# Family Law:
## Helping Your Clients Through Difficult Cases

**Indianapolis, Indiana**
**June 2, 2008**

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Presented by Alan A. Bouwkamp, Bryan Lee Ciyou, Magistrate William P. Greenaway, Joseph R. Guy and Melanie Reichert

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**June 2008**

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## Authors


Alan A. Bouwkamp
Newton Becker Bouwkamp Pendoski, PC
3755 East 82nd Street, Suite 220
Indianapolis, IN

Bryan Lee Ciyou
Ciyou & Dixon P.C.
Chamber of Commerce Building
320 North Meridian Street, Suite 311
Indianapolis, IN

Magistrate William P. Greenaway
Hamilton County
One Hamilton County Square
Noblesville, IN

Kevin A. Hoover
Hill Fulwider McDowell Funk & Matthews Law Offices PC
One Indiana Square, Suite 2000
Indianapolis, IN

Melanie Reichert
Broyles Kight & Ricafort, LLP
450 East 96th Street, Suite 340
Indianapolis, IN

# Avoid Ethical Challenges Common In Family Law

**Submitted By Bryan Lee Ciyou**

- The Qualities Of An Ethical Client-Lawyer Relationship
- Fulfill Your Role As A Counselor/Advocate Without Crossing The Line
- Malpractice Alerts! Watch Out For These Danger Areas
- Where Questions About Conflicts Of Interest May Arise
- Know When It's Your Duty To Report Abuse And Neglect

# III. AVOID ETHICAL[1] CHALLENGES COMMON IN FAMILY LAW

Although a dissolution of a marriage case may sometimes involve one without children, and mere division of "stuff", real, personal, and intangible/mixed property, the Author submits such typically defaults to, and is easily resolved by, the normal civil litigation model: The assets (and liabilities), if any, are determined and valued (by the processes of discovery and experts), and the litigants and lawyers then argue about values and division in mediation, and sometimes at trial and on appeal. This is not the central focus of this section.

Instead, this section focuses upon the operational ethics germane to "families" in crisis by virtue of the erosion of the marital relationship where there are children involved, and ultimately, legal separation and termination by dissolution thereof, all to the end of trying to help the litigants, lawyers, and legal system get beyond the acute emotional trauma associated therewith. The short-term purpose, therefore, is to make a difference by helping the parties disengage the battle. The sole, ultimate objective, it is hoped, is that of being a small step in helping the parties' children not carry (at least all of) their parents "baggage" into the next generation and repeat the vicious cycle.

## A. The Qualities of an Ethical Client-Lawyer Relationship[2]

### I. Introduction.

The lofty ends of this section noted (it is the objective of all of the Author's materials, and presumably this Seminar, to help litigants through the domestic legal process without breeding long-term hostility between the parties and/or the lawyers, and help the parties maintain faith in the integrity of the legal system), to open this sub-section, on the ethical attorney-client relationship, which is arguably the benchmark for whether the parties, a real, living breathing family, moves on post-divorce in a healthy way or becomes "bogged down" into what is tantamount to long-term trench warfare, the Author begins with an old adage, "where the rubber meets the road".

By analogy to the lawyer, the tire of the car can be first conceptualized as the round tire carved by early homo sapiens. On a more sophisticated level, the car as a whole can be an item of art and admiration. More pragmatically, it can be a mere functional means of conveyance. However, in the final analysis, in the blind icy turn, as it is the sole contact point with the twists and turns of the open road, the tire decides the qualities of the entire car and likely whether its occupants live or die.

Likewise, the lawyer is often reduced to and judged by, as the first and final mechanism to engage the legal system--sometimes to handle entrenched disputes that can be reduced to terms of no less importance than those of life and death. His/her ethical qualities are typically

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[1] The legal basis for each set of materials and arguments put forth in this section are the conduct and legal relationship standards set forth by the Indiana Rules of Professional Conduct, unless the context specifically indicates otherwise.

[2] NBI seminar brochure topical sub-headings.

manifested in many ways prior to this time. However, unfortunately, this may be too late in the matter for the client to determine if he/she has a good, ethical lawyer to couple with the client and his/her objective.

Given this stark reality, to meet the minimum standards of the Rules of Professional Conduct, and to be a contributing member of the bar, every lawyer should seriously contemplate his practice and personal life to gain insights into this critical matter. Inasmuch, the ethical attorney-client relationship begins with, and is largely defined by, the lawyer. The elements to make ***a client*** able to engage the attorney-client relationship in an ethical way are largely addressed in the malpractice/ethics subsection that follows.

This is the lynchpin of this sub-section: the lawyer. And against this backdrop that the ultimate question, "What makes a good, perhaps great, ethical lawyer?" is posited. The Author submits that on the macro level, the hallmarks of a good lawyer are: a thinker, one with broad life experiences, a good value system, and most critically, a keen set of problem solving skills driven by deft common sense.

Assuming a working understanding of the law, and possession of the noted personal characteristics, the lofty Preamble of the Rules of Professional Conduct specifically articulates and enumerates some of the traits a very "ethical lawyer" or "model ethical lawyer"must possess. The Author submits, however, that at least the following Rules themselves are minimum characteristics/requirements/expectations of an ethical lawyer. Since the lawyer rarely chooses the client, who may range in character from moral, and highly ethical, to immoral, a embodying of a living cesspool, the defining benchmark of the "ethical" client-lawyer relationship is, again, defined at least initially by the lawyer himself/herself.

What are these traits to aspire to as enumerated in the Preamble of the Rules of Professional Conduct?

## II. Preamble to the Rules of Professional Conduct.

As the Preamble anticipates, what follows is a shortened statement of the ideal characteristic associated with the ethical lawyer, all as the beginning point of analysis of the ethical client-lawyer relationship:

**A. Lawyer is in the Spotlight and Must Act as Such.** A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably. Preamble [1], *Indiana Rules of Court 2007*, p. 359.

**B. Honesty in all Encounters**. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains the practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a

result advantageous to the client but consistent with requirements of honest dealings with others. As an intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting them to the client or to others. *Id.* at 360.

**C. Crimes of Honesty Reflect on Fitness to Practice.**. . . In addition, there are Rules

that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *Id.*

**D. Know What You are Doing and Be Timely.** In all professional functions a lawyer

should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law. *Id.*

**E. Don't Abuse Your Power.** A lawyer's conduct should conform to the requirement

of the law, both in professional service to the clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers or public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. *Id.*

**F. Know the Law and Advance the Profession.** As a public citizen, a lawyer should

seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, the lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education . . . .*Id.*

**G. Follow Your Gut and Advance Public Service.** Many of a lawyer's professional

responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscious and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal professional and the exemplify the legal profession's ideals of public service. *Id.*

**H. Be Professional and Discreet.**. . . . So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. *Id.*

**I. Carefully Consider the Complex Dynamics of Conflicts.** In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. *Id.*

As with trying to place adequate descriptors on Michangelo's the "David", these, the Preamble's characteristics, may be found in a healthy and ethical attorney-client relationship in a domestic case, but really do not define "why" that relationship is ethical. The following analysis provided by the Author at least tries to look more closely into the academic-to-practical traits of an ethical attorney-client relationship. Clearly, at some level, this is a unanticipated, and perhaps an impossible task, or the ethical rules, found in the Indiana Rules of Professional Conduct, would not occupy so little volume of printed law in Indiana, seventy-three (73) +/- pages of ***all*** Indiana rule, administrative, and code printed materials.

## III. What Kind of a Lawyer are You?

As noted in the foregoing, the lawyer himself/herself defines, at least initially, the ethics of the attorney-client relationship in most dissolution cases. And, remember, the Preamble defines and describes the model ethical lawyer. However, in reality, even the brightest, most experienced, lawyer brings to the table a unique set of personal baggage, which may be a matched set of designer baggage or the K-Mart, blue-light special, mis-matched set.

In all cases, this may impair the ultimate objective of operating at the highest level of ethics to effectuate a fair dissolution that meets the children's best interests, and yet, preserves some open line of communication between the parties to deal with the children. In some cases, weaknesses can be managed and actually become strengths, such as, for instance, helping the lawyer empathize with a client because of his own "bad" divorce

Understanding where one (as a lawyer for the client) fits into the spectrum of, "Who am I as a lawyer?" helps the lawyer, and ultimately the client, mitigate any inherent biases and operate at the highest level of ethical standards. Inversely, and as noted, the ability to use life-experiences to related to, and be identified by, one's client is also quite useful forging and maintaining a strong attorney-client relationship to aid with him/her anticipating and accepting a less than optimal outcome. Keen awareness is critical, since there is at least some experiential data to suggest and support the notion that clients pick lawyers of similar personality traits.

Now, in short, do you think that this is not that important to an ethical attorney-client relationship? Really? Think about your initial telephone call or new client meeting. How long

before you ask, "Who is the opposing counsel?" This Author's first question is typically, "Who is the opposing counsel?"[3] Do you ask this in the opening moments of the conversation? Although simplistic, the Author believes the following embody the essence of many family law attorneys, for better and sometimes worse, and help us all to hone in on how we may impact our client's case and the ethics of each matter, although certainly there maybe more than one descriptor that may be necessary to describe the lawyer:

**A. The "Turtle."** The "Turtle" lawyer is one, who to meet the objectives of his/her client, pulls in his figurative head, tail, and appendages into his/her shell and does nothing. This type of lawyer caters to a client who does not want to incur legal fees and/or one who does not want to be divorced. Therefore, the legal work done is disproportionately borne by the other party and his/her counsel--who wants a divorce.

**B. "Old School."** This type of lawyer puts little stock in "new fangled" legal notions
such as Agreements of Settlement, mediation, and parenting coordinators, and prefers to have matters decided by trial. In cases with common settlement terms between parties, this causes the case to drag on unnecessarily.

**C. "Slash and Burn" (a/k/a "Chip on Your Shoulder").** The lawyer of this type
and/or the client are not seeking pure legal relief. Instead, one or both have an ax to grind to the end of both parties being burdened, embittered, and embodying of long-term animosity toward each other (parties or counsel); this is the ends of the litigation, not an inadvertent outcome of same.

**D. "The Utilitarian."** The utilitarian lawyer "knows" the right outcome, is somewhat
disengaged from either "side", and tries to use the system to attain the right result, no matter what his/her client's position. The ends, thereby, justify the means.

**E. "Everyone Does It, So Do I."** Perhaps the most dangerous (at least reckless) type
of counsel is one who handles dissolution cases because of the simple fact that such cases occupy one-half or more of the civil docket in Indiana. Everyone, every firm, does domestic relations law, so do I (we). With a bright, diligent lawyer, this mindset is perhaps a non-issue. However, given the complexity of domestic cases, which may have legal issues as complex as whether to assert a Fifth Amendment Privilege must be asserted (viz-a-vie the Fourteenth Amendment) to bankruptcy, the ill equipped, or faint of heart, may work their clients a grave injustice.

**F. "The Banker."** Another type of lawyer is one who is a businessman perhaps first and foremost and accepts domestic cases because of their financial reality: one-half of civil cases

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[3] A companion question that may be appropriate, in some cases, is what court the case is docketed in, who is hearing the case, a judge, commissioner/magistrate, or pro tempore, and whether a discussion of a change of judge is timely and appropriate.

are domestic in nature. And save for the big corporate client, a client fighting custody because it is "right" will go to the ends of the earth both workwise (to the aid of the lawyer) and financially to "win". Thus, it is "no-brainer" that the lawyer or firm will handle these types of cases.

G. **"Peacemaker, Warrior."** No matter what personality type the domestic lawyer may
be, the Author submits that under the present societal perceptions and expectations of a divorce lawyer, he/she must have the skill set to be firstly a peacemaker, and, reluctantly, a worrier. Without both, it is very easy for the client to perceive the lawyer as devoid of the requisite skills necessary to the case. In the final analysis, the Author submits that the legally prudent outcome is a "dissolution" (or paternity finding or post-decree order) order that maintains the client's faith in the lawyer and the fairness of the system. It is this delicate balance that separates any organized, post-industrial society from a third-world anarchy. In fact, it is in the unfortunate wild-west, free-for-all, take-no-prisoners, win-at-all-costs (including my children's college education), melee that typifies a common divorce case, to get and keep the confidence of the client, and help him/her gain insights into the depravity and moral (and financial) costs of a divorce gone wild, the Author submits that the good lawyer is often forced into a mold of presenting himself/herself to a client as a peacemaker or worrier to the end of successfully moving the case to fruition. The client "needs" to know that despite what he/she has heard on the "street", victimizing his/her soon to be ex-spouse is never to be encouraged or sought. Long after the divorce dust settles, he/she will have to deal with the ex to the end of the best-interests of the children. Thus, it behooves him/her to give to the point where it truly hurts in order to obtain the best bad outcome. Yet, at the end of the day, the client must understand that if his/her soon-to-be ex will not be reasonable to the end of the best interests of the children, his/her attorney has the deft skills to go to trial and tell an as of yet undeveloped and untold story to the aid of the children and helping justice be served.

What type of lawyer are you? Any one in particular. An amalgamation of two (2) or three (3)? Does your client share a similar view, mindset, and ensuing objectives of his/her case? Does this impair your ability to advocate the case or enhance it? Does this impair or enhance your ability to strive to be the model ethical lawyer the Preamble aspires we all reach?

## IV. Nuts-and-Bolts of Ethical Domestic Practitioners.

In any seminar, including this one, the ultimate objective is to provide tips that are readily transferable and adaptable to one's practice. What follows are some (practical) criteria that the Author believes define an ethical attorney-client relationship in most every domestic case. It is hoped that these are your practice standards, will be considered for same, or will refine your daily attorney-client relationships. Where to start these practice tips and characteristics of an ethical lawyer? Well, at the beginning, the formation of the attorney-client relationship.

### A. Getting Off to a Good Start (Taking on the Case).

Judge David's entire section topic was focused on getting a case off to a "good" start. Clearly, this is the crux of any relationship, be it a marriage to a spouse, a business relationship, or a dissolution of marriage relationship by attorney to client. Relationships will always be

defined by highs, lows, and the perceptions thereof. This noted, the savvy attorney will take steps to help the client to define same by the peaks, not the valleys, or the costs associated with same, which from market analysis of cost-benefit, risk-return, or win-loss, will almost always never make sense.

To this end, defining the attorney-client relationship, what ever that may be, is critical. How is this accomplished? At least five (5) legal steps are required, or are at a ***minimum***, a topic of consideration to start off ***any*** attorney-client relationship on the right foot. While same may not always maintain/ensure a healthy attorney-client relationship over the long-haul, it may prevent the client from having buyer's remorse, or on the farthest end of the spectrum, provide a memorialization of the critical who, what, when, where, why, and how of the case, typically defined by the objectives, means to obtain same, and the costs; these five (5) are as follows:

1. Written contract. [The ethical rule governing fees changed and the new rule became effective January 1, 2005. The Author taught an NBI seminary on this topic in April, 2006 and those written materials are attached as Exhibit"1"]

2. Engagement letter (where more precise information is set out and major points of the case referenced and memorialized).

3. Clarification letters.

4. Objectives, versus means and costs, associated with this.

    a. Emotional objective.

    b. Legal objective(s).

5. Boundaries.

Typically, in an initial attorney-client set of contacts, this is about as much information as the client can process. With much more, the client has the tendency to get the "glazed over look", wherein it is clear that information overload is operational.

• **Practice Tip.** Inform the client that they are going to "remember" things they wanted to
ask as soon as they leave the office. Encourage them to write such down, along with other critical case points they want to make in preparation for the next meeting, phone discussion, etc.

## B. Keeping the Case and Client on Track as Time Marches On.

Once the case is off to a good start, there are many other matters that must be addressed with the client. Some of the most critical are as follows. Moreover, remember that the passage of time, particularly with domestic cases, may cause the clients to lose faith if they do not hear

from you.

1. Office Policies.

   a. Phone call return process.

   b. Correspondence sent/received.

   c. Original documents.

   d. Current address/telephone number.

   e. Hard and fast rules.

      I. Reconciliation.

2. The Process.

   a. The process start to finish of the case.

   b. The statutory components, such as in a dissolution.

   c. The means by which the case resolves:

      I. Agreement

      ii. Trial.

3. How to Explain What to Expect in Outcomes and How to Feel.

   a. Rainbows, bubbles, birds chirping, the pot of gold at the end of the rainbow, and a perfect sunset are not the end of the divorce.

      I. Magic wand.

      ii. Crystal ball.

      iii. One door closes, another opens.

   b. Less bad result on the perfect day.

   c. Default institution is the judiciary.

4. The Wild Cards.

a. Appeal.

b. Motion to Correct.

c. 60(B).

d. Modification:

I. MacLafferty.

e. Companion actions.

I. War of the Roses.

5. Common Problems (only so many of the variables can be controlled or mitigated)

a. Counsels/Litigants: [Discussion, *Supra, Infra*].

b. A complete clash of objectives, legal vs. non-legal.

6. General Rule/Observations.

a. Like each other because grow old together.

b. The unsaid:

I. Initial impressions.

a. Pro Tempore.

ii. Old habits die hard.

## C. Terminating the Relationship.

[The ethical rules and particularly local rules governing withdrawal are in flux over the last several years, with new ethical rules becoming effective January 1, 2005, and all local rules having to be reduced to writing and approved by the Supreme Court by January 1, 2007. The Author taught a seminar on this topic in April, 2006, and those written materials are attached as Exhibit "2"

## V. Conclusion.

Clearly, an ethical attorney-client relationship is a two-way street and requires certain cooperation, actions, and inactions on the client's part. These are discussed in the "Malpractice Alert! Watch Out for These Danger Areas" subsection, *infra*, which will collectively help the attorney ascertain the type of client that he/she may have ethical difficulties with maintaining a professional, meaningful, and most of all, ethical attorney-client relationship.

## B. Fulfill Your Role as a Counselor/Advocate without Crossing the Line

## I. Introduction.

As every seasoned family law attorney understands, his/her role is rarely dealing with a purely legal, intellectually challenging, issue of law. Instead, a large portion of his/her worktime is spent lending a sympathetic ear, being a pep rally cheerleader, sitting in as a defacto therapist, all to the end of dispensing common sense and applying basic problem-solving skills. This is anticipated by the Rules of Professional Conduct (see Preamble), and arguably is a critical part of bringing any family law case to a controlled end.

This noted, however, in the surreal world of family law with lives hanging in the balance and intractable problems (with client's lives literally so off course) it would be hard to get there if they tried), it is easy to just given in and tell the client what he/she wants to hear or wholly ignore them, both causing the issue at hand to become even more acute. This noted, the Rules of Professional Conduct have four (4) initial rules grouped together that encompass these wide roles we handle as family law lawyers and the limitations thereof.

