure of the trial and the way he or she takes notes of the evidence admitted.

Unless the trial court elects to issue *sua sponte* special findings, a litigant is only entitled to findings if a timely request is made prior to the admission of evidence. Without a timely request for special findings, the trial court merely needs to issue a general judgment.

As a general statement, in most domestic cases, the lawyer should seriously consider requesting special findings. The central reasons are explored herein.

In litigation in general, first, special findings "offer this court [the Indiana Court of Appeals] valuable insight into the trial court's rationale for its review and facilitate appellate review." *See, e.g., First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604 (Ind.Ct.App.2008), *trans. denied.*

In domestic litigation, specifically, aside from theoretically making appellate relief easier where the trial court erred, special findings served another critical function. This is to allow a party to understand the rationale of the trial court in reaching its decision. Failure of the trial court to follow a timely request for special findings is reversible error. *Carmichael v. Siegel*, 670 N.E.2d 890 (Ind.1996).

On appeal, as noted, the way the trial court enters its order may aid appellate review (and reversal if the client is the appellant). To understand this, and how to present the evidence, it is critical to understand the standard of review of alleged errors of the trial court. Each type of review and general analysis follows:

- Questions of Law.

A trial court's error in the application of the law or construction of the law are owed no deference and are reviewed de novo. *See, e.g., 600 Land, Inc. v. Metropolitan Board of Zoning Appeals of Marion County*, 889 N.E.2d 305 309 (Ind.2008).

- *Sua Sponte* Findings.

In cases where a trial court enters sua sponte special findings, the Court of Appeals has stated the standard of review to be as follows:

> "When the trial court enters such findings *sua sponte*, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issue upon which the trial court has not found." *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1215 (Ind.Ct.App.2002) (internal citations omitted). *See also Town of Cloverdale*, 901 N.E.2d 524 (Ind.Ct.App.2009).

- Requested Special Findings.

When a trial court enters special findings, the standard of appellate review has been stated by the Court of Appeals as follows:

> " The trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. In our review, we first consider whether the evidence supports the factual findings. Second, we consider whether the findings support the judgment. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. A judgment is clearly erroneous if it relies on an incorrect legal standard. We give due regard to the trial court's ability to assess the credibility of witnesses. While we defer substantially to findings of fact, we do not do so to conclusions of law. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment." *Perrine v. Marion County Office of Child Services, et. al.*, 866 N.E.2d 269, 273-74 (Ind.Ct.App.2007) (internal citations omitted).

- General Judgment.

If special findings are not entered, the Court of Appeals will affirm the trial court on any legal theory consistent with the facts and inferences of the record. *Clark v. Hunter*, 861 N.E.2d 1202, 1206 (Ind.Ct.App.2007).

- Tactical Considerations.

The proposed special findings anticipated under Trial Rule 52(C) may allow a party to characterize the evidence in a way the trial court may not have considered. Also, in high-stakes, big-budget domestic cases, obtaining the transcript to prepare the findings may be an expense worth considering.

- Controlling Rule.

The authority for special findings is Trial Rule 52(A).

4. Filing a Motion to Correct Errors [1] or Notice of Appeal[2].

If faced with an adverse outcome, the attorney has one of three (3) choices to make with his/her client: (1) accept the trial court's order, (2) file a MTCE, or (3) file a NOA.

- Accept the Decision.

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1 Hereinafter "MTCE".

2 Hereinafter "NOA".

First, a choice that is often lost on high-stakes domestic litigation is to accept the decision of the trial court. Where the matter decided is one of fact, particularly if under the child custody umbrella, a wiser use of resources may be to save funds for future modification actions. This will happen automatically by the passage of time.

The careful attorney should immediately notify his client of a final decision and right to appeal by phone and written format (e-mail or letter) immediately and specify the dates for challenge.

- File Motion to Correct Errors.

Second, a MTCE may be considered. There are a number of considerations and risks with a MTCE, as follows:

With regard to dissolution cases, MTCE is not required except in the narrowly defined circumstance of newly discovered evidence. Trial Rule 59(A).

A MTCE generally has limited application and use to a domestic litigant. Most of these are strategic.

However, they may be useful (or successful) if there is a mathematical error or misapplication of the law (see *In re the Paternity of S.G.H.*, 913 N.E.2d 1265 (Ind.Ct.App.2009, is a case where the Author considered filing a MTCE because father was awarded overnight parenting credit and summer abatement, the later of which was no longer current law).

In addition, in the rare circumstance of a change in the law by the Legislature or issuance of new caselaw guidance, a MTCE may be considered.

Perhaps most practically, a MTCE is useful to "buy" time if there is confusion about the propriety of appeal, counsel is changing, or distance of the litigants is involved.

With particularly litigious parties, who want to exhaust every possible course of action to address a perceived legal error, a MTCE is a matter to discuss with the client.

Filing a MTCE creates affirmative duties on the lawyer to move forward with the appeal if the trial court does not set the matter for hearing or rule upon the MTCE, whereupon it is deemed denied.

As noted, the rule governing a MTCE is Trial Rule 59.

- File NOA (f/k/a Praecipe).

The appellate process begins by filing a NOA with the trial court, and serving it on the Clerk of the Court of Appeals of Indiana. Where a MTCE has been denied or deemed denied, a NOA may also be filed. At the same time, the filing fee of $250.00 should be tendered to the COA.

There is ambiguity in the rules as to when and how the Clerk of the COA should be served with this document. A vast number of lawyers first "serve" the COA by including it in the Appellant's Case Summary (f/k/a Appearance). By doing so, the COA has a file-stamped copy from the trial court (an issue where the appeal is effectuated by mail service). However, the Author has been challenged (unsuccessfully) with this technical reading of the rules.

The controlling rule is Indiana Rule of Appellate Procedure 9. The NOA, like the MTCE, must be from a final judgment and filed within thirty (30) days after its entry. The NOA has specific requirements and essentially serves three (3) functions: (1) notifying the parties and trial court of the appeal, (2) directing the clerk to prepare the Clerk's Record, and instructing the official court reporter to prepare the transcript.

The notice of appeal must include four (4) items:

First, the NOA must identify the order or judgment appealed. With multiple hearings, entry of hand-written jacket entries, this may not be entirely clear. In these cases, all dates should be identified if they occur within the thirty (30) days. Outside this window, successive amended notices or new notices should be filed. The Clerk of the Court of Appeals may consolidate these on its own motion or upon motion of appellant.

Second, the NOA must designate the higher court to which it will be taken. For practical purposes, this will be the Court of Appeals of Indiana. *See* Indiana Rule of Appellate Procedure 5(A).

Third, the NOA must direct the Clerk to assemble the clerk's record.

Fourth, and importantly, the NOA must direct the part(s) of the transcript (s) required.

With domestic appeals being expedited by rule, and extensions for briefing only granted in "extraordinary circumstances", this decision may be difficult, yet critical, for successor counsel to properly advocate the matter. The time this should not be determined is during the brief writing. *See* Indiana Rule of Appellate Procedure 35(D).

5. Speciality Consideration/Topics.

A host of issues must be considered and/or be operational in any given case and are central to preserving the issues for appeal. Two (2) more common circumstances are discussed.

- Bifurcating.

Under the Dissolution Act, it is possible to divorce the parties and leave remaining contested issues open for final contested hearing. These are a potential legal trap for the practitioner and require careful attention to the statutory requirements not to waive the right to appeal.

The controlling statute is enumerated as follows:

"(a) The court may bifurcate the issues in an action for dissolution of marriage . . .to provide for a summary disposition of uncontested issues and a final hearing of contested issues. The court may enter a summary disposition order under this section upon the filing with the court of verified pleadings, signed by the parties, containing: (1) a written waiver of final hearing in the matter of: (A) uncontested issues specified in the waiver; or (B) contested issues specified in the waiver upon which the parties have reached an agreement; (2) a written agreement made in accordance with . . . this chapter pertaining to contested issues settled by the parties; and (3) a statement: (A) specifying contested issues remaining between the parties; and (B) requesting the court to order a final hearing as to contested issues to be held under this chapter. (b) The court shall include in a summary disposition order entered under this section a date for a final hearing of contested issues." Ind.Code § 31-15-2-14.

In *Wilson v. Wilson*, 732 N.E.2d 841, 844-45 (Ind.Ct.App.2000), the Court of Appeals found the trial court had bifurcated property issues, but husband had allowed it to pend without seeking a contested final hearing for over four (4) years. Thus, his failure waived the issue.

- **Stays.**

Stays are technical, and governed by Trial Rule 62 and Ind.App.Rule 39. Generally, a stay must be first filed with the trial court (jurisdiction considered) and then with the Court of Appeals, if denied by the trial court, unless emergency provisions apply.

B. Appeals Process and Tips.

1. Introduction.

The Court of Appeals of Indiana issued 2,945 opinions for fiscal 2008 (calendar year). The average of age of cases pending was a mere 1.1 months. Of the 446 civil cases decided, 259, or 36.2 % were reversed. **EXHIBIT V** (2008 Annual Report of the Court of Appeals of Indiana).

Given this NBI is "Advanced Issues" in dissolution, the topical coverage focuses on the more complicated risks/matters that may be encountered by appellate counsel in handling dissolution and post-decree (i.e., modifications).

2. Propriety of Appeal.

The point of departure in these materials is with determination of whether the appeal is the legally prudent course of action. The following should be carefully considered by the counsel at threshold matters:

- Final Appealable Order.
- Trial Counsel Continuing as Appellate Counsel.
- Motion to Correct Error or Notice of Appeal (or both).

- Question of Law or Fact.

- Budget for Appeal.

3. Appellate Timeline.

A NOA must be filed within thirty (30) days of the entry of the final order or within thirty (30) days of the MTCE being denied or deemed denied. Ind.App. Rule 9(A).

The clerk has thirty (30) days to prepare its record, and the Court Reporter ninety (90) days to complete the transcript. Ind.App. Rules 10(B), 11(B). Failures to follow these deadlines creates a duty on the lawyer to compel such. Failure to do so may result in forfeiture of the appeal. Ind.App. Rule 10(F),(G), 11(D).

The briefing is thirty (30) days for the appellant. Ind.App.Rule 45(B)(1). Thirty (30) days for the appellee. Ind.App.Rule 45(B)(2). A reply may be filed within fifteen (15) days. Ind.App.Rule 45(B)(3).

Upon decision, rehearing or transfer must be sought within thirty (30) days.

4. Practical Tips.

- Determining controlling dates.

The chronological case summary provides the controlling dates.

- Compelling.

The attorney appealing has a duty to compel. The failure to compel the filing of the Notice of Completion of Clerk's Record, Notice of Completion of Transcript, or if the court reporter fails to file the transcript, could subject the appeal to dismissal.

- Issues to argue.

As questions of law are reviewed de novo, these are the most likely candidate cases for appeal. With questions of fact, the appeal has much less chance of success because of the deferential standard the Court of Appeals affords to the trial court.

- Appendix

The appendix is the mechanism to provide the Court of Appeals with certain documents necessary to the appeal. It is not a vehicle to introduce new evidence not presented at trial. Ind.App. Rule 50.

- Rotunda/Self-Filing.

5. Conclusion.

The appellate process is expensive and deadline driven. The good advocate is very careful and cognizant of this.

C. Realistic Child Support and Alimony Enforcement.

At the time of this publication, the new child support guidelines were not in force. The Supreme Court's order on same is included **EXHIBIT VI** (Order Amending Indiana Child Support Rules and Guidelines).

A preliminary consideration in child support enforcement, is if a Wage Withholding Order may be put in place to ensure payment. Generally, most courts will grant this request, if it is not already in the order for child support. This is not always possible in self-employment situations.

Generally, child support should be at least four (4) to six (6) weeks in arrears before a filing for enforcement should be considered. Typically, the author also ensures that the amount of the arrearage is at least $1,000.00.

Truly "realistic" child support enforcement would be handled by the child support prosecutor in your client's county. Depending upon the county, some prosecutor's are more aggressive on enforcing statutory provisions of suspension of driver's licenses and potentially professional licenses. Further, the prosecutors can generate the proper vehicles to intercept tax refunds. They can also lien vehicles and other property for child support.

Most prosecutor's offices are overwhelmed with their caseloads and it may take months for any responsive action. In such cases, where the client is willing to pay for child support enforcement, and the client is requesting immediate assistance, there are several options for enforcing a child support order.

If child support enforcement is sought through the assistance of private legal counsel, a client may file a Petition for Contempt, or Rule to Show Cause, or Request to Enforce the Child Support Order, all of which will require a hearing before the Court. Sometimes this is enough to obtain the attention of the payor and arrangements can be made for payment. Other times a hearing is necessary and the client may request relief for the child support arrearage, including holding the payor in contempt of court. Depending upon the county or the individual judge, if the payor is found to have failed to pay child support, they may place the payor in jail and release them with a purge bond.

The potential statutory provisions to child support enforcement are provided in a handout and are numerous. **SEE HANDOUT.**

With regard to alimony, it is allowed in a provisional context. Ind.Code § 31-15-4-1. As a disposition of property, maintenance is only allowed in narrow circumstances of physical or mental impairment or rehab maintenance for up to three (3) years. Ind.Code § 31-15-7-2. Alimony may be enforced through a Petition for Contempt, Rule to Show Cause, or Request to Enforce the Order of

the Court, and again a hearing will need to be set.

D. Post-Divorce Financial Planning–Give Your Client a Clear To-Do List.

Upon entry of a final order, particularly with high net worth litigants, there are a number of financial steps that must be taken. However, while this is a seminar agenda, tax consultations and structuring any agreement or trial evidence begins long before a final order. Failure to so consider places the attorney at malpractice risk and not serving his client's interests. Some of the more common post-divorce checklist items for clients are as follows:

- Fee-based financial advisor.
- QDRO.
- Life insurance beneficiary changes.
- Homeowner's insurance changes and schedules.
- COBRA.
- Review credit bureau and reporting.
- Auto insurance.
- Banking relationship.
- Quitclaim and recording.
- Refinancing.
- Short-sales.
- CPA Review.
- Child support:

  Insuring it.

  Reliance upon it.

  Payment by WWO.

Court of Appeals of Indiana

2008 Annual Report

First District

John G. Baker, Chief Judge
Edward W. Najam Jr., Judge
L. Mark Bailey, Judge

Second District

Ezra H. Friedlander, Presiding Judge
James S. Kirsch, Judge
Cale J. Bradford, Judge

Third District

Paul D. Mathias, Presiding Judge
Michael P. Barnes, Judge
Terry A. Crone, Judge

Fourth District

Carr L. Darden, Presiding Judge
Patricia A. Riley, Judge
Melissa S. May, Judge

Fifth District

Elaine B. Brown, Presiding Judge
Margret G. Robb, Judge
Nancy H. Vaidik, Judge

The Mission of the Court of Appeals of Indiana
TO SERVE ALL PEOPLE BY PROVIDING EQUAL JUSTICE UNDER LAW

Room 433, 200 West Washington Street, Indianapolis, Indiana 46204 (317) 232-6893
http://www.in.gov/judiciary/appeals

Court of Appeals of Indiana

2008 Annual Report

This report pertaining to the progress of the work of the Court of Appeals of Indiana for the period from January 1, 2008, through December 31, 2008, is being submitted pursuant to paragraph 6.35, Judge's Manual.

John G. Baker
Chief Judge and
Presiding Judge
First District

Ezra H. Friedlander
Presiding Judge
Second District

Paul D. Mathias
Presiding Judge
Third District

Carr L. Darden
Presiding Judge
Fourth District

Elaine B. Brown
Presiding Judge
Fifth District

COURT OF APPEALS OF INDIANA

ANNUAL REPORT

January 1, 2008 - December 31, 2008

Court Summary

	Criminal	Post-Conviction	Civil	Expedite	Other	TOTAL
Cases Pending 12-31-07	161	25	147	7	32*	372*
Cases Fully-Briefed Received	1589	147	694	50	276	2756
Geographic District One	361	32	238	0	73	704
Geographic District Two	823	74	249	50	119	1315
Geographic District Three	405	41	207	0	84	737
Cases Disposed	1554	151	723	46	278	2752
By Majority Opinion	1550	150	716	46	277	2739
By Order	4	1	7	0	1	13
Net Increase/Decrease	34	-4	-29	4	-1	4
Cases Pending 12-31-07	195	21	118	11	31	376
Cases Affirmed	1336	131	446	35	222	2170
Cases Affirmed Percent	86.2%	87.4%	62.3%	76.1%	80.2%	79.2%
Cases Reversed	196	17	259	11	53	536
Cases Reversed Percent	12.6%	11.3%	36.2%	23.9%	19.1%	19.6%
Cases Remanded	18	2	11	0	2	33
Cases Remanded Percent	1.2%	1.3%	1.5%	0.0%	0.7%	1.2%
Oral Arguments Heard	18	2	52	3	3	78

Oral Arguments Heard includes: 1 Stay Hearing

Average Age of Cases Pending

12-31-07	1.6	Months
12-31-08	1.1	Months

Motions, Petitions for Time, Misc. Motions Received..... 8453

Motions, Petitions for Time, Misc. Orders Issued..... 7115

*Total is one less than total on 2007 Annual Report because a case disposed on 12/17/07 was not included in the 2007 dispositions.

