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Ethical Considerations In Divorce

Submitted by Bryan Lee Ciyou

IV. ETHICAL CONSIDERATIONS IN DIVORCE

written materials by Bryan Lee Ciyou and Julie C. Dixon

A. Application of the Rules of Professional Conduct in Family Law.

This ethics discussion begins with the Indiana Rules of Professional Conduct. In order for ethics to be effectively engaged in the emotionally charged nature of domestic practice, it is important that the lawyer understand the overall purpose of the Rules.

They are guidance for the lawyer for conduct in working through the complex facts of cases, without the need of outside intervention, in a competent and timely manner, in professional way, to the end of working toward the client's legal objectives. And they do so with commentary of practical application.

This is best stated in the Preamble to the Rules of Professional Conduct:

> " . . . .The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through the disciplinary agencies. They are not designed to be a basis for civil liability, but these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client."
>
> **Practice Tip:** Any lawyer who is not reading, or at least frequently referencing, the Rules is not professionally developing with rule changes and contingencies of practice. They provide tremendous guidance and clarity with regard to the complexities of modern-day practice. In many respects, the rules provide safe-harbors for actions and omissions by lawyer's in certain complex situations.

This noted, a critical point for the practitioner to grasp is that the Rules interplay with local rules, caselaw and the like. The ethical rules simply do not stand alone for determining appropriate conduct.

For example, take Rule 1.16, addressing permissive and mandatory withdrawal. It specifically integrates ethical conduct on following local rules and guidance of the trial court, as follows:

> "(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

In attorney fee issues, such as the reasonableness thereof, the courts look to the Rules for guidance. A number of components for what may be considered in the reasonableness of a fee are set out in that rule. Caselaw and local rules also apply.

Practice Tip (Annual Report of Disciplinary Commission): Fortunately, the data

gathered by the Disciplinary Commission shows that statistically very few lawyers engage in conduct that raises a serious issue of misconduct. This noted, the areas that are problematic or basis for grievance are well organized and presented in each annual report of the Disciplinary Commission. The 2008-2009 Annual Report of the Disciplinary Commission of the Indiana Supreme Court is enclosed at **Exhibit "I" (Annual Report)**. Given the time burden of responding to any grievance and the cost in insurance, every lawyer would do well to review these. During the seminar, several issues set out in the Annual Report that are related to this topic area will be addressed.

Ultimately, if not resolved, the domestic matter may play out through the courtroom, where a number of ethical rules should be considered by the lawyer regarding trials, including those precisely incorporated and those of usual application, as follows:

- Rule 1.1. Competence.
- Rule 1.3. Diligence.
- Rule 3.1. Meritorious Claims and Contentions.
- Rule 3.2. Expediting Litigation.
- Rule 3.3. Candor Toward the Tribunal.
- Rule 3.4. Fairness to Opposing Party and Counsel.
- Rule 3.5. Impartiality and Decorum of the Tribunal.
- Rule 3.6. Trial Publicity.
- Rule 3.7. Lawyer as Witness.

B. IOLTA Rules.

The IOLTA rules and requirements are set out in the publication of the Indiana Supreme Court Disciplinary Commission, *Trust Account Management Handling Client and Third Party Funds* (ISC, January 8, 2007). **EXHIBIT "II" (ISC's Trust Account Manual).**

C. Attorneys' Fees.

1. Introduction.

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

Excessive fee matters accounted for 99, or 4.9% of the grievances filed against lawyers for the Disciplinary Commission 2007-08 reporting year. **EXHIBIT "II"** (2008-2009 Annual

Report of the Disciplinary Commission of the Supreme Court of Indiana). If the lawyer is to ethically charge and collect his/her fee, and avoid unnecessary liability, the rules must be understood and practically applied.

In complicated and complex domestic cases, which may embody several companion matters, legal fees and expenses may range in the tens of thousands of dollars. To begin, the materials start with the ethical rule itself (it is well to note the commentary to the rules provides a substantial amount of supplemental material and should be considered).

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

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

> "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (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.
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or

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

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

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

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

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

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

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

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

(3) the total fee is reasonable." Indiana Rule of Professional Conduct 1.5 (2010).

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

A number of important ethical concepts may be distilled from Rule 1.5; and a practitioner is handling complex and/or protracted domestic litigation would do well to carefully consider applying these throughout his/her practice, from initial client contact, contract, and by considerations if the case has unforseen permutations.