These, plus the commentary, and two (2) safe(r) harbors, typically provide the lawyers with solid guidance on how to handle terrible situations and what to do if the client simply will not listen. Again, failure to understand the Rules, and the limitations thereof places the lawyer at extreme risk for violating the ethical rules to committing a criminal act.

Inasmuch, the role of counselor/advocate is critical to the ethical attorney-client relationship and inextricably linked to meeting the client's legal objectives.

•**Practical Tip.** In many complex domestic cases, the Author will literally have to stop the client's conversation, forcefully tell the client they are not listening, and remind them of his role as their counsel, which is to advise them as is legally prudent, specifically instructing, "You are paying me to give you sound, balanced advice and logical alternatives and outcomes, not to tell you what you want to hear."

## II. Rule of Professional Conduct.

### A. Competence, Rule 1.1.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

representation.

### B. Scope of Representation and Allocation of Power Between Lawyer and Client, Rule 1.2.

(a) Subject to paragraphs (a) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

. . .

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

• **Practice Example (Author).** In the Matter of T.S.: False allegations of child molestation.

### C. Diligence, Rule 1.3.

A lawyer shall act with reasonable diligence and promptness in representing a client.

### D. Communication, Rule 1.4.

(a) A lawyer shall: (1) promptly inform a client of any decision or circumstance with respect to which the client's informed consent, as required by Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and(5) consult with the client about any relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

• **Practical Tip.** By understanding, and the utilizing the basic concepts (in domestic relations cases) of information theory and communication theory, as applied to the attorney-client communication, the attorney may have more success in explaining a concept to the client or helping him/her gain insight into the untenable nature of their position.

--Example of Giving the Husband the Dishwasher and the Wife the Tools.

--Harsh analogies.

--Quicksand analogy for those fixated on problem of the day, largely or wholly irrelevant to their broad legal objectives: "Where's my hotel room?"

## III. Distinctions Between Counselor or Advocate?

This section intentionally left blank for group discussion at the seminar of May 17, 2007.

## IV. How to Avoid Crossing the Line.

What follows are suggestions to consider to mitigate those unresolvable issues that come up in many domestic contexts in discussions between the attorney and client. Each will be discussed as time permits.

1. Family evaluations.
2. Counseling/Therapy.
3. Parent Coordinators.
4. Ex Parte Motions and Orders.
5. Limiting Attorney's Role and Scope of Representation.
6. In Chambers Conferences.
7. CASA/GAL.
8. In-Camera Interviews.
9. Third-Party (Such as Family Member).
10. Psychiatric Evaluations.
11. The Touchy-Feeley
    a. Protective Order.
    b. Contempt.

• **Caution.** It must remembered that each of these legal tools has a distinct legal rule and source of authority that must be considered before use of same.

## V. Safe(r) Harbors.

1. Client with diminished capacity.

2. Withdrawal.

## VI. Conclusion.

The role of the lawyer in the domestic arena is one where he/she faces emergencies, both actual and perceived, and chronic problems decades in the making. Without firm control of the limits of the Rules of Professional Conduct, good problem solving skills, and a will strong enough to tell a client "no", it is very easy to cross into the grey or black and unwittingly make a mistake that can damage and or end one's career. However, being prepared, and always keeping in mind (and informing the client precisely if it becomes necessary) that this is NOT A PROBLEM THE LAWYER CREATED, but instead a problem your trying your best to help the client address, logically, systematically, and with appropriate time, will make this challenge manageable, albeit unpleasant.

## C. Malpractice Alerts! Watch Out for These Danger Areas.

## I. Introduction.

Unlike most professions, the lawyer could easily become discouraged and disheartened by the fact that sometimes his/her job will conclude with a less than enthusiastic client. However, it is important to understand human nature and basic psychology, which is that one's problem must be somebody's fault (other than the client's!), and his/her lawyer sometimes seems to be a logical target, which is a mere coping and justification tool.

Clearly, there are also a few cases where a lawyer did not do his/her job professionally, but this is not the central focus of this section. Instead, it is identifying malpractice risk, disciplinary quandaries, and most importantly, geared to the end of helping the lawyer identify clients who may be unable or unwilling to work within the boundaries of the legal system and subvert the ethical attorney-client relationship (clearly either the attorney, client, or both may approach "the line", *supra*, which also erodes an ethical relationship and exposes both the attorney and client to risk).[4]

In contemplating this topic of the seminar, the lawyer must be able to conceptualize such issues with a model that distinguishes between a grievance being filed by the (former) client with the Disciplinary Commission of the Supreme Court of Indiana, which, at its most extreme level, can result in disbarment, and/or a malpractice action, which can result in a financial settlement or judgement. Both are addressed in this subsection. In rare cases, a lawyer's acts may also additionally cause a criminal case and this becomes interwoven into the malpractice and/or disciplinary analysis. The express language of the *2006-2007 Annual Report of the Disciplinary Commission of the Supreme Court of Indiana* (Exhibit "3") makes this distinction and any

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[4] Conceptually, the client's risk would be not meeting his objectives in a civil court or incurring criminal exposure. The lawyer has these risks, plus the risk of professional discipline.

overlap clear:

"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 causes 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." Page 6.

• **Indiana Case Example.** *In the Matter of David Charles Johnson*, on August 6, 2002, the Supreme Court suspended *pendente lite* Mr. Johnson from the practice of law due to his conviction for a crime punishable as a felony, namely Obstruction of Justice, on June 14, 2002.

## II. Malpractice Risk & Reduction.

The legal malpractice landscape continues to see dramatic changes since it became an area of study by the American Bar Association more than twenty (20) years ago. Two (2) trends/statistics are noteworthy. First, since at least 2002, there has been a dramatic increase in the number of malpractice claims settled for $2,000,000 or more. Second, the most malpractice claims are lodged nationally against the plaintiffs and defense personal injury bar, with real estate law following close behind. For instance, by percent of all claims according to the ABA's figures for 2003, 20% were plaintiffs' personal injury, 10% defense personal injury, and 16% were real estate. *See ABA* studies.

The clearest example of the "why" they occurred, for a large number of these claims, is because a lawyer missed a deadline (such as a statute of limitation). Unfortunately, still, the root cause of increase for the bulk of the claims is not readily identifiable. As with the nature of law, working in "grey areas", instead of black and white, may account for some novel theories of claim, damages, and recovery and/or settlement. A number of excellent seminars and written materials are widely available, and it would behoove every lawyer to stay abreast of this area of the law. *Id.*

Family law malpractice cases are a mixed bag. The number of claims is a staggering ten (10) percent of all claims by all areas of law. The basis of these claims is not as clearly defined and identified, but appear to be fueled by the fact that the lawyer failed them in an already emotional dissolution matter. Moreover, the inherent nature of a domestic matter, wherein the laws are tantamount to empowering the trial court judge with more equitable powers and ability to judicially decree good common sense, make benchmarks of sound practice hard to identify. Often this is further blurred by almost purely strategic courses of action in sole fashion, since exploring and preparing for all courses of action is financially not possible (perhaps unlike most other civil litigation).

The up side, save for the big asset case, may be that the overall claim ceiling, claims

settled, and judgments may be expected to be lower. This noted, on the other hand, it may be expected for defense costs to be higher because of sorting out the facts to ascertain the underlying claim. Unless dismissed for failure to state a claim under Rule 12, it may be expected to take a great deal of legal time and resources to hone in on the "disgruntled" client's claim. And consistent with the vast majority of family law attorneys and practice models, a majority of all malpractice claims are filed against firms with five (5) or fewer attorneys. *Id.*

Although the types of disciplinary pitfalls noted *infra* may also be instructive of the reasons for family law malpractice claims (and hence by inductive reasoning provide insights as to protective measures), it is clear that with the fact-sensitivity of domestic cases, coupled with the sometimes extreme emotional dynamics defining most of such, it makes the nuisance of any given pitfall likely to cause malpractice and/or ethical issues difficult to identify with any great deal of precision. The Author would like nothing more than to provide a "laundry list" of cases or issues to avoid. The complex, unique dynamics of family law cases unfortunately preclude this.

All is not lost, however. This Author has reviewed a good number of discipline cases, researched the scholarly materials, reviewed malpractice trade papers, considered a vast number of cases from his own practice (over 3,000 in over a decade plus in practice), and worked with a significant number of outside attorneys on highly complex domestic cases. In these, a pattern emerges of behaviors and factual dynamics that are reflective of cases that have a higher potential to breed malpractice claims and ethical grievances.

Stated differently, there are a number of consistent "red flags" that the legal research, scholarly works, civil case law, disciplinary data, and common experiences of domestic practitioners (operating at advanced levels), demonstrate are associated with cases likely to have malpractice traps or have clients associated therewith who make such claims or file grievances (which are assumed for purposes of this model do not raise a substantial issue of misconduct).

In fact, these "red flags" are typically applicable to the opposing party as well. Inasmuch, a lawyer considering accepting a case would do well to seriously consider "yes" answers to the following questions in contemplating whether to accept the case. "Yes" answers are "red flags". And in the event that these dynamics come to be operational in an existing case, the lawyer would do well to consider whether continuing in the case is prudent. The following are the ten (10) red flag questions:

**Question One.** The client has had multiple, prior and well-regarded counsel? This can be further explored by:

- Contacting prior counsel (properly and with the client's consent). Has the counsel been paid? Has there been a recent adverse order?

- Reviewing the court's trial file (particularly of importance in active cases, as opposed to new modification in an archived case).

- Contacting opposing counsel.

**Question Two.** The client has active companion cases? These may included, but not be limited to, the following:

- CPS Investigation/CHINS Matter. Have there been multiple unsubstantiated CPS investigations? Were these in multiple counties?

- Pending Protective Orders?

- Pending Criminal Cases?

- Pending Mental Health Commitment Case?

**Question Three.** The client(s) insists on a "collective client" in the form of parent(s) and/or significant others. Inquiries/consideration:

- Written waivers.
- Independence of relationship.

- Author's case of SK.

**Question Four.** The client has crossed, is, or plans on crossing state lines with the children regardless of any court order?

**Question Five.** The client has a "ghost attorney" who has allegedly told them to tell you what to do? Who are they?

- Counsel out-of-state? Counsel domestic?

- 50 South Alabama Counsel?

**Question Six.** The client has a documented substance abuse issue and is within eighteen (18) months of sobriety or mental illness for which he/she has historically not been medically compliant. Considerations:

- Relapse rate.

- Mental health where patients are chronically non-compliant.

- Settlement/payment issues and impaired condition.

**Question Seven.** The client has an emergency matter or perceives a matter or the entire case to be an emergency?

**Question Eight.** The client is in denial of the nature and scope of the proceedings and the types of likely relief available?

**Question Nine.** The client has been severely emotionally abused, or has been sexually or physically abused?

**Question Ten.** The client calls and leaves messages to the messages? Inquires:

- Time of call.
- How far apart the calls come.

Where there are affirmative answers to these questions, further research and reflection needs to be conducted by the attorney in making the decision to accept or continue with the case (if withdrawal is an option).

## III. Disciplinary Pitfalls and Prevention of Breakdowns in the Attorney-Client Relationship.

### A. What's the Situation?

Enclosed as Exhibit "3" is the most recent report of the Disciplinary Commission. It would behoove every lawyer to review this in its entirety.

### B. An Ounce of Prevention.[5]

The forgoing Annual Report begs the question of, "What can I do to avoid problems with my [client] lawyer in the first place?" Clearly, every ethical lawyer should want to include and convey this material to his client and should want to know this him or herself. What follows are the precise tips regarding prevention that the Disciplinary Commission posts on its website:

> Successful lawyers are busy people. A telephone call often cannot be handled right away, and you may have to leave a message. Leave as complete a message as possible so your lawyer has a sense of the urgency of the situation. If you don't get a timely return call, request an appointment or send a letter and keep a copy for your records.
>
> Make sure you have a good understanding of the basis of the fee you will be charged. It is always fair for you to ask the lawyer to put the basic fee agreement in writing.
>
> If you feel problems are developing in your relationship with your lawyer,

[5] Heading utilized on the website of the Indiana Supreme Court Disciplinary Commission.

discuss them early on before they become serious. Most lawyers will welcome an opportunity to speak with their clients about improving the relationship.

If your fee agreement calls for you to pay fees on an hourly basis, ask to be billed frequently so you an keep track of the costs of representation.

A workable attorney-client relationship is worth preserving, but if you have lost confidence in your lawyer, remember that you are free to discharge your lawyer and hire a new one at any time.

Ask to receive copies of the written legal work that is prepared on your behalf by your lawyer.

Be an informed consumer of legal services. Don't be afraid to ask your lawyer questions about your case.

Make wise use of your lawyer's time. *Supreme Court Disciplinary Commission Website* as of 04/23/07.

Clearly, this is sage advice.

## IV. Conclusion.

Family law practice has a high rate of malpractice claims and rate of grievances. However, they constitute a large segment of the civil docket, with roughly one-half of all civil filings being domestic. With proper screening, the lawyer can engage in a manageable family law practice with controlled risk.

## D. Where Questions About Conflicts of Interest May Arise.

## I. Introduction.

Broadly, a conflict of interest is a legal term used to describe public officials and fiduciaries and their relationship to matters of private interest or gain to them. *See, e.g., Black's Law Dictionary* (6th ed.), p. 299. While certainly such could exist in a domestic relations case, the focus of this subsection, and of typical concern to the family lawyer, is a conflict of interest as set forth in the Rules of Professional conduct for actual or potential conflicts of interest between attorney and client. Under the Rules of Professional Conduct, there are three (3) major rules and areas of topical coverage governing conflict of interest: (1) conflicts of interest with current clients, (2) specific conflicts with current clients, and (3) conflicts of interest due to a prior attorney-client relationship. These ethical rules setting forth standards are the focus of this sub-section. Actual practice examples and common conflicts of interests are then addressed.

## II. Rules of Professional Conduct.

What follows is the verbatim statement of the three (3) central ethical rules governing

conflicts of interest. This noted, however, the reader is ***strongly*** encouraged to review the commentary to each rule and research case law for specific circumstances he/she may face. The comment to each rule often encompasses significant discussion and analysis of common conflicts of interest.

## A. General Conflicts of Interest with Current Clients, Rule 1.7.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exits if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

## B. Specific Conflicts of Interest with Current Clients, Rule 1.8.[6]

(a) A lawyer should not enter into a business transaction with a client or knowingly acquire an ownership, possessor, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the clients maintains a close, familial relationship.

(d) Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to representation.

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[6] While this lengthy rule has regulation in every section that may be operational in domestic cases, those bolded are the most common faced by a domestic practitioner. They will be discussed in more detail in this Seminar.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

**(f) 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 relating to representation of a client is protected as required by Rule 1.6.**

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendre pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(I) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.

**(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.**

(k) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (I) and (l) that applies to any one of them shall apply to all of them.

(l) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibility. This restriction is not intended representation in tort cases in which investigation and any prosecutor of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent clients in cases involving family law.

## C. Conflicts of Interest with Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former clients gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom

the lawyer acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

## III. Common Areas of Conflict of Interest for Domestic Relations Attorneys.

Client under a disability.

- In re MP.

Attorney for child/GAL.

- See Author's materials, *infra*.

Prior representation.

- In re SR.

Companion cases.

- In re SK.

Third parties paying.

- In re BL.
- In re SK.

Sexual relations with clients.

- Never (EVER) conduct client meetings alone.
- In re SM (10:00 p.m. meeting).

## E. Know When It's Your Duty to Report Abuse and Neglect.

## I. Introduction.

The confidentiality of a client's information is subject to one of the strongest policies and legal evidentiary privileges of any profession. It has very narrow exceptions.

## II. Rule of Professional Conduct, 1.6.

(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.

. . . .

## III. Group Discussion Points.

1. Confidence versus legal evidentiary privilege.

2. Disclosures for death or serious bodily injury.

3. Clients versus third parties.

4. Common "traps" that might be found with third-party referral.

5. Special issues regarding children.

## IV. Conclusion.

The confidentiality of the attorney-client relationship is one of the hallmarks of the ethical attorney-client relationship, a them interwoven and discussion throughout this section. Clearly, it has narrow limits and exceptions. Those limits, and use of exceptions, must be fully understood to proceed ethically. While it may be tempting to "ignore" this issue entirely as esoteric and not typical of practice, the Author's experience is that most every family law practitioner will deal with this precise issue at one time or another. Thus, be prepared.

## Exhibit "1": NBI APRIL, 2006 MATERIALS ON FEES

Responding to the Ethics 2000 project of the Indiana State Bar Association, the Indiana Supreme Court adopted amendments to the Rules of Professional Conduct on September 30, 2004, which then became effective January 1, 2005. This Section VI, Ethical Consideration, is current through the September 30, 2004 amendments.

Those wanting a more detailed compare and contrast of these rule changes should refer to Donald R. Lundberg's, Executive Secretary, Indiana Supreme Court Disciplinary Commission, informative series of articles on same in *Res Gestae*. Additionally, substantial commentary on the ethical rules are provided with same and is quite useful for practical application and problem areas.

### A. SUB-SECTION "A": FEE ARRANGEMENTS

#### 1. Introduction.

Charging an excessive fee is an area of complaint that accounts for almost five percent (5%) of total grievances filed with the Disciplinary Commission. Given that domestic relations matters further comprises over twenty-one percent (21%) of total grievances, the practitioner should fully understand the ethics of legal fees by review of the rule and its development through case law (often times disciplinary cases).

As a practical matter, it is likely and apparent that many of these grievances result from frustrated clients projecting their anger about the dissolution and the financial consequences associated therewith onto the lawyer. However, even if this is the case, it is no less problematic for the lawyer, and great care must be exercised in this area. If the lawyer is to ethically charge

and collect his/her fee, and avoid unnecessary liability, the rules must be understood and practically applied.

### 2. Rule of Professional Conduct 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;**
**(6) the nature and length of the professional relationship with the client;**
**(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
**(8) whether the fee is fixed or contingent.**
**(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.**
**© 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 calculation.**
**(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©.**
**(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) the total fee is reasonable.**

### 3. Ethical Rule on Fees Applied to Domestic Cases.

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).

- **Time for notification:** Scope of representation and basis of rate commenced within a reasonable time after commencing representation. Rule 1.5(b).

- **Commentary**: "Generally, 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. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding." Comment 2.

- **Proposed clauses:**

  -Expenses.
  -Draw-down provision.
  -Emergencies.
  -Billing increments.
  -Billable events (e.g., time).