COURT OF APPEALS OF INDIANA

ANNUAL REPORT

January 1, 2008 - December 31, 2008

Summary by Judge

	Majority Opinions Issued	All Opinions Issued	Orders Issued	Cases Voted On	Oral Arguments Heard	Cases Pending 12/31/2007	Cases Pending 12/31/2008
Judges (District)							
Bailey (1st)	185	188	0	513	18	14	19
Baker (1st)	242	271	0	600	24	15	16
Barnes (3rd)	185	200	1	551	11	18	24
Bradford (2nd)	173	179	2	524	20	17	20
Brown (5th)**	105	122	0	324	8	0	19
Crone (3rd)	173	180	0	542	19	26	22
Darden (4th)	154	162	2	527	18	23	23
Friedlander (2nd)	164	181	0	529	8	22	18
Kirsch (2nd)	153	174	1	558	19	32	31
Mathias (3rd)	164	167	0	537	10	34	32
May (4th)	165	179	0	538	19	39	35
Najam (1st)	176	189	1	507	10	14	10
Riley (4th)	156	172	0	544	20	20	28
Robb (5th)	173	193	2	549	18	30	25
Sharpnack (5th)*	57	59	1	184	3	28	0
Vaidik (5th)	172	182	2	530	8	24	22
Senior Judges						16	32
Barteau	44	45	1	44	0	0	0
Garrard	9	9	0	9	0	0	0
Hoffman	40	41	0	41	1	0	0
Robertson	12	12	0	12	0	0	0
Sharpnack	21	21	0	36	0	0	0
Sullivan	16	19	0	18	0	0	0
TOTAL	**2739**	**2945**	**13**	**8217**	**234**	**372**	**376**

*Judge John T. Sharpnack retired May 2, 2008

**Judge Elaine B. Brown sworn in May 5, 2008

COURT OF APPEALS OF INDIANA

ANNUAL REPORT

January 1, 2008 - December 31, 2008

Caseload

	Cases Pending 1/1/2008	INTAKE Cases Assigned	Transfers In	Transfers Out	Total	DISPOSITIONS Majority Opinions	Orders	Total	Cases Pending 12/31/2008
Judges (District)									
Bailey (1st)	14	175	15	0	190	185	0	185	19
Baker (1st)	15	178	68	3	243	242	0	242	16
Barnes (3rd)	18	177	22	7	192	185	1	186	24
Bradford (2nd)	17	176	7	5	178	173	2	175	20
Brown (5th)	0	106	20	2	124	105	0	105	19
Crone (3rd)	26	175	3	9	169	173	0	173	22
Darden (4th)	23	172	3	19	156	154	2	156	23
Friedlander (2nd)	22	174	1	15	160	164	0	164	18
Kirsch (2nd)	32	174	7	28	153	153	1	154	31
Mathias (3rd)	34	172	1	11	162	164	0	164	32
May (4th)	39	173	2	14	161	165	0	165	35
Najam (1st)	14	177	0	4	173	176	1	177	10
Riley (4th)	20	174	7	17	164	156	0	156	28
Robb (5th)	30	174	4	8	170	173	2	175	25
Sharpnack (5th)	28	51	0	21	30	57	1	58	0
Vaidik (5th)	24	175	5	8	172	172	2	174	22
Senior Judges	16*	153	14	8	159	*(142)*	*(1)*	*(154)*	32
Barteau	0	0	0	0	0	44	1	45	0
Garrard	0	0	0	0	0	9	0	9	0
Hoffman	0	0	0	0	0	40	0	40	0
Robertson	0	0	0	0	0	12	0	12	0
Sharpnack	0	0	0	0	0	21	0	21	0
Sullivan	0	0	0	0	0	16	0	16	0
TOTAL	**372**	**2756**	**179**	**179**	**2756**	**2739**	**13**	**2752**	**376**

*Total is one less than on 2007 Annual Report because a case that was disposed in 2007 was not included on the 2007 Annual Report.

COURT OF APPEALS OF INDIANA

ANNUAL REPORT

January 1, 2008 - December 31, 2008

Opinions Issued

	MAJORITY OPINIONS							
	Issued	Published	Percent Published	Concurring Opinions	Dissenting Opinions	Rehearing Opinions	Other Opinions	TOTAL
Judges (District)								
Bailey (1st)	185	26	14.1%	0	3	0	0	188
Baker (1st)	242	69	28.5%	8	18	1	2	271
Barnes (3rd)	185	28	15.1%	6	5	4	0	200
Bradford (2nd)	173	31	17.9%	1	5	0	0	179
Brown (5th)	105	29	27.6%	1	9	6	1	122
Crone (3rd)	173	34	19.7%	2	3	2	0	180
Darden (4th)	154	31	20.1%	0	7	1	0	162
Friedlander (2nd)	164	22	13.4%	3	12	1	1	181
Kirsch (2nd)	153	28	18.3%	6	14	0	1	174
Mathias (3rd)	164	31	18.9%	0	3	0	0	167
May (4th)	165	56	33.9%	3	8	3	0	179
Najam (1st)	176	34	19.3%	0	6	7	0	189
Riley (4th)	156	51	32.7%	0	14	2	0	172
Robb (5th)	173	30	17.3%	9	6	4	1	193
Sharpnack (5th)	57	17	29.8%	0	0	0	2	59
Vaidik (5th)	172	43	25.0%	2	6	1	1	182
Senior Judges								
Barteau	44	3	6.8%	0	0	1	0	45
Garrard	9	2	22.2%	0	0	0	0	9
Hoffman	40	12	30.0%	0	1	0	0	41
Robertson	12	0	0.0%	0	0	0	0	12
Sharpnack	21	3	14.3%	0	0	0	0	21
Sullivan	16	4	25.0%	1	1	1	0	19
TOTAL	**2739**	**584**	**21.3%**	**42**	**121**	**34**	**9**	**2945**

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January 1, 2008 - December 31, 2008

Cases Handed Down

	CRIMINAL		POST-CONVICTION		CIVIL		EXPEDITE		OTHER		TOTAL	
	Writing	Panel	Writing	Panel	Writing	Panel	Writing	Panel	Writing	Panel	Writing	Panel
Judges (District)												
Bailey (1st)	106	185	9	15	52	90	3	4	15	34	**185**	**328**
Baker (1st)	132	202	11	23	66	91	6	6	27	36	**242**	**358**
Barnes (3rd)	99	212	10	20	53	94	3	6	20	34	**185**	**366**
Bradford (2nd)	100	203	11	15	42	89	3	7	17	37	**173**	**351**
Brown (5th)	59	120	7	20	27	49	2	4	10	26	**105**	**219**
Crone (3rd)	100	206	7	18	50	101	2	5	14	39	**173**	**369**
Darden (4th)	90	206	7	21	32	106	3	8	22	32	**154**	**373**
Friedlander (2nd)	99	203	7	23	33	101	2	5	23	33	**164**	**365**
Kirsch (2nd)	85	229	7	22	38	109	3	7	20	38	**153**	**405**
Mathias (3rd)	91	215	16	21	37	91	2	7	18	39	**164**	**373**
May (4th)	89	212	6	29	45	91	3	4	22	37	**165**	**373**
Najam (1st)	98	187	11	21	46	83	3	4	18	36	**176**	**331**
Riley (4th)	86	225	9	16	47	102	2	8	12	37	**156**	**388**
Robb (5th)	96	204	12	21	49	102	3	6	13	43	**173**	**376**
Sharpnack (5th)	31	69	5	3	17	37	1	4	3	14	**57**	**127**
Vaidik (5th)	98	210	9	12	44	91	3	7	18	38	**172**	**358**
Senior Judges												
Barteau	29	0	2	0	12	0	0	0	1	0	**44**	**0**
Garrard	7	0	1	0	0	0	0	0	1	0	**9**	**0**
Hoffman	20	1	0	0	18	0	0	0	2	0	**40**	**1**
Robertson	11	0	0	0	1	0	0	0	0	0	**12**	**0**
Sharpnack	15	10	1	0	4	4	1	0	0	1	**21**	**15**
Sullivan	9	1	2	0	3	1	1	0	1	0	**16**	**2**
TOTAL	**1550**	**3100**	**150**	**300**	**716**	**1432**	**46**	**92**	**277**	**554**	**2739**	**5478**

COURT OF APPEALS OF INDIANA

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Oral Arguments

	CRIMINAL		POST-CONVICTION		CIVIL		EXPEDITE		OTHER		TOTAL	
	Writing	Panel	Writing	Panel	Writing	Panel	Writing	Panel	Writing	Panel	Writing	Panel
Judges (District)												
Bailey (1st)	1	2	1	0	2	11	1	0	0	0	**5**	**13**
Baker (1st)	4	3	0	1	7	6	1	0	0	2	**12**	**12**
Barnes (3rd)	0	2	0	0	2	7	0	0	0	0	**2**	**9**
Bradford (2nd)	4	3	0	1	2	9	0	0	0	1	**6**	**14**
Brown (5th)	0	3	0	0	1	4	0	0	0	0	**1**	**7**
Crone (3rd)	0	5	0	0	3	10	0	1	0	0	**3**	**16**
Darden (4th)	0	4	0	0	5	8	0	0	1	0	**6**	**12**
Friedlander (2nd)	0	2	0	0	2	2	1	0	1	0	**4**	**4**
Kirsch (2nd)	2	1	0	0	4	11	0	0	0	1	**6**	**13**
Mathias (3rd)	3	1	0	0	2	3	0	1	0	0	**5**	**5**
May (4th)	0	3	0	2	6	7	0	0	1	0	**7**	**12**
Najam (1st)	1	1	1	0	2	4	0	1	0	0	**4**	**6**
Riley (4th)	1	2	0	0	7	8	0	1	0	1	**8**	**12**
Robb (5th)	1	2	0	0	5	8	0	1	0	1	**6**	**12**
Sharpnack (5th)	0	0	0	0	1	1	0	1	0	0	**1**	**2**
Vaidik (5th)	1	1	0	0	1	5	0	0	0	0	**2**	**6**
Senior Judges												
Barteau	0	0	0	0	0	0	0	0	0	0	**0**	**0**
Garrard	0	0	0	0	0	0	0	0	0	0	**0**	**0**
Hoffman	0	1	0	0	0	0	0	0	0	0	**0**	**1**
Robertson	0	0	0	0	0	0	0	0	0	0	**0**	**0**
Sharpnack	0	0	0	0	0	0	0	0	0	0	**0**	**0**
Sullivan	0	0	0	0	0	0	0	0	0	0	**0**	**0**
TOTAL	**18**	**36**	**2**	**4**	**52**	**104**	**3**	**6**	**3**	**6**	**78**	**156**

COURT OF APPEALS OF INDIANA

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	Cases Pending					
	Criminal	Post-Conviction	Civil	Expedite	Other	Total
Judges (District)						
Bailey (1st)	8	0	10	1	0	19
Baker (1st)	7	0	6	0	3	16
Barnes (3rd)	14	2	5	1	2	24
Bradford (2nd)	9	2	5	0	4	20
Brown (5th)	11	0	4	1	3	19
Crone (3rd)	11	2	6	1	2	22
Darden (4th)	12	2	7	0	2	23
Friedlander (2nd)	10	0	6	1	1	18
Kirsch (2nd)	15	2	11	1	2	31
Mathias (3rd)	15	0	16	1	0	32
May (4th)	22	0	7	1	5	35
Najam (1st)	5	0	3	0	2	10
Riley (4th)	12	3	11	1	1	28
Robb (5th)	16	1	7	0	1	25
Sharpnack (5th)	0	0	0	0	0	0
Vaidik (5th)	9	4	6	1	2	22
Senior Judges	19	3	8	1	1	32
TOTAL	**195**	**21**	**118**	**11**	**31**	**376**

COURT OF APPEALS OF INDIANA

ANNUAL REPORT

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Successive Petitions for Post-Conviction Relief

Pending 12-31-07	15
Petitions Filed	180
TOTAL	195

Authorization

Petitions Authorized To Be Filed in Trial Court for Hearing	14
Petitions Not Authorized To Be Filed in Trial Court for Hearing ("No Merit")	167
Petitions Pending	14
TOTAL	195

COURT OF APPEALS OF INDIANA

ANNUAL REPORT

January 1, 2008 - December 31, 2008

Motions to Dismiss

Pending Motions 12-31-07	19
Motions Filed	216
TOTAL	235
Dispositions:	
Motion to Dismiss Granted	115
Motion to Dismiss Denied	108
Subtotal	223
By Per Curiam Opinions	0
Total Dispositions	223
Pending Motions 12-31-08	12

POST-DIVORCE CONSIDERATIONS: EXHIBIT VI (Order Amending Indiana Child Support Rules and Guidelines).

In the
Indiana Supreme Court

CAUSE NUMBER: 94S00-0901-MS-4

ORDER AMENDING INDIANA CHILD SUPPORT RULES AND GUIDELINES

This Court finds after lengthy study, consultation with an expert, a public hearing, and public comment on a proposed draft, and with the cooperation of the Department of Child Services, Child Support Bureau, the Domestic Relations Committee of the Indiana Judicial Conference has proposed amendments to the Indiana Child Support Rules and Guidelines previously adopted by this Court. Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administrative procedures of all courts and to direct trial courts in implementing and applying applicable statutes, the Indiana Child Support Rules and Guidelines, the Child Support Obligation Worksheet, Guideline Schedules for Weekly Support Payments and Health Insurance Premium Worksheet are amended to read as follows (deletions shown by ~~striking~~ and new text shown by underlining):

INDIANA CHILD SUPPORT RULES AND GUIDELINES

~~CHILD SUPPORT RULES~~

Rules

~~Support Rule~~ 1. Adoption of Child Support Rules and Guidelines
~~Support Rule~~ 2. Presumption
~~Support Rule~~ 3. Deviation from Guideline Amount

Guidelines

1. Preface.
2. Use of the Guidelines.
3. Determination of Child Support Amount.

Amended Child Support Obligation Worksheet (CSOW)
Parenting Time Credit Worksheet
Post-Secondary Education Worksheet (PSEW)
New Health Insurance Premium Worksheet (HIPW)
Amended Guideline Schedules for Weekly Support Payments

CHILD SUPPORT RULES

Support Rule 1. Adoption of Child Support Rules and Guidelines

The Indiana Supreme Court hereby adopts the Indiana Child Support Guidelines ~~(Third Edition, 1989)~~, as drafted by the Judicial Administration Committee and adopted by the Board of the Judicial Conference of Indiana and all subsequent amendments thereto presented by the Domestic Relations Committee of the Judicial Conference of Indiana, as the child support rules and guidelines of this Court.

Support Rule 2. Presumption

In any proceeding for the award of child support, there shall be a rebuttable presumption that the amount of the award which would result from the application of the Indiana Child Support Guidelines is the correct amount of child support to be awarded.

Support Rule 3. Deviation from Guideline Amount

If the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that conclusion.

INDIANA CHILD SUPPORT GUIDELINES

GUIDELINE 1. PREFACE

Guidelines to determine levels of child support were developed by the Judicial Administration Committee of the Judicial Conference of Indiana and adopted by the Indiana Supreme Court. The guidelines are consistent with the provisions of Indiana Code Title 31 which place a duty for child support upon parents based upon their financial resources and needs, the standard of living the child would have enjoyed had the marriage not been dissolved or had the separation not been ordered, the physical or mental condition of the child, and the child's educational needs.

The Guidelines have three objectives:

(1) To establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support;

(2) To make awards more equitable by ensuring more consistent treatment of people in similar circumstances; and

(3) To improve the efficiency of the court process by promoting settlements and giving courts and the parties guidelines in settling the level of awards.

The Indiana Child Support Guidelines are based on the Income Shares Model, developed by the Child Support Project of the National Center for State Courts. The Income Shares Model is predicated on the concept that the child should receive the same proportion of parental income that he or she would have received if the parents lived together. Because household spending on behalf of children is intertwined with spending on behalf of adults for most expenditure categories, it is difficult to determine the proportion allocated to children in individual cases, even with exhaustive financial information. However, a number of authoritative economic studies provide estimates of the average amount of household expenditure on children in intact households. These studies have found the proportion of household spending devoted to children is related to the level of household income and to the number and ages of children. The Indiana Child Support Guidelines relate the level of child support to income and the number of children. In order to provide simplicity in the use of the Guidelines, however, child support figures reflect a blend of all age categories weighted toward school age children.

Based on this economic evidence, the Indiana Child Support Guidelines calculate child support as the share of each parent's income estimated to have been spent on the child if the parents and child were living in an intact household. The calculated amount establishes the level of child support for both the custodial and non-custodial parent. Absent grounds for a deviation, the custodial parent should be required to make monetary payments of child support, if application of the parenting time credit would so require. ~~If one parent has custody, the amount calculated for that parent is presumed to be spent directly on the child. For the noncustodial parent, the calculated amount establishes the level of child support.~~

COMMENTARY

History of Development. *In June of 1985, the Judicial Reform Committee (now the Judicial Administration Committee) of the Judicial Conference of Indiana undertook the task of developing child support guidelines for use by Indiana judges. While the need had been long recognized in Indiana, the impetus for this project came from federal statutes requiring guidelines to be in place no later than October 1, 1987. P.L. 98-378. Paradoxically, guidelines did not need to be mandatory under the 1984 federal legislation to satisfy federal requirements; they were only required to be made available to judges and other officials with authority to establish child support awards. 45 CFR Ch. III, § 302.56.*

The final draft was completed by the Judicial Reform Committee on July 24, 1987, and was presented to the Judicial Conference of Indiana Board of Directors on September 17, 1987. The Board accepted the report of the Reform Committee, approved the Guidelines and recommended their use to the judges of Indiana in all matters of child support.

Family Support Act of 1988. *On October 13, 1988, the United States Congress passed the "Family Support Act of 1988," P.L. 100-485 amending the Social Security Act by deleting the original language which made application of the guideline discretionary and inserted in its place the following language:*

"There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the

application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case." P.L. 100-485, § 103(a)(2).

The original Guidelines that went into effect October 1, 1987 and their commentary were revised by the Judicial Administration Committee to reflect the requirement that child support guidelines be a rebuttable presumption. The requirement applies to all cases where support is set after October 1, 1989, including actions brought under Title IV-D of the Social Security Act (42 U.S.C.A. § 651-669). Also, after October 1, 1989, counties and individual courts may not opt to use alternate methods of establishing support. The Indiana Child Support Guidelines were required to be in use in all Indiana courts in all proceedings where child support is established or modified on and after October 1, 1989.

Periodic Review of Guidelines and Title IV-D Awards. *The "Family Support Act of 1988" also requires that the Guidelines be reviewed at least every four years "to assure their application results in the determination of appropriate child support award amounts." P.L. 100-485, § 103(b). Further, each state must develop a procedure to ensure that all Title IV-D awards are periodically reviewed to ensure that they comply with the Guidelines. P.L. 100-485, § 103(c).*

Compliance With State Law. *The Child Support Guidelines were developed specifically to comply with federal requirements, as well as Indiana law.*

Objectives of the Indiana Child Support Guidelines. *The following three objectives are specifically articulated in the Indiana Child Support Guidelines:*

1. To establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support. When the Guidelines were first recommended for use by the Indiana Judicial Conference on September 17, 1987, many courts in the state had no guideline to establish support. Many judges had expressed the need for guidelines, but few had the resources to develop them for use in a single court system. The time, research and economic understanding necessary to develop meaningful guidelines were simply beyond the resources of most individual courts.

2. To make awards more equitable by ensuring more consistent treatment of people in similar circumstances. This consistency can be expected not only in the judgments of a particular court, but between jurisdictions as well. What is fair for a child in one court is fair to a similarly situated child in another court.

3. To improve the efficiency of the court process by promoting settlements and giving courts and the parties guidelines in settling the level of awards. In other words, when the outcome is predictable, there is no need to fight. Because the human experience provides an infinite number of variables, no guideline can cover every conceivable situation, so litigation is not completely forestalled in matters of support. If the guidelines are consistently applied, however, those instances should be minimized.