These are enumerated as follows:

- Reasonableness of fee.

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

A critical distinction is a reasonable legal fee to charge may not be a reasonable fee award; this may be far less.

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

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

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

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

- Scope of representation. Rule 1.5(b).

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

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

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

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

- Change in basis or rate of fees.

A lawyer shall communicate with the client in the event of a change in the basis or rate of fees. Some domestic cases may go on for years and the attorney is well advised to have a provision to allow for adjustment to market rates. Rule 1.5(b).

- Domestic contingent fees generally prohibited.

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

4. Selected Reported Disciplinary Decisions on Fees.

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

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

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

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

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

Domestic cases provide many potential practice traps for practitioners. An example of this is found in a case for discussion at this NBI seminar on advanced family law. In *McClure & O'Farrell, P.C. v. Grigsby*, 918 N.E.2d 335 (Ind.Ct.App.2009), the firm was sued by former client's wife. The basis of the legal contention was that the firm had acted unreasonably in

opposing the wife's petition for an accounting of the firm's services to her deceased and estranged husband in their divorce proceedings. The trial court awarded fees, but the Court of Appeals reversed.

- Client's attorney fees are not protected by the attorney-client privilege.

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

6. Local Rules.

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

7. Conclusion.

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

D. Conflicts of Interest.

1. 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.

2. 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." Indiana Rule of Professional Conduct 1.7 (2010).

b. Specific Conflicts of Interest with Current Clients, Rule 1.8.[1]

(a) A lawyer should not enter into a business transaction with a client or knowingly acquire an ownership, possessory, 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

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[1] 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.

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.

(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 to preclude 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." Indiana Rule of Professional Conduct 1.8 (2010).

c. Conflicts of Interest with Former Clients, Rule 1.9.

"(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." Indiana Rule of Professional Conduct 1.9 (2010).

3. Common Areas of Conflict of Interest for Domestic Relations Attorneys.

There are a number of types of matters that cause potential or actual conflicts of interests for attorneys and they are discussed, along with remedies/courses of action.

a. Client under a diminished capacity.

b. Attorney for child/GAL.

c. Prior representation.

d. Companion cases.

e. Third parties paying.

f. Sexual relations with clients.

- **Practice Points:** Never (EVER) conduct client meetings alone.

- **Practice Points:** In re SM (10:00 p.m. meeting).

E. Confidentiality.

1. Introduction.

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

2. Controlling Rule of Professional Conduct, Rule 1.6.

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

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

(b) A lawyer may not reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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

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

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

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

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

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

(c) In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's name and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files." Indiana Rule of Professional Conduct 1.6 (2010).

3. Advanced Considerations.

- Support Staff.

The discussion of this topic will focus on the ethical rules governing use of non-lawyer assistants.

- Administrative Rule 9.

In a significant case determining the composition of Adm. Rule 9, the Indiana Court of Appeals decided *In re the Paternity of K.D.* 2010 WL 2590546 (Ind.App) (not certified as of the time these materials were sent to press).

- Third Parties.

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

Perhaps the most common is a third-party payor. In this circumstance, the lawyer must account for maintaining client confidentiality. This is addressed in Rule 1.8(f).

This requires that a lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information related to representation of a client is protected as required by Rule 1.6.

4. Conclusion.

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

F. What to Do When You Think the Client is Lying.

1. Introduction.

The first component of any given legal representation should be the lawyer's due diligence. In addition, where a client may lie, the lawyer must be cognizant of the Fifth Amendment Privilege if applicable. In addition, the ultimate relief may be found through the permissive or mandatory withdrawal provisions of the Rules.

2. Rule of Professional Conduct 1.16.

Rule of Professional Conduct 1.16 is set forth in full, as follows:

"(a) Except as stated in paragraph (c), 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.
(c) 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." Indiana Rule of Professional Conduct 1.16 (2010).

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.[2]

The 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,

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[2] Not all examples and cases are domestic in nature, but are supplied for general educational purposes.

in fact, he did, but simply did not want to abide by same. To continue would have resulted in the motion (i.e., moving to set aside) 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.

The 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.

The lawyer 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.

The 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.

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

The client has used lawyer's services to perpetrate crime.

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

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

The 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.

In any notice of withdrawal, the lawyer should consider the following:

- Trial Rule 3.1(E).

- Local rules.