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).

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

- **Annual fee increases.**

- **Rates for collateral/companion matters.**

- **Structured rates.**

- **Emergency rates.**

A lawyer shall not charge an unreasonable amount of expenses (see discussion *infra*).

A lawyer shall relate not only the rate of the fee, but also the scope of the representation (see discussion, *infra*).

### 3. Ethical Rule Changes Effective January 1, 2005.

The two (2) significant changes to the ethical rule on fees as applied to domestic cases require the expenses charged to the client be reasonable and scope of the representation to be clear to the client.

> "A lawyer shall not make an agreement for, charge, or collect an . . .unreasonable amount of expenses." Rule 1.5(a) This rule is not yet developed, but the commentary seems to limit this to "in-house" expenses, which may be charged (1) actual costs, (2) or as agreed by the client (presumably in the contract." Commentary 1.

- **Disclosure and charge of expenses not occurring "in-house."**

-Family evaluations.
-Private investigators.

> "The scope of the representation . . . shall be communicated with the client." Rule 1.5(b). This addition to the rule on charging fees is particularly important in family law contexts for two (2) central reasons. First, domestic clients often fail to grasp the lawyers are paid for their time in incremental billings. Second, family law cases often "spin-off" into other areas for which the lawyer's services may be sought, and the client must know he/she will be charged for same, including, but not limited to: (1) criminal cases; (2) protective order matters; (3) CHINS cases; (4) CPS investigations; and (5) juvenile matters.

### 4. Recent Case law.

Perhaps one (1) of the most significant clarifications of the law on fees as it relates to domestic matters is with regard to non-refundable clauses in contracts. The author submits that a non-refundable retainer or engagement fee was widely viewed as "ethical" prior to March 24, 2004, at which time the Supreme Court issued its *Kendall* decision. As the law of ethics stands today, any type of non-refundable legal fee is unethical until the actual work is completed, save

for perhaps a flat fee.

*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 must contain a "non-refundable" clause, as this is an unreasonable fee. However, flat fee 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 all concurred with same.

## 5. Local Rule Considerations.

### a. New Developments to Make Local Rules Uniform and Available.

As courts wrestle with expanding dockets, particularly on domestic relations matters, local rules are becoming ever-more important and enforced by trial courts. This area is particularly problematic in domestic cases because many county have such rules, although the range from informal, unwritten practices to formal published rules. Adding to this problem is that there is no single written reference source for same. Local rules are typically secured by (1) referring to published counties in the *Indiana Rules of Court*, (2) contacting the local court or counsel, or (3) by referencing the Indiana Supreme Court Division of State Court Administration through the internet portal for the state of Indiana, "access Indiana".

The Supreme Court has recognized the difficulty of the lack of access to local rules and uniformity thereof. On December 13, 2004, the Supreme Court approved standards for the preparation of local rules pursuant to Indiana Trial Rule 81. These standards include a schedule and format for local rules took effect on January 1, 2005. All existing rules must be compliant with same by January 1, 2007. Thereafter, when the Division of State Court Administration receives approved versions of same, they will be posed to its website.

Since the Legislature has statutorily deviated from the American Rule and allows trial court to award attorney's fees in domestic cases, local rules governing awarding of fees and costs are common.

### b. Marion County Local Rule 10 on Attorney's Fees.

Marion County has a local rule focused on preliminary awards of fees and costs, which is enumerated in full as follows:

**A. Preliminary Attorneys Fees. Attorney fees may be awarded based on evidence presented by affidavit or oral testimony at a preliminary hearing. Affidavits shall be admissible subject to cross-examination. The following factors may be considered:**

**1. The number and complexity of the issues;**

**2. The nature and extent of discovery;**

**3. The time reasonably necessary for the preparation and conduct of contested hearings;**

**4. The attorney's hourly rate; and**

**5. The amount counsel has received from all sources.**

**B. Preliminary Appraisal and Accountant Fees. Appraisal and accounting fees may be awarded based on evidence presented by affidavit or oral testimony at a preliminary hearing. The following factors may be considered.**

**1. An itemized list of property to be appraised or valued; and**

**2. An estimate of the cost of the appraisals and the retainer required**

**C. Contempt Citation Attorney Fees. There shall be a rebuttable presumption that attorney fees will be awarded to the prevailing party in all matters involving a contempt citation. An attorney may submit the requested fee by affidavit or oral testimony, which may be accompanied by an itemized statement.**

**6. Disciplinary Information of Relevant Type for 2002-03.**

The following are of note to the domestic practitioner, and is a summary of relevant disciplinary information/action for the 2002-2003 period, according to the *2002-2003 Annual Report of the Indiana Supreme Court Disciplinary Commission* :

> Grievance by alleged misconduct: For the 2002-03 period, 110 (or 4.9%) of total grievances were filed alleging excessive fees.

## Exhibit "2": NBI APRIL, 2006 MATERIALS ON WITHDRAWAL

Responding to the Ethics 2000 project of the Indiana State Bar Association, the Indiana Supreme Court adopted amendments to the Rules of Professional Conduct on September 30, 2004, which then became effective January 1, 2005. This Section VI, Ethical Consideration, is current through the September 30, 2004 amendments.

Those wanting a more detailed compare and contrast of these rule changes should refer to Donald R. Lundberg's, Executive Secretary, Indiana Supreme Court Disciplinary Commission, informative series of articles on same in *Res Gestae*. Additionally, substantial commentary on the ethical rules are provided with same and is quite useful for practical application and problem areas.

### B. SUB-SECTION "B":THE RIGHT OF AN ATTORNEY TO WITHDRAW FROM REPRESENTATION

#### 1. Introduction.

Garnering even more ethical complaints than excessive fees are those related to improper withdrawal. Rule of Professional Conduct 1.16 governs and controls withdrawal. This is a rather expansive rule, and even typical family law matters are so fluid that the entire breadth of Rule 1.16 must be considered in any withdrawal scenario. The rule consists of four (4) major components related to withdrawal: (1) mandatory withdrawal; (2) permissive withdrawal; (3) withdrawal on tribunal conditions of withdrawal; and (4) withdrawing to protect client's interest. Ethical withdrawal is also enveloped by a wide array of local rules, practices and customs.

After the substantive work of any case is over, it is very easy for the lawyer to not withdraw, or make a hap-hazard attempt (and often insufficient) at same. This is a risk simply not worth taking and has residual risks weeks, months, and years after the fact. Perhaps every lawyer has received a notice of a hearing in a domestic case years after the fact. If withdrawal was not properly effectuated, this raises numerous questions. Is the lawyer still actual counsel? What duty does the lawyer have to notify the former (or present) client. Simply put, as domestic cases with child-related issues have active life spans beyond even civil statutes of limitations and repose, withdrawal must be done in every case on conclusion, unless the lawyer intends to stay in the case.

## 2. Rule of Professional Conduct 1.16.

Rule of Professional Conduct 1.6 is set forth in full, as follows:

**(a) Except as stated in paragraph ©, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in a violation of Professional Conduct or other law;**
**(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**
**(3) the lawyer is discharged.**
**(b) Except as stated in paragraph ( c), a lawyer may withdraw from representing a client if:**
**(1) withdrawal can be accomplished without material adverse effect on the interest of the client;**
**(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;**
**(3) the client has used the lawyer's services to perpetrate a crime or fraud;**
**(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;**
**(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**
**(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**
**(7) other good cause for withdrawal exists.**
**© A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, a lawyer shall continue the representation notwithstanding good cause for terminating the representation.**
**(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.**

### 3. Ethical Rule on Withdrawal Applied to Domestic Cases.

The most distinct feature of this ethical rule governing withdrawal is that it is bifurcated in that it requires withdrawal in certain contexts and merely permits same in other circumstances:

#### a. Mandatory Withdrawal.[7]

Continuation of representation will result in violation of ethical rules or other law.

- **Practice example:** In the case of one of the author's former clients, Mr. B., he agreed to an extensively negotiated agreed entry on visitation and same was put onto the record. He then refused to adhere to this agreement and ordered that the author move to set this aside because he did not understand the agreement, when, in fact, he did, but simply did not want to abide by same. To continue would have resulted in the pleading committing fraud upon the court and perjury by the client. A thorough documentary letter was sent to the client to memorialize same. And thereafter, the author moved to withdraw and same was ordered. Finally, lawyers faced with these issues are cautioned that other ethical rules may require other action.

Continuation is materially impaired by lawyer's physical or mental abilities.

- **Discipline case:** In *In the Matter of James Richard Barnes*, 691 N.E.2d 1225 (Ind.Sup.Ct. 1998), the Supreme Court found that Attorney Barnes had violated the requirement of mandatory withdrawal when he failed to notify his clients of his declining mental condition, handle the client's case before the statute of limitations ran, and withdraw. *Id.* at 1226-1227.

Layer is discharged.

- **Discipline case:** *In the Matter of Gregory L. Caldwell*, 715 N.E.2d 362, 364 (Ind.Sup.Ct. 1999), wherein the Supreme Court found that this collection attorney, Attorney Caldwell, had violated the rules of ethics by failing, months after discharge, to withdraw his appearance of record for a number of cases of his former client pending in court.

#### b. Permissive Withdrawal.

---

[7] Note all examples and cases are domestic in nature, but are supplied for general educational purposes.

Withdrawal can be accomplished without material adverse effect on client.

- **Analysis:** The September 30, 2004, amendment to Rule 1.16 separated this language from permissive withdrawal authority, perhaps as an acknowledgment that permissive withdrawal may, at times, be materially adverse to the client. This is supported by the commentary to both versions of the rule.

Client insists on a course of action lawyer believes criminal or fraudulent.

Client has used lawyer's services to perpetrate crime.

Client insists on course of action lawyer believes repugnant or fundamental disagreement.

Client fails to substantially fulfill obligation and has been given warning of withdrawal without compliance.

Representation will result in unreasonable financial burden on lawyer or is unreasonably difficult because of client.

Other good cause exists for withdrawal.

- **Analysis:** This is obviously the catch-all provision, Rule 1.16(b)(7), for the innumerable number of factual scenarios where counsel may seek to withdraw, and may frequently be in operation in the context of domestic cases.

- **Domestic case:** Application of this ethical rule was likely operational in *In re the Marriage of Virginia M. Hawblitzel*, 447 N.E.2d 1156-1158 (Ind.Ct.App. 1983), wherein the wife's counsel sought to withdraw one (1) day before trial on the dissolution and the court granted same because the wife had accused the attorney of theft the day before trial.

**c. Notice of withdrawal and permission.**

Trial Rule 3.1(E).

Local rules.

**d. Protecting Client's Interest.**

Upon withdrawal, attorneys must take steps to protect the client's interest, including returning unused fees and property. In domestic cases, non-payment is often a reason counsel moves to withdraw and, thereafter, it is the author's experience that a few attorneys exercise

retaining liens for payment. The author believes that the prejudice to the client and successor counsel, the ethical implications, and the malpractice risk do not warrant engaging in this practice. Guidance, moreover, for protecting a client's interest and discussion of retaining liens are found in disciplinary cases under this rule.

In *In the Matter of Richard L. Roberts*, 727 N.E.2d 705, 710 (Ind.Sup.Ct. 2000), the Supreme Court found that by Attorney Roberts' abandonment of a dissolution action by failing to take any action after a reconciliation, despite repeated attempts to obtain action from the attorney or return her unused fees so she could seek alternative counsel, he violated the requirement to protect her interest upon *de facto* withdrawal.

In *In the Matter of Alfred Towell*, 699 N.E.2d 1138 (Ind.Sup.Ct. 1998), the Supreme Court found that Attorney Towell had violated Rule 1.16(d) for retaining client files once the client had satisfied the judgment the attorney had against the former client.

### 4. Ethical Rule Changes Effective January 1, 2005.

There are two (2) significant changes to the ethical rules on declining or terminating representation as applied to domestic practice.

> Permissive withdrawal is appropriate if the lawyer and client disagree over "actions" to be taken by the lawyer on the client's behalf (previously the basis for permissive withdrawal was if client on "objective" lawyer found repugnant or imprudent). Rule 1.16(b)(4). Prior Rule 1.16(b)(3).
>
> Withdrawal must only occur in accordance with notice provisions and permission of tribunal (previously just required continuation if tribunal ordered). Rule 1.16©.

### 5. Local Rule Considerations.

#### a. Developing Area.

[See discussion, *supra*]

#### b. Change in Marion County Local Rules.

### 6. Disciplinary Information of Relevant Type.

[See handout of new report, if available]

### 7. Common Mistakes and Practice Tips.

#### a. Common Mistakes.

**Assuming withdrawal and failing to appear:** The first common mistake

the author has observed in domestic cases is a motion to withdraw by counsel, and before said motion is granted, a hearing is held that the counsel is not present for. So long as you are counsel of record, you must protect your clients interest or be in violation of the ethical rules. Further, not representing a client at a hearing for which the attorney is still counsel of record, particularly if said client does not have substitute counsel, is a substantial malpractice risk.

**Failure to follow local rules:** A second and related mistake is not following a local rule for withdrawal, the withdrawal being denied, and the attorney learning of this just before a hearing, being forced to litigate the matter, all while being unprepared. All motions to withdraw must be docketed and followed up upon with the court.

**Failure to act on breakdown of relationship:** A third type of withdrawal mistake domestic attorneys make is having a case where the relationship has broken down, but not taking the time to move to withdraw until just before the hearing.

**Failure to withdraw on completion of representation:** Fourth, lawyers often fail to take the extra step to withdraw upon completion of representation in the matter. Then months or years later are served with arguably proper service and are unable to locate the client, forced to appear at an emergency hearing, or otherwise.

## Exhibit "3": 2006- 2007ANNUAL REPORT OF THE DISCIPLINARY COMMISSION OF THE INDIANA SUPREME COURT

# 2005-2006
# Annual Report

## of the

## Disciplinary Commission

## of the

## Supreme Court of Indiana

**Published by the**

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**(317) 232-1807**
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**http://www.in.gov/judiciary/discipline**

# Indiana Supreme Court Disciplinary Commission

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J. Mark Robinson, Vice-Chairperson
Anthony M. Zappia, Secretary
Fred Austerman
Diane L. Bender
Corinne R. Finnerty
Maureen Grinsfelder
R. Anthony Prather
Sally Franklin Zweig

Donald R. Lundberg, Executive Secretary

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Allison S. Avery
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Laura B. Iosue
Charles M. Kidd
Carol Kirk
Dennis K. McKinney
Seth T. Pruden
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Robert C. Shook

**Support Staff:**

Ronda Johnson
Sharon F. Scholl
Judy E. Whittaker

**Investigator:**

Robert D. Holland

## TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. HISTORY AND STRUCTURE OF THE DISCIPLINARY COMMISSION ..... 1

III. THE DISCIPLINARY PROCESS ..... 3
- A. The Grievance Process ..... 3
- B. Preliminary Investigation ..... 3
- C. Further Investigation ..... 4
- D. Authorizing Charges of Misconduct ..... 4
- E. Filing Formal Disciplinary Charges ..... 4
- F. The Evidentiary Hearing ..... 4
- G. Supreme Court Review ..... 5
- H. Final Orders of Discipline ..... 5
- I. Resolution By Agreement ..... 6
- J. Temporary Suspension ..... 7
- K. The License Reinstatement Process ..... 7
- L. Lawyer Disability Proceedings ..... 8

IV. COMMISSION ACTIVITY IN 2005-2006 ..... 8
- A. Grievances and Investigations ..... 8
- B. Nonpayment of Costs ..... 9
- C. Non-Cooperation By Lawyers ..... 9
- D. Trust Account Overdraft Reporting ..... 12
- E. Litigation ..... 13
  1. Overview ..... 13
  2. Verified Complaints for Disciplinary Action ..... 13
  3. Final Dispositions ..... 14

V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES ..... 16

VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE ..... 17

VII. OTHER DISCIPLINARY COMMISSION ACTIVITIES ..... 17

VIII. FINANCIAL REPORT OF THE DISCIPLINARY COMMISSION ..... 17

IX. APPENDICES:
- APPENDIX A Biographies of Commission Members
- APPENDIX B Number of Grievances Filed
- APPENDIX C Grievance Rates
- APPENDIX D Grievances by Case Type and Misconduct Alleged
- APPENDIX E Grievances by Case Type
- APPENDIX F Grievances by Misconduct Alleged
- APPENDIX G Disciplinary Sanctions Ordered
- APPENDIX H Other Disciplinary Commission Activities
- APPENDIX I Statement of Revenues and Expenses

## 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, 2005 and ending June 30, 2006. 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 $105.00, $90.00 of which goes to fund the Disciplinary Commission, approximately $12.00 of which is transferred to the Judges and Lawyers Assistance Commission to fund its operation. The remaining $15.00 goes to fund the Indiana Supreme Court Commission for Continuing Legal Education. The annual registration fee for lawyers in inactive status is $45.00. 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. On May 23, 2006, the Supreme Court issued an order suspending **65** lawyers on active and inactive status, effective June 23, 2006, for failure to pay their annual attorney registration fees.

Effective with the annual registration fee payment due by October 1, 2005, lawyers are now able to make their fee payments on-line by using a credit card as the means of payment.

## 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* |
|---|---|---|---|
| Robert L. Lewis, Chair | Gary | July 1, 1999 | June 30, 2009 |
| J. Mark Robinson, Vice-Chair | Charlestown | April 11, 2001 | June 30, 2011 |
| Anthony M. Zappia, Secretary | South Bend | September 9, 2001 | June 30, 2011 |
| Diane L. Bender | Evansville | July 1, 1999 | June 30, 2009 |
| Sally Franklin Zweig | Indianapolis | September 2, 2001 | June 30, 2011 |
| Fred Austerman | Liberty | July 1, 2003 | June 30, 2008 |
| Corinne R. Finnerty | North Vernon | 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
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 who were employed during this reporting period included Joshua W. Casselman, H. Max Kelln, Dea C. Lott, and Donald E. Thomas, Jr.

The offices of the Disciplinary Commission are located at National City Center, 115 West Washington Street, Suite 1165, South Tower, 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. When a lawyer's license is suspended for not cooperating, the suspension will be lifted once the lawyer cooperates. However, if the lawyer is suspended for six months without curing the non-cooperation, on the Commission's motion, the Court may suspend the lawyer's law license indefinitely.

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.