Economic Data Used in Developing Guidelines. *What does it take to support a child? The question is simple, but the answer is extremely complex. Yet, the question must be answered if an adequate amount of child support is to be ordered by the court. Determining the cost attributable to children is complicated by intertwined general household expenditures. Rent,*

transportation, and grocery costs, to mention a few, are impossible to accurately apportion between family members. In developing these Guidelines, a great deal of reliance was placed on the research of Thomas J. Espenshade, (Investing In Children, Urban Institute Press, 1984) generally considered the most authoritative study of household expenditure patterns. Espenshade used data from 8,547 households and from that data estimated average expenditures for children present in the home. Espenshade's estimates demonstrate that amounts spent on the children of intact households rise as family income increases. They further demonstrate at constant levels of income that expenditures decrease for each child as family size increases. These principles are reflected in the Guideline Schedules for Weekly Support Payments, which are included in the Indiana Child Support Guidelines. By demonstrating how expenditures for each child decrease as family size increases, Espenshade should have put to rest the previous practice of ordering equal amounts of support per child when two or more children are involved. Subsequent guidelines reviews have considered more current economic studies of child-rearing expenditures (e.g., Mark Lino, Expenditures on Children by Families: 2006 Annual Report, United States Department of Agriculture, 2007; David Betson, State of Oregon Child Support Guidelines Review: Updated Obligation Scales and Other Considerations, report to State of Oregon Department of Justice, 2006). These periodic guidelines reviews have concluded that the Indiana Guidelines based on the Espenshade estimates are generally within the range of more current estimates of child-rearing expenditures. A notable exception at high incomes leveled off the child support schedule for combined weekly adjusted incomes above $4,000. In 2009 this exception was removed. The increase is now incorporated into the schedule up to combined weekly adjusted incomes of $10,000 and a formula is provided for incomes above that amount. Previously, a formula was provided for combined weekly adjusted incomes above $4,000.

Income Shares Model. *After review of five approaches to the establishment of child support, the Income Shares Model was selected for the Indiana Guidelines. This model was perceived as the fairest approach for children because it is based on the premise that children should receive the same proportion of parental income after a dissolution that they would have received if the family had remained intact. Because it then apportions the cost of children between the parents based on their means, it is also perceived as being fair to parents. In applying the Guidelines, the following steps are taken:*

1. *The gross income of both parents is added together after certain adjustments are made. A percentage share of income for each parent is then determined.*
2. *The total is taken to the support tables, referred to in the Indiana Guidelines as the Guideline Schedules for Weekly Support Payments, to determine the total cost of supporting a child or children.*
3. *Work-related child care expenses and the weekly costs of health insurance premiums for the child(ren) are then added to the basic child support obligation.*
4. *The child support obligation is then prorated between the parents, based on their proportionate share of the weekly adjusted income, hence the name "income shares."*

The Income Shares Model was developed by The Institute for Court Management of the National Center for State Courts under the Child Support Guidelines Project. This approach was designed to be consistent with the Uniform Marriage and Divorce Act, the principles of which are consistent with IC 31-16-6-1. Both require the court to consider the financial

resources of both parents and the standard of living the child would have enjoyed in an intact family.

Gross Versus Net Income. *One of the policy decisions made by the Judicial Administration Committee in the early stages of developing the Guidelines was to use a gross income approach as opposed to a net income approach. Under a net income approach, extensive discovery is often required to determine the validity of deductions claimed in arriving at net income. It is believed that the use of gross income reduces discovery. (See Commentary to Guideline 3A.) While the use of gross income has proven controversial, this approach is used by the majority of jurisdictions and, after a thorough review, is considered the best reasoned.*

The basic support obligation would be the same whether gross income is reduced by adjustments built into the Guidelines or whether taxes are taken out and a net income option is used. A support guideline schedule consists of a column of income figures and a column of support amounts. In a gross income methodology, the tax factor is reflected in the support amount column, while in a net income guideline, the tax factor is applied to the income column. In devising the Indiana Guidelines, an average tax factor of 21.88 percent was used to adjust the support column.

Of course, taxes vary for different individuals. This is the case whether a gross or net income approach is used. Under the Indiana Guideline, where taxes vary significantly from the assumed rate of 21.88 percent, a trial court may choose to deviate from the guideline amount where the variance is substantiated by evidence at the support hearing.

Flexibility Versus the Rebuttable Presumption. *Although application of the Guideline yields a figure that becomes a rebuttable presumption, there is room for flexibility. Guidelines are not immutable, black letter law. A strict and totally inflexible application of the Guidelines to all cases can easily lead to harsh and unreasonable results. If a judge believes that in a particular case application of the Guideline amount would be unreasonable, unjust, or inappropriate, a finding must be made that sets forth the reason for deviating from the Guideline amount. The finding need not be as formal as Findings of Fact and Conclusions of Law; the finding need only articulate the judge's reasoning. For example, if under the facts and circumstances of the case, the noncustodial parent would bear an inordinate financial burden, the following finding would justify a deviation:*

"Because the noncustodial parent suffers from a chronic medical condition requiring uninsured medical expenses of $357.00 per month, the Court believes that setting child support in the Guideline amount would be unjust and instead sets support in the amount of $___ per week."

Agreed Orders submitted to the court must also comply with the "rebuttable presumption" requirement; that is, the order must recite why the order deviates from the Guideline amount.

*1. **Phasing in Support Orders.** Some courts may find it desirable in modification proceedings to gradually implement the Guideline order over a period of time, especially where support computed under the Guideline is considerably higher than the amount previously paid. Enough flexibility exists in the Guidelines to permit that approach, as long as the judge's rationale is explained with an entry such as:*

"The Guideline's support represents an increase of 40%, and the court finds that such an abrupt change in support obligation would render the obligor incapable of meeting his/her other established obligations. Therefore, the Court sets support in the amount of $____ and, on October 1, ~~19~~20___, it shall increase to $____ and, on September 1, ~~19~~20__, obligor shall begin paying the Guideline amount of $____."

*2. **Situations Calling for Deviation**. An infinite number of situations may prompt a judge to deviate from the Guideline amount. For illustration only, and not as a complete list, the following examples are offered:*

- *One or both parties pay union dues as a condition of employment.*
- *A party provides support for an elderly parent.*
- *The noncustodial parent purchases school clothes.*
- *The noncustodial parent has extraordinary medical expenses for himself or herself.*
- *Both parents are members of the armed forces and the military provides housing.*
- *The obligor is still making periodic payments to a former spouse pursuant to a prior Dissolution Decree.*
- *One of the parties is required to travel an unusually long distance in the course of employment on a regular or daily basis and incurs an unusually large expense for such travel, and*
- *The custodial or noncustodial parent incurs significant travel expense in exercising visitation.*

Again, no attempt has been made to define every possible situation that could conceivably arise when determining child support and to prescribe a specific method of handling each of them. Practitioners must keep this in mind when advising clients and when arguing to the court. Many creative suggestions will undoubtedly result. Judges must also avoid the pitfall of blind adherence to the computation for support without giving careful consideration to the variables that require changing the result in order to do justice.

GUIDELINE 2. USE OF THE GUIDELINES

The Guideline Schedules provide calculated amounts of child support. For obligors with a combined weekly adjusted income, as defined by these Guidelines, of less than $100.00, the Guidelines provide for case-by-case determination of child support. When a parent has extremely low income the amount of child support recommended by use of the Guidelines should be carefully scrutinized. ~~, normally with a range of $25.00-$50.00 weekly. In such cases, the Court should carefully review.~~ The court should consider the obligor's income and living expenses to determine the maximum amount of child support that can reasonably be ordered without denying the obligor the means for self-support at a minimum subsistence level. The court may consider $12.00 as a minimum child support order; however, there are situations where a $0.00 support order is appropriate. A ~~specific~~ numeric amount of child support ~~should always~~ shall be ordered.

~~The Guideline Schedules provide calculated amounts of child support to a combined weekly adjusted income level of 4,000 dollars ($4,000.00) or 208,000 dollars ($208,000.00) per~~

~~year. For cases with higher combined weekly adjusted income, child support should be determined by using the formula found in Commentary to Guideline 3D3.~~

Temporary maintenance may be awarded by the court not to exceed thirty-five percent (35%) of the obligor's weekly adjusted income. In no case shall child support and temporary maintenance exceed fifty percent (50%) of the obligor's weekly adjusted income. Temporary maintenance and/or child support may be ordered by the court either in dollar payments or "in-kind" payments of obligations.

~~It is also intended that~~ These guidelines are to be used in paternity cases and all other child support actions.

Commentary

Minimum Support. *The Guideline's schedules for weekly support payments do not provide an amount of support for couples with combined weekly adjusted income of less than $100.00. Consequently the Guidelines do not establish a minimum support obligation. Instead the facts of each individual case must be examined and support set in such a manner that the obligor is not denied a means of self-support at a subsistence level. For example, (1) a parent who has a high parenting time credit; (2) a parent who suffers from debilitating mental illness (3) a parent caring for a disabled child, (4) an incarcerated parent, (5) a parent or a family member with a debilitating physical health issue, or (6) a natural disaster are significant but not exclusive factors for the Court to consider in setting a child support order. The court should not automatically attribute minimum wage to parents who, for a variety of factors, are not capable of earning minimum wage.*

Where parents live together with the child and share expenses, a child support worksheet shall be completed and a $0.00 order may be entered as a deviation. ~~*It is, however, recommended that a specific amount of support be set. Even in situations where the noncustodial parent has no income, courts have routinely established a child support obligation at some minimum level. An obligor cannot be held in contempt for failure to pay support when there is no means to pay, but the obligation accrues and serves as a reimbursement if the obligor later acquires the ability to meet the obligation.*~~

Economic data indicate one hundred dollars, which is half of the 2008 federal poverty level for one person, is not sufficient for a person to live at a subsistence level today. The prior obligation amounts at combined incomes of $100.00 per week are $25.00 per week for one child and $50 per week for two children. These amounts absorb 25 and 50 percent, respectively, of the parents' gross income. Most states set their minimum child support order at $50.00 per month, which is about $12.00 per week. Therefore, the revised low-income adjustment sets the obligation amount for combined weekly incomes of $100.00 at $12.00 for one child.

~~***Income in Excess of Guideline Schedule.*** *The Guidelines Schedules for Weekly Support Payments provide calculations for the basic support obligation to a combined weekly adjusted income of $4,000.00 or annual adjusted income of $208,000.00. The formula for computing support, when combined annual adjusted income is above $208,000.00, is contained in Commentary to Guideline 3D3.*~~

Temporary Maintenance. *It is recommended that temporary maintenance not exceed thirty-five percent (35%) of the obligor's weekly adjusted income. The maximum award should be reserved for those instances where the custodial spouse has no income or no means of*

support, taking into consideration that spouse's present living arrangement (i.e., whether or not he or she lives with someone who shares or bears the majority of the living expense, lives in the marital residence with little or no expense, lives in military housing, etc.).

It is further recommended that the total of temporary maintenance and child support should not exceed fifty percent (50%) of the obligor's weekly adjusted income. In computing temporary maintenance, in-kind payments, such as the payment of utilities, house payments, rent, etc., should also be included in calculating the percentage limitations. Care must also be taken to ensure that the obligor is not deprived of the ability to support himself or herself.

Spousal Maintenance. *It should also be emphasized that the recommendations concerning maintenance apply only to temporary maintenance, not maintenance in the Final Decree. An award of spousal maintenance in the Final Decree must, of course, be made ~~under IC 31-15-7-2~~ in accordance with Indiana statute. These Guidelines do not alter those requirements. Theoretically, when setting temporary maintenance, child support should come first. That is, if child support is set at forty percent (40%) of the obligor's weekly adjusted income, only a maximum of ten percent (10%) of the obligor's income would be available for maintenance. That distinction, however, makes little practical difference. As with temporary maintenance, care should be taken to leave the obligor with adequate income for subsistence. In many instances the court will have to review the impact of taxes on the obligor's income before entering an order for spousal maintenance in addition to child support to avoid injustice to the obligor.*

The worksheet provides a deduction for spousal maintenance paid as a result of a former marriage (Line 1~~C~~D). Caution should be taken to assure that any credit taken is for maintenance and not for periodic payments as the result of a property settlement. ~~pursuant to IC 31-15-7-4.~~ No such deduction is given for amounts paid by an obligor as the result of a property settlement resulting from a former marriage, although that is a factor the court may wish to consider in determining the obligor's ability to pay the scheduled amount of support at the present time. Again, flexibility was intended throughout the Guidelines and they were not intended to place the obligor in a position where he or she loses all incentive to comply with the orders of the court.

Guidelines to Be Applied in All Matters of Child Support. *Federal law now requires that the Indiana Child Support Guidelines be applied in every instance in which child support is established including, but not limited to, dissolutions of marriage, legal separations, paternity actions, juvenile proceedings, petitions to establish support and Title IV-D proceedings.*

The Indiana legislature requires the Indiana Child Support Guidelines be applied and the Child Support Worksheet be used in determining the manner in which financial services to children that are CHINS (Child in Need of Services) or delinquent are to be repaid ~~(see I.C. 31-40-1-3)~~. Similarly, the legislature requires the court to use the Guidelines to determine the financial contribution required from each parent of a child or the guardian of the child's estate for costs associated with the institutional placement of a child ~~(see I.C. 31-40-1-5)~~.

GUIDELINE 3. DETERMINATION OF CHILD SUPPORT AMOUNT

A. Definition of Weekly Gross Income.

1. *Definition of Weekly Gross Income (Line 1 of Worksheet).* For purposes of these Guidelines, "weekly gross income" is defined as actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and imputed income based upon "in-kind" benefits. Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received from other marriages. Social Security disability benefits paid for the benefit of the child must be included in the disabled parent's gross income. The disabled parent is entitled to a credit for the amount of Social Security disability benefits paid for the benefit of the child. Specifically excluded are benefits from means-tested public assistance programs, including, but not limited to Temporary Aid To Needy Families (TANF), Supplemental Security Income, and Food Stamps. Also excluded are survivor benefits received by or for other children residing in either parent's home.

2. *Self-Employment, Business Expenses, In-Kind Payments and Related Issues.* Weekly Gross Income from self-employment, operation of a business, rent, and royalties is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly gross income from self-employment may differ from a determination of business income for tax purposes.

Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business should be counted as income if they are significant and reduce personal living expenses. Such payments might include a company car, free housing, or reimbursed meals.

The self-employed shall be permitted to deduct that portion of their F.I.C.A. tax payment that exceeds the F.I.C.A. tax that would be paid by an employee earning the same Weekly Gross Income.

3. *Unemployed, Underemployed and Potential Income.* If a court finds a parent is voluntarily unemployed or underemployed, without just cause, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. If there is no work history and no higher education or vocational training, ~~it is suggested~~ the facts of the case may indicate that weekly gross income be set at least at the federal minimum wage level.

~~4. *Natural and Adopted Children Living in the Household.* In determining a support order, there should be an adjustment to Weekly Gross Income of parents who have natural or legally adopted children living in their households, and who were born or adopted subsequent to the prior support order.~~

Commentary to Guideline 3A

Weekly Gross Income.

1. Child Support Calculations Generally. Weekly gross income, potential income, weekly adjusted income and basic child support obligation have very specific and well-defined meanings within the Indiana Child Support Guidelines. Their definitions are not repeated in the Commentary, but further explanation follows.

2. Determination of Weekly Gross Income. Weekly gross income is the starting point in determining the child support obligation, and it must be calculated for both parents. If one or both parents have no income, then potential income may be calculated and used as weekly gross income. Likewise, imputed income may be substituted for, or added to, other income in arriving at weekly gross income. It includes such items as free housing, a company car that may be used for personal travel, and reimbursed meals or other items received by the obligor that reduce his or her living expenses.

The Child Support Obligation Worksheet does not include space to calculate weekly gross income. It must be calculated separately and the result entered on the worksheet.

In calculating weekly gross income, it is helpful to begin with total income from all sources. This figure may not be the same as gross income for tax purposes. Internal Revenue Code of 1986, § 61. Means-tested public assistance programs (those based on income) are excluded from the computation of weekly gross income, but other government payments, such as social security benefits and veterans pensions, should be included. However, survivor benefits paid to or for the benefit of their children are not included. In cases where a custodial parent is receiving, as a representative payee for a prior born child, Social Security survivor benefits because of the death of the prior born child's parent, the court should carefully consider Line 1 ~~B~~C of the of the basic child support obligation worksheet, Legal Duty of Support for Prior-born Children. Because the deceased parent's contribution for the support of the prior born child is being partially paid by Social Security survivor benefits that are excluded from Weekly Gross Income, the court should not enter, on Line 1~~B~~C, an amount that represents 100% of the cost of support for the prior born child. ~~Only the income of the parties is included in Weekly Gross Income.~~ The income of the spouses of the parties is not included in Weekly Gross Income.

a. Self-Employment, Rent and Royalty Income. Calculating weekly gross income for the self-employed or for those who receive rent and royalty income presents unique problems, and calls for careful review of expenses. The principle involved is that actual expenses are deducted, and benefits that reduce living expenses (company cars, free lodging, reimbursed meals, etc.) should be included in whole or in part. It is intended that actual out-of-pocket expenditures for the self-employed, to the extent that they are reasonable and necessary for the production of income, be deducted. Reasonable deductions for capital expenditures may be included. While income tax returns may be helpful in arriving at weekly gross income for a self-employed person, the deductions allowed by the Guidelines may differ significantly from those allowed for tax purposes.

The self-employed pay F.I.C.A. tax at twice the rate that is paid by employees. At present rates, the self-employed pay fifteen and thirty one-hundredths percent (15.30%) of their gross income to a designated maximum, while employees pay seven and sixty-five (7.65%) to the same maximum. The self-employed are therefore permitted to deduct one-half of their F.I.C.A. payment when calculating Weekly Gross Income.

b. Overtime, Commissions, Bonuses and Other Forms of Irregular Income. There are numerous forms of income that are irregular or nonguaranteed, which cause difficulty in accurately determining the gross income of a party. Overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional are all illustrations, but far from an all-inclusive list, of such items. Each is includable in the total income approach taken by the Guidelines, but each is also very fact-sensitive.

Each of the above items is sensitive to downturns in the economy. The fact that overtime, for example, has been consistent for three (3) years does not guarantee that it will continue in a poor economy. Further, it is not the intent of the Guidelines to require a party who has worked sixty (60) hour weeks to continue doing so indefinitely just to meet a support obligation that is based on that higher level of earnings. Care should be taken to set support based on dependable income, while at the same time providing children with the support to which they are entitled.

When the court determines that it is not appropriate to include irregular income in the determination of the child support obligation, the court should express its reasons. When the court determines that it is appropriate to include irregular income, an equitable method of treating such income may be to require the obligor to pay a fixed percentage of overtime, bonuses, etc., in child support on a periodic but predetermined basis (weekly, bi-weekly, monthly, quarterly) rather than by the process of determining the average of the irregular income by past history and including it in the obligor's gross income calculation.

One method of treating irregular income is to determine the ratio of the basic child support obligation (line 4 of the worksheet) to the combined weekly adjusted income (line 3 of the worksheet) and apply this ratio to the irregular income during a fixed period. For example, if the basic obligation was $110.00 and the combined income was $650.00, the ratio would be .169 ($110.00 / $650.00). The order of the court would then require the obligor to make a lump sum payment of .169 of the obligor's irregular income received during the fixed period.