4. Fifth Amendment Privilege.

In the circumstance a client gets to place in sworn testimony where he/she must either tell the truth and acknowledge a crime, or misrepresent and commit perjury, the attorney must understand and assert the Fifth Amendment Privilege, as it applies in civil proceedings. *Ingram v. City of Indianapolis*, 759 N.E.2d 1144, 1149 (Ind.Ct.App.2001). However, the assertion of such does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify.

Spousal Support

Submitted by Bryan Lee Ciyou

VII. SPOUSAL SUPPORT

written materials by Bryan Lee Ciyou and Julie C. Dixon

A. Waiver of Spousal Support in the Marital Agreement.

The central consideration of a waiver of spousal support in a marital agreement is to ensure, in the correct case, it was not an omitted term, subjecting the agreement to later challenge under Trial Rule 60(B). In addition, the language of maintenance has tax implications, bankruptcy implications, and the like. This area should be entered into with caution, employing the appropriate professionals for consideration, including financial advisor, tax consult, and bankruptcy considerations.

B. Spousal Support in the Event of Cohabitation.

By definition, a "spouse" is a party married in Indiana subject to rights and remedies in a dissolution context. Where that has not occurred, but cohabitation has inextricably linked parties, the Indiana courts have addressed division of assets, liabilities (to the extent this includes support, this is the provision) under express contract, or equitable theories such as implied contract or unjust enrichment. *Bright v. Kuehl,* 650 N.E.2d 311, 315 (Ind.Ct.App.1995).

C. Provisions and Timelines for Self-Support Resumption.

1. Introduction.

Spousal support provisions arise in three (3) distinctly different contexts in Indiana dissolution cases. Determining which applies is the threshold matter to properly handling spousal support.

Structure, language, and otherwise may have tax consequences. This is an easy mistake to make, and in cases of high enough worth, a tax consult should be considered. Also, the impact, if any, of a future bankruptcy filing may be considered. Finally, insuring the maintenance may also be critical.

2. Agreements (Contracts).

The first, and most expansive, is provisions set out by contract. In a preliminary or final context, the parties are generally free to enter into support provisions beyond what the Court could order under the Dissolution Act. In fact, they are encouraged under the divorce statutes. Ind.Code § 31-15-2-17.

3. Pendency Orders.

There is a precise statute that affords trial courts wide discretion in ordering maintenance during the pendency of a divorce, as follows:

"In an action for dissolution of marriage . . .or legal separation . . .either party may file a motion for any of the following: (1) Temporary maintenance. . . ." Ind.Code § 31-15-4-1(a)(1).

"(a) The court may issue an order for temporary maintenance or support in such amounts and on such terms that are just and proper. . . ." Ind.Code § 31-15-4-8.

In any circumstance, the provisional order is subject to re-argument and apportionment at a final hearing. Ind.Code § 31-15-4-13. Moreover, a provisional order may be revoked or modified before a final hearing. Ind.Code § 31-15-4-15.

Finally, a provisional order terminates when the decree is entered subject to the right or appeal. Alternatively, it expires when the petition for dissolution or legal separation is dismissed. Ind.Code § 31-15-4-14.

4. Maintenance in Decree.

In Indiana, alimony is generally rejected. However, at it may be ordered, with findings in three (3) circumstances:

- The court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself/herself is materially affected, for the duration of same.

  This is a complex and advanced area and should include the following:

  - How to prove.
  - Disability insurance or social security consideration.
  - Medical records.
  - Various experts.

- The court finds the spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment.

- The court finds rehabilitative maintenance is necessary in an amount not to exceed three (3) years. Ind.Code § 31-15-7-2.

D. Standard of Living.

The standard of living relating to maintenance may be considered under any or all of the following legal considerations:

- Economic forecasts.
- Actuarial considerations.

- Child support policy of maintaining the child in the standard as if the parties had not divorced.

E. Overpayment Issues.

Under the code provisions for maintenance during the pendency or upon dissolution, there are mechanisms to address overpayment of maintenance. They follow:

In the preliminary context, maintenance overpayment may be mitigated or eliminated by accounting provisions as the matter pends or at final hearing (or through discovery).

With maintenance following the decree, provision should be addressed for monitoring of the physical or mental impairment of the spouse or child. This would necessitate continuing jurisdiction of the trial court.