### 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. Occasionally, in private reprimand cases, the Court will 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 2005-2006

### 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 **4,065** 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, **1,589** grievances were filed with the Disciplinary Commission. Of this number, the Disciplinary Commission initiated **62** grievances. The total number of grievances filed was similar to 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 **15,517** Indiana lawyers in active, good-standing status and **2,612** lawyers in inactive, good-standing status as of June 30, 2006. In addition, **1,063** 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 **10.2 grievances for every 100** regular actively practicing lawyers or one grievance for every **9.77** lawyers in regular active practice. **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 1,589 separate lawyers received grievances during the reporting period, because many lawyers were the recipients of multiple grievances. 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, **1,014** 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, 2006, 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, Bankruptcy, Probate and Personal Misconduct*. 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, Not Acting With Competence, Improper Withdrawal, Conflicts of Interest, Exercising Improper Influence and Misinforming*, 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, 2006, or that had been dismissed during the reporting period:

| | DISMISSED | | OPEN |
|---|---|---|---|
| Grievances filed before July 1, 2005 | 180 | | 521 |
| Grievances filed on or after July 1, 2005 | 1,263 | | 318 |
| Total carried over from preceding year: | | 775 | |
| Total carried over to next year: | | 839 | |

**B. Nonpayment of Costs**

On February 14, 2006, the Supreme Court entered an order granting a petition filed by the Disciplinary Commission pursuant to Admission and Discipline Rule 23(21)(j) suspending one lawyer for failure to pay costs assessed against him in connection with a lawyer discipline matter. Upon payment of the delinquent costs, that lawyer's law license was reinstated.

| Name | City of Practice | Date of Admission | Date Reinstated |
|---|---|---|---|
| Eckert, Stephen P. | Indianapolis | October 9, 1981 | March 3, 2006 |

**C. Non-Cooperation By Lawyers**

Admission and Discipline Rule 23(10) provides for the suspension of a lawyer's law license upon a showing that the lawyer has failed to cooperate with the disciplinary process. The purpose of this rule 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 **35** petitions with the Supreme Court to suspend the law licenses of **26** individual lawyers 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:

**Show cause petitions ........................................................................................35**

| Name | City of Practice | Date of Admission |
|---|---|---|
| Cosby, Dwight A. | Jeffersonville | October 22, 1993 |
| Deets, Charles R., III | Lafayette | September 25, 1968 |
| Eckert, Stephen P. | Indianapolis | October 9, 1981 |
| Eckert, Stephen P. | Indianapolis | October 9, 1981 |
| Fetters, Jeffrey K. | Wolcottville | October 31, 1994 |
| Haughee, Michael B | Griffith | May 29, 1981 |
| Haughee, Michael B. | Griffith | May 29, 1981 |
| Haughee, Michael B. | Griffith | May 29, 1981 |
| Haughee, Michael B. | Griffith | May 29, 1981 |
| Hill, Danny Ray | South Bend | October 10, 1973 |
| Hill, Danny Ray | South Bend | October 10, 1973 |
| Hosinski, John S. | South Bend | October 25, 1991 |
| Hughes, John M. | Highland | June 5, 1998 |
| Jarrett, Jerry T. | Gary | May 26, 1981 |
| Kapitan, James M. | Highland | June 7, 1991 |
| Kelly. Daniel S. | Indianapolis | November 9, 1998 |
| Kendall, Michael C. | Carmel | October 21, 1975 |
| Kilburn, James R. | Austin | October 9, 1981 |
| Lambka, Bruce A. | Crown Point | January 7, 1978 |
| Lambka, Bruce A. | Crown Point | January 7, 1978 |
| Moerlein, Steven J. | South Bend | October 9, 1981 |
| Montgomery, Thomas L. | Evansville | January 19, 1990 |
| Ramsey, Shawn D. | Anderson | November 4, 1996 |
| Rathburn, Charles L., Jr. | Fort Wayne | June 7, 1991 |
| Rawls, William J. | Indianapolis | October 18, 1985 |
| Rawls, William J. | Indianapolis | October 18, 1985 |
| Shoker, Gursaran S. | W. College Corner | June 3, 1985 |
| Singleton, Edwin Dean | Owensville | October 10, 1986 |
| Stanko, Paul D. | Crown Point | January 29, 1979 |
| Streckfus, George M. | New Albany | October 15, 1982 |
| Streckfus, George M. | New Albany | October 15, 1982 |
| Streckfus, George M. | New Albany | October 15, 1982 |
| Tilden, Cynthia A. | Porter | October 25, 1991 |
| Transki, Barbara Ann | Michigan City | October 31, 1994 |
| Yudt, Michael F., II | Valparaiso | October 12, 1978 |

Dismissed as moot after cooperation without show cause order.....0

Pending on June 30, 2006 without show cause order......................0

**Show cause orders with no suspension ...............................................................26**

Dismissed after show cause order due to compliance ..................21

Cosby, Dwight A.
Deets, Charles R., III
Eckert, Stephen P.
Eckert, Stephen P.
Fetters, Jeffrey K.
Hill, Danny Ray
Hill, Danny Ray
Kendall, Michael C.
Kilburn, James R.
Lambka, Bruce A.
Lambka, Bruce A.
Montgomery, Thomas L.
Ramsey, Shawn D.
Rathburn, Charles J., Jr.
Rawls, William J.
Rawls, William J.
Shoker, Gursaran S.
Stanko, Paul D.
Streckfus, George M.
Tilden, Cynthia A.
Transki, Barbara Ann

Dismissed after cooperation subject to payment of costs ................1

Hill, Danny Ray

Dismissed due to other discipline ....................................................3

Hughes, John M.
Jarrett, Jerry T.
Regenauer, Gerald J.

Show cause orders pending with no ruling on 6/30/06....................6

Haughee, Michael B.
Hosinski, John S.
Kelly, Daniel S.
Moerlein, Steven J.
Streckfus, George M.
Yudt, Michael F., II

**Suspensions for non-cooperation .......... 8**

Suspensions still in effect on 6/30/06 .......... 5

Haughee, Michael B.
Haughee, Michael B.
Haughee, Michael B.
Kapitan, James M.
Singleton, Edwin Dean

Indefinitely suspended .......... 2

Hill, Danny Ray
Hill, Danny Ray

Reinstatements due to cooperation after suspension .......... 1

Baker, Amy B.

Reinstated after cooperation subject to payment of costs .......... 1

Hill, Danny Ray

**Non-Cooperation Suspensions Converted to Indefinite Suspensions .......... 6**

| Name | City of Practice | Date of Admission |
|---|---|---|
| Allen, Larry J., Jr. | Michigan City | October 22, 1993 |
| Ebersol, James Michael | South Bend | June 10, 1988 |
| Gaudio-Graves, Ginamarie | Merrillville | June 7, 1991 |
| Jarrett, Jerry T. | Gary | May 26, 1981 |
| Lunn, Mark A. | Indianapolis | August 28, 1993 |
| Mocek, Robert J. | Indianapolis | October 15, 1982 |

**D. 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 shown on the following page:

| | |
|---|---|
| Carried Over From Prior Year | 7 |
| Overdraft Reports Received | 122 |
| Inquiries Closed | 111 |
| Reasons for Closing: | |
| Bank Error | 30 |
| Deposit of Trust Funds to Wrong Trust Account | 5 |
| Disbursement From Trust Before Deposited Funds Collected | 4 |
| Referral for Disciplinary Investigation | 15 |
| Disbursement From Trust Before Trust Funds Deposited | 17 |
| Overdraft Due to Bank Charges Assessed Against Account | 3 |
| Inadvertent Deposit of Trust Funds to Non-Trust Account | 5 |
| Overdraft Due to Refused Deposit for Bad Endorsement | 6 |
| Law Office Math or Record-Keeping Error | 18 |
| Death, Disbarment or Resignation of Lawyer | 1 |
| Inadvertent Disbursement of Operating Obligation From Trust | 7 |
| Non-Trust Account Inadvertently Misidentified as Trust Account | 0 |
| Inquiries Carried Over Into Following Year | 11 |

## E. Litigation

### 1. Overview

In 2005-2006, the Commission filed **42** 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 **76** separate counts of misconduct during the reporting year.

Including dismissals, in 2005-2006, the Supreme Court issued **52** final, dispositive orders, compared to **60** in the previous year. The final orders in the reporting year represent completion of **108** separate discipline files, compared to the completion of **94** separate discipline files by court order in the previous year. Including private administrative admonitions, **57** lawyers were sanctioned in the reporting year, compared to **76** in the previous year. Compared to the previous year, more cases concluded with license suspensions and fewer cases concluded with admonitions or reprimands this 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 | 42 |
| Number Disposed Of By End Of Year | 9 |
| Number Pending At End Of Year | 33 |

In addition, the Disciplinary Commission authorized the filing of **14** verified complaints during the reporting period that had not yet been filed by June 30, 2006.

The Commission also filed **3** 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, §11.1(a) in **4** cases.

Also, during the year, **2** petitions were filed seeking a finding of contempt against lawyers and are still pending at the end of the year.

### b. Status of All Pending Verified Complaints

The following reports the status of all formal disciplinary proceedings pending as of June 30, 2006:

| | |
|---|---|
| Appointment of Hearing Officer Pending | 5 |
| Cases Pending Before Hearing Officers | 34 |
| Cases Pending On Review Before the Supreme Court | 13 |
| Total Verified Complaints Pending on June 30, 2006 | 52 |

During the course of the reporting year, **15** cases were tried on the merits to hearing officers at final hearings, almost double the number of tried cases (8) in the previous year. **24** cases were submitted to the Supreme Court for resolution by way of Conditional Agreements for Discipline or Consents to Discipline, a similar number (25) to the previous year, and **2** Applications for Judgment on the Complaint were filed because respondents failed to appear and file answers.

### 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:

**Private Administrative Admonitions .......... 8**

**Private Reprimands .......... 3**

**Public Reprimands .......... 10**

| Name | City of Practice | Date of Admission |
|---|---|---|
| Baldwin, Brian B. | Martinsville | October 16, 1987 |
| Boggess, Jeffrey Allan | Greencastle | June 14, 1993 |
| Conover, Todd M. | Hammond | June 4, 1982 |
| Conteh, Swaray E. | Indianapolis | October 23, 1995 |
| DeSanctis, Christine Ann | Lafayette | June 3, 1983 |
| Drake, MacArthur | Gary | May 5, 1976 |
| Hughes, John M. | Highland | June 5, 1998 |
| Shouse, Randall R. | Indianapolis | October 10, 1980 |
| Thomsen, Dorothy J. | Indianapolis | October 20, 1989 |
| Vegter, J. Robert, II | Merrillville | September 16, 1970 |

**Suspensions With Automatic Reinstatement .......... 10**

| Name | City of Practice | Date of Admission | Suspension |
|---|---|---|---|
| Beckett, Brant R. | Mishawaka | October 26, 1992 | 120 days |
| Clark, Timothy | Indianapolis | June 2, 1982 | 90 days |

| | | | |
|---|---|---|---|
| Fetters, Jeffrey K. | Wolcottville | October 31, 1994 | 60 days |
| Goode, Blaine | Salem | June 7, 2002 | 60 days |
| Harris, James A. | Highland | February 8, 1977 | 60 days |
| Layson, David A. | Corydon | September 26, 1972 | 60 days |
| Moyer, Kevin L. | Frankfort | June 5, 1998 | 60 days |
| Peters, John W. | Portage | May 1, 1974 | 30 days |
| Roberts, Kenneth T. | Indianapolis | October 10, 1973 | 30 days |
| Winkler, Cynthia. | Salem | June 3, 1983 | 120 days |

**Suspensions With Reinstatement on Conditions..............................................4**

| Name | City of Practice | Date of Admission | Suspension |
|---|---|---|---|
| Belleperche, Thomas W. | Fort Wayne | November 9, 1979 | 6 months[1] |
| Geheb, Mark D. | Demotte | June 12, 1992 | 6 months[2] |
| Ricks, Hilary Bowe | Indianapolis | May 30, 1986 | 6 months[3] |
| Wittry, Daniel Lane | Indianapolis | October 20, 1989 | 6 months[4] |

[1] Six months suspension, six months stayed conditioned on compliance with terms of probation for 24 months.

[2] Six months suspension, six months stayed conditioned on compliance with terms of probation for two years.

[3] Six months suspension, six months stayed conditioned on compliance with terms of probation for one year.

[4] Six months suspension, four months stayed conditioned on compliance with terms of probation for 12 months.

**Suspensions Without Automatic Reinstatement..............................................14**

| Name | City of Practice | Date of Admission | Suspension |
|---|---|---|---|
| Allen, Larry J., Jr. | Michigan City | October 22, 1993 | Indefinite |
| Corizzi, Anthony J. | Anderson | June 8, 1979 | Indefinite |
| Cosby, Dwight A. | Jeffersonville | October 22, 1993 | 9 months |
| Ebersol, James M. | South Bend | June 10, 1988 | Indefinite |
| Freeman, John H., IV | Indianapolis | July 13, 1993 | One year |
| Gaudio-Graves, Ginamarie | Merrillville | June 7, 1991 | Indefinite |
| Gofourth, Dewayne H. | English | November 8, 1999 | 3 years |
| Hill, Danny Ray | South Bend | October 10, 1973 | Indefinite |
| Hill, Danny Ray | South Bend | October 10, 1973 | Indefinite |
| Jarrett, Jerry T. | Gary | May 26, 1981 | Indefinite |
| Lunn, Mark A. | Indianapolis | September 28, 1993 | Indefinite |
| Mocek, Robert J. | Indianapolis | October 15, 1982 | Indefinite |
| Regenauer, Gerald J. | Peru | October 14, 1988 | Indefinite |
| Wheeler, Kimberly | Indianapolis | October 16, 1987 | Indefinite |

**Accepted Resignations..............................................................................7**

| Name | City of Practice | Date of Admission |
|---|---|---|
| Fife, James H., III | Schererville | October 15, 1987 |
| Haney, Stephen R. | Indianapolis | October 6, 2000 |
| Hughes, John M. | Highland | June 5, 1998 |

| | | |
|---|---|---|
| Lacava, Frederick W. | Indianapolis | October 4, 1979 |
| McQueen, Alvan Vance | Shelbyville | May 31, 1977 |
| Ramsey, Shawn D. | Anderson | November 4, 1996 |
| Wartenbe, Robert S. | Fort Wayne | May 31, 1977 |

**Disbarments**..........................................................................................0

**Judgments for Respondent**..........................................................................1

**Dismissals**..............................................................................................3

Reconsideration of Probable Cause........................................2
Death of Respondent...........................................................1

**Reinstatement Proceedings**

Number of Petitions Filed........................................................8

Hearings.................................................................................3

Disposed of by Final Order......................................................3

Denied.................................................................................0

Dismissed............................................................................1

| Name | City of Residence | Date of Admission |
|---|---|---|
| Krebs, Warren D. | Indianapolis | October 9, 1974 |

Petition Withdrawn....................................................................1

| Name | City of Residence | Date of Admission |
|---|---|---|
| Vernia, Stephen D. | Valparaiso | June 8, 1987 |

Conditional Reinstatement Granted...........................................1

| Name | City of Residence | Date of Admission |
|---|---|---|
| Atanga, Joseph A. | Indianapolis | October 15, 1990 |

**Revocations of Probation**..........................................................................1

| Name | City of Practice | Date of Admission |
|---|---|---|
| Belleperche, Thomas W. | Fort Wayne | November 9, 1979 |

## V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES

| | 2005-06 | 2004-05 | 2003-04 | 2002-03 | 2001-02 |
|---|---|---|---|---|---|
| Matters Completed | 1,599 | 1,692 | 1,765 | 1,641 | 1,704 |
| Complaints Filed | 42 | 41 | 54 | 37 | 62 |
| Final Hearings | 15 | 8 | 10 | 15 | 21 |
| Final Orders | 52 | 60 | 54 | 88 | 82 |
| Reinstatement Petitions Filed | 8 | 4 | 4 | 3 | 4 |
| Reinstatement Hearings | 3 | 4 | 3 | 2 | 3 |
| Reinstatements Ordered | 1 | 4 | 0 | 4 | 0 |

| | 2005-06 | 2004-05 | 2003-04 | 2002-03 | 2001-02 |
|---|---|---|---|---|---|
| Reinstatements Deny/Dismiss | 2 | 2 | 2 | 0 | 3 |
| Income | $1,870,208 | $1,785,247 | $1,731,521 | $1,650,231 | $1,389,875 |
| Expenses | $1,766,748 | $1,629,153 | $1,638,797 | $1,621,569 | $1,454,041 |

## VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE

### A. Indiana Rules of Professional Conduct

**Rule of Professional Conduct 7.5(a) and (b):** On July 1, 2005, effective January 1, 2006, the Supreme Court made a technical amendment to Rule of Professional Conduct 7.5(a) and (b) to correct an erroneous cross-reference in each paragraph to Rule of Professional Conduct 7.1 to reflect that the correct cross-reference should be to Rule of Professional Conduct 7.2.

### B. Admission and Discipline Rules

**Admission and Discipline Rule 23, section 21(k):** On July 1, 2005, effective January 1, 2006, the Supreme Court amended the rule governing permanent relinquishment of a law license. One change was that it clarified that Indiana lawyers are not eligible to permanently relinquish their law licenses unless they are current in all registration fees and financial obligations imposed on lawyers by the Admission and Discipline Rules. The second amendment was to make the procedure for permanent relinquishment administrative by requiring the relinquishing lawyer to tender an affidavit setting forth eligibility for relinquishment to the Executive Secretary of the Disciplinary Commission. Upon verifying the eligibility of the relinquishing lawyer, the Executive Secretary will certify the same to the Clerk of the Supreme Court, who will show on the roll of attorneys that the lawyer's law license has been permanently relinquished.

## 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 audited financial condition of the Disciplinary Commission Fund is attached as **Appendix I**.

# IX. APPENDICES

## BIOGRAPHIES OF DISCIPLINARY COMMISSION MEMBERS

**Fred Austerman** is from Union 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 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 Association of Trial Lawyers of America. 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.

**Maureen I. Grinsfelder**, a native of Whitley County, is Executive Director of the Fort Wayne Educational Foundation, 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. Having previously served as Secretary and Vice-Chair, he was elected Chair of the Commission on July 8, 2005.

**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 28 years with Indiana Legal Services. His professional memberships include the Clark

and Floyd County Bar Associations; the Indiana State, Kentucky, and American Bar Associations; and the Sherman Minton American Inn of Court. He is the past 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 nine 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 was appointed 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 has served small rural parishes in southeastern Indiana throughout the past 32 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. On July 8, 2005, after serving as Secretary of the Commission, he was elected Vice-Chair of the Commission.