The use of this ratio will not result in an exact calculation of support paid on a weekly basis. It will result in an overstatement of the additional support due, and particularly so when average irregular income exceeds $250.00 per week or exceeds 75% of the regular adjusted weekly gross income. In these latter cases the obligor may seek to have the irregular income calculation redetermined by the court.

Another form of irregular income may exist when an obligor takes a part-time job for the purpose of meeting financial obligations arising from a subsequent marriage, or other circumstances. Modification of the support order to include this income or any portion of it may require that the obligor continue with that employment just to meet an increased support obligation, resulting in a disincentive to work.

Judges and practitioners should be innovative in finding ways to include income that would have benefited the family had it remained intact, but be receptive to deviations where reasons justify them. The foregoing discussion should not be interpreted to exclude consideration of irregular income of the custodial parent.

c. Potential Income. Potential income may be determined if a parent has no income, or only means-tested income, and is capable of earning income or capable of earning more. Obviously, a great deal of discretion will have to be used in this determination. One purpose of potential income is to discourage a parent from taking a lower paying job to avoid the payment

of significant support. Another purpose is to fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed. However, attributing potential income that results in an unrealistic child support obligation may cause the accumulation of an excessive arrearage, and be contrary to the best interests of the child(ren). Research shows that on average more noncustodial parental involvement is associated with greater child educational attainment and lower juvenile delinquency. Ordering support for low-income parents at levels they can reasonably pay may improve noncustodial parent-child contact, and in turn, the outcomes for their children. The six ~~four~~ examples which follow illustrate some of the considerations affecting attributing potential income to an unemployed or underemployed parent.

(1) When a custodial parent with young children at home has no significant skills or education and is unemployed, he or she may not be capable of entering the work force and earning enough to even cover the cost of child care. Hence, it may be inappropriate to attribute any potential income to that parent. It is not the intention of the Guidelines to force all custodial parents into the work force. Therefore, discretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular nonworking or underemployed custodial parent. The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full-time presence in the home.

(2) When a parent has some history of working and is capable of entering the work force, but without just cause voluntarily fails or refuses to work or to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income shall be included in ~~should be determined to be a part of~~ the gross income of that parent. The amount to be attributed as potential income in such a case may ~~would~~ be the amount that the evidence demonstrates he or she was capable of earning in the past. If for example the custodial parent had been a nurse or a licensed engineer, it may be ~~is~~ unreasonable to determine his or her potential at the minimum wage level. Discretion must be exercised on an individual case basis to determine whether under the circumstances there is just cause to attribute potential income to a particular unemployed or underemployed parent.

(3) Even though an unemployed parent has never worked before, potential income should be considered for that parent if he or she voluntarily remains unemployed without justification. Absent any other evidence of potential earnings of such a parent, the federal minimum wage should be used in calculating potential income for that parent. However, the court should not add child care expense that is not actually incurred.

(4) When a parent is unemployed by reason of involuntary layoff or job termination, it still may be appropriate to include an amount in gross income representing that parent's potential income. If the involuntary layoff can be reasonably expected to be brief, potential income should be used at or near that parent's historical earning level. If the involuntary layoff will be extensive in duration, potential income may be determined based upon such factors as the parent's unemployment compensation, job capabilities, ~~and~~ education and whether ~~if~~ other employment is available. Potential income equivalent to the federal minimum wage may be attributed to that parent.

(5) When a parent is unable to obtain employment because that parent suffers from mental illness, a significant health issue, or is caring for a disabled child, it may be

inappropriate to attribute any potential income to that parent. Another example may be when the cost of child care makes employment economically unreasonable.

(6) When a parent is incarcerated and has no assets or other source of income, potential income should not be attributed.

d. Imputing Income. Whether or not income should be imputed to a parent whose living expenses have been substantially reduced due to financial resources other than the parent's own earning capabilities is also a fact-sensitive situation requiring careful consideration of the evidence in each case. It may be inappropriate to include as gross income occasional gifts received. However, regular and continuing payments made by a family member, subsequent spouse, roommate or live-in friend that reduce the parent's costs for rent, utilities, or groceries, may be the basis for imputing income. The marriage of a parent to a spouse with sufficient affluence to obviate the necessity for the parent to work may give rise to a situation where either potential income or imputed income or both should be considered in arriving at gross income.

e. Return from Individual Retirement Accounts and other retirement plans. The annual return of an IRA, 401(K) or other retirement plan that is automatically reinvested does not constitute income. Where previous withdrawals from the IRA or 401(K) have been made to fund the parent's lifestyle choices or living expenses, these withdrawals may be considered 'actual income' when calculating the parent's child support obligation. The withdrawals must have been received by the parent and immediately available for his or her use. The court should consider whether the early withdrawal was used to reduce the parent's current living expenses, whether it was utilized to satisfy on-going financial obligations, and whether the sums are immediately available to the parent. This is a fact-sensitive situation. Retirement funds which were in existence at the time of a dissolution and which were the subject of the property division would not be considered "income" when calculating child support.

~~*3. Adjustment of Weekly Gross Income for Subsequent Children. In determining support orders, an adjustment should be made in arriving at Weekly Gross Income of the parents in instances where either or both have natural or legally adopted children who were born or adopted subsequent to the prior support order. The adjustment should be computed as follows:*~~

~~*STEP 1: Determine the number of natural or legally adopted children born or adopted by the custodial and/or noncustodial parents subsequent to entry of the present support order, and who are living in the respective parent's household.*~~

~~*STEP 2: Adjust the Weekly Gross Income of each parent according to the number of natural or legally adopted children in their household, by multiplying their Weekly Gross Incomes by one of the following percentages and entering the product on line 1A of the worksheet.*~~

~~*The applicable percentages are derived from the average percentages calculated by using the Guideline Schedules for Weekly Support Payments. When there is one natural or legally adopted child born or adopted subsequent to the present support order living in the custodial or noncustodial parent's household, multiply Weekly Gross Income by .935. The factor of .935 is derived by dividing the average base support percentage for one child (13.1%) by 2 and then subtracting that number (6.5) from 100. When there are two such children, multiply by .903; when there are three, multiply by .878; when there are four, multiply by .863; and when there are five, multiply by .854.*~~

~~*The appropriate factors are:*~~

~~*1 child .935 = 100 - (13.1% ÷ 2)*~~
~~*2 children .903 = 100 - (1.5 x 6.5)*~~
~~*3 children .878 = 100 - (1.25 x 9.75)*~~
~~*4 children .863 = 100 - (1.125 x 12.19)*~~
~~*5 children .854 = 100 - (1.0625 x 13.71)*~~

~~*EXAMPLE: A noncustodial parent has a Weekly Gross Income, before adjustment, of $500.00. The custodial parent has a Weekly Gross Income, before adjustment, of $300.00. In considering a modification request, an adjustment should be made to the parents' respective Weekly Gross Incomes for the two (2) natural children born to the noncustodial parent since entry of the present support order and the adopted child of the custodial parent, adopted since entry of the present order. The respective Weekly Gross Incomes of the parties to be entered on line 1A of the worksheet would be as follows:*~~

~~*Noncustodial..... $500 x .903 = $451.50, and*~~
~~*Custodial..... $300 x .935 = $280.50.*~~

B. Income Verification.

1. *Submitting Worksheet to Court.* In all cases, a copy of the worksheet which accompanies these Guidelines shall be completed and filed with the court when the court is asked to order support. This includes cases in which agreed orders are submitted. Worksheets shall be signed by both parties, not their counsel, under penalties for perjury.

2. *Documenting Income.* Income statements of the parents shall be verified with documentation of both current and past income. Suitable documentation of current earnings includes paystubs, employer statements, or receipts and expenses if self-employed. Documentation of income may be supplemented with copies of tax returns

Commentary to Guideline 3B

Worksheet Documentation.

1. Worksheet Requirement. Submission of the worksheet became a requirement in 1989 when use of the Guidelines became mandatory. The Family Support Act of 1988 requires that a written finding be made when establishing support. In Indiana, this is accomplished by submission of a child support worksheet. The worksheet memorializes the basis upon which the support order is established. Failure to submit a completed child support worksheet may, in the court's discretion, result in the court refusing to approve a child support order or result in a continuance of a hearing regarding child support until a completed worksheet is provided. At subsequent modification hearings the court will then have the ability to accurately determine the income claimed by each party at the time of the prior hearing.

If the parties disagree on their respective gross incomes, the court should include in its order the gross income it determines for each party. When the court deviates from the Guideline amount, the order or decree should also include the reason or reasons for deviation. This information becomes the starting point to determine whether or not a substantial and continuing change of circumstance occurs in the future.

2. Verification of Income. The requirement of income verification is not a change in the law but merely a suggestion to judges that they take care in determining the income of each party. One pay stub standing alone can be very misleading, as can other forms of documentation. This is particularly true for salesmen, professionals and others who receive commissions or bonuses, or others who have the ability to defer payments, thereby distorting the true picture of their income in the short term. When in doubt, it is suggested that income tax returns for the last two or three years be reviewed.

C. Computation of Weekly Adjusted Income (Line 1~~D~~E of Worksheet).

After weekly gross income is determined, certain reductions are allowed in computing weekly adjusted income which is the amount on which child support is based. These reductions are specified below.

1. *Adjustment for Subsequent born or Adopted Child(ren) (Line 1A of Worksheet).* In determining a support order, there should be an adjustment to Weekly Gross Income of parents who have a legal duty or court order to support children who were naturally born or legally adopted subsequent to the existing support order and that parent is actually meeting or paying that obligation.

~~1.~~ 2. *Court Orders for Prior-born Child(ren) (Line 1~~A~~B of Worksheet).* The amount(s) of any court order(s) for child support for prior-born children should be deducted from weekly gross income. This should include court ordered post-secondary education expenses calculated on an annual basis divided by 52 weeks.

~~2~~ 3. *Legal Duty of Support for Prior-born Children (Line 1~~B~~C of Worksheet).* Where a party has a legal support duty for children born prior to the child(ren) for whom support is being established, not by court order, an amount reasonably necessary for such support shall be deducted from weekly gross income to arrive at weekly adjusted income. This deduction is not allowed for step-children. (See line 1~~B~~C of worksheet)

~~3~~ 4. *Alimony or Maintenance From Prior Marriage (Line 1~~C~~D of Worksheet).* The amounts of alimony ordered in decrees from foreign jurisdictions or maintenance arising from a prior marriage should be deducted from weekly gross income.

Commentary to Guideline 3C

Determining Weekly Adjusted Income. *After weekly gross income is determined, the next step is to compute weekly adjusted income (line 1~~D~~E. of the worksheet). Certain deductions, discussed below, are allowed from weekly gross income in arriving at weekly adjusted income.*

1. Adjustment of Weekly Gross Income for Subsequent Children. In determining support orders, an adjustment should be made in arriving at Weekly Gross Income of the parents in instances where either or both have natural or legally adopted children who were born or adopted subsequent to the prior support order. The adjustment should be computed as follows:

STEP 1: Determine the number of natural or legally adopted children born or adopted by the parents subsequent to entry of the present support order, and for whom the parent has a legal duty or court order to support. The parent seeking the adjustment has the burden to prove the support is actually paid if the subsequent child does not live in the respective parent's household.

STEP 2: Calculate the subsequent child credit by multiplying the parent's weekly gross income by the appropriate factor listed in the table below and enter the product on line 1.A on the worksheet.

Appropriate factors are:

1	*Subsequent child*	*.065*
2	*Subsequent children*	*.097*
3	*Subsequent children*	*.122*
4	*Subsequent children*	*.137*
5	*Subsequent children*	*.146*
6	*Subsequent children*	*.155*
7	*Subsequent children*	*.164*
8	*Subsequent children*	*.173*

EXAMPLE: A noncustodial parent has a Weekly Gross Income, before adjustment of $500.00. The custodial parent has a Weekly Gross Income, before adjustment, of $300.00. In considering a modification request, an adjustment should be made to the parents' respective Weekly Gross Incomes for the two (2) natural children born to the noncustodial parent since entry of the present support order and the one (1) adopted child of the custodial parent, adopted since entry of the present order. The respective subsequent child credit to be entered on line 1A of the worksheet would be as follows:

Noncustodial..... $500 x .097 = $48.50 credit
Custodial..... $300 x .065 = $19.50 credit

~~1~~2. Modification of Support in Prior Marriage. When considering a petition to modify support arriving out of a prior marriage, no deduction is allowed for support ordered as the result of a second or subsequent marriage. Establishment of a support order in a second marriage should not constitute a change in circumstance in the first marriage which would lead to modification of the support order from the prior marriage. Each child is being supported from the money from which they could have expected to be supported had the dissolution not occurred.

Likewise, if support is being established or modified for a child born out of wedlock, the date of birth of the child would determine whether or not a deduction for the support of other children is allowed in arriving at weekly adjusted income. If a child is born out of wedlock before the children of the marriage, no deduction for the children of the marriage is allowed. A deduction for children of the marriage is allowed in establishing support for a child born out of wedlock after the children of the marriage.

~~2.~~ 3. Legal Duty to Support for Prior Born Children. A deduction is allowed for support actually paid, or funds actually expended, for children born prior to the children for whom support is being established. This is true even though that obligation has not been reduced to a court order. The obligor bears the burden of proving the obligation and payment of the obligation.

A custodial parent should be permitted to deduct his or her portion of the support obligation for prior-born children living in his or her home. It is recommended that these guidelines be used to compute support.

Example: In establishing support for children of a subsequent marriage, the custodial spouse should be permitted to deduct the support he or she would pay in the prior marriage (pursuant to line 6 of Worksheet) if custody had been placed with the former spouse.

This necessitates the computation in the second dissolution of the support that would be paid by each spouse in the former marriage. This amount is inserted on line 1~~B~~C of the Worksheet.

~~3~~ 4. Alimony or Maintenance From Prior Marriage. The final allowable deduction from weekly gross income in arriving at weekly adjusted income is for alimony ordered in decrees from foreign jurisdictions or spousal maintenance arising from a prior marriage. These amounts are allowable only if they arise as the result of a court order. This deduction is intended only for spousal maintenance, not for periodic payments from a property settlement ~~which are made under IC 31-15-7-4,~~ although the court may consider periodic payments when determining whether or not to deviate from the guideline amount when ordering support. Refer to the discussion of temporary maintenance earlier in this commentary. (Line 1 ~~C~~ D of worksheet)

D. Basic Child Support Obligation (Worksheet Line 4).

The Basic Child Support Obligation should be determined using the attached Guideline Schedules for Weekly Support Payments. For combined weekly adjusted income amounts falling between amounts shown in the schedule, basic child support amounts should be rounded to the nearest amount. The number of children refers to children for whom the parents share joint legal responsibility and for whom support is being sought, excluding children for whom a post-secondary education worksheet is used to determine support. Work-related child care expense for these children is to be deducted from total weekly adjusted income in determining the combined weekly adjusted income that is used in selecting the appropriate basic child support obligation.

Commentary to Guideline 3D

Use of Guideline Schedules.

~~1. Combined Weekly Adjusted Income. After reducing weekly gross income by the deductions allowed above, weekly adjusted income is computed. The next step is to add the weekly adjusted income of both parties and take the combined weekly adjusted income to the Guideline schedules for weekly support payments. In selecting the appropriate column for the determination of the basic child support obligation, it should be remembered that the number of children refers only to the number of children of this marriage for whom support is being computed, excluding children for whom a post-secondary education worksheet is used to determine support. As previously explained, these Guidelines do not contain figures for combined weekly adjusted income of less than $100.00 or more than $4,000.00.~~

~~2. Income in Excess of Guideline Schedules. The following formula is specifically adopted for incomes in excess of the table and has no application to income under $4,000.00 per week. When combined weekly adjusted income exceeds $4,000.00, it is necessary to use this formula:~~

~~y = [89.42443 x ln(N)] - 411.24~~
~~y = support for one child~~
~~ln(N) = natural log of N~~
~~N = combined weekly adjusted income~~

~~The examples below make it apparent that use of the formula is not complicated. With a little practice and an inexpensive calculator equipped with a natural logarithm key, the calculation is easily made.~~

~~(1) Assume combined weekly adjusted income is $4,000 with one child, then~~

~~Support = [89.42443 x ln(4,000)] - 411.24~~
~~= [89.42443 x (8.29405)] - 411.24~~
~~= 741.69066 - 411.24~~
~~= $330.00 (rounded to nearest dollar)~~

~~(2) Assume combined weekly adjusted income is $6,000, then~~

~~Support = [89.42443 x ln(6,000)] - 411.24~~
~~= [89.42443 x (8.69951)] - 411.24~~
~~= 777.94915 - 411.24~~
~~= $367.00 (rounded to nearest dollar)~~

~~Before moving on to example (3), please note that the support level for second and subsequent children is not simply 2, 3, or 4 times the support for one. The appropriate multiples are set forth in the following table:~~

~~*support for 2 children = 1.50 x support for one child*~~
~~*support for 3 children = 1.875 x support for one child*~~
~~*support for 4 children = 2.10938 x support for one child*~~
~~*support for 5 children = 2.24121 x support for one child*~~
~~*support for 6 children = 2.31135 x support for one child*~~
~~*support for 7 children = 2.34736 x support for one child*~~
~~*support for 8 children = 2.36570 x support for one child*~~

~~*This progression on the Guideline Schedules does not go beyond five children.*~~

~~*(3) Assume combined weekly adjusted income is $7,500 with 3 children, then*~~

~~*Support for one child = 89.42443 x ln(7,500) - 411.24*~~
~~*= 89.42443 x [8.92266] - 411.24*~~
~~*= 797.90363 - 411.24*~~
~~*= $386.66 (support for one child rounded to nearest penny)*~~

~~*Support for 3 children = 89.42443 x 1.875 x support for one child*~~
~~*= 1.875 x 386.66*~~
~~*= $725.00 (rounded to nearest dollar)*~~

~~*The basic child support obligation is placed on line 4 of the worksheet. (An explanation of line 3 computations, Percentage Share of Income, is given later.)*~~

E. Additions to the Basic Child Support Obligation.

1. *Work-Related Child Care Expense (Worksheet Line 4A).* Child care costs incurred due to employment or job search of both parent(s) should be added to the basic obligation. It includes the separate cost of a sitter, day care, or like care of a child or children while the parent works or actively seeks employment. Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children. Continuity of child care should be considered. Child care costs required for active job searches are allowable on the same basis as costs required in connection with employment.

The parent who contracts for the child-care shall be responsible for the payment to the provider of the child care. For the purposed of designating this expense on the Child Support Obligation Worksheet (Line 4A), each parent's expense shall be calculated on an annual basis divided by 52 weeks. The combined amount shall be added to the Basic Child Support Obligation and each parent shall receive a credit equal to the expense incurred by that parent as an Adjustment (Line 7 of the Worksheet).

When potential income is attributed to a party, the court should not also attribute work-related child-care expense which is not actually incurred.