TRUST ACCOUNT MANAGEMENT: HANDLING CLIENT AND THIRD PARTY FUNDS

By the Staff of the Indiana Supreme Court Disciplinary Commission

(Last updated: January 8, 2007)

I. Introduction

How Lawyers End Up with Client and Third Party Funds

A lawyer may end up with client and third party funds in his or her possession in a variety of ways. Probably the most common way is for a lawyer to receive a settlement or judgment check made payable to the lawyer, his or her client, and a subrogation lien holder in a personal injury action. Lawyers also end up with client and third party funds in other ways. In a divorce, a lawyer may be asked by the court to sell the real estate and hold the funds from the sale of the real estate until the court makes its final decision on the property settlement. A lawyer may also ask a client to give him an advance on the lawyer's fee and bill against this advance on an hourly basis. Another common way for lawyers to end up with client funds is for the lawyer to ask a client to give him or her an advance to pay the expenses of litigating a case.

These examples are not a comprehensive list of how a lawyer ends up with client and/or third party funds. There are numerous other ways that a lawyer may end up with client and/or third party funds in his or her possession. Because of their duties as fiduciaries, lawyers must treat these funds with special care. This special care begins with lawyers properly designating funds as belonging to the lawyer, the client, and to a third party. Lawyers' fiduciary duties also require lawyers to properly maintain client funds and third party funds separate from the lawyer's funds in a trust account. Lawyers' fiduciary duties are spelled out in several rules.

II. Rules and Statutes Pertaining to Trust Account Management

- Prof. Cond. R. 1.15[1]: Safekeeping Property (ATTACHMENT A)
- Prof. Cond. R. 1.16(d): Duty to refund unearned fees at the termination of representation
- Prof. Cond. R. 5.1: Responsibilities of a Partner or Supervisory Lawyer
- Prof. Cond. R. 5.2: Responsibilities of a Subordinate Lawyer
- Prof. Cond. R. 5.3: Responsibilities Regarding Nonlawyer Assistants
- Prof. Cond. R. 8.4(b): Misconduct; criminal acts
- Prof. Cond. R. 8.4(c): Misconduct; dishonesty, fraud, deceit or misrepresentation
- I.C. 35-43-4-2: Theft
- I.C. 35-43-4-3: Conversion
- Admis. Disc. R. 23, §29(a): Trust Account Recordkeeping Requirements (ATTACHMENT B)
- Admis. Disc. R. 23, §29(b) through (g): Trust Account Overdraft Notification (ATTACHMENT C)
- Admis. Disc. R. 23, §30: Audits of Trust Accounts (ATTACHMENT D)
- Rules Governing Attorney Trust Account Overdraft Reporting (ATTACHMENT E)

III. A Lawyer's Fiduciary Duties in Handling Client and Third Party Funds

A. What is a trust account?

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[1] All references to the Indiana Rules of Professional Conduct are to the rules as amended effective July 1, 2005.

Most trust account management obligations grow out of Prof. Cond. R. 1.15. Interestingly, Rule 1.15(a) does not mention trust accounts by name, it merely states that, "Funds shall be kept in a separate account . . . ." The Comment [1], however, provides: "All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property, and, if monies, in one or more trust accounts." See also, Admis. Disc. R. 23, §29(a)(1): "Attorneys shall deposit all funds held in trust in accounts clearly identified as 'trust' or 'escrow' accounts . . . ."

B. Key Fiduciary Principles

In general, lawyers act in a fiduciary relationship to their clients. Many of the general principles that apply to a fiduciary's duties in handling the principal's property apply with equal (if not greater) force to lawyers. "A lawyer should hold property of others with the care required of a professional fiduciary." Comment [1] to Prof. Cond. R. 1.15.

With respect to handling property of others, here are some key fiduciary principles. Each of these principles is embedded in Rule 1.15.

1. Duty to segregate: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Prof. Cond. R. 1.15(a).

2. Duty to safeguard: "Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded." Prof. Cond. R. 1.15(a).

3. Duty to promptly notify of receipt of funds: "Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person." Prof. Cond. R. 1.15(d).

4. Duty to promptly deliver funds: "Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . ." Prof. Cond. R. 1.15(d).

5. Duty to account: "[U]pon request by the client or third person, [a lawyer] shall promptly render a full accounting regarding such property." Prof. Cond. R. 1.15(d).

C. Prohibition against Commingling

The inverse side of the obligation to segregate client or third party funds is the prohibition against commingling. The concept of commingling is simple. Commingling is the simultaneous presence of funds belonging to a lawyer and a client or third party in the same account. When commingling occurs, there is a loss of identity of funds as between the lawyer and clients or third persons.