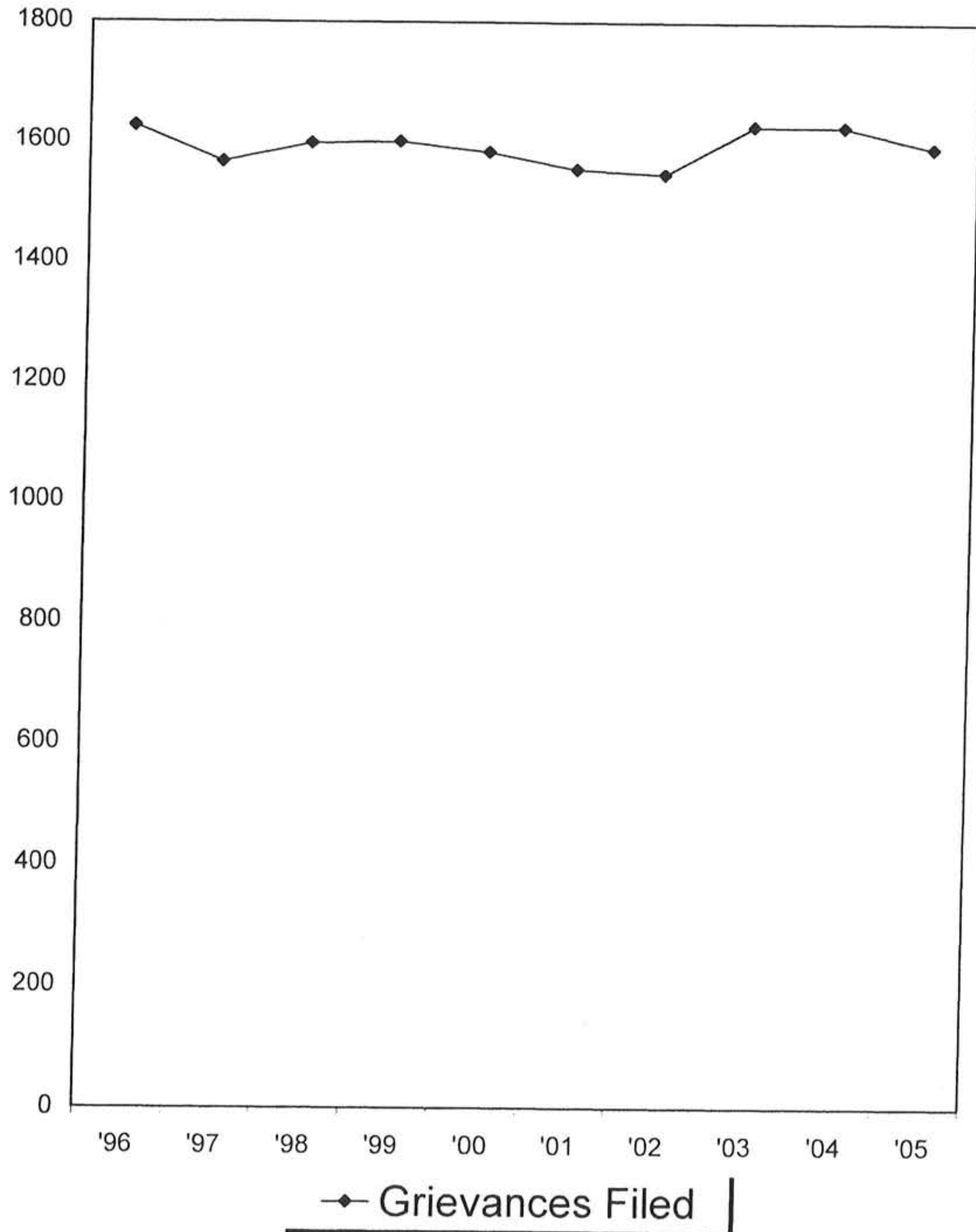
**Anthony M. Zappia** is the senior member of the 4-person law firm of Zappia Zappia & Stipp, located in South Bend, Indiana. He attended the University of Notre Dame where he received his B.A. in 1972, cum laude, in the School of Economics, and earned his law degree in 1976 from Valparaiso University. 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. On July 8, 2005, he was elected Secretary of the Commission.

**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 is 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 co-chair of the Race Relations Leadership Counsel of Indianapolis. She also presently serves on the boards of directors of the Indianapolis Art Center 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.

## APPENDIX A

# APPENDIX A

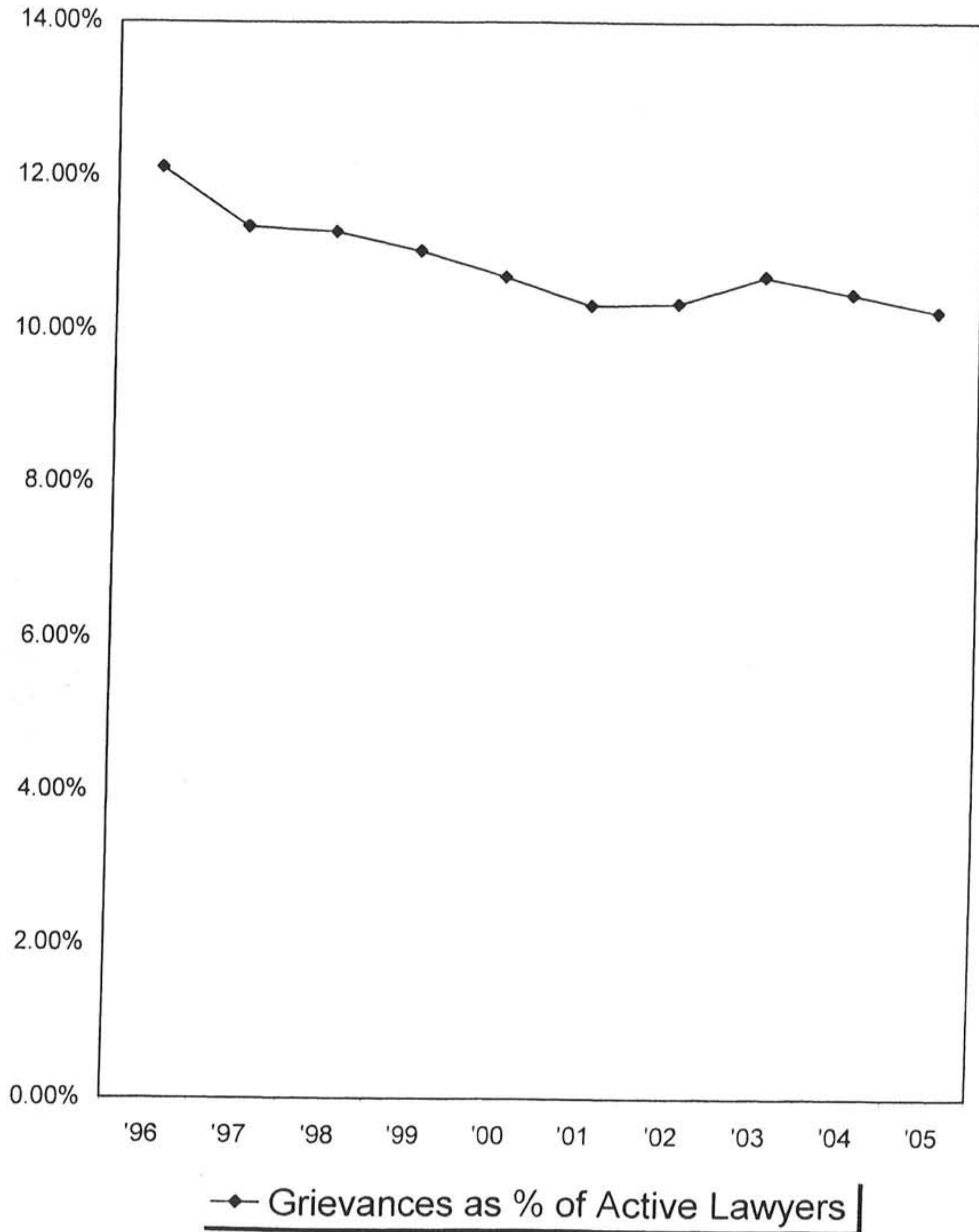
# TRENDS IN LAWYER DISCIPLINE




APPENDIX B

# TRENDS IN LAWYER DISCIPLINE

## GRIEVANCE RATES 1996-2005




**APPENDIX C**

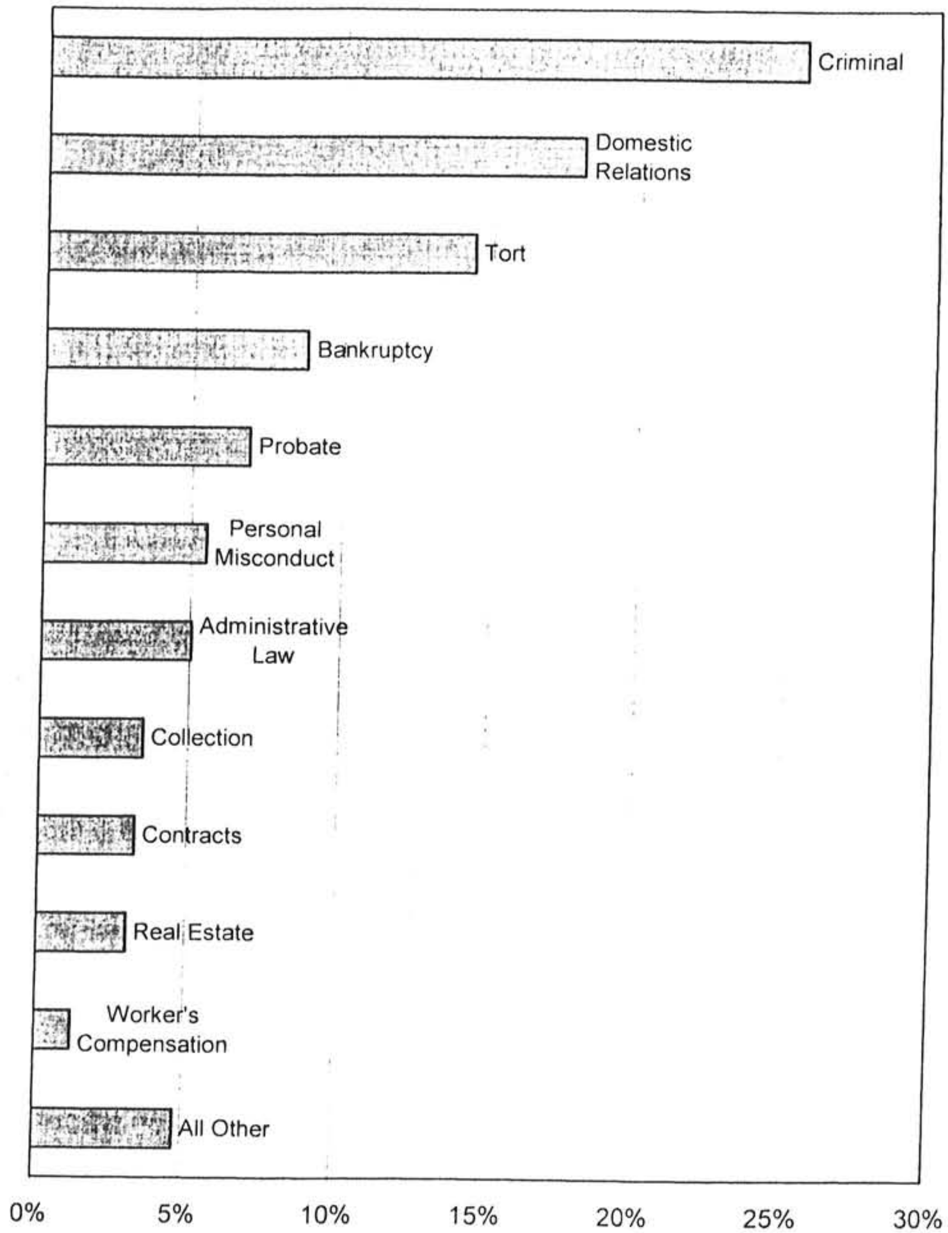
## GRIEVANCES BY CASE TYPE AND MISCONDUCT ALLEGED (2005-2006)

| **Type of Legal Matter** | **Number** | **% of Total** |
|---|---|---|
| Administrative Law | 65 | 5.1% |
| Adoption | 4 | 0.3% |
| Bankruptcy | 113 | 8.8% |
| Collection | 45 | 3.5% |
| Condemnation | 0 | 0.0% |
| Contracts | 42 | 3.3% |
| Corporate | 21 | 1.6% |
| Criminal | 328 | 25.5% |
| Domestic Relations | 232 | 18.0% |
| Guardianship | 21 | 1.6% |
| Other Judicial Action | 3 | 0.2% |
| Patent, Copyright | 4 | 0.3% |
| Personal Misconduct | 71 | 5.5% |
| Real Estate | 39 | 3.0% |
| Tort | 185 | 14.4% |
| Probate | 89 | 6.9% |
| Worker's Compensation | 16 | 1.2% |
| Zoning | 1 | 0.1% |
| Other | 7 | 4.7% |
| TOTAL | 1286 | 100.0% |

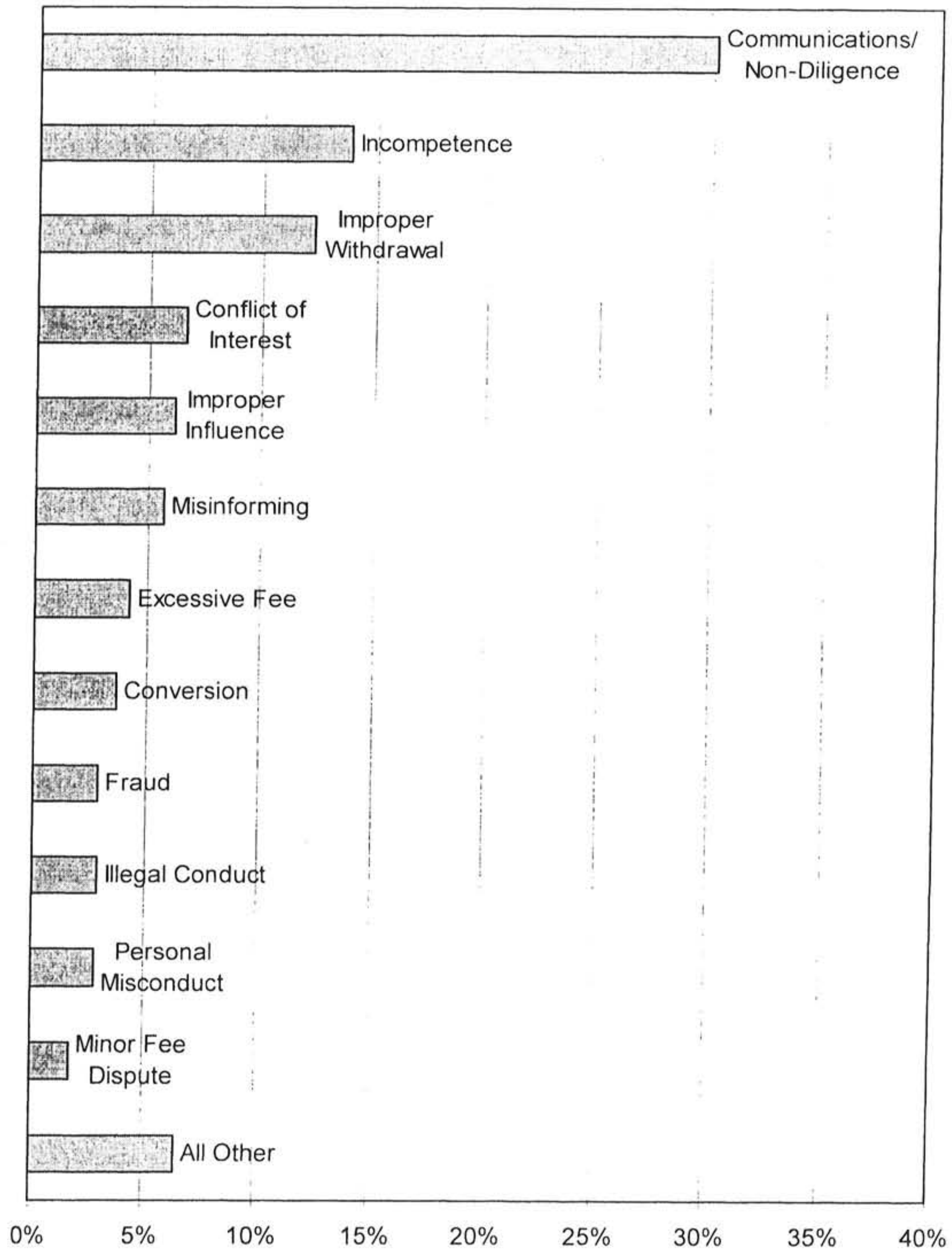
| **Alleged Misconduct** | **Number** | **% of Total** |
|---|---|---|
| Action in Bad Faith | 16 | 0.8% |
| Advertising | 32 | 1.6% |
| Bypassing Other Attorney | 16 | 0.8% |
| Communications/ Non-Diligence | 599 | 30.2% |
| Conflict of Interest | 133 | 6.7% |
| Conversion | 74 | 3.7% |
| Disclosure of Confidences | 19 | 1.0% |
| Excessive Fee | 84 | 4.2% |
| Fraud | 59 | 3.0% |
| Illegal Conduct | 58 | 2.9% |
| Improper Influence | 123 | 6.2% |
| Improper Withdrawal | 244 | 12.3% |
| Incompetence | 276 | 13.9% |
| Minor Disagreement | 1 | 0.1% |
| Minor Fee Dispute | 35 | 1.8% |
| Misinforming | 114 | 5.7% |
| Overreaching | 38 | 1.9% |
| Personal Misconduct | 57 | 2.9% |
| Solicitation | 8 | 0.4% |
| TOTAL | 1986 | 100.0% |