2. *Cost of Health Insurance For Child(ren) (Worksheet Line 4B).* The weekly cost of health insurance premiums for the child(ren) should be added to the basic obligation whenever

either parent actually incurs the premium expense or a portion of such expense. (Please refer to Guideline 7 for additional information regarding the treatment of Health Care Expenses.)

3. *Extraordinary Health Care Expense*. Please refer to Support Guideline ~~3-H-~~7 for treatment of this issue.

4. *Extraordinary Educational Expense*. Please refer to Support Guideline ~~6-~~8 for treatment of this issue.

Commentary to Guideline 3E

Additions to the Basic Child Support Obligation.

1. Work-Related Child Care Expense (Worksheet Line 4A). One of the additions to the basic child support obligation is a reasonable child care expense incurred due to employment, or an attempt to find employment. This amount is added to the basic child support obligation in arriving at the total child support obligation.

Work-related child care expense is an income-producing expense of the parent. Presumably, if the family remained intact, the parents would treat child care as a necessary cost of the family attributable to the children when both parents work. Therefore, the expense is one that is incurred for the benefit of the child(ren) which the parents should share.

In circumstances where a parent claims the work-related child care credit for tax purposes, it would be appropriate to reduce the amount claimed as work-related child care expense by the amount of tax saving to the parent. The exact amount of the credit may not be known at the time support is set, but counsel should be able to make a rough calculation as to its effect.

When potential income is attributed to a party, the court should not also attribute a work-related child care expense which is not actually incurred because this expense is highly speculative and difficult to adequately verify.

2. Cost of Health Insurance For Child(ren) (Worksheet Line 4B). The weekly costs of health insurance premiums only for the child(ren) should be added to the basic obligation so as to apportion that cost between the parents. The parent who actually pays that cost then receives a credit towards his or her child support obligation on Line 7 of the Worksheet. (See Support Guideline 3G. ~~Additions~~ Adjustments To Parent's Child Support Obligation). Only that portion of the cost actually paid by a parent is added to the basic obligation. If health insurance coverage is provided through an employer, only the child(ren)'s portion should be added and only if the parent actually incurs a cost for it.

~~*Health insurance coverage should normally be provided by the parent who can obtain the most comprehensive coverage at the least cost. If a separate policy of insurance is*~~

~~purchased for the children, determining the weekly cost should be no problem, but in the most common situation coverage for the child(ren) will occur through an employer group plan. If the employer pays the entire cost of coverage, no addition to the basic obligation will occur. If there is an employee cost, it will be necessary for the parent to contact his or her employer or insurance provider to obtain appropriate documentation of the parent's cost for the child(ren)'s coverage.~~

~~At low income levels, giving the noncustodial parent credit for payment of the health insurance premium may reduce support to an unreasonably low amount. In such instance the Court may, in the exercise of its discretion, deny or reduce the credit.~~

~~A number of different circumstances may exist in providing health insurance coverage, such as a situation in which a subsequent spouse or child(ren) are covered at no additional cost to the parent who is paying for the coverage. The treatment of these situations rests in the sound discretion of the court, including such options as prorating the cost.~~

3. Total Child Support Obligation (Worksheet Line 5). Adding work-related child care costs, and the weekly cost of health insurance premiums for the child(ren) to the basic child support obligation results in a figure called Total Child Support Obligation. This is the basic obligation of both parents for the support of the child(ren) of the marriage, or approximately what it would cost to support the child(ren) in an intact household, excluding extraordinary health care and/or extraordinary education expenses.

F. Computation of Parent's Child Support Obligation (Worksheet Line 6).

Each parent's child support obligation is determined by multiplying his or her percentage share of total weekly adjusted income (Worksheet Line 2) times the Total Child Support Obligation (Worksheet Line 5).

1. *Division of Obligation Between Parents (Worksheet Line 6).* The total child support obligation is divided between the parents in proportion to their weekly adjusted income. A monetary obligation is computed for each parent. The custodial parent's share is presumed to be spent directly on the child. When there is near equal parenting time, and the custodial parent has significantly higher income than the noncustodial parent, application of the parenting time credit should result in an order for the child support to be paid from a custodial parent to a noncustodal parent, absent grounds for a deviation. ~~Although a monetary obligation is computed for each parent, the custodial parent's share is not payable to the other parent as child support. Instead, the custodial parent's share is presumed to be spent directly on the child.~~

2. *Deviation From Guideline Amount.* If, after consideration of the factors contained in IC 31-16-6-1 and IC 31-16-6-2, the court finds that the Guideline amount is unjust or inappropriate in a particular case, the court may state a factual basis for the deviation and proceed to enter a support amount that is deemed appropriate.

Commentary to Guideline 3F

Computation of Child Support.

1. Apportionment of Support Between Parents. After the total child support obligation is determined, it is necessary to apportion that obligation between the parents based on their respective weekly adjusted incomes. First, a percentage is formed by dividing the weekly adjusted income of each parent by the total weekly adjusted income (Line 1~~D~~ E of the worksheet). The percentages are entered on Line 2 of the worksheet. The total child support obligation is then multiplied by the percentages on Line 2 (the percentage of total weekly adjusted income that the weekly adjusted income of each parent represents) and the resulting figure is the child support obligation of each parent. The noncustodial parent is ordered to pay his or her proportionate share of support as calculated on line 6 of the worksheet. Custodial parents are presumed to be meeting their obligations by direct expenditures on behalf of the child, so a support order is not entered against the custodial parent.

2. Apportionment of Support When Incapacitated Adult Child Has Earned Income. Under certain circumstances the earned income of a child may be considered in apportioning support. In calculating a support obligation with respect to an incapacitated adult child with earned income, the support obligation may be determined by apportioning the support based upon the relative amount earned by the parents and the child.

3. Deviation From Guideline Amount. If the court determines that the Guideline amount is unjust or inappropriate, a written finding shall be made setting forth the factual basis for deviation from the Guideline amount. A simple finding such as the following is sufficient: "The court finds that the presumptive amount of support calculated under the Guidelines has been rebutted for the following reasons." A pro forma finding that the Guidelines are not appropriate does not satisfy the requirement for a specific finding of inappropriateness in a particular case, which is required in an order to deviate from the Guideline amount. For further discussion of deviation from the Guideline amount, see also the Commentary to Support Guideline ~~One~~ 1.

G. Adjustments to Parent's Child Support Obligation (Worksheet Line 7)

The parent's child support obligation (Worksheet Line 7) may be subject to four (4) adjustments.

1. *Obligation From Post-Secondary Education Worksheet.* If the parents have a child who is living away from home while attending school, his or her child support obligation will reflect the adjustment found on Line J of the Post-Secondary Education Worksheet (See Support Guideline 6~~8~~ ~~Commentary entitled Extraordinary Educational Expenses~~).

2. *Weekly Cost of Work-related Child Care Expenses.* A parent who pays a weekly child care expense should receive a credit towards his or her child support obligation. This credit is entered on the space provided on the Worksheet Line 7. The total credits claimed by the parents must equal the total amount on Line 4A. (See Support Guideline 3E Commentary ~~entitled Additions to the Basic Child Support Obligation~~).

3. *Weekly Cost of Health Insurance Premiums For Child(ren).* The parent who pays the weekly premium cost for the child(ren)'s health insurance should receive a credit towards his or her child support obligation in most circumstances. This credit is entered on the space provided on the Worksheet Line 7 and will be in an amount equal to that entered on the Worksheet Line 4B (See Support Guideline 3E Commentary ~~entitled Additions to the Basic Child Support Obligation~~).

4. *Parenting Time Credit.* The court should grant a credit toward the total amount of calculated child support for either "duplicated" or "transferred" expenses incurred by the noncustodial parent. The proper allocation of these expenses between the parents shall be based on the calculation from a Parenting Time Credit Worksheet. ~~The court may grant the noncustodial parent a credit toward his or her weekly child support obligation (Line 6 of Worksheet) based upon the calculation from a Parenting Time Credit Worksheet~~ (See Support Guideline 6 Commentary ~~entitled Parenting Time and Child Support~~).

5. *Effect of Social Security Benefits ~~Received By Child Because Of Parent's Disability.~~* ~~Social Security benefits received by a child because of the custodial parent's disability do not reduce the child support obligation of the noncustodial parent. However, Social Security benefits received by a child because of the noncustodial parent's disability may be applied on a case by case basis as a credit to the noncustodial parent's child support obligation.~~

~~Commentary~~

~~(See Commentary to Support Guideline 3E and Support Guideline 6)~~

a. *Current Support Obligation*

1. Custodial parent: Social Security benefits received for a child based upon the disability of the custodial parent are not a credit toward the child support obligation of the noncustodial parent. It is a credit to the custodial parent's child support obligation.

2. Noncustodial parent: Social security benefits received by a custodial parent, as representative payee of the child, based upon the earnings or disability of the noncustodial parent shall be considered as a credit to satisfy the noncustodial parent's child support obligation as follows:

i. Social Security Retirement benefits may, at the court's discretion, be credited to the noncustodial parent's current child support obligation. The credit is not automatic. The presence of Social Security Retirement benefits is merely one factor for the court to consider in determining the child support obligation or modification of the obligation. Stultz v. Stultz, 659 N.E.2d 125 (Ind. 1995)

ii. Social Security Disability benefits shall be included in the weekly gross income of the noncustodial parent and applied as a credit to the noncustodial parent's current child support obligation. The credit is

automatic.

iii. Any portion of the benefit that exceeds the child support obligation shall be considered a gratuity for the benefit of the child, unless there is an arrearage.

3. The filing of a petition to modify on grounds a Social Security Disability determination has been requested will not relieve the parent's obligation to pay the current support order while the disability application is pending. Filing of the petition to modify support entitles the noncustodial parent to a retroactive reduction in support to the date of filing of the petition for modification and not the date of filing for the benefits. If the modification of support is granted, any lump sum payment of retroactive Social Security Disability benefits paid shall be credited toward the modified support obligation.

b. *Arrearages*

1. Credit for retroactive lump sum payment. A lump sum payment of retroactive Social Security Disability benefits shall be applied as a credit against an existing child support arrearage if the custodial parent, as representative payee, received a lump sum retroactive payment, without the requirement of a filing of a Petition to Modify Child Support. However, no credit should be allowed under the following circumstances:

i. A custodial parent should never be required to pay restitution to a disabled noncustodial parent for lump sum retroactive Social Security Disability benefits which exceed the amount of "court-ordered' child support. Any portion of lump sum payments of retroactive Social Security Disability benefits paid to children not credited against the existing child support arrearage is properly treated as a gratuity to the children. No credit toward future support should be granted.

ii. No credit shall be given for a lump sum disability payment paid directly to a child who is over the age of eighteen (18). The dependency benefits paid directly to a child who has reached the age of majority under the Social Security law, rather than to the custodial parent, as representative payee, do not fulfill the obligations of court-ordered child support.

2. Application of current Social Security Disability benefits. The amount of the benefit which exceeds the child support order may be treated as an ongoing credit toward an existing arrearage.

3. In Title IV-D cases there is no credit toward the monies owed to the State of Indiana unless the retroactive benefit is actually paid to the State of Indiana. The child's Social Security benefits received and used by the custodial parent will

not reduce or be credited against the noncustodial parent's obligation to reimburse the State of Indiana for Title IV-A or Title IV-E benefits previously paid on behalf of the children.

4. Modification. The award of Social Security Disability benefits retroactive to a specific date does not modify a noncustodial parent's child support obligation to the same date. The noncustodial parent's duty to pay support cannot be retroactively modified earlier than the filing date of a petition to modify child support. Ind. Code § 31-16-16-6.

Commentary to Guideline 3G

It is important to remember the amount of social security disability benefit that exceeds the current child support order will not be reflected in ISETS as a credit toward an existing arrearage unless specified in the court order. Unless the credit is recognized in ISETS, there is a chance that an arrearage notice may be issued administratively and sanctions could be entered on that arrearage.

Social Security benefits paid to a parent for the benefit of a minor child are included in the disabled parent's gross weekly income for purposes of determining child support regardless of which parent actually receives the payment. (See Guideline 3.A.) This section, 3.G., and its commentary address adjustments to the recommended child support obligation. Although Social Security benefits are not reflected on line 7 of the child support worksheet, the benefit should be considered, and its effect and application shall be included in the written order for support of that child.

The revised Guidelines make no change in the law regarding an adjustment for Social Security Retirement benefits or Supplemental Security Income (SSI). The Court has discretion to allow an adjustment to a parent's child support obligation based on the amount of Social Security Retirement benefits paid for the benefit of the child due to that parent's retirement. The retirement benefit is merely one of the factors that the court should consider when making an adjustment to the child support obligation. SSI is a means-tested program and the benefit is not included in either parent's gross income. It therefore should not be considered an adjustment to either parent's child support obligation.

In Brown v. Brown, 849 N.E.2d 610 (Ind. 2006), Social Security Disability benefits paid to a child were clearly recognized as earnings of the disabled parent. Id, at 614. Under the new Guidelines, Social Security Disability benefits paid for a child are now recognized as income of the disabled parent who earned the benefits and those benefits are included in the Weekly Gross Income of that parent. See Guideline 3.A. It follows then that the payment received for the benefit of the child should be applied to satisfy the disabled parent's support obligation. The child support order should state that the SSD benefit received for the child is credited as payment toward the support obligation. Any portion of the SSD benefit in excess of the current support obligation is a gratuity, unless there is an arrearage.

The new language in Guideline 3.G.5. directs that the excess SSD benefit shall be

applied as payment toward an existing arrearage. Once the arrearage is satisfied, any portion of the SSD benefit that exceeds the current support obligation is considered a gratuity. The new guidelines also change the application of a lump sum SSD payment. SSD is, by definition, a substitution for a person's income lost due to a recognized disability. Further, under the Act, that individual may be entitled to a lump sum benefit retroactive to the date that his or her disability occurred and that caused the disruption in earnings. This lump sum payment is unique to SSD. The guidelines now allow the courts to apply the lump sum Social Security Disability benefits toward an existing child support arrearage if the custodial parent, as representative payee, receives a lump sum payment. This credit is appropriate without the requirement of a filing of a Petition to Modify Child Support.

The revised Guidelines change the law regarding the application of Social Security Disability (SSD) benefits. The holding in Hieston v. State, 885 N.E.2d 59 (Ind. Ct. App. 2008) and its progeny has been superseded by this change. The rationale is that the lump sum payment is merely a method of payment applied to a past support obligation not paid. The distinction is between modification of support which changes the rate of support, e.g. from $100 per week to $50 per week, as opposed to credit for an indirect payment. Modification of a child support obligation still requires the filing of a petition for modification as set forth in Guideline 4.

The lump sum payment is a method of payment that may not be specifically authorized by express court order but which should be recognized as a payment of support. Indiana case law establishes that credit can be allowed for payments that do not technically conform to the original support decree. For example, where the obligated parent makes payments directly to the custodial parent rather than through the clerk of the court, the Supreme Court has recognized these payments when there was sufficient proof to convince a trier of fact that the required payments were actually made. O'Neil v. O'Neil, 535 N.E.2d 523 (Ind. 1989), Nill v. Martin, 686 N.E.2d 116 (Ind. 1997). Proof of the lump sum Social Security Disability benefit payment is not difficult because the social security award certificate is a record easily admitted into evidence as an exception to the hearsay rule under IRE 803(6) and (8) (reports of a public agency setting forth its regularly recorded activity) and trial courts are rarely burdened with an evidentiary dispute about what was paid, when or to whom, once the Social Security records are shared. By contrast, the informal arrangement disputes between parties to modify and reduce the actual amount of weekly support below that ordered in the divorce decree are actual attempts to retroactively modify the amount of support, which are prohibited. Similar to the nonconforming payment, the lump sum payment shall be applied as a credit to an existing child support arrearage.

If there is no child support arrearage, the lump sum payment is considered gratuity. As long as there is an existing support order, there should never be an order entered that requires any excess payment of SSD or the lump sum payment to be paid back to the disabled parent.

The revised Guidelines exclude from the parent's weekly gross income any survivor benefits received by or for other children residing in either parent's home based on the Social Security death benefits of a deceased parent of a prior born child. See Commentary to Guideline 3(A).

H. Treatment of Health Care Obligation

The data upon which the Guideline schedules are based include a component for ordinary health care expenses. Ordinary uninsured health care expenses are paid by the parent for whom the parenting time credit is not calculated up to six percent (6%) of the basic child support obligation (Line 4 of the child support obligation worksheet)and, if applicable, the child support obligation attributed to a student living away from home (Section Two Line I of the post-secondary education worksheet) annually since the Guideline Schedules for Weekly Support Payments include six percent (6%) for ordinary uninsured health care costs. (See Commentary to Guideline 6 for further explanation.) Extraordinary health care expenses are those uninsured expenses which are in excess of six percent (6%) of the basic obligation, and would include uninsured expenses for chronic or long term conditions of a child. Calculation of the apportionment of the health care expense obligation is a matter separate from the determination of the weekly child support obligation. These calculations shall be inserted in the space provided on the Worksheet.

Commentary

Apportionment of Health Care Expenses. The data on which the Guideline schedules are based include a component for ordinary medical expenses. Specifically, six percent (6%) of the support amount is for health care. The non-custodial parent is, in effect, prepaying health care expenses every time a support payment is made. Consequently, the Guidelines require that the custodial parent bear the cost of uninsured health care expenses up to six percent (6%) of the basic child support obligation found on Line 4 of the child support obligation worksheet and, if applicable, the child support obligation attributable to a student living away from home (Section Two Line I of the post secondary education worksheet). That computation is made by multiplying the total of Line 4 and Line I by 52 (weeks) and multiplying the product of that multiplication by .06 to arrive at the amount the custodial parent must spend on the uninsured health care costs of the parties' child(ren) in any calendar year before the non-custodial parent is required to contribute toward payment of those uninsured costs. For example, if line 4 is $150.00 per week and Line I is $25.00 per week, the calculation would be as follows: $150.00 + $25.00 = $175.00 x 52 = $9,100.00 x .06 = $546.00.

Thus, on an annual basis, the custodial parent is required to spend $546.00 for health care of the child(ren) before the non-custodial parent is required to contribute. The custodial parent must document the $546.00 on health care.

After the custodial parent's obligation for ordinary uninsured health care expenses is computed, provision should be made for the uninsured health care expenses that may exceed that amount. The excess costs should be apportioned between the parties according to the Percentage Share of Income computed on Line 2 of the worksheet. Where imposing such percentage share of the uninsured costs may work an injustice, the court may resort to the time honored practice of splitting uninsured health care costs equally, or by using other methods.