Commingling occurs anytime a lawyer's own funds are held in an account that also contains client or third party funds. Commingling can occur in two different ways. First, the lawyer

deposits his own funds into a trust account containing funds belonging to clients or third parties. Second, the lawyer deposits client or third party funds in an account that is not a trust account and that contains the lawyer's own funds.

1. Proper Identification of Trust Account

Part of the obligation to safeguard trust funds is the duty to assure that those funds are properly identified as such. It is insufficient for a lawyer to segregate trust funds in an account that is not properly designated as a trust account. The account must be formally designated a "Trust Account" or "Escrow Account." All documents associated with a trust account should indicate its trust nature by being properly labeled, including checks, deposit tickets, monthly bank statements. More importantly, the account must be identified as a trust account to the financial institution and the financial institution's records must reflect that it is a trust account. See Admis. Disc. R. 23, §29(a)(1). Thus, the lawyer's agreement with the bank[2] should clearly provide that it is a trust account.[3] This avoids any danger that the financial institution will freeze or attach the funds if proceedings supplementary to execution are filed by one of the lawyer's personal creditors or the bank exercises a set off against the funds upon a default on a personal obligation owed to the bank by the lawyer. It also assures that the funds in the account will not be considered a part of the lawyer's bankruptcy, probate or marital estate should the lawyer file for bankruptcy, die or divorce. It will also protect the funds from seizure by the IRS in the event of a levy against the lawyer.

2. Risks of Lawyer Commingling Money in Client Trust Account

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[2]For simplicity, financial institutions will be occasionally referred to as "banks." It is understood that lawyers may use a variety of financial institutions as depositories for their trust accounts, including banks, savings and loan associations, savings banks, credit unions and the like. See Admis. Disc. R. 23, section 29(g)(1).

[3]When opening a trust account, the bank is required to obtain a federal tax identification number or social security number from the lawyer or law firm for purposes of reporting interest (if any) to the Internal Revenue Service. How the lawyer handles this situation depends upon the circumstances. If the trust account is a non-IOLTA trust account that does not earn any interest, the lawyer may use his or her federal tax identification number or his or her own social security number. Because no interest will be earned or reported, there are no tax ramifications. If the trust account is an IOLTA account, the interest (less bank charges) will be paid over to the Indiana Bar Foundation pursuant to Prof. Cond. R. 1.15(f)(5)(A). For a discussion of the IOLTA program, see section III(E), infra. In this event, the lawyer will supply the Bar Foundation's federal tax identification number to the bank, and the bank will report the interest earned on the account to the IRS under the Bar Foundation's tax identification number. If a lawyer holds client funds that are not nominal in amount and not to be held for a short period of time, the lawyer may, in consultation with the client, determine to hold the funds in a separate interest-bearing account, with the interest, net of bank charges, accumulating for the benefit of the client. In this event, the lawyer **should not** use his or her tax identification or social security number on the account. If he or she does, the interest will be reported to the IRS as income of the lawyer or law firm. Instead, the lawyer should use the client's tax identification or social security number or apply for a separate federal tax identification number in the name of the client to assure that the interest is reported in the name of the client. The same rule applies to situations in which the lawyer controls an account as a fiduciary for a trust or an estate.

There are numerous risks that are imposed upon clients when a lawyer holds his own funds in a bank account that is denominated a trust account.

(a) There is the risk that the lawyer's personal creditors will be able to gain access to client funds in the trust account in order to satisfy the lawyer's personal obligations.[4]

(b) Negligent invasion of client funds. There is the problem that the lawyer is obligated to keep track of his or her own funds in the trust account, as well as funds of clients or third persons. Sloppiness in accounting or confusion in the identity of funds could lead to the reckless or negligent invasion of client funds when the lawyer innocently intends to access funds in the trust account erroneously thought to belong to the lawyer.

(c) A lawyer's tendency to look to the trust account as a source of funds that belong, in part, to the lawyer, may habituate the lawyer to draw funds from the account for personal use even when it does not contain funds belonging to the lawyer. A lawyer's use of client funds for his personal benefit is a criminal act. See, section VI, infra.

(d) Maintenance of a trust account is a public declaration that the funds in the account do not belong to the lawyer in his or her personal capacity. By placing or retaining his or her own funds in the trust account, the lawyer acts inconsistently with the established purpose of the account and, in effect, engages in misrepresentation to the world about the true purpose and function of the account.