APPENDIX D

## GRIEVANCES BY CASE TYPE 2005-2006

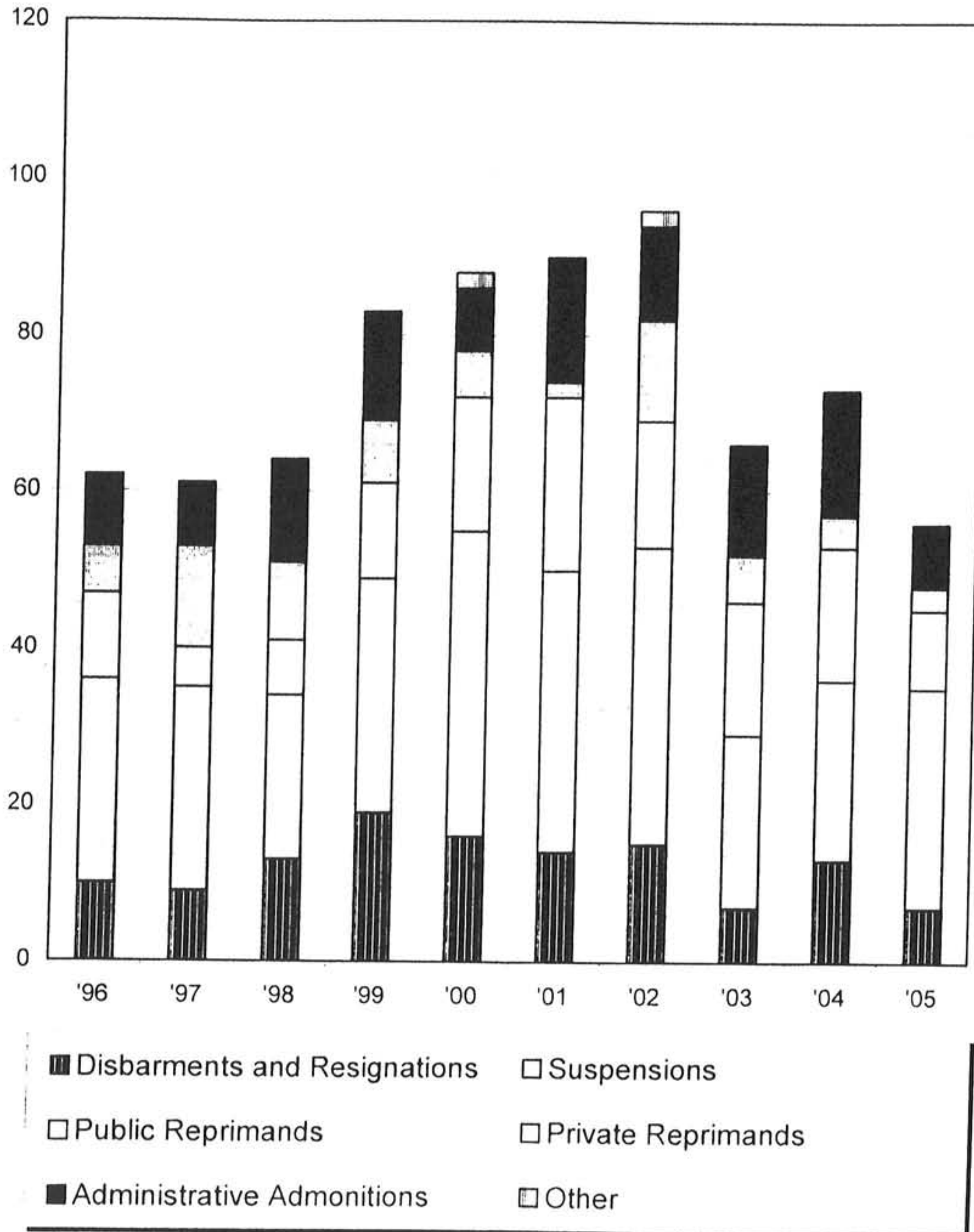



APPENDIX E




**APPENDIX F**

## SANCTIONS ORDERED 1996-2005




APPENDIX G

**PUBLIC AND BAR IMPROVEMENT AND EDUCATION ACTIVITIES**
**2005-2006**

| | | |
|---|---|---|
| AUTHORS | *You Say You Want an Evolution? An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 INDIANA LAW REVIEW 1255 (2005) | Lundberg & Kidd |
| AUTHOR | *Survey of the Law of Professional Responsibility*, 39 INDIANA LAW REVIEW 1199 (2006) | Kidd |
| AUTHOR | *Trust Accounts and More*, Vol. 49, No. 1 RES GESTAE 19 (2005) | Lundberg |
| AUTHOR | *What Do You Do When You Receive a Grievance?*, Vol. 49, No. 2 RES GESTAE 35 (2005) | Lundberg |
| AUTHOR | *An Advertising Primer: Part 1*, Vol. 49, No. 3 RES GESTAE 19 (2005) | Lundberg |
| AUTHOR | *An Advertising Primer: Part 2*, Vol. 49, No. 4 RES GESTAE 32 (2005) | Lundberg |
| AUTHOR | *Finder's Fee or Kickback? You Decide*, Vol. 49, No. 5 RES GESTAE 32 (2005) | Lundberg |
| AUTHOR | *Trust Account Debit Cards and a Footnote on Client Confidentiality*, Vol. 49, No. 6 RES GESTAE 36 (2006) | Lundberg |
| AUTHOR | *Disciplinary Commission Rolls Out New Website*, Vol. 49, No. 7 RES GESTAE 43 (2006) | Lundberg |
| AUTHOR | *Turning Due Process on Its Head: Ethical Limitations on Ex Parte Practice*, Vol. 49, No. 8 RES GESTAE 26 (2006) | Lundberg |
| AUTHOR | *Lawyers and Judicial Criticism*, Vol. 49, No. 9 RES GESTAE 34 (2006) | Lundberg |
| AUTHOR | *Migratory Lawyers and Other Exotic Species*, Vol. 49, No. 10 RES GESTAE 27 (2006) | Lundberg |
| JUL 20, 2005 | Presenter: "Hidden Ethics Matters of Interest in Family Law" Indianapolis Bar Association, Indianapolis | Kidd |
| AUG 16, 2005 | Presenter: "Ethics in Mediation," Public Policy Mediation Course, Prof. Krauss, Indiana University School of Law, Indianapolis | Kidd |
| AUG 25, 2005 | Co-Presenter: "Recent Amendments to the Rules of Professional Conduct," Fulton County Bar Association, Rochester | Lundberg |
| SEP 23, 2005 | Presenter: "Update of Recent Cases" Utility Law Section, Indiana State Bar Association, Bloomington | Kidd |
| SEP 27, 2005 | Co-Presenter: "Professional Responsibility," Indiana Law Update, Indiana Continuing Legal Education Forum, Indianapolis | Lundberg |
| OCT 20, 2005 | Panelist: "Ethical Dilemmas in Mediation," Indiana State Bar Association, Annual Meeting, Indianapolis | Lundberg |
| OCT 21, 2005 | Presenter: "Update on Recent Ethics Decisions," Applied Professionalism Course, Indianapolis Bar Association, Indianapolis | Kidd |
| OCT 21, 2005 | Presenter: "Trust Account Management" Applied Professionalism Course, Indianapolis Bar Association, | Pruden |

| | | |
|---|---|---|
| | Indianapolis | |
| OCT 25, 2005 | Presenter: "Ethical Issues Relating to Discovery and Evidence in Business Litigation," Indiana Continuing Legal Education Forum, Indianapolis | Lundberg |
| OCT 27, 2005 | Presenter: "Trust Account Management," Applied Professionalism Course, Evansville Bar Association, Evansville | Pruden |
| NOV 4, 2005 | Presenter: "Amended Rules of Professional Conduct," Boone County Bar Association, Lebanon | Pruden |
| NOV 10, 2005 | Co-Presenter: "Top Ten Ethics Problems for Lawyers," ICLEF Practice Skills Seminar, Indianapolis | Kidd |
| NOV 11, 2005 | Presenter: "Ethics Issues in Pro Bono Practice," Heartland Pro Bono Council, Indianapolis | Kidd |
| NOV 15, 2005 | Guest lecturer: "The Lawyer Discipline Process," Course in The Legal Profession, Prof. Fuentes-Rowher, Indiana University School of Law, Bloomington | Lundberg |
| NOV 21, 2005 | Presenter: "Top Ten Ethics Tips for Litigation," Indiana State Bar Association, Indianapolis | Pruden |
| NOV 29, 2005 | Co-Presenter: "Overview of the Lawyer Discipline System," Indiana University School of Law, Indianapolis | Kidd |
| DEC 6, 2005 | Presenter: "Trust Account Management," Bridge the Gap Program (Applied Professionalism Course), Lake County Bar Association, Merrillville | Pruden |
| DEC 6, 2005 | Co-Presenter: "Year In Review," Indiana Continuing Legal Education Forum, Indianapolis | Kidd |
| DEC 9, 2005 | Presenter: "Family Law Ethics," Heartland Pro Bono Council, Indianapolis | Iosue |
| DEC 16, 2005 | Presenter: "The Disciplinary Process in Indiana," Brown County Bar Association, Nashville | Shook |
| DEC 16, 2005 | Presenter: "Legal Advertising and Trust Accounts," Year End Update, Indiana Trial Lawyers Association, Indianapolis | Lundberg |
| DEC 20, 2005 | Presenter: "Staying Out of Trouble," Allen County Bar Association, Fort Wayne | Pruden |
| DEC 30, 2005 | Presenter: "Applied Professionalism," Allen County Bar Association, Fort Wayne | McKinney |
| JAN 9, 2006 | Presenter: "Recent Amendments to the Rules of Professional Conduct," Indiana School Boards Association, School Law Seminar, Indianapolis | Lundberg |
| JAN 10, 2006 | Presenter: "Ethics in Mediation," Public Policy Mediation Course, Prof. Krauss, Indiana University School of Law, Indianapolis | Kidd |
| FEB 8, 2006 | Co-Presenter: "The Wreck of the S.S. Robert Hanna: Leaks and Other Releases" Sagamore American Inn of Court, Indianapolis | Rice |
| FEB 10, 2006 | Moderator: "Is Check 21 Checkmate for Discipline?" Mid-Year Meeting, National Organization of Bar Counsel, Chicago, IL | Lundberg |

**APPENDIX H**

| | | |
|---|---|---|
| FEB 24, 2006 | Presenter: "Update of Recent Ethics Cases," Allen County Bar Association, Fort Wayne | Kidd |
| MAR 7, 2006 | Co-Presenter: "Overview of the Lawyer Discipline System," Indiana University School of Law, Indianapolis | Kidd |
| MAR 9, 2006 | Presenter: "Update of Recent Ethics Cases," Grant American Inn of Court, South Bend | Kidd |
| MAR 9, 2006 | Presenter: "Disciplinary Enforcement," Applied Professionalism Course, Indianapolis Bar Association, Indianapolis | Iosue |
| MAR 9, 2006 | Co-Presenter: "Law Practice Scenarios," Applied Professionalism Course, Indianapolis Bar Association, Indianapolis | Lundberg |
| MAR 29, 2006 | Presenter: "Trust Account Management," Applied Professionalism Course, Indianapolis Bar Association, Indianapolis | Pruden |
| MAR 30, 2006 | Moderator: "Public Sector Career Panel," Indiana University School of Law, Indianapolis | Lundberg |
| APR 24, 2006 | Guest-lecturer: "Criminal Ethics," Class in Criminal Procedure, Prof. Schumm, Indiana University School of Law, Indianapolis | Iosue |
| MAY 10, 2006 | Co-Presenter: "The Dull Edge of Advocacy: Techniques of Oral Argument," Sagamore American Inn Of Court | Kidd |
| MAY 11, 2006 | Moderator and Panelist: "Masters Series: Advanced Legal Ethics," Indiana Continuing Legal Education Forum, Indianapolis | Lundberg |
| MAY 12, 2006 | Presenter: "Rules of Professional Conduct for the Planning and Zoning Lawyer," Indiana Continuing Legal Education Forum, Indianapolis | McKinney |
| MAY 18, 2006 | Presenter: "Ten Top Topical Ethics Topics," Indiana Pro Bono District Eleven, Volunteer Lawyers Appreciation Luncheon, Columbus | Lundberg |
| MAY 24, 2006 | Moderator and Panelist: "Masters Series: Advanced Legal Ethics," Indiana Continuing Legal Education Forum, Evansville | Lundberg |
| MAY 25, 2006 | Presenter: " Rules of Professional Conduct for the Commercial Real Estate Lawyer," Indiana Continuing Legal Education Forum, Indianapolis | McKinney |
| MAY 30, 2006 | Presenter: "Recent Amendments to the Rules of Professional Conduct," Allen County Bar Association, Fort Wayne | Lundberg |
| JUN 2, 2006 | Presenter: "Lawyer Advertising," Solo & Small Firm Conference, Indiana State Bar Association, Bloomington | Kidd |
| JUN 14, 2006 | Moderator and Panelist: "Masters Series: Advanced Legal Ethics," Indiana Continuing Legal Education Forum, Merrillville | Lundberg |
| JUN 22, 2006 | Presenter: "Prosecutorial Misconduct," Indiana Public Defender Council, Indianapolis | Iosue |

**APPENDIX H**

## INDIANA SUPREME COURT DISCIPLINARY COMMISSION FUND
### Statement of Revenues and Expenses (Audited)
### Fiscal Year Ending June 30, 2006

| | | |
|---|---|---|
| BEGINNING DISCIPLINARY FUND BALANCE | | $1,010,628 |
| REVENUES: | | |
| REGISTRATION FEES: | | |
| 2005-06 Active Fees | $1,396,530 | |
| Prior Year Fees | 20,426 | |
| Pro Hac Vice Fees | 95,670 | |
| 2005-06 Inactive Fees | 117,540 | |
| Delinquent Fee Penalties | 159,807 | |
| TOTAL REGISTRATION FEES COLLECTED | | $1,789,973 |
| REVENUE FROM OTHER SOURCES: | | |
| Court Costs | $17,103 | |
| Reinstatement Fees | 4,000 | |
| Investment Income | 47,354 | |
| Rule 7.3 Filing Fees | 7,100 | |
| Other | 4,678 | |
| TOTAL REVENUE FROM OTHER SOURCES | | $80,235 |
| TOTAL REVENUE | | $1,870,208 |
| EXPENSES: | | |
| OPERATING EXPENSES: | | |
| Personnel | $1,272,003 | |
| Investigations/Hearings | 36,911 | |
| Postage and Supplies | 41,663 | |
| Utilities and Rent | 142,520 | |
| Travel | 43,196 | |
| Equipment | 3,211 | |
| Other Expenses | 28,584 | |
| TOTAL OPERATING EXPENSES | | $1,568,088 |
| TRANSFER TO JUDGES/LAWYERS ASSISTANCE PROGRAM | | $198,660 |
| TOTAL EXPENSES | | $1,766,748 |
| NET INCREASE (DECREASE) IN FUND BALANCE | | $103,460 |
| ENDING DISCIPLINARY FUND BALANCE | | $1,114,088 |

**APPENDIX I**

# Gain Confidence Handling Child Custody Issues

**Submitted By Bryan Lee Ciyou**

- Pros And Cons Of Joint Vs. Sole Custody And Creative Ways To Work Out Joint Custody Plan And Visitation Schedules
- When A Guardian Ad Litem May Be Involved
- Considerations In Removal Of Children From Jurisdiction
- The Changing Rights Of Grandparents And Third Parties
- How Domestic Violence Complicates Child Custody

# VI. GAIN CONFIDENCE HANDLING CHILD CUSTODY ISSUES

## A. and B. Pros and Cons of Joint vs. Sole Custody[1] and Creative Ways to Work out Joint Custody Plan and Visitation Schedules

Nearly a decade ago, the relatively black and white standards governing visitation and custody modification began to change. Ultimately, local rules governing visitation, which had perhaps draconian, rigid rules, were replaced with the Indiana Parenting Time Guidelines, which are permeated with "grey." The custody modification standard itself was lowered (at least theoretically) to require only a "substantial change", not a "substantial and continuing change". In fact, there have been a number of constitutional challenges lodged to argue that the fundamental right to raise one's family presumes joint custody.

The study committees, academics, psychologists, and adopting Supreme Courts (of the parenting time guidelines) are right that working together to co-parent is always in the children's best interests. However, as will be discussed in this seminar, such may still fail to fully account for the psychological dynamics of post-divorce circumstances and the ***success*** of this model as put forth through the IPTGs is of question. Disputes thereunder have literally overwhelmed the court systems on a national basis. While there may again be a radical shift in custody thinking, as has occurred in the past with the standards treating children as chattels of the fathers, the tender years presumption, and the gender neutral standard, which the IPTGs seem to be the ultimate manifestation of, it is likely this standard/and IPTGs will be with us for a while.

This noted, given that courts cannot operate in real time and solve the myriad of problems that exist with the "grey" areas of the IPTGs, a new concept, the Parenting Coordinator is coming of age. The PC may have powers under three (3) levels, the latter of which may vest him/her with decision-making authority in certain contexts. The success of parenting coordinators is yet to be determined. Perhaps the most critical problem with this is that faced by court-ordered services, lawyers dispensing services, and with PCs: a typical set of divorced parents often do not have the financial resources to access the system in these ways. These concepts, particularly the relatively new use of a PC, will be discussed in some detail in this sub-section.

**Practice Example (Pending).** There is a petition to modify or eliminate the PC due to the cost.

[See Handouts for PC materials]

## C. When a Guardian ad Litem May be Involved

### I. Introduction.

In domestic cases with custody at issue, be it dissolution or paternity, or post-decree, the

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[1] Consistent with the Author's analysis herein, it is important for the lawyer to always conceptualize legal and physical custody distinctions and make sure this important difference is understood by his/her client. This subsection focuses on physical custody.

children are often the critical focus. The parties, attorneys, and most importantly, the trial court needs information from them. This area is laden with risks/harms for all, yet without involving same, the children's best interests may not be met, the singular statutory focus found in the domestic and paternity statutes and cases. To this end, a good number of "fixes" have been proposed to the end of obtaining critical information from the children, while at the same time, keeping them out of the court room and the typical adversarial system. As the Seminar advertises, a Guardian ad Litem may become involved to effectuate this end. This entire area is quite complex and is explored in this sub-section.

For every lawyer in this room, at some level the use of a GAL begs the question, "Why not use the lawyers and the typical legal process?" This is a great question without clear answers. A reoccurring theme in this Seminar, and particularly so in this Author's materials, is that above all, walk the ethical highroad. So this is the point of departure in these materials. The typical ethical risks faced by any lawyer having routine contact with children of the parties in the domestic litigation comes from the duties charged to the lawyer by his role as "advocate" and having "transactions with persons other than clients".

## II. Problems with Lawyer Contact with Children.

While a myriad of other ethical rules obviously come into play with such contact, the following are perhaps the most problematic, with readily apparent scenarios invoking same, as follows:

> By and 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 or that requires disclosure. Indiana Rule of Professional Conduct 3.7.
>
> Communication with a child might cause that child 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.
>
> Contact with the child (and an apparently emerging area of ethical focus/grievance, with same constituting almost 1% of grievances for the 2002-03 period) might be deemed to be "bypass" communication with opposing parties, which could be viewed to be the case in certain attorney-client-child communications. This is particularly the case when the client with an older child, allied with him/her, unexpectedly brings that child to an attorney-client conference or otherwise. Rule 4.2 *See In The Matter of Anonymous*, 2004 Ind. LEXIS 1084 (Ind. 2004).