As a practical matter, it may be wise to spell out with specificity in the order what

~~*uninsured expenses are covered and a schedule for the periodic payment of those expenses. For example, a chronic long-term condition might necessitate weekly payments of the uninsured expense. The order may include any reasonable medical, dental, hospital, pharmaceutical and psychological expenses deemed necessary for the health care of the child(ren). If it is intended that such things as aspirin, vitamins and band-aids be covered, the order should specifically state that such non-prescription health care items are covered.*~~

~~*There are also situations where major health care costs are incurred for a single event such as orthodontics or major injuries. For financial reasons, this may require the custodial parent to pay the provider for the amount not covered by insurance over a number of years. The 6% rule applies to expenses actually paid by the custodial parent each year.*~~

~~*The order regarding the payment of the child(ren)'s health expenses should specify which parent will have the responsibility to provide health insurance.*~~

~~*Amended July 1, 2003, effective January 1, 2004.*~~

GUIDELINE 4. MODIFICATION

The provisions of a child support order may be modified only if there is a substantial and continuing change of circumstances.

Commentary

Substantial and Continuing Change of Circumstances. *Before a child support order may be modified in Indiana, it is necessary for a party to demonstrate a substantial and continuing change in circumstances that makes the present order unreasonable or that the amount of support ordered at least twelve (12) months earlier differs from the Guideline amount presently computed by more than twenty percent (20%), see IC 31-16-8-1 regarding dissolution of marriage actions or I.C. 31-14-11-8 regarding paternity actions. A change in circumstances may include a change in the income of the parents, the application of a parenting plan, the failure to comply with a parenting plan or a changes in the expenses of child rearing specifically considered in the Guidelines.*

If the amount of support computed at the time of modification is significantly higher or significantly lower than that previously ordered and would require a drastic reduction in a parent's standard of living, consideration may be given to phasing in the change in support. This approach would allow the parent affected by the change time to make adjustments in his or her standard of living. Again, it is not the intent of the Guidelines to drive the parents into noncompliance by reducing their spendable income below subsistence level.

Retroactive modification. *The modification of a support obligation may only relate back to the date the petition to modify was filed, and not an earliear date, subject to two exceptions: (1) when the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree; or (2) the obligated parent takes the child into the obligated parent's home and assumes custody, provides necessities, and exercises parental control for a period of time that a permanent change of custody is exercised.*

Emancipation: Support Orders for Two or More Children. *Support orders for two or*

more children, under the Guidelines, are stated as an in gross or total amount rather than on a per child basis. The total obligation will not decrease when the oldest child reaches twenty-one (21) years of age, or upon the occurrence of some other series of events that gives rise to emancipation, absent judicial modification of the order. Conversely, the law recognizes that where an order is framed in terms of an amount per child, an abatement of respective shares will occur upon each child's emancipation.

The concept of a pro-rata delineation of support is generally inconsistent with the economic policy underlying the Guidelines (See "Economic Data Used in Developing Guidelines" in "Commentary" to Support Guideline 1). That policy recognizes that the amount of support required for two children is 1.5 times that required to support one child. The multiplication factor decreases as the number of children increases. If support were reduced by one half when the first of two children was emancipated, the remaining amount of support would be significantly below the Guideline amount for one child at the same parental income levels.

Support orders may, however, be framed to allow for automatic abatement of support upon the emancipation of the first child if that emancipation is by reaching age twenty-one (21) or by virtue of some other significant event that will not be disputed between the parties.

EXAMPLE: Assume a combined weekly adjusted income of $1,000.00 provided solely by the noncustodial parent, and an order for support of three children. No other factors being considered, a support order would provide for payment of $285 per week for three children; $228 weekly upon the oldest child reaching age twenty-one (21) years of age; and $152 per week after the second oldest child reaches twenty-one (21), to and until the youngest child's twenty-first birthday, unless otherwise modified by the court.

It is recommended that such a delineation should be an exception and not the rule. It is incumbent upon counsel who represent parents to attempt to familiarize them with the need to judicially amend the order of support when children are emancipated and to discuss with the parties what constitutes emancipation.

~~*Amended July 1, 2003, effective January 1, 2004.*~~

GUIDELINE 5. FEDERAL STATUTES

These guidelines have been drafted in an attempt to comply with, and should be construed to conform with applicable federal statutes.

Commentary

Every attempt was made to draft Guidelines for the state of Indiana that would comply with applicable federal statutes and regulations. Likewise, careful attention was paid to state law.

GUIDELINE 6. ~~ADDITIONAL COMMENTARY~~PARENTING TIME CREDIT

~~Additional Commentary is offered to assist courts, practitioners and litigants in the application of the guidelines.~~

A credit should be awarded for the number of overnights each year that the child(ren) spend with the non-custodial parent.

Commentary

~~***Parenting Time and Child Support***~~

Analysis of Support Guidelines. *The Indiana Child Support Guidelines are based on the assumption the child(ren) live in one household with primary physical custody in one parent who undertakes all of the spending on behalf of the child(ren). There is a rebuttable presumption the support calculated from the Guideline support schedule is the correct amount of weekly child support to be awarded. The total amount of the anticipated average weekly spending is the Basic Child Support Obligation (Line 4 of the Worksheet).*

The Guideline support schedules do not reflect the fact, however, when both parents exercise parenting time, out-of-pocket expenses will be incurred for the child(ren)'s care. These expenses were recognized previously by the application of a 10% visitation credit and a 50% abatement of child support during periods of extended visitation. The visitation credit was based on the regular exercise of alternate weekend visitation which is equivalent to approximately 14% of the annual overnights. With the adoption of the Indiana Parenting Time Guidelines, the noncustodial parent's share of parenting time, if exercised, is equivalent to approximately 27% of the annual overnights. As a result, these revisions provide a parenting credit based upon the number of overnights with the noncustodial parent ranging from 52 overnights annually to equal parenting time. As parenting time increases, a proportionally larger increase in the credit will occur.

~~***Modification of Child Support Based on Parenting Time.*** *A change in a child support order through the application of a parenting time credit does not constitute good cause for modification of the order unless the modification meets the requirements of Guideline 4.*~~

Analysis of Parenting Time Costs. *An examination of the costs associated with the sharing of parenting time reveals two types of expenses are incurred by both parents, transferred and duplicated expenses. A third category of expenses, is controlled expenses, such as the 6% uninsured health care expense, remains the sole obligation of the parent for whom the parenting time credit is not calculated. This latter category is assumed to be equal to 15% of the Basic Child Support Obligation.*

Transferred Expenses. This type of expense is incurred only when the child(ren) reside with a parent and these expenses are "transferred" with the child(ren) as they move from one parent's residence to the other. Examples of this type of expense are food and the major portion of spending for transportation. When spending is transferred from one parent to the other parent, the other parent should be given a credit against that parent's child support obligation since this type of expense is included in the support calculation schedules. When parents equally share in the parenting, an assumption is made that 35% of the Basic Child Support Obligation reflects "transferred" expenses. The amount of expenses transferred from one parent to the other will depend upon the number of overnights the child(ren) spend with each parent.

Duplicated Fixed Expenses. This type of expense is incurred when two households are maintained for the children. An example of this type of expense is shelter costs which are not transferred when the child(ren) move from one parent's residence to the other but remain fixed in each parent's household and represent duplicated expenditures. The fixed expense of the

parent who has primary physical custody is included in the Guideline support schedules. However, the fixed expense of the other parent is not included in the support schedules but represents an increase in the total cost of raising the child(ren) attributed to the parenting time plan. Both parents should share in these additional costs.

When parents equally share in the parenting, an assumption is made that 50% of the Basic Child Support Obligation will be "duplicated." When the child(ren) spend less time with one parent, the percentage of duplicated expenses will decline.

Controlled Expenses. This type of expense for children is typically paid by the custodial parent and is not transferred or duplicated. Controlled expenses are items like clothing, education, school books and supplies, ordinary uninsured health care and personal care. For example, the custodial parent buys a winter coat for the child. The noncustodial parent will not buy another one. The custodial parent controls this type of expense. The controlled expenses account for 15% of the cost of raising the child. The parenting time credit is based on the more time the parents share, the more expenses are duplicated and transferred. The controlled expenses are not shared and remain with the parent that does not get the parenting time credit. Controlled expenses are generally not a consideration unless there is equal parenting time.

These categories of expenses are not pertinent for litigation. They are presented only to explain the factors used in developing the parenting time credit formula. The percentages were assigned to these categories after considering the treatment of joint custody by other states and examining published data from the Bureau of Labor Statistics' Consumer Expenditure Survey.

Computation of Parenting Time Credit. *The computation of the parenting time credit ~~apportionment of credit for "transferred" and "duplicated" expenses~~ will require a determination of the annual number of overnights of parenting time exercised by the parent who is to pay child support, the use of the standard Child Support Obligation Worksheet, a Parenting Time Table, and a Parenting Time Credit Worksheet.*

An overnight will not always translate into a twenty-four hour block of time with all of the attendant costs and responsibilities. It should include, however, the costs of feeding and transporting the child, attending to school work and the like. Merely providing a child with a place to sleep in order to obtain a credit is prohibited.

The Parenting Time Table (Table PT) begins at 52 overnights annually or the equivalent of alternate weekends of parenting time only. If the parenting plan is for fewer overnights because the child is an infant or toddler (Section II A of the Parenting Time Guidelines), the court may consider granting the noncustodial parent an appropriate credit for the expenses incurred when caring for the child. If the parenting plan is for fewer overnights due to a significant geographical distance between the parties, the court may consider granting an appropriate credit. The actual cost of transportation should be treated as a separate issue.

If the parents are using the Parenting Time Guidelines without extending the weeknight period into an overnight, the noncustodial parent will be exercising approximately 98 overnights.

Parenting Time Table. The TOTAL column represents the anticipated total out-of-pocket expenses expressed as a percentage of the Basic Child Support Obligation that will be incurred by the parent who will pay child support. The total expenses are the sum of transferred and duplicated expenses. The DUPLICATED column represents the duplicated expenses and reflects

the assumption that when there is an equal sharing of parenting time, 50% of the Basic Child Support Obligation will be duplicated. The Number of Annual Overnights column will determine the particular fractions of TOTAL and DUPLICATED to be used in the Parenting Time Credit Worksheet.

Table PT

ANNUAL OVERNIGHTS			
FROM	TO	TOTAL	DUPLICATED
1	51	0.000	0.000
52	55	0.062	0.011
56	60	0.070	0.014
61	65	0.080	0.020
66	70	0.093	0.028
71	75	0.108	0.038
76	80	0.127	0.052
81	85	0.150	0.070
86	90	0.178	0.093
91	95	0.211	0.122
96	**100**	**0.250**	**0.156**
101	105	0.294	0.195
106	110	0.341	0.237
111	115	0.388	0.280
116	120	0.434	0.321
121	125	0.476	0.358
126	130	0.513	0.390
131	135	0.544	0.417
136	140	0.570	0.438
141	145	0.591	0.454
146	150	0.609	0.467
151	155	0.623	0.476
156	160	0.634	0.483
161	165	0.644	0.488
166	170	0.652	0.491
171	175	0.660	0.494
176	180	0.666	0.495
181	183	0.675	0.500

Parenting Time Credit Worksheet (Credit Worksheet). In determining the credit, take the following steps:

1. *Complete the Child Support Obligation Worksheet through Line 6.*
2. *Enter on Line 1PT of the Credit Worksheet the annual number of overnights exercised by the parent who will pay child support.*
3. *Enter on Line 2PT of the Credit Worksheet the Basic Child Support Obligation (Line 4 from the Child Support Obligation Worksheet).*

4. *Enter on Line 3PT of the Credit Worksheet the figure from the TOTAL column that corresponds to the annual overnights exercised by the parent who will pay child support.*
5. *Enter on Line 4PT of the Credit Worksheet the figure from the DUPLICATED column that corresponds to the annual number of overnights exercised by the parent who will pay child support.*
6. *Enter on Line 5PT of the Credit Worksheet the percentage share of the Combined Weekly Income of the parent who will pay child support (Line 2 of the Child Support Obligation Worksheet).*
7. *Complete Lines 6PT through 9PT to determine the allowable credit.*
8. *Enter the result from Line 9PT on Line 7 of the Child Support Obligation Worksheet as the Parenting Time Credit.*
9. *Apply the Line 7 Adjustments to determine the recommended Child Support Obligation (Line 8 of the Child Support Obligation Worksheet).*

Parenting Time Credit Worksheet

Line:		
1PT	Enter Annual Number of Overnights	
2PT	Enter Weekly Basic Child Support Obligation – BCSO (Enter Line 4 from Child Support Worksheet)	.
3PT	Enter Total Parenting Time Expenses as a Percentage of the BCSO (Enter Appropriate TOTAL Entry from Table PT)	.
4PT	Enter Duplicated Expenses as a Percentage of the BCSO (Enter Appropriate DUPLICATED Entry from Table PT)	.
5PT	Parent's Share of Combined Weekly Income (Enter Line 2 from Child Support Worksheet)	.
6PT	Average Weekly Total Expenses during Parenting Time (Multiply Line 2PT times Line 3PT)	.
7PT	Average Weekly Duplicated Expenses (Multiply Line 2PT times Line 4PT)	.
8PT	Parent's Share of Duplicated Expenses (Multiply Line 5PT times Line 7PT)	.
9PT	Allowable Expenses during Parenting Time (Line 6PT – Line 8PT)	.
	Enter Line 9PT on Line 7 of the Child Support Worksheet as the Parenting Time Credit	

Application of Parenting Time Credit. *Parenting Time Credit is not automatic. The court should determine if application of the credit will jeopardize a parent's ability to support*

the child(ren). If such is the case, the court should consider a deviation from the credit.

The Parenting Time Credit is earned by performing parental obligations as scheduled and is an advancement of weekly credit. The granting of the credit is based on the expectation the parties will comply with a parenting time order.

A parent who does not carry out the parenting time obligation may be subject to a reduction or loss of the credit, financial restitution, or any other appropriate remedy. However, missed parenting time because of occasional illness, transportation problems or other unforeseen events should not constitute grounds for a reduction or loss of the credit, or financial restitution.

Consistent with Parenting Time Guidelines ~~Section 1, E. 2.~~, if court action is initiated to reduce the parenting time credit because of a failure to exercise scheduled parenting time, the parents shall enter mediation unless otherwise ordered by the court.

~~*Other Child Rearing Expenses. The economic data used in developing the Child Support Guideline schedules do not include components related to those expenses of an 'optional' nature such as costs related to summer camp, soccer leagues, scouting and the like. When both parents agree that the child(ren) may participate in optional activities, the parents should pay their pro rata share of these expenses. In the absence of an agreement relating to such expenses the issue should be referred to the court for resolution. If the parents or the court determine that the child(ren) may participate in optional activities, the method of sharing the expenses shall be set forth in the entry.*~~

***Contents of Agreements/Decrees**. Orders establishing custody and child support shall set forth the specifics of the parties' parenting time plan in all cases. A reference to the Indiana Parenting Time Guidelines will suffice if the parties intend to follow the Guidelines. All such entries shall be accompanied by a copy of the Child Support Obligation Worksheet and the Parenting Time Credit Worksheet.*

In every instance the court shall designate one parent who is receiving support and shall be responsible for payment of the uninsured health care expenses up to 6% of the basic child support obligation.

If the Court determines it is necessary to deviate from the parenting time credit, it shall state its reasons in the order.

Split Custody and Child Support

In those situations where each parent has physical custody of one or more children (split custody), it is suggested that support be computed by completing the child support obligation worksheets in the following manner:

1. Compute the support a father would pay to a mother for the children in her custody as if they were the only children of the marriage.

2. Compute the support a mother would pay to a father for the children in his custody as if they were the only children of the marriage.

3. Subtract the lesser from the greater support amount. The parent who owes the remaining amount pays the difference to the other parent on a weekly basis.

This method of computation takes into account the fact that the first child in each home is

the most expensive to support, as discussed in the commentary to Guideline 1.

Child Support When Parenting Time Is Equally Shared. A frequent source of confusion in determining child support arises in cases where parents equally share the parenting time with the children. Parenting time is considered equally shared when it is 181 to 183 overnights per year. To determine child support in these cases, either the mother or father must be designated as the parent who will pay the controlled expenses. Then, the other parent is given the parenting time credit. The controlled expenses remain the sole obligation of the parent for whom the parenting time credit is not calculated.

When both parents equally share parenting time, the court must determine which parent will pay the controlled expenses. If, for example, father is the parent paying controlled expenses, the parenting time credit will be awarded to the mother.

Factors courts should use in assigning the controlled expenses to a particular parent include the following areas of inquiry:

- *Which parent has traditionally paid these expenses.*
- *Which parent is more likely to be able to readily pay the controlled expenses.*
- *Which parent more frequently takes the child to the health care provider.*
- *Which parent has traditionally been more involved in the child's school activities (since much of the controlled expenses concern school costs, such as clothes, fees, supplies, and books.)*

This determination requires a balancing of these and other factors. Once the court assigns responsibility for these controlled expenses, the court should award the other parent the Parenting Time Credit. When the assignment of the controlled expenses occurs, calculation of the child support in shared custody situations is fairly basic, and is completed by application of the remainder of these Guidelines.

~~*Tax Exemptions. Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is recommended that each case be reviewed on an individual basis and that a decision be made in the context of each case. Judges and practitioners should be aware that under current law the court cannot award an exemption to a parent, but the court may order a parent to release or sign over the exemption for one or more of the children to the other parent pursuant to I.R.C. s 152(e). To effect this release, the parent releasing the exemption must sign and deliver to the other parent I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The parent claiming the exemption must then file this form with his or her tax return. The release may be made, pursuant to the Internal Revenue Code, annually, for a specified number of years or permanently. Judges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year for which the exemption is ordered as an additional incentive to keep support payments current. It may also be helpful to specify a date by which the release is to be delivered to the other parent each year. Shifting the exemption for minor children does not alter the filing status of either parent.*~~

~~*In determining when to order a release of exemptions, it is recommended that at minimum the following factors be considered:*~~

~~*(1) the value of the exemption at the marginal tax rate of each parent;*~~

~~(2) the income of each parent;~~

~~(3) the age of the child(ren) and how long the exemption will be available;~~

~~(4) the percentage of the cost of supporting the child(ren) borne by each parent; and~~

~~(5) the financial burden assumed by each parent under the property settlement in the case.~~

Cost of Transportation for Parenting Time. ~~*Courts should not automatically require the noncustodial parent to bear the entire expense for transportation of the child(ren) for purposes of parenting time. Among other factors, consideration should be given to the reason for the geographic distance between the parties and the financial resources of each party.*~~

The Parenting Time Guidelines require the noncustodial parent to provide tranportation for the child(ren) at the start of the scheduled parenting time, and the custodial parent to provide transportation for the child(ren) at the end of the scheduled parenting time. There is no specific provision in the Child Support Guidelines for an assignment of costs or a credit for transportation on the child support worksheet. Transportation costs are part of the transferred expenses. When transportation costs are significant, the Court may address transportation costs as a deviation from the child support calculated by the worksheet, or may address transportation as a separate issue from child support. Consideration should be given to the reason for the geographic distance between the parties and the financial resources of each party. The relocation statute provides that one factor in modifying child support in conjunction with parent relocation is the hardship and expense involved for the nonrelocating individual to exercise parenting time.