(e) The lawyer who deposits or retains his or her own funds in a trust account invites the accusation that he is using the account to shield his personal assets from his own creditors. It may not be that every lawyer who commingles personal funds in a trust account intends to defraud creditors, but such an improper use is not without precedent.

(f) Especially by retaining earned fees in a trust account, a lawyer may be tempted to improperly use the trust account to shield income from recognition in the tax year received. Thus, the trust account is misused as a vehicle for defrauding the taxing authorities.

(g) Importance of promptly disbursing funds earned by the lawyer. When funds are paid into trust and the lawyer is entitled to a portion of those funds as a fee after there has been a division of interests as between the client and the lawyer, the lawyer should promptly withdraw his earned fees. If the lawyer delays withdrawing fees after they are earned, the retention of the earned fees in the trust account constitutes improper commingling.

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[4]The very nature of a fiduciary account is that it does not contain funds belonging to the fiduciary in any non-fiduciary capacity. It is certainly possible that a persistent personal creditor of a lawyer could discover the fact that the lawyer maintains personal funds in his trust account and argue persuasively that the account's fiduciary character should be disregarded because of the lawyer's failure to honor the obligation to segregate funds held in a fiduciary capacity from personal funds. In any event, there is the even greater risk, under these circumstances, that client funds will be frozen and unavailable to clients until there has been a full accounting and separation of the funds belonging to the lawyer from funds belonging to clients.

3. Risks of Lawyer Commingling Client Funds in Lawyer's Personal or Business Account

   (a) Client funds become available to the lawyer's personal creditors in the event of an attachment of those funds pursuant to proceedings supplementary to execution or otherwise under the Depository Financial Institutions Adverse Claims Act. IC 28-9-1-1, et seq. Even if the identity of the funds is later clarified, the client funds may be frozen for up to ninety (90) days by virtue of the automatic hold provision of IC 28-9-4-2.

   (b) Upon bankruptcy, dissolution of marriage or death of the lawyer, client funds may become a part of the lawyer's bankruptcy, marital or probate estate. Once again, there may eventually be a separation of interests in the funds, but in the meantime, client funds will be unavailable to their true owners.

   (c) Client funds are available to cover checks written for the personal benefit of the lawyer, resulting in conversion of client funds. See, section VI, infra.

D. Pooled trust accounts versus separate trust accounts.

Generally, funds held for clients that are small in amount or not being held for a substantial period of time will be combined into a pooled trust account. The administrative burden and costs of opening and maintaining a separate interest-bearing account for each client or sub-accounting for interest earned on a pooled account is generally not justified by the small amount of interest that could be earned on the funds. Notwithstanding the fact that the account is pooled, there must be sub-accounting methods in place (discussed below) that accurately account for each individual client's funds. When the lawyer is handling large amounts of client funds, especially for significant periods of time, the lawyer should consult with the client concerning whether or not that client's funds should be segregated into a separate trust account that earns interest. Any interest earned on trust funds belongs to the client, not to the lawyer. *Prof. Cond. R.* 1.15(f)(1); In re Pub. Law No. 154-1990, 561 N.E.2d 791 (Ind. 1990).

E. IOLTA Accounts.

Effective February 1, 1998, the Indiana Supreme Court promulgated rules creating an Interest on Lawyers Trust Account (IOLTA) program in Indiana. Prof. Cond. R. 1.15(f) through (i). Whereas previously lawyers generally pooled their trust funds in non-interest bearing accounts, under the IOLTA program lawyers are allowed to have their pooled trust accounts draw interest. The interest on trust funds in an IOLTA account does not belong to the lawyer, nor does it belong to the clients. Instead, by opening an IOLTA account, the bank is directed to pay the interest on the account over to the Indiana Bar Foundation to be used to fund law-related programs that are in the public interest. The IOLTA program has been designed in such a way as to make participation by lawyers very simple. Attached as ATTACHMENT F are materials produced by the Indiana Bar Foundation about the IOLTA program. More information is available on the IOLTA program by contacting the Indiana Bar Foundation or visiting its website at: www.inbf.org.