## III. How to Develop a Case in the Absence of Direct Lawyer Interaction with Children.

This noted, is should now be apparent that is where the GAL may become involved in a

case.

Most importantly, completely effective and ethical representation can be ensured and children dealt with therein in domestic cases by making their voice, position, and information heard in the case by several mechanisms, primarily: (1) GAL/CASA for children (see discussion on same *infra*); (2) counsel for children (see discussion on same *infra*); (3) family evaluations; (4) court's own expert; (4) in-camera interviews; and (5) calling the child as a witness at trial, although this is widely "frowned upon" by trial courts, not recommended by the Author, and should always be used as a last resort in extreme situations.

Each of the foregoing is addressed:

Family evaluations.

- Dissolution of Marriage, Ind.Code 31-17-2-12 and Trial Rule 35.

- Paternity, 31-14-10-1, and Trial Rule 35.

- Practice consideration:

-Private evaluation
-Court's evaluation services
-Striking panel
-Apportionment of fees

Court's own expert.

Dissolution of marriage, Ind.Code 31-17-2-10 (practice tip may be useful for conflicting expert reports in certain contexts).

In-camera interviews.

- Dissolution of marriage, Ind.Code 31-17-2-9

- Paternity, 31-14-13-3.

- Making a record, presence of counsel.

Child witness.

- Children presumptively competent: A child was presumed to be incompetent if under ten (10) years old, but this statute was repealed in 1990. Now IRE 601 applies, which states that "every person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly." *See, generally, Burrell v. State*,

701 N.E.2d 582 (Ind.Ct.App. 1998).

-Practice tip: IRE 601's failure to presumptively exclude children does not prohibit special inquiry into their competency prior to testifying when the issue is raised. *See, generally, Aldridge v. State*, 779 N.E.2d 607 (Ind.Ct. App. 2002), *trans. denied.*

- Court's positions

## IV. GALs and Children.

It is the Author's belief that there is wide mis-understanding about attorneys for children, who may or may not be GALs. Clearly, there are at least two (2) distinct focuses such counsels for children may have, which may or may not overlap with means and objectives: (1) focus on the child's best interests, and (2) focus on the child's wishes and directives.

Depending upon the factual context facing the attorney, he or she is advised that there are several excellent background materials available debating this issue; three (3) are enumerated as follows: (1) "Lawyers as Non-Lawyers in Child-Custody and Visitation Cases: Questions from the 'Legal Ethics' Perspective," 73 Ind. L.J. 665 (1998); (2) "Mandatory Appointment of Guardians Ad Litem for Children in Dissolution Proceedings: An Important Step Towards Low-Impact Divorce," 30 Ind. L. Rev. 551 (1997); "Children's Rights and Legal Representation--The Proper Roles of Children, Parents, and Attorneys," 7 Notre Dame J.L. Ethics & Pub. Pol'y 423 (1993).

Both in original dissolution and paternity actions and in modifications of custody and visitation thereunder (as well as other provisions of Indiana domestic and other statutory law), there are provisions for appointments for guardians ad litem. When appointed, a guardian ad litem or court appointed special advocate must universally focus on what is in the child's best interest, which may or may not coincide with the wishes of the parent(s) and/or the child(ren). Ind.Code 31-17-6-3, as amended.

There are several unique characteristics of a statutory GAL/CASA, who may be an attorney, aside from the focus on the child's best interests, as follows:

GAL/CASA is an officer of the court, despite what may be the case, for instance, with a therapist. Ind.Code 31-17-6-4.

- Gives GAL/CASA power to subpoena.
- Makes GAL/CASA accountable to the court.

GAL/CASA may have counsel to facilitate their duties. Ind.Code 31-17-6-5.

GAL/CASA may subpoena witnesses and present evidence on what is in the child's best interest. Ind.Code 31-17-6-6.

GAL/CASA may be ordered by the Court to continue supervision of the matter after the conclusion of the matter.31-17-6-1.

GAL/CASA and their agents, helpers, volunteers, and employees have civil immunity from liability if they perform their duty in good faith. Ind.Code 31-17-6-8.

In cases where an attorney is engaged as counsel, the attorney is faced with a clear mandate to abide by the client's (e.g., child's) wishes. This is as required by Indiana Rule of Professional Conduct 1.2(a), which states as follows:

**(a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . . Rule 1.2(a).**

Obviously, this representation would be limited by the scope of other professional rules governing the general nature of the representation. Beyond this, the lawyer may find some protection in the rule allowing for mandatory or permissive withdrawal. Rule. 1.16, *supra.*

Lastly, in certain factual circumstances the lawyer may be able to meet the conflicting legal duty to his client and what is the child's best interests, if the client qualifies ethically as a client under a diminished capacity under Indiana Rule of Professional Conduct 1.14.

### V. Conclusion.

In the right circumstance, a GAL may be a choice the lawyer wants to consider requesting. In other matters, the GAL will already be appointed. It is important to understand the precise role of the GAL and also be aware that in some legal areas (such as with a molestation allegation), a GAL may be completely the wrong choice and make matters worse.

## D. Considerations in Removal of Children from Jurisdiction

### A. Uniform Child Custody Jurisdiction Act.

#### 1. Introduction.

Prior to the 1968, multiple states often exercised jurisdiction in child custody cases, which was tantamount to encouraging child abduction, interstate transportation of same, and other self-help remedies: classic forum shopping. Moreover, a parent who took such illicit action had a very good chance of maintaining custody and obtaining a decree.

In response to same, the National Conference of Commissioners on State Laws drafted the Uniform Child Custody Jurisdiction Act, which was ultimately adopted in all states, although

with some irregularities and variances between states.

To the present, this was re-codified in 1997 and known as the Uniform Child Custody Jurisdiction Law (known as the "UCCJL"). Ind.Code 31-17-3-1 to 31-17-3-25 (repealed). Again, the act was re-codified as the Uniform Child Custody Jurisdiction Act (herein "UCCJA") in Indiana effective July 1, 2007.Ind.Code § 31-21-1-1 *et. seq.*

Inasmuch, the lawyer should determine which version of the uniform act applies. *In re the Guardianship of T.W.*, 875 N.E.2d 826 (2007) (memorandum decision–not for publication). Moreover, variances, if any, between such should be considered when reviewing caselaw.

The purpose of the UCCJA is to determine jurisdiction where there are cases with interstate dimensions. Typically, the parents live in different states. Under the UCCJA, in these cases each respective trial court must determine whether it has jurisdiction and, if it does, whether to exercise that jurisdiction. *Christensen v. Christensen*, 752 N.E.2d 179, 182 (Ind.Ct.App.2001).

### 2. Statutory Law.

As noted, the UCCJA is a uniform act adopted and enacted in all states in some fashion. It is substantially developed by caselaw and may work in companion with the Parental Kidnaping and Abduction Act (herein "PKPA"). In custody cases with international components, the UCCJA may be applied in some fashion. Ind.Code § 31-21-1-3. Most of the central terms of this act are defined therein.

### 3. Jurisdictional Bases for Application.

The UCCJA is applicable to a court of the state which is statutorily competent to hear and decide child custody cases in **initial or modification** proceedings. This must be determined to begin UCCJA analysis in state-to-state conflicts (Exhibit "4" for current Indiana jurisdictional statutes).

#### a. Initial Custody Determination.

In initial custody determination contexts, the UCCJA applies pursuant to the controlling statute:

> "(a) Except as otherwise provided in section 4 of this chapter, an Indiana court has jurisdiction to make an initial child custody determination only if one (1) of the following applies: (1) Indiana is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six (6) months before the commencement of the proceeding, and the child is absent from Indiana but a parent or person acting as a parent continues to live in Indiana. (2) A court of another state does not have jurisdiction under subdivision (1) or a court of the home state of the child has declined to exercise jurisdiction on the ground that Indiana is the more appropriate forum under section 8 or 9 of this chapter, and: (A) the child and the child's parents, or the child and at least one (1) parent or person acting as a parent, have a

significant physical connection with Indiana other than mere physical presence; and (B) substantial evidence is available in Indiana concerning the child's care, protection, training, and personal relationships. (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that an Indiana court is the more appropriate forum to determine the custody of the child under section 8 or 9 of this chapter. (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3). (b) The jurisdictional requirements described in this section provide the exclusive jurisdictional basis for making a child custody determination by an Indiana court. (c) Physical presence of, or personal jurisdiction over, a party or child is not necessary or sufficient to make a child custody determination." Ind.Code § 31-21-5-1.

After an Indiana court (or court of another state) has made an initial custody determination, it retains continuing jurisdiction, as follows:

"(a) Except as otherwise provided in section 4 of this chapter, an Indiana court that has made a child custody determination consistent with section 1 or 3 of this chapter has exclusive, continuing jurisdiction over the determination until: (1) an Indiana court determines that (I) the child; (ii) the child's parents; nor (iii) any person acting as a parent; has a significant connection with Indiana; and (B) substantial evidence is no longer available in Indiana concerning the child's care, protection, training, and personal relationships; or (2) an Indiana court or court or another state determines that (A) the child; (B) the child's parents; and (C) any person acting as a parent; do not presently reside in Indiana. (b) An Indiana court that (1) has made a child custody determination; and (2) does not have exclusive, continuing jurisdiction under this section; may modify the determination only if the Indiana court has jurisdiction to make an initial determination under section 1 of this chapter." Ind.Code § 31-21-5-2.

**<u>b.</u> <u>Modification of Determination.</u>**

After a custody order is made and entered, an Indiana court, or court of another state, which did not issue the order cannot modify same, save in narrow statutory circumstances, as follows:

"Except as provided in section 4 of this chapter, an Indiana court may not modify a child custody determination made by a court of another state unless an Indiana court has jurisdiction to make an initial determination under section 1(a)(1) or 1(a)(2) of this chapter and: (1) the court of the other state determines that: (A) it no longer has exclusive, continuing jurisdiction under section 2 of this chapter; or (2) an Indiana court or court of the other state determines that: (A) the child; (B) the child's parents; and (C) any person acting as a parent; do not presently reside in the other state." Ind.Code § 31-21-5-3.

**<u>c.</u> <u>Temporary Emergency Jurisdiction.</u>**

In certain emergency situations, a trial court may have temporary emergency jurisdiction

of children located within the state, but this is beyond the scope of this seminar. Ind.Code § 31-21-5-4.

### d. Summary of Bases of Jurisdiction.

From the foregoing statutes, it may be distilled that an Indiana trail court may have jurisdiction under the UCCJA to make or modify a child custody order in the following circumstances:

- **Home state jurisdiction:** Indiana is the child's home state at the commencement of the proceedings or had been within six months before commencement and the child is absent from Indiana because of wrongful removal. Ind.Code § 31-21-5-1(a)(1).

- **Significant connection and substantial evidence jurisdiction:** Indiana has a significant connection with the child, even if it is not the child's home state. Ind.Code § 31-21-5-1(a)(2).

- **Default Jurisdiction (a/k/a Last Resort)** In this type of matter, a trial court is not faced with an emergency, and no other state assumes jurisdiction, but the state is not the child's home state nor, one to which the child has a significant connection, although a custody determination needs to be made. Ind.Code § 31-21-5-1(a)(3).

- **Continuing modification jurisdiction (is not considered an independent basis in some legal texts).** This type of jurisdiction applies only to modification of existing orders and refers to the continuing jurisdiction of the state to do so. Ind.Code § 31-21-5-2,3.

- **Emergency jurisdiction:** With this basis of jurisdiction, a child may be present in Indiana, and not be the child's home state, or a state to which the child has a significant connection. Typically, this is an abandoned child or a child that needs protection from abuse. Ind.Code § 31-21-5-4.

## 4. Other Considerations.

Central to this NBI seminar, the practitioner should be aware that the UCCJA has international application. Namely, an Indiana court shall treat a foreign country as if it were a state of the United States, but there are defenses to same. Ind.Code § 31-21-1-3. Also, an Indiana court may enforce an order for return of a child made under the Hague Convention on the Civil Aspects of International Child Abduction. Ind.Code § 31-21-6-1.

## 5. Operational Example.

A number of operational consideration must be made with any potential conflicting interstate custody litigation, including, but not limited to, stays, communication, and registration

of orders.

[See Handout]

### 5. Conclusion.

The UCCJA is one (1) of at least three (3) bodies of law to address custody cases of interstate or international dimensions. This is a complex area that requires due consideration and attention to be a successful advocate.

## B. Parental Kidnaping Prevention Act.

### 1. Introduction.

In 1980, the Congress also acted on problem of interstate custody disputes, all by enacting the PKPA into law. 28 U.S.C.A. 1738A. That is, the UCCJA did not resolve all jurisdictional disputes, and the PKPA was enacted to attempt to remedy same. Typically, the UCCJA is the primary resource to consider in interstate custody cases.

The PKPA, being federal law, takes precedent over state law, although it does not pre-empt the field. The PKPA only comes into play when there is already an existing custody decree, and a party is trying to enforce same in another state. Pursuant to PKPA and under the Constitution, another state's decree must be given full faith and credit.

Unlike the UCCJA, the PKPA does not apply to international cases. Thus, for domestic custody cases, the UCCJA or the PKPA are available bodies of law to consider. For international cases, the UCCJA or the Hague Convention on the Civil Aspects of Child Abduction are sources of controlling law.

In this section, a summary is provided of the differences between the UCCJA and the PKPA.

### 2. United States Code.

Practically applied, the UCCJA and PKPA differences are now analyzed. First, given the PKPA's promise of full faith and credit, where there is home state jurisdiction, it is the preferred basis of initial jurisdiction.

With such, it eliminates the possibility of "home state" versus "significant connection/substantial evidence" in concurrent jurisdiction disputes. A "home state" custody decree is entitled to full faith and credit even over a decree entered by a state acting with "significant connection/substantial evidence" jurisdiction.

In addition, the PKPA bars concurrent exercise of jurisdiction where custody litigation is pending in a child's "home state".

Second, the PKPA provides that from the time a "home state" enters a custody decree, it retains exclusive jurisdiction of the case including in modification matters even if the child and custodial parent no longer live in that state, son long as the non-custodial parent lives there and there is any basis under state law for custody jurisdiction to lie.

**3. Examples.**

**a. Case study.**

[See Handout]

**b. Recent Indiana case.**

*Cox v. Cantrell*, 866 N.E.2d 798 (Ind.Ct.App.2007), *reh'g denied, trans. denied.* [Discussed at NBI and Handout]

**4. Conclusion.**

By way of summary, the UCCJA and PKPA apply to custody cases with interstate dimensions. Where there is a conflict between the UCCJA and the PKPA, the PKPA controls. Under the PKPA, and order issued in a "home state" jurisdiction is given full faith and credit even over a custody order of a court entering same under the "significant connection/substantial evidence" basis of UCCJA jurisdiction. The UCCJA may have application to modification of international custody orders, subject to certain defenses and exceptions.

**C. The Hague Convention.**

**1. Introduction (What is The Hague and The Hague Convention?).**

The author finds that the terms "The Hague" and "The Hague Convention", in respect to certain child-custody abduction matters are used very imprecisely. Such is the point of departure in this primer, as the lawyer must understand The Hague" and the "The Hague Convention" concepts in order to properly and fully advocate for his/her client.

The Netherlands has a long-standing historical status, much like Switzerland, as a neutral in international conflicts. As such, its third-largest city, The Hague, which was founded in 1248 by William II, County of Holland and *Rex Romanorum*, has been the primary location for diplomatic and international conferences and conventions since at least 1899, when it hosted an international peace conference.

At present, The Hague is the central base of operations for over 150 international organizations. Perhaps the most notable are the International Court of Justice and the International Criminal Court. War crimes tribunals are commonly associated with The Hague in present day.

With regard to international child abduction, it necessary to understand the Hague

Conference on Private International Law (herein "HCPIL")[2], which seeks to "rationalize" certain aspects of civil law between signatories. This is an international treaty organizations that handles/manages a number of conventions (agreements) between nations. These conventions are numbered in order (the lower the number, the older the convention).

Operationally, a Hague Convention is convened and the parties negotiate a given treaty. This is signed by State and then ratified by its government. Thus, it applies only between States that have signed and ratified the particular Hague Convention.

Convention No. 28, which was an intergovernmental agreement reached and signed at The Hague on October 15, 1980, by the HCPIL, is formally known as The Hague Convention on Civil Aspects of International Child Abduction (herein "The Hague No.28 (1980) or "Convention"). It became effective on December 1, 1983.

The Convention consists of six (6) chapters containing 45 articles (or effectively paragraphs), which are enumerated as follows:

- Chapter 1: Scope of the Convention.
- Chapter 2: Central Authorities.
- Chapter 3: Return of Children.
- Chapter 4: Rights of Access.
- Chapter 5: General Provisions.
- Chapter 6: Final Clauses.

The objectives of The Hague No. 28 (1980) are two-fold and are set out in Article 1; first it is to secure the prompt return of children wrongfully removed to or retained in any contracting State; second, The Hague No. 28 (1980) is to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State. Convention, Article 1.

The United States deposited its instrument of ratification of the Convention on April 29, 1988. The Hague No. 28 (1980), became force of law in the United States on July 1, 1988. 42 U.S.C.A. 11601-11610. The federal ratification and enabling legislation was titled the International Child Abduction Remedies Act, Pub.L. No. 100-300, 102 Stat. 437 (codified, and as amended 42 U.S.C.A. 11601 *et. seq.*

In simple terms, it governs and addresses legal issues related to the prompt return of children under 16 years of age to their state of "habitual residence" who have been taken across international borders. More precisely, it is a contract between certain Member States (countries)

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[2] It has drafted and coordinated over forty (40) Hague Conventions.

who were parties to The Hague No. 28 (1980) to address children wrongfully removed to or retained in any Contracting States. Under the Convention, both **administrative and judicial remedies** are available and they are not mutually exclusive (filing an Application and litigation). Alternatively, it provides a right of access to the child taken to another country.

Not all of the Member States to The Hague No.28 (1980) have been effectively approved/recognized by the United States as a party thereto. The Department of State reviews other Member States who agree to The Hague No.28 (1980), and reviews such in sequential order.

### 2. Definitions.

Not all terms are defined in the Convention directly or indirectly, but are augmented by caselaw, statutory law, and administrative definitions. Central terms likely to be encountered are generally defined/explained as follows:

Accession State. Any State may become a Contracting State by virtue of accession to the Convention by tender of an instrument of accession and deposit of same with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. This makes them a Contracting State to the Convention, but such is not binding upon the accession until it is accepted by each other Contracting State. Convention, Article 38.