~~***Accountability of the Custodial Parent for Support Received.*** *Quite commonly noncustodial parents request, or even demand, that the custodial parent provide an accounting for how support money is spent. While recognizing that in some instances an accounting may be justified, the Committee does not recommend that it be routinely used in support orders. The Indiana Legislature apparently recognized that an accounting may sometimes be needed when, in 1985, it passed into law IC 31-1-11.5-13(e), now IC 31-16-9-6.*~~

~~*At the time of entering an order for support, or at any time thereafter, the court may make an order, upon a proper showing of the necessity therefore, requiring the spouse or other person receiving such support payments to render an accounting to the court of future expenditures upon such terms and conditions as the court shall decree.*~~

~~*It is recommended that an accounting be ordered upon a showing of reasonable cause to believe that child support is not being used for the support of the child. However, an order for an accounting should not be made in cases where support received by the custodial parent is $50.00 or less per week. This provision is prospective in application and discretionary with the court. An accounting may not be ordered as to support payments previously paid.*~~

~~*A custodial parent may be able to account for direct costs (clothing, school expenses, music lessons, etc.) but it should be remembered that it is extremely difficult to compile indirect costs (a share of housing, transportation, utilities, food, etc.) with any degree of accuracy. If a court found that a custodial parent was diverting support for his or her own personal use, the remedy is not clear. Perhaps, the scrutiny that comes with an accounting would itself resolve the problem.*~~

~~***Emancipation: Support Orders for Two or More Children.*** *Support orders for two or*~~

~~*more children, under the Guidelines, are stated as an in gross or total amount rather than on a per child basis. The total obligation will not decrease when the oldest child reaches twenty one (21) years of age, or upon the occurrence of some other series of events that gives rise to emancipation, absent judicial modification of the order. Conversely, the law recognizes that where an order is framed in terms of an amount per child, an abatement of respective shares will occur upon each child's emancipation.*~~

~~*The concept of a pro-rata delineation of support is generally inconsistent with the economic policy underlying the Guidelines (See "Economic Data Used in Developing Guidelines" in "Commentary" to Support Guideline 1). That policy recognizes that the amount of support required for two children is 1.5 times that required to support one child. The multiplication factor decreases as the number of children increases. If support were reduced by one half when the first of two children was emancipated, the remaining amount of support would be significantly below the Guideline amount for one child at the same parental income levels.*~~

~~*Support orders may, however, be framed to allow for automatic abatement of support upon the emancipation of the first child if that emancipation is by reaching age twenty-one (21) or by virtue of some other significant event that will not be disputed between the parties.*~~

~~*EXAMPLE: Assume a combined weekly adjusted income of $1,000.00 provided solely by the noncustodial parent, and an order for support of three children. No other factors being considered, a support order would provide for payment of $285 per week for three children; $228 weekly upon the oldest child reaching age twenty-one (21) years of age; and $152 per week after the second oldest child reaches twenty one (21), to and until the youngest child's twenty-first birthday, unless otherwise modified by the court.*~~

~~*It is recommended that such a delineation should be an exception and not the rule. It is incumbent upon counsel who represent parents in dissolutions to attempt to familiarize them with the need to judicially amend the order of support when children are emancipated and to discuss with the parties what constitutes emancipation.*~~

~~***Extraordinary Educational Expenses***~~

~~*The data upon which the Guideline schedules are based include a component for ordinary educational expenses. Any extraordinary educational expenses incurred on behalf of a child shall be considered apart from the total basic child support obligation.*~~

~~*Extraordinary educational expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child.*~~

~~*a. Elementary and Secondary Education. If the expenses are related to elementary or secondary education, the court may want to consider whether the expense is the result of a personal preference of one parent or whether both parents concur; if the parties would have incurred the expense while the family was intact; and whether or not education of the same or higher quality is available at less cost.*~~

~~*b. Post-Secondary Education. The authority of the Court to award post-secondary educational expenses is derived from IC 31-16-6-2. It is discretionary with the court to award post-secondary educational expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each*~~

~~parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.~~

~~If the Court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration the incomes and overall financial condition of the parents and the child, education gifts, education trust funds, and any other education savings program. The court should also take into consideration scholarships, grants, student loans, summer and school year employment and other cost-reducing programs available to the student. These latter sources of assistance should be credited to the child's share of the educational expense unless the court determines that it should credit a portion of any scholarships, grants and loans to either or both parents' share(s) of the education expense.~~

~~Current provisions of the Internal Revenue Code provide tax credits and preferences which will subsidize the cost of a child's post secondary education. While tax planning on the part of all parties will be needed to maximize the value of these subsidies, no one party should disproportionately benefit from the tax treatment of post-secondary expenses. Courts may consider who may be entitled to claim various education tax benefits and tax exemptions for the minor child(ren) and the total value of the tax subsidies prior to assigning the financial responsibility of post-secondary expenses to the parents and the child.~~

~~A determination of what constitutes educational expenses will be necessary and will generally include tuition, books, lab fees, supplies, student activity fees and the like. Room and board will also be included when the student resides on campus or otherwise is not with the custodial parent.~~

~~The impact of an award of post-secondary educational expenses is substantial upon the custodial and non-custodial parent and a reduction of the basic child support obligation attributable to the child in question will be required when the child resides on campus or otherwise is not with the custodial parent.~~

~~A consideration of the foregoing factors is addressed in the Worksheet on Post-Secondary Education Expense which should be utilized in making a fair distribution of this expense.~~

~~The court should require that a student maintain a certain minimum level of academic performance to remain eligible for parental assistance and should include such a provision in its order. The court should also consider requiring the student or the custodial parent provide the non custodial parent with a copy of the child's high school transcript and each semester or trimester post-secondary education grade report.~~

~~The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school.~~

~~The court may wish to consider in the category of "Other" educational costs (Line B(5) of the Worksheet) such items as transportation, car insurance, clothing, entertainment and incidental expenses.~~

~~c. Use of Post Secondary Education Worksheet~~

~~The Worksheet makes two determinations. Section One determines the obligation of each~~

~~*parent for payment of post secondary education expenses based upon his or her pro rata share of the weekly adjusted income from the Child Support Obligation Worksheet after contribution from the student toward those costs. The method of paying such obligation should be addressed in the court's order. When the student remains at home with the custodial parent while attending an institution of higher learning, generally no reduction to the non custodial parent's support obligation will occur and Section Two of the worksheet need not be completed.*~~

~~*Section Two determines the amount of each parent's weekly support obligation for the student who does not live at home year round. The amount attributable to the student while at home has been annualized to avoid weekly variations in the order. It further addresses the provisions of IC 31-16-6-2(b) which require a reduction in the child support obligation when the court orders the payment of educational expenses which are duplicated or would otherwise be paid to the custodial parent. In determining the reduction, the student is treated as emancipated. This treatment recognizes that the diminishing marginal effect of additional children is due to economies of scale in consumption and not the age of the children. A second child becomes the "first child" in terms of consumption and the custodial parent will receive Guideline child support on that basis.*~~

~~*Section Two applies when the parties' only child attending school does not reside with the custodial parent while attending school, as well as when the parties have more than one child and one resides away from home while attending school and the other child(ren) remain at home.*~~

~~*Line E of the Worksheet determines the percentage of the year the student lives at home. Line F is used to enter the basic child support obligation, from the Guideline Schedules for all of the children of the parties including the student who does not live at home year round. Line G is used to enter the amount of support for those children who are not living away from home. If the student is the only child, Line G will be $0.00. The difference between Lines F and G is the total support obligation attributable to the student. This is entered on Line H. By multiplying the percentage of the year the student lives at home, times the support obligation attributable to the student, the worksheet pro rates to a weekly basis the total support obligation attributed to the student. This is computed on Line I and the result is included in the uninsured health care expense calculation. The parents' pro rata share of this obligation is computed in Line J. This result is included in section 7 of the Child Support Obligation Worksheet.*~~

~~*a. The One Child Situation. When the parties' only child is a student who does not live at home with the custodial parent while attending school, Section Two establishes the weekly support obligation for that child on Line I. The regular Child Support Obligation Worksheet should be completed through Line 5 for that child and the annualized obligation from Line J of the Post Secondary Education Worksheet is entered on Line 7 with an explanation of the deviation in the order or decree.*~~

~~*b. The More Than One Child Situation. When the parties have more than one child, Section Two requires the preparation of a regular Child Support Obligation Worksheet applicable only to the child(ren) who regularly reside with the custodial parent, and for a determination of that support obligation. The annualized obligation from Line (J) of the Education Worksheet is then inserted on Line 7 of the regular support Worksheet as an addition to the Parent's Child Support Obligation on Line 6. An explanation of the increase in the support obligation should then appear in the order or decree.*~~

~~*In both situations the Child Support Obligation Worksheet and the Post Secondary Education Worksheet must be filed with the court. This includes cases in which agreed orders are submitted.*~~

~~*When more than one child lives away from home while attending school. Section One of the Post Secondary Education Worksheet should be prepared for each child. However, Section Two should be completed once for all children living away from home while attending school. The number used to fill in the blank in Line E should be the average number of weeks these children live at home. For example, if one child lives at home for ten (10) weeks and another child lives at home for sixteen (16) weeks, the average number of weeks will be thirteen (13). This number would then be inserted in the blank on Line E which is then divided by 52 weeks.*~~

GUIDELINE 7. HEALTH CARE / MEDICAL SUPPORT

The court shall order one or both parents to provide private health care insurance when accessible to the child at a reasonable cost.

Accessibility. Private insurance is accessible if it covers the geographic area in which the child lives. The court may consider other relevant factors such as the managed care regions used by Hoosier Healthwise, the accessibility and comprehensiveness of covered services and likely continuation of coverage.

Reasonable cost. The cost of private health insurance for child(ren) is considered reasonable, if it does not exceed five percent (5%) of the weekly gross income of the parent obligated to provide medical support. The cost of private health insurance for the children is not considered reasonable when it is combined with that party's share of the total child support obligation (line 4 of the worksheet) and that sum exceeds fifty percent (50%) of the gross income of the parent responsible for providing medical support.

A consideration of the foregoing factors is addressed in the Health Insurance Premium Worksheet (HIPW), which should be utilized in determining the appropriate adjustments for the children's health insurance on the Child Support Obligation Worksheet.

Cash medical support. When private health care insurance is not accessible to the children at a reasonable cost, federal law requires the court to order the parties to pay cash medical support. Cash medical support is an amount ordered for medical costs not covered by insurance. The uninsured medical expense apportionment calculation on the Child Support Obligation Worksheet, "the 6% rule," satisfies this federal requirement for a cash medical support order, when incorporated into the court order.

Explanation of 6% rule/uninsured health care expenses. The data upon which the Guideline schedules are based include a component for ordinary health care expenses. Ordinary uninsured health care expenses are paid by the parent who is assigned to pay the controlled expenses (the parent for whom the parenting time credit is not calculated) up to six percent (6%) of the basic child support obligation (Line 4 of the child support obligation worksheet.)

Extraordinary health care expenses are those uninsured expenses which are in excess of six percent (6%) of the basic obligation, and would include uninsured expenses for chronic or long term conditions of a child. Calculation of the apportionment of the health care expense obligation is a matter separate from the determination of the weekly child support obligation. These calculations shall be inserted in the space provided on the Worksheet.

Birth expense. The Court may order the father to pay a percentage of the reasonable and necessary expenses of the mother's pregnancy and childbirth, as part of the Court's decree in child support actions. The costs to be included in apportionment are pre-natal care; delivery; hospitalization; and post-natal care. The paternity statutes require the father to pay at least 50% of the mother's pregnancy and childbirth expenses.

Commentary

Health insurance premiums.

The court is federally mandated to order accessible private health care insurance if the cost is at or below 5% of the weekly gross income of a parent as indicated in the child support obligation worksheet. If above 5% of weekly gross income, the court has discretion to require the health insurance premium be paid by a parent if the court indicates the reason for the deviation.

The 50% cap is not a federal requirement. The basis is the Consumer Credit Protection Act (CCPA) income withholding limits. The 50% cap places less burden on employers when they do income withholding. Without the cap, they would have to figure out whether to withhold child support or health insurance first and how to divide what they can legally withhold. One of the most common questions employers ask child support agencies in states without a cap concerns cases where the combined amount does exceed the CCPA cap. In addition to being less burdensome on employers, it is also commonsense not to set child support at more than what can be legally withheld. Indiana already has that attribute as evident in the last column of the schedule.

When parents agree one or both parents will provide private health insurance, the HIPW need not be completed and filed.

Private health insurance coverage should normally be provided by the parent who can obtain the most comprehensive coverage at the least cost. If a separate policy of private insurance is purchased for the children, determining the weekly cost should be no problem, but in the most common situation coverage for the child(ren) will occur through an employer group plan. If the employer pays the entire cost of coverage, no addition to the basic obligation will occur. If there is an employee cost, it will be necessary for the parent to contact his or her employer or insurance provider to obtain appropriate documentation of the parent's cost for the child(ren)'s coverage.

At low income levels, giving the noncustodial parent credit for payment of the private health insurance premium may reduce support to an unreasonably low amount. In such instance

the Court may, in the exercise of its discretion, deny or reduce the credit.

A number of different circumstances may exist in providing private health insurance coverage, such as a situation in which a subsequent spouse or child(ren) are covered at no additional cost to the parent who is paying for the coverage. The treatment of these situations rests in the sound discretion of the court, including such options as prorating the cost.

There may be situations where neither parent has the opportunity or ability to afford private health insurance. In those cases, the court may direct the parties to investigate the cost of health insurance and/or may require the parties to obtain health insurance when it is reasonable and accessible.

Where one or both parents have a history of changing jobs and/or health insurance providers both parents may be ordered to carry health insurance when it becomes available at reasonable cost to the parent. Where one parent has a history of maintaining consistent insurance coverage for the children, there is no need to order both parents to provide health insurance for the children.

The court may order both parents to provide health insurance and in those cases both parents should have the cost of the children's portion of the health insurance premium included in the calculation of the support order. In such cases both parents receive a credit.

Completion of the Health Insurance Premium Worksheet (HIPW)

Section One: Calculation of Reasonable Cost Threshold

Line A: *Enter each parent's Weekly Gross Income in the appropriate columns, carrying the numbers from Line 1 of the Child Support Worksheet (CSOW).*
Line B: *Calculate the reasonable cost threshold by multiplying the amount on Line A times five percent (.05). This amount becomes the "reasonableness" threshold against which the weekly health insurance premium is compared.*

Section Two: Determination of Private Health Insurance Available to the Parents

Line C: *This line is intended to record, for each parent, whether private health insurance is available. Availability is not strictly limited to insurance available through employment. For example, insurance may be available through a union or another group insurance plan, could be available through COBRA, or could be obtained as an individual private insurance plan. If insurance is not available, the rest of the HIPW need not be completed. However, the court has discretion to order one or both parties to provide health insurance if it becomes available and meets the tests of reasonableness and accessibility.*

Section Three: Determination of Whether Premium is Reasonable in Cost

There are two tests to determine if the cost of the health insurance premium is reasonable to a parent. Both tests must be satisfied for the cost to be reasonable. The first test determines whether the health insurance premium cost exceeds five percent of the parent's weekly gross income. The second test determines whether the parent's portion of the child support obligation plus the health insurance premium cost exceeds fifty percent of the parent's weekly gross income.

Line D: *Each party should have determined the weekly cost of premiums prior to completing the worksheet. The cost should be for the "child's portion only." This is the cost of the child's portion, if known, or the difference between the cost of insuring a single party versus the cost of family coverage.*

Line E, Test One: *The first test of reasonableness compares the cost of the weekly premium with the "reasonable cost threshold." The cost of the health insurance premium cannot exceed five percent of the parent's weekly gross income. For each parent, compare the amount on Line D to the amount on Line B. If the amount on Line D is less than the amount on Line B, mark "yes" and proceed to Line F. If the amount on Line D is not less than the amount on Line B, mark "no" and the rest of the HIPW for that parent need not be completed.*

Line F, Test Two: *The second test of reasonableness ensures that a parent's cost of his or her child support obligation added to any health insurance premium that is ordered does not exceed fifty percent of the his or her gross income. For this test, add the Basic Child Support Obligation amount from Line 4 of the CSOW to the weekly health insurance premium cost from Line D of the HIPW. If this amount is equal to or less than fifty percent of the Parent's Weekly Gross Income, mark "yes" and proceed to Line G. If this amount is more than fifty percent of the Parent's Weekly Gross Income, mark "no" and the rest of the HIPW need not be completed for that parent.*

Section Four: Accessibility of the Insurance

Line G: *This line indicates whether the health insurance coverage is accessible for the child(ren). For example, this line tests the geographical coverage of the health insurance. If parents live in different States or different areas of the same State, health insurance that one parent has may not be accessible to the child. See Guideline 7 for more information. For each parent, mark "yes" or "no."*

Section Five: Parent(s) Ordered to Provide Health Insurance

Line H: *On this line, mark the parent or parents where "yes" is marked for Lines C, E, F and G.*

Line I: *Mark the parent or parents who are ordered to provide health insurance. If both parents are ordered, mark both boxes. Enter the amount from Line D in the box next to the parent(s) who are ordered to provide the insurance, and indicate the "Total Ordered." Please note that the court may use its discretion to order or not order health*

insurance coverage even when all tests are met or not met.

Apportionment of Uninsured Health Care Expenses. *Six percent (6%) of the support amount is for health care. The non-custodial parent is, in effect, prepaying health care expenses every time a support payment is made. Consequently, the Guidelines require that custodial parent bear the cost of uninsured health care expenses up to six percent (6%) of the basic child support obligation found on Line 4 of the child support obligation worksheet and, if applicable, the child support obligation attributable to a student living away from home (Section Two Line I of the post-secondary education worksheet).*

That computation is made by multiplying the total of Line 4 and Line I by 52 (weeks) and multiplying the product of that multiplication by .06 to arrive at the amount the custodial parent must spend on the uninsured health care costs of the parties' child(ren) in any calendar year before the non-custodial parent is required to contribute toward payment of those uninsured costs. For example, if line 4 is $150.00 per week and Line I is $25.00 per week, the calculation would be as follows: $150.00 + $25.00 = $175.00 x 52 = $9,100.00 x .06 = $546.00.

Thus, on an annual basis, the custodial parent is required to spend $546.00 for health care of the child(ren) before the non-custodial parent is required to contribute. The custodial parent must document the $546.00 spent on health care and provide the documentation to the noncustodial parent.

After the custodial parent's obligation for ordinary uninsured health care expenses is computed, provision should be made for the uninsured health care expenses that may exceed that amount. The excess costs should be apportioned between the parties according to the Percentage Share of Income computed on Line 2 of the worksheet. Where imposing such percentage share of the uninsured costs may work an injustice, the court may resort to the time-honored practice of splitting uninsured health care costs equally, or by using other methods. The court may prorate the custodial parent's uninsured health care expense contribution when appropriate.