Applicant. The term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed, or retained, or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention. 42 U.S.C.A. 11602(1).

Child. The Convention shall apply to any child who was habitually resident in a Contacting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen (16) years. Convention, Article 4.

Contracting State. A "Contracting State" is a state that is a Member State or Accession State that has agreed to be bound by the contractual terms of the HCPIL's Convention, although until ratified and approved by other States, it is not binding between two (2) States.

Central Authority. A "Central Authority" is division of a State designated by same to handle Application for Convention assistance. The Central Authority cooperates with other Contracting States' Central Authorities and with authorities within their own State to effectuate relief under the Convention. Convention, Article 7. In the United States, this is the Department of State as designated by the President. 42 U.S.C.A. 11602(9). This was done by Ronald Regan by Executive Order No. 12648.

Convention. The term "Convention" means the Convention of the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980. 42 U.S.C.A. 11602(2).

Habitual Residence. The term "Habitual Residence" is not defined in the Convention. The Sixth Circuit of Appeals has developed a flexible definition of this term that has been followed by several courts: "habitual residence pertains to [the child's] customary residence prior to the removal." *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

Member State. A "Member State" is a nation or regional economic integration organization that belong to the HCPIL. A current list of member states can be found on the website of the Permanent Bureau (secretariat) of the HCPIL database at www.incadat.com. However, this term may be more narrowly utilized with respect to the Convention and include Member States of the HCPIL at the time of its Fourteenth Session wherein The Hague No.28 (1980) was drafted. Convention, Article 37, Article 38, Article 45.

Petitioner. The term "Petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention.

Person. The term "Person" includes any individual, institution, or the Convention.

Respondent. The term "Respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention. 42 U.S.C.A. 11602(6).

Right of Custody. This term is precisely defined in the Convention. "Rights of Custody" shall include rights relating to the care of the person of the child and, in particular, the right to determination of the child's place of residence. Convention, Article 5.

Right of Access. This term is precisely defined in the Convention. "Rights of Access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence. Convention, Article 5. *See also,* 42 U.S.C.A. 11602(7).

State. The term State is not defined in the Convention. However, it is clear that this is a sovereign nation. In the context of litigation for relief under the Convention within the United States, the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States. 42 U.S.C.A. 11602(8).

### 3. Regions of Concentrated Non-Member States.

Non-member States of the HCPIL, and those who have typically not accessed to the Convention are clustered by geographic region. They primarily include the following:

- Middle East.
- Africa.
- Asia.

### 4. Procedure.

Although there is no specific and precise means under which to invoke the Convention, the following are typical steps to follow in the United States.

Step #1, Administrative Relief.

In order to invoke The Hague No.28 (1980) to secure the prompt return of or access to children wrongfully removed to or retained in any Contracting State (the United States), the party should complete an application for return or access to the children by applying to the Central Authority. Convention Article 8, Article 21.

In the United States, this is the U.S. Department of State, Office of Children's Issues, Bureau of Consular Affairs. The form is available on-line at the State Department, and is titled Application Under the Hague Convention on the Civil Aspects of International Child Abduction. (Exhibit "5" for Application). The Application shall contain the following:

- Information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child.

- Where available, the date of birth of the child.

- The grounds on which the applicant's claim for return of the child is based.

- All available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. Convention, Article 8.

In addition, the Application may be supplemented by the following:

- An authenticated copy of any relevant decision or agreement.

- A certificate or affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the law of that State.

- Any other documents. Convention, Article 8.

Step #1, Judicial Relief.

As noted, the administrative remedy of filing an Application with the Central Authority is not the exclusive means of redress of a wrongfully removed child. A petitioner may bring a suit for return under the Convention in state or federal Court. 42 U.S.C.A. 11603 (a).

Step #2, Return Court Order.

The custody/visitation rights need not have been via a formal adjudication (just actually exercising a "right of custody" at the time of the abduction) at the time of the wrongful removal or retention, but should be established in the forum where the child was wrongfully removed from, with this court communicating with the Central Agency. Convention, Article 4, Article 7, Article 15.

Step #3, Enforcing Right of Return/Access.

The Central Authorities of the respective countries work together to effectuate return or visitation or access through administrative and judicial channels. The specific procedures for such differ in each country.

**5. Practice Tips/Matters.**

**a. Does The Hague No. 28 (1980) apply to the wrongful removal or retention in all cases of international dimension?**

No. The Hague No. 28 (1980) only applies to address a wrongful removal or retention when both States involved have ratified the Convention with respect to each other. Also, where a State is not a member of the HCPIL, accedes to The Hague No. 28 (1980), the other contracting state must specifically declare its acceptance of the accession. Therefore, where a country has acceded to The Hague No. 28 (1980), but the other state has not accepted the accession yet (or at all), the Convention does not apply. Convention Articles 35, 38.

**b. Does the anticipated litigation focus on the merits of an international child custody dispute?**

No. The Convention is not substantive or jurisdictional law for determination of an international custody dispute. Central to its stated objectives, the Convention seeks to promptly restore the status quo that existed before the wrongful removal or retention. The state or federal court is merely to determine under this Convention's requirements whether the child is to be returned.

**c. Where is a Petition filed under the Convention?**

A petition is filed in state or federal court. An Application for return is tendered to the Central Authority.

**e. Are there language requirements for an Application?**

Yes. Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English. Convention, Article 24.

**g. Are there any time limitations?**

Yes. Judicial or administrative relief must be sought within one (1) year to compel the

Contracting State where the child has been wrongfully removed or retained to return him/her. Article 12.

**h. Are there defenses to Convention return?**

Yes. Both under the Convention and federal law, there are a number of defenses. An attorney representing the respondent in state or federal court or with regard to an Application made to a Central Authority should be cognizant of same. This may provide relief. There is also a significant amount of state and federal caselaw that may provide guidance and development of defenses.

**6. Resources.**

[Handout]

**7. Cases of Non-Application of the Convention.**

In cases where an international child abduction is not covered by the Convention, there are still a number of potential courses of action. The Department of State provides a summary overview of legal processes on their website.

## E. The Changing Rights of Grandparents and Third Parties

[This section will be covered by Melanie Reichert in Section VIII, Subsection "C"]

## F. How Domestic Violence Complicates Child Custody

A domestic violence allegation, charge, or conviction ***dramatically*** complicates any custody case, depending more or less on the factual, procedural, and substantive orientation of the case. Any practitioner facing such must very carefully determine the orientation of the case and what his/her precise role is to be, given the client and objectives (at least identifying for the client important, conflicting objectives), and at least do enough research into the facts and law of these types of cases, to ***minimally*** know when he/she does not know. The case is no longer simple and straight forward (if such exists in domestic), but instead is a piece of complex litigation with conflicting law, legal advice, and courses of action.

In this section, the Author, who has handled many such cases, and observed other attorneys, both criminal and civil, handle a/the case(s) so poorly as to reach the level of ineffective assistance of counsel under the *Strickland* test (a violation of the United States Constitution) and/or commit malpractice and violate thereby the most basic ethical rule requiring competence, enumerates the top ten (10) mistakes/issues/considerations these types of cases raise. Each is discussed herein to aid the attendee in understanding this very complex area. While this will not equip the practitioner to handle all of such cases, it will provide useful skills to aid in the attorney-client relationship should same arise:

1. Information Overload/Management.

2. Legal Timing.

3. Environment Fostering False Allegation.

4. Concurrent/Multiple Jurisdiction/Litigation.

5. Fifth Amendment Privilege Application in Civil Contexts.

6. Parties Who Reconcile.

7. False Memory Issues Unique to Young Children.

8. Supervised Visitation Presumption.

9. Competency of and Risks Related to Incompetent and/or Ill Qualified "Official" Actors.

10. Unified Plan for Each of the Cases and Collectively.

## EXHIBIT "4": INDIANA'S CURRENT UCCJA JURISDICTIONAL STATUTES

**31–21–5–1 Initial child custody determination**

Sec. 1. (a) Except as otherwise provided in section 4 of this chapter, an Indiana court has jurisdiction to make an initial child custody determination only if one (1) of the following applies:

(1) Indiana is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six (6) months before the commencement of the proceeding, and the child is absent from Indiana but a parent or person acting as a parent continues to live in Indiana.

(2) A court of another state does not have jurisdiction under subdivision (1) or a court of the home state of the child has declined to exercise jurisdiction on the ground that Indiana is the more appropriate forum under section 8 or 9 of this chapter, and:

(A) the child and the child's parents, or the child and at least one (1) parent or person acting as a parent, have a significant connection with Indiana other than mere physical presence; and

(B) substantial evidence is available in Indiana concerning the child's care, protection, training, and personal relationships.

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that an Indiana court is the more appropriate forum to determine the custody of the child under section 8 or 9 of this chapter.

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

(b) The jurisdictional requirements described in this section provide the exclusive jurisdictional basis for making a child custody determination by an Indiana court.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

*As added by P.L.138–2007, SEC.45.*

(d) If:

(1) there is a previous child custody determination that is entitled to be enforced under this article; or

(2) a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 1 through 3 of this chapter;

an order issued by an Indiana court under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 1 through 3 of this chapter.

(e) The order issued in Indiana remains in effect until an order is obtained from the other state within the period specified or the period expires.

(f) An Indiana court that has been asked to make a child custody determination under this section, on being informed that:

(1) a child custody proceeding has been commenced in; or

(2) a child custody determination has been made by;

a court of a state having jurisdiction under sections 1 through 3 of this chapter, shall immediately communicate with the other court.

(g) An Indiana court that is exercising jurisdiction under sections 1 through 3 of this chapter, on being informed that:

(1) a child custody proceeding has been commenced in; or

(2) a child custody determination has been made by;

a court of another state under a statute similar to this section, shall immediately communicate with the court of the other state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

*As added by P.L.138–2007, SEC.45.*

### 31–21–5–2 Exclusive, continuing jurisdiction

Sec. 2. (a) Except as otherwise provided in section 4 of this chapter, an Indiana court that has made a child custody determination consistent with section 1 or 3 of this chapter has exclusive, continuing jurisdiction over the determination until:

(1) an Indiana court determines that:

(A) neither:

(i) the child;

(ii) the child's parents; nor

(iii) any person acting as a parent;

has a significant connection with Indiana; and

(B) substantial evidence is no longer available in Indiana concerning the child's care, protection, training, and personal relationships; or

(2) an Indiana court or a court of another state determines that:

(A) the child;

(B) the child's parents; and

(C) any person acting as a parent;

do not presently reside in Indiana.

(b) An Indiana court that:

(1) has made a child custody determination; and

(2) does not have exclusive, continuing jurisdiction under this section;

may modify the determination only if the Indiana court has jurisdiction to make an initial determination under section 1 of this chapter.

*As added by P.L.138–2007, SEC.45.*

### 31–21–5–3 Modification of determination

Sec. 3. Except as provided in section 4 of this chapter, an Indiana court may not modify a child custody determination made by a court of another state unless an Indiana court has jurisdiction to make an initial determination under section 1(a)(1) or 1(a)(2) of this chapter and:

(1) the court of the other state determines that:

(A) it no longer has exclusive, continuing jurisdiction under section 2 of this chapter; or

(B) an Indiana court would be a more convenient forum under section 8 of this chapter; or

(2) an Indiana court or a court of the other state determines that:

(A) the child;

(B) the child's parents; and

(C) any person acting as a parent;

do not presently reside in the other state.

*As added by P.L.138–2007, SEC.45.*

### 31–21–5–4 Temporary emergency jurisdiction

Sec. 4. (a) An Indiana court has temporary emergency jurisdiction if the child is present in Indiana and:

(1) the child has been abandoned; or

(2) it is necessary in an emergency to protect the child because:

(A) the child;

(B) the child's sibling; or

(C) the child's parent;

is subjected to or threatened with mistreatment or abuse.

(b) If:

(1) there is no previous child custody determination that is entitled to be enforced under this article; and

(2) a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 1 through 3 of this chapter;

a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 1 through 3 of this chapter.

(c) If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 1 through 3 of this chapter, a child custody determination made under this section becomes a final determination, and, if it so provides, Indiana becomes the home state of the child.

**EXHIBIT "5": APPLICATION UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

U. S. Department of State

OMB NO. 1405-0076
EXPIRES 10-31-2009
Estimated Burden - 1 Hour*

# APPLICATION UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

*FILL OUT ALL SECTIONS ON BOTH SIDES*
**Provide Information Below to the extent that it is available.*

This is an application for the ☐ **Return** ☐ **Access** to the child/children listed below.

## I. FIRST CHILD SUBJECT OF APPLICATION

| Child's Name *(Last, First, MI.)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth |
|---|---|---|---|
| Address *(At Time of Removal)* | | U.S. SSN* | Passport/Identity Card*<br>Country<br>Number |
| Address and Telephone Number of Child's Current Location *(If Known)* | | | Citizenship (s) |
| Height | Weight | Color of Hair | Color of Eyes |
| Name of Child's Father if not Listed in Section II or III. | | Name of Child's Mother if not Listed in Section II or III. | |

## II. APPLICANT (PERSON SEEKING RETURN OF/ACCESS TO CHILD/CHILDREN)

| Name *(Last, First, MI)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth |
|---|---|---|---|
| Relationship to Child/ren | Citizenship(s) | U.S. SSN* | Passport/Identity Card*<br>Country<br>Number |
| Current Address, Telephone, Number, and Email Address | | | Occupation |
| Name, Address, and Telephone Number or Legal Advisor* | | | |

## III. PERSON ALLEGED TO HAVE WRONGFULLY REMOVED OR RETAINED THE CHILD/CHILDREN

| Name *(Last, First, MI)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth |
|---|---|---|---|
| Relationship to Child/ren | Citizenship(s) | U.S. SSN* | Passport/Identity Card*<br>Country<br>Number |
| Occupation, Name, and Address of Employer *(If Known)* | | | Known Aliases |
| Address and Telephone Number of Current Location | | | |
| Height | Weight | Color of Hair | Color of Eyes |

## IV. ADDITIONAL CHILD/CHILDREN Subject of Application

| Child's Name *(Last, First, MI)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth | |
|---|---|---|---|---|
| Address *(At Time of Removal)* | | U.S. SSN* | Passport/Identity Card* Country Number | |
| Address and Telephone Number of Child's Location *(If Known)* | | | Citizenship(s) | |
| Height | Weight | Color of Hair | | Color of Eyes |
| Name of Child's Father if not Listed in Section II or III. | | Name of Child's Mother if not Listed in Section II or III. | | |
| Child's Name *(Last, First, MI)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth | |
| Address *(At Time of Removal)* | | U.S. SSN* | Passport/Identity Card* Country Number | |
| Address and Telephone Number of Child's Current Location *(If Known)* | | | Citizenship(s) | |
| Height | Weight | Color of Hair | | Color of Eyes |
| Name of Child's Father if not Listed in Section II or III. | | Name of Child's Mother if not Listed in Section II or III. | | |
| Child's Name *(Last, First, MI)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth | |
| Address *(At Time of Removal)* | | U.S. SSN* | Passport/Identity Card* Country Number | |
| Address and Telephone Number of Current Location *(If Known)* | | | Citizenship(s) | |
| Height | Weight | Color of Hair | | Color of Eyes |
| Name of Child's Father if not Listed in Section II or III. | | Name of Child's Mother if not Listed in Section II or III. | | |
| Child's Name *(Last, First, MI)* | | Date of Birth *(mm-dd-yyyy)* | Place of Birth | |
| Address *(At Time of Removal)* | | U.S. SSN* | Passport/Identity Card* Country Number | |
| Address and Telephone Number of Current Location *(If Known)* | | | Citizenship(s) | |
| Height | Weight | Color of Hair | | Color of Eyes |
| Name of Child's Father if not Listed in Section II or III. | | Name of Child's Mother if not Listed in Section II or III. | | |

ADDITIONAL SHEETS MAY BE ATTACHED

## V. TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION

Additional sheets may be attached.

## VI. FACTUAL AND LEGAL JUSTIFICATION FOR THE REQUEST

Habitual Residence *(Please provide details related to the child's place of habitual residence.)*

Basis of Applicants's Custody Rights

Supporting Documentation *(Please check applicable boxes and attach.)*

- ☐ Law/Statute of Child's Residence at Time of Alleged Removal or Retention
- ☐ Court Order in Effect at Time of Alleged Removal or Retention
- ☐ Legally Binding Agreement
- ☐ Marriage Certificate, If Applicable
- ☐ Child's Birth Certificate, Required
- ☐ Other ______________________________

Are civil proceedings currently in progress? *(If yes, please provide details.)*

ADDITIONAL SHEETS MAY BE ATTACHED

## VII. PROPOSED ARRANGEMENTS FOR RETURN TRAVEL OF CHILD/CHILDREN

## VIII. OTHER PERSONS WITH ADDITIONAL INFORMATION RELATING TO THE WHEREABOUTS OF THE CHILD/CHILDREN

**Preferably, in country of child's current location. Please include, name, address, telephone number, and /or email address.**

## XI. OTHER RELEVANT INFORMATION

| Signature of Applicant *(Sign in Blue Ink)* | Date *(mm-dd-yyyy)* |
|---|---|
| | |

**PRIVACY ACT AND PAPERWORK REDUCTION ACT STATEMENTS**

This information solicited on this form is requested under the authority of the International Child Abduction Remedies Act, Public Law 100-300. The primary purpose for soliciting the information is to evaluate applicants' claims under the Hague Convention on the Civil Aspects of International Child Abduction, advise applicants about available legal remedies, and locate abducted children. The principal users of this information are offices within the U.S. Department of State's Bureau of Consular Affairs. The information will be used to assist in facilitating operations under the Convention and may be provided to governments of member countries, bar associations and legal aid services, local police, social service agencies, and parents. This information may also be released on a need-to-know basis to other government agencies, including foreign agencies, having statutory or other lawful authority to gain access to such information. Furnishing your social security number, as well as the other information requested on this form, is voluntary. However, failure to submit this form or to provide all the requested information may result in delay in the processing of your application.

*Public reporting burden for this collection of information is estimated to average 1hour per response, including time required for searching existing data sources, gathering the necessary data, providing the information required, and reviewing the final collection. You do not have to provide this information requested if the OMB approval has expired. Send comments on the accuracy of this estimate of the burden and recommendations for reducing it to: U.S. Department of State (A/ISS/DIR), 1800 G Street, Washington, DC 20520.