As a practical matter, it may be wise to spell out with specificity in the order what uninsured expenses are covered and a schedule for the periodic payment of these expenses. For example, a chronic long-term condition might necessitate weekly payments of the uninsured expense. The order may include any reasonable medical, dental, hospital, pharmaceutical and psychological expenses deemed necessary for the health care of the child(ren). If it is intended that such things as aspirin, vitamins and band-aids be covered, the order should specifically state that such non-prescription health care items are covered.

There are also situations where major health care costs are incurred for a single event such as orthodontics or major injuries. For financial reasons, this may require the custodial parent to pay the provider for the amount not covered by insurance over a number of years. The 6% rule applies to expenses actually paid by the custodial parent each year.

Birth expenses. There is no statute of limitations barring recovery of birthing expenses, providing the paternity, Title IV-D or child support action is timely filed. The court should be very careful to be sure the claimed expenses are both reasonable and necessary. Birthing

expenses include both the expenses incurred by the child as well as by the mother, providing they are directly related to the child's birth. The court should distinguish between "postpartum expenses" and "postnatal expenses." "Postpartum" expenses are mother's expenses following the birth of the child. "Postnatal" expenses of the child are those expenses directly related to the child's birth. Between the two, only "postnatal" expenses are reimbursable.

GUIDELINE 8. EXTRAORDINARY EXPENSES

Extraordinary Educational Expenses

The data upon which the Guideline schedules are based include a component for ordinary educational expenses. Any extraordinary educational expenses incurred on behalf of a child shall be considered apart from the total basic child support obligation.

Extraordinary educational expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child.

a. Elementary and Secondary Education. If the expenses are related to elementary or secondary education, the court may want to consider whether the expense is the result of a personal preference of one parent or whether both parents concur; if the parties would have incurred the expense while the family was intact; and whether or not education of the same or higher quality is available at less cost.

b. Post-Secondary Education. The authority of the Court to award post-secondary educational expenses is derived from IC 31-16-6-2. It is discretionary with the court to award post-secondary educational expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.

If the Court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration the incomes and overall financial condition of the parents and the child, education gifts, education trust funds, and any other education savings program. The court should also take into consideration scholarships, grants, student loans, summer and school year employment and other cost-reducing programs available to the student. These latter sources of assistance should be credited to the child's share of the educational expense unless the court determines that it should credit a portion of any scholarships, grants and loans to either or both parents' share(s) of the education expense.

Current provisions of the Internal Revenue Code provide tax credits and preferences which will subsidize the cost of a child's post-secondary education. While tax planning on the part of all parties will be needed to maximize the value of these subsidies, no one party should disproportionately benefit from the tax treatment of post-secondary expenses. Courts may consider who may be entitled to claim various education tax benefits and tax exemptions for the minor child(ren) and the total value of the tax subsidies prior to assigning the financial

responsibility of post-secondary expenses to the parents and the child.

A determination of what constitutes educational expenses will be necessary and will generally include tuition, books, lab fees, supplies, student activity fees and the like. Room and board will also be included when the student resides on campus or otherwise is not with the custodial parent.

The impact of an award of post-secondary educational expenses is substantial upon the custodial and non-custodial parent and a reduction of the basic child support obligation attributable to the child in question will be required when the child resides on campus or otherwise is not with the custodial parent.

A consideration of the foregoing factors is addressed in the Worksheet on Post-Secondary Education Expense which should be utilized in making a fair distribution of this expense.

The court should require that a student maintain a certain minimum level of academic performance to remain eligible for parental assistance and should include such a provision in its order. The court should also consider requiring the student or the custodial parent provide the non-custodial parent with a copy of the child's high school transcript and each semester or trimester post-secondary education grade report.

The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school.

The court may wish to consider in the category of "Other" educational costs (Line B(5) of the Worksheet) such items as transportation, car insurance, clothing, entertainment and incidental expenses.

c. Use of Post-Secondary Education Worksheet

The Worksheet makes two determinations. Section One determines the obligation of each parent for payment of post-secondary education expenses based upon his or her pro-rata share of the weekly adjusted income from the Child Support Obligation Worksheet after contribution from the student toward those costs. The method of paying such obligation should be addressed in the court's order. When the student remains at home with the custodial parent while attending an institution of higher learning, generally no reduction to the non-custodial parent's support obligation will occur and Section Two of the worksheet need not be completed.

Section Two determines the amount of each parent's weekly support obligation for the student who does not live at home year round. The amount attributable to the student while at home has been annualized to avoid weekly variations in the order. It further addresses the provisions of IC 31-16-6-2(b) which require a reduction in the child support obligation when the court orders the payment of educational expenses which are duplicated or would otherwise be paid to the custodial parent. In determining the reduction, the student is treated as emancipated. This treatment recognizes that the diminishing marginal effect of additional children is due to economies of scale in consumption and not the age of the children. A second child becomes the "first child" in terms of consumption and the custodial parent will receive Guideline child support on that basis.

Section Two applies when the parties' only child attending school does not reside with the custodial parent while attending school, as well as when the parties have more than one child

and one resides away from home while attending school and the other child(ren) remain at home.

Line E of the Worksheet determines the percentage of the year the student lives at home. Line F is used to enter the basic child support obligation, from the Guideline Schedules for all of the children of the parties including the student who does not live at home year round. Line G is used to enter the amount of support for those children who are not living away from home. If the student is the only child, Line G will be $0.00. The difference between Lines F and G is the total support obligation attributable to the student. This is entered on Line H. By multiplying the percentage of the year the student lives at home, times the support obligation attributable to the student, the worksheet pro rates to a weekly basis the total support obligation attributed to the student. This is computed on Line I and the result is included in the uninsured health care expense calculation. The parents' pro rata share of this obligation is computed in Line J. This result is included in section 7 of the Child Support Obligation Worksheet.

a. *The One Child Situation.* When the parties' only child is a student who does not live at home with the custodial parent while attending school, Section Two establishes the weekly support obligation for that child on Line I. The regular Child Support Obligation Worksheet should be completed through Line 5 for that child and the annualized obligation from Line J of the Post-Secondary Education Worksheet is entered on Line 7 with an explanation of the deviation in the order or decree.

b. *The More Than One Child Situation.* When the parties have more than one child, Section Two requires the preparation of a regular Child Support Obligation Worksheet applicable only to the child(ren) who regularly reside with the custodial parent, and for a determination of that support obligation. The annualized obligation from Line (J) of the Education Worksheet is then inserted on Line 7 of the regular support Worksheet as an addition to the Parent's Child Support Obligation on Line 6. An explanation of the increase in the support obligation should then appear in the order or decree.

In both situations the Child Support Obligation Worksheet and the Post-Secondary Education Worksheet must be filed with the court. This includes cases in which agreed orders are submitted.

When more than one child lives away from home while attending school. Section One of the Post Secondary Education Worksheet should be prepared for each child. However, Section Two should be completed once for all children living away from home while attending school. The number used to fill in the blank in Line E should be the average number of weeks these children live at home. For example, if one child lives at home for ten (10) weeks and another child lives at home for sixteen (16) weeks, the average number of weeks will be thirteen (13). This number would then be inserted in the blank on Line E which is then divided by 52 weeks.

Other Extraordinary Expenses. The economic data used in developing the Child Support Guideline schedules do not include components related to those expenses of an 'optional' nature such as costs related to summer camp, soccer leagues, scouting and the like. When both parents agree that the child(ren) may participate in optional activities, the parents should pay their pro rata share of these expenses. In the absence of an agreement relating to such expenses, assigning responsibility for the costs should take into account factors such as each parent's ability to pay, which parent is encouraging the activity, whether the children have

historically participated in the activity, and the reasons a parent encourages or opposes participation in the activity. If the parents or the court determine that the child(ren) may participate in optional activities, the method of sharing the expenses shall be set forth in the entry.

GUIDELINE 9. ACCOUNTABILITY, TAX EXEMPTIONS, ROUNDING SUPPORT AMOUNTS

Accountability of the Custodial Parent for Support Received. Quite commonly noncustodial parents request, or even demand, that the custodial parent provide an accounting for how support money is spent. While recognizing that in some instances an accounting may be justified, the Committee does not recommend that it be routinely used in support orders. The Indiana Legislature recognized that an accounting may sometimes be needed when it enacted IC 31-16-9-6.

At the time of entering an order for support, or at any time thereafter, the court may make an order, upon a proper showing of the necessity therefore, requiring the spouse or other person receiving such support payments to render an accounting to the court of future expenditures upon such terms and conditions as the court shall decree.

It is recommended that an accounting be ordered upon a showing of reasonable cause to believe that child support is not being used for the support of the child. This provision is prospective in application and discretionary with the court. An accounting may not be ordered as to support payments previously paid.

A custodial parent may be able to account for direct costs (clothing, school expenses, music lessons, etc.) but it should be remembered that it is extremely difficult to compile indirect costs (a share of housing, transportation, utilities, food, etc.) with any degree of accuracy. If a court found that a custodial parent was diverting support for his or her own personal use, the remedy is not clear. Perhaps, the scrutiny that comes with an accounting would itself resolve the problem.

Tax Exemptions. Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is recommended that each case be reviewed on an individual basis and that a decision be made in the context of each case. Judges and practitioners should be aware that under current law the court cannot award an exemption to a parent, but the court may order a parent to release or sign over the exemption for one or more of the children to the other parent pursuant to I.R.C. § 152(e). To effect this release, the parent releasing the exemption must sign and deliver to the other parent I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The parent claiming the exemption must then file this form with his or her tax return. The release may be made, pursuant to the Internal Revenue Code, annually, for a specified number of years or permanently. Judges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year for which the exemption is ordered as an additional incentive to keep support payments current. It may also be helpful to specify a date by which the release is to be delivered to the other parent each year. Shifting the exemption for minor children does not alter the filing status of either parent.

The noncustodial parent must demonstrate the tax consequences to each parent as a result of releasing the exemption and how the release would benefit the children. In determining when to order a release of exemptions, it is recommended that at minimum the following factors be considered:

(1) the value of the exemption at the marginal tax rate of each parent;
(2) the income of each parent;
(3) the age of the child(ren) and how long the exemption will be available;
(4) the percentage of the cost of supporting the child(ren) borne by each parent;
(5) the financial aid benefit for post-secondary education for the child(ren); and
(6) the financial burden assumed by each parent under the property settlement in the case.

Rounding child support amounts. The amount of child support entered as an order may be expressed as an even amount, by rounding to the nearest dollar. For example, $50.50 is rounded to $51.00 and $50.49 is rounded to $50.00.

Additional Documents.

Amended Child Support Obligation Worksheet
Parenting Time Credit Worksheet
Post-Secondary Education Worksheet
New Health Insurance Premium Worksheet
Amended Guideline Schedules for Weekly Support Payments

WORKSHEET – CHILD SUPPORT OBLIGATION

Each party shall complete that portion of the worksheet that applies to him or her, sign the form and file it with the court. This worksheet is required in all proceedings establishing or modifying child support.

IN RE:

CASE NO:
FATHER:
MOTHER:

CHILD SUPPORT OBLIGATION WORKSHEET (CSOW)

Children	DOB	Children	DOB

		FATHER	MOTHER	
1.	WEEKLY GROSS INCOME ~~Subsequent Children Multipliers (Circle .935 .903 .878 .863 .854)~~			
	A. Subsequent Children Multipliers Credit (~~Circle .935 .903 .878 .863 .854~~ .065 .097 .122 .137 .146 .155 .164 .173)			
	BA. Child Support (Court Order for Prior Born) ~~Child(ren)~~			
	CB. Child Support (Legal Duty for Prior Born) ~~Child(ren)~~			
	DC. Maintenance Paid			
	~~E~~. WEEKLY ADJUSTED INCOME (WAI) Line 1 minus 1A, 1B, ~~and~~ 1C and 1D			
2.	PERCENTAGE SHARE OF TOTAL WAI	%	%	
3.	COMBINED WEEKLY ADJUSTED INCOME ~~(Line 1D)~~ (Line 1E)			
4.	BASIC CHILD SUPPORT OBLIGATION Apply CWAI to Guideline Schedules			
	A. Weekly Work-Related Child Care Expense of each parent			
	B. Weekly Health Insurance Premium —Total from HIPW, Line I ~~Children's Portion of Health Insurance Only~~			
5.	TOTAL CHILD SUPPORT OBLIGATION (Line 4 plus 4A and 4B)			
6.	PARENT'S CHILD SUPPORT OBLIGATION (Line 2 times Line 5)			
7.	ADJUSTMENTS			
	( ) Obligation from Post-Secondary Education Worksheet Line J.	+	+	
	( ) Payment of work-related child care by each parent. (Same amount as Line 4A)	-	-	
	( ) Child(ren)'s Portion of Weekly Health Insurance Premium $_____, for parent(s) ordered to provide health insurance.	-	-	
	( ) Parenting Time Credit $_____	-	-	
8.	RECOMMENDED CHILD SUPPORT OBLIGATION			

~~EXPLAIN ANY DEVIATION FROM GUIDELINE SCHEDULES IN ORDER/DECREE.~~

I affirm under penalties for perjury that the foregoing representations are true.

Father: _____

Dated: _____ Mother: _____

UNINSURED HEALTH CARE EXPENSE CALCULATION

A. Custodial Parent Annual Obligation: (CSOW Line 4 Total) $_____ + (PSEW § Two, Line I) $_____ = $____ x 52 weeks x .06 = $ _____.

B. Balance of Annual Expenses to be Paid: (Line 2) _____ % by Father; _____ % by Mother.

IN RE:	CASE NO: FATHER: MOTHER:	
HEALTH INSURANCE PREMIUM WORKSHEET (HIPW)		
SECTION ONE: CALCULATION OF REASONABLE COST THRESHOLD	FATHER	MOTHER
A. Parent's Weekly Gross Income (from Line 1 of Child Support Worksheet)	$	$
B. Weekly Reasonable Cost Threshold (Line A x .05)	$	$
SECTION TWO: DETERMINATION OF PRIVATE HEALTH INSURANCE AVAILABLE TO THE PARENTS		
C. Does the parent have private health insurance, for example, employer sponsored, available for the children? If the answer is No for a parent, STOP for that parent.	☐ YES ☐ NO	☐ YES ☐ NO
SECTION THREE: DETERMINATION OF WHETHER PREMIUM IS REASONABLE IN COST		
D. What is the weekly premium for the children's portion only?	$	$
E. TEST ONE: Is Amount on Line D less than the Amount on Line B? If the answer is No for a parent, STOP for that parent. If the answer is Yes for at least one parent, proceed to Line F for that parent(s).	☐ YES ⇨The premium may be reasonable in cost. ☐ NO ⇨The premium on Line D *is not* reasonable in cost.	☐ YES ⇨The premium may be reasonable in cost. ☐ NO ⇨The premium on Line D *is not* reasonable in cost.
F. TEST TWO: Is the parent's child support obligation from Line 4 of the Basic CSOW plus the weekly premium from Line D of the HIPW equal to or less than 50% of the Parent's Weekly Gross Income on Line A of the HIPW? Formula: Father: Line 4, CSOW ($) + Line D, HIPW, ($) = $ is equal to or less than Line A, HIPW $ X .5 = $ Mother: Line 4, CSOW ($) + Line D, HIPW, ($) = $ is equal to or less than Line A, HIPW $ X .5 = $	☐ YES ⇨The premium *is* reasonable in cost. Father may be ordered to provide health insurance. ☐ NO ⇨The premium on Line D *is not* reasonable in cost.	☐ YES ⇨The premium *is* reasonable in cost. Mother may be ordered to provide health insurance. ☐ NO ⇨The premium on Line D *is not* reasonable in cost.
SECTION FOUR: ACCESSIBILITY OF THE INSURANCE		
G. Is the insurance coverage accessible to the children? (See Guideline 7 for definition of accessible)	☐ YES ☐ NO	☐ YES ☐ NO
SECTION FIVE: PARENT(S) ORDERED TO PROVIDE HEALTH INSURANCE		
H. Parent(s) for whom health insurance is reasonable and accessible	☐ FATHER ☐ MOTHER	
I. Parent(s) ordered to provide health insurance for children.	☐ FATHER ☐ MOTHER TOTAL ORDERED:	$ $ $

State of Indiana Guideline Schedules for Weekly Support Payments

Combined Weekly Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children	Seven Children	Eight Children	Maximum Spouse and Child (50%)
9980	711	1002	1150	1284	1413	1536	1656	1772	4990
9990	712	1003	1151	1285	1414	1538	1657	1773	4995
10000	712	1004	1152	1287	1415	1539	1659	1775	5000
The following percentages shall be applied to calculate basic child support when the parties' combined weekly adjusted income is above $10,000 per week.									
	7.1%	10.0%	11.5%	12.9%	14.2%	15.4%	16.6%	17.7%	50.0%

These amendments shall take effect January 1, 2010.

The Clerk of this Court is directed to send a copy of this Order to the clerk of each circuit court of in the state of Indiana; to the Executive Director and President of the Indiana State Bar Association; to the Legislative Services Agency; to the office of Code Revision of the Legislative Services Agency; to the Attorney General of Indiana; to the Indiana Judicial Center; to the Michie Company; to the Supreme Court Administrator; to the Executive Director of State Court Administration; to Cynthia Longest, Deputy Director, Child Support Bureau, Department of Child Services; to Jeffrey Lozer, General Counsel, Department of Child Services, to the Prosecuting Attorneys Council, Public Defenders Council, and to Thomson Reuters for publication in the advance sheets of this Court.

The Clerks of the circuit courts are directed to bring this Order to the attention of all judges within their respective counties and to post this Order for examination by the practicing bar and general public.

Done at Indianapolis, Indiana this 15th day of September, 2009.

/s/ Randall T. Shepard
Chief Justice of Indiana

SHEPARD, C.J. and DICKSON and BOEHM, JJ, concurring.

SULLIVAN and RUCKER, JJ, concurring in part and dissenting in part.

SULLIVAN and RUCKER, JJ, dissenting in part.

We dissent from those amendments to the Guidelines that have the effect of overruling Grant v. Hager, 868 N.E.2d 801 (Ind. 2007). Grant held that there is a rebuttable presumption that neither parent owes the other support in a circumstance where the Child Support Obligation Worksheet calculation produced a negative amount for the non-custodial parent's child support payment because of the application of the Parenting Time Credit. Under the amendments to the Guidelines approved in this Order, however, there will be a rebuttable presumption in such circumstances that the custodial parent must make child support payments to the non-custodial parent equal to the negative amount.

We believe that the Guidelines' presumption in such circumstances should continue to be that neither parent owes the other support. We also note that, notwithstanding this amendment, the trial court has authority to deviate from the new Guidelines amount and order that neither parent owes the other support based on their respective incomes and parenting time arrangements if the court had concludes that it would be unjust not to do so and the court makes the written finding mandated by Child. Supp. R. 3.