In late 2004, the Supreme Court announced a change to the Interest on Lawyers Trust Account (IOLTA) program to require that all lawyers who maintain pooled trust accounts participate in the IOLTA program. Press release, "Legal Aid to the Poor Gets Boost from Supreme Court: Court to Adopt Universal IOLTA Plan" (Nov. 23, 2004), available on-line at http://www.in.gov/judiciary/press/2004/1123b.html (last visited Oct. 4, 2005). On February 5,

2005, the Court ordered amendments to Prof. Cond. R. 1.15 implementing mandatory IOLTA participation, effective July 1, 2005. See, Attachment A.

F. Lawyers in Other Fiduciary Roles

When the lawyer holds funds in some capacity other than as an attorney acting in a representative capacity, e.g., as trustee of a trust or as personal representative of an estate, the lawyer should maintain a separate trust or escrow account for each such fiduciary role and should not intermingle those funds with client trust funds or with other similar fiduciary accounts.

G. Signatory Authority over Trust Accounts

Only lawyers admitted in Indiana should have signatory authority over a trust account. Admis. Disc. R. 23, sec. 29(a)(6), contemplates that a lawyer may designate an agent as a trust account signatory. It should only be in limited and highly controlled situations that a lawyer delegates signature authority over a trust account to a non-lawyer. In the event there is such a delegation, the lawyer must institute and maintain thorough internal controls to insure against the mishandling of funds. The lawyer must receive the monthly bank statement directly from the bank without it passing through the hands of the non-lawyer who is responsible for the day-to-day management of the trust account and carefully review the bank statement. Also, someone who has no signatory authority over the account must be responsible for periodic account reconciliations. See Rule 7(B)(2), Trust Account Overdraft Reporting Rules. Surety bonding for all employees who have control over the trust account should be obtained. Comprehensive staff training for all staff having functions relating to the management of a trust or other fiduciary account is essential.

H. Where Should Lawyers Maintain Client Trust Accounts?

The trust account must be at a financial institution located within the state of Indiana unless there is specific consent from all account beneficiaries to hold funds in an out-of-state bank. Prof. Cond. R. 1.15(a).

A lawyer must maintain his or her trust account only in a financial institution approved by the Disciplinary Commission. Approval is contingent upon the institution agreeing to provide notice to the Disciplinary Commission of all overdrafts on lawyer trust accounts. Admis. Disc. R. 23, § 29(b) through (g). A current list of approved financial institutions is available on the Disciplinary Commission's website at: http://www.in.gov/judiciary/discipline/docs/trust-account-depositories.pdf.

IV. Whose funds are these?

A good rule of thumb is to ask the question: "At this point in time, who owns these funds?" If the answer to that question is that the client or a third party owns the funds, the funds belong in trust. If the answer is the lawyer owns the funds, the funds do not belong in trust.

A. What funds must go into the trust account?

1. Advanced Expenses: Funds paid by the client to the lawyer to defray anticipated costs that will arise during the course of representation, e.g., filing fees, deposition costs, expert witness fees, belong in trust until disbursed to pay for those costs. *Prof. Cond. R.* 1.15(c).

2. Advanced Fees: Fee retainers that are in the nature of deposits to secure payment of fees to be earned by the lawyer in the future on an hourly basis must be deposited into the trust account, not the operating account. *Matter of Kendall*, 804 N.E.2d 1152, 1158 (Ind. 2004). See also, Prof. Cond. R. 1.15(c). These funds should be held in trust until fees are earned through hourly work or by whatever method is agreed upon with the client and the client is billed. Sufficient funds to satisfy the bill may be issued from the trust account to the lawyer or law firm by way of a properly documented trust check once the client has received a proper billing and the bill is shown to have been satisfied by a transfer from trust. In the event the client disputes the charges, the disputed fees should be immediately returned to trust until the dispute is resolved.

   By contrast, a flat fee, as is common in many criminal representations, need not be deposited into the trust account. *Kendall* at 1157. Flat fees are, generally, deemed to be earned when paid, and so flat fees should be deposited into the operating account. However, this does not relieve the lawyer of an obligation to promptly refund unearned fees and expenses upon being discharged by the client before the completion of the legal matter. See Prof. Cond. R. 1.16(d); *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). Upon being discharged before representation is complete, the lawyer's entitlement to fees is not pursuant to the fee contract, but is to be determined on a *quantum meruit* basis. *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind. 1999); *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315 (Ind.App. 1990). Nonrefundable retainers, while not prohibited under proper circumstances, or other types of minimum fee arrangements that create financial disincentives for a client to discharge counsel are of questionable validity. *In re Thonert*, 682 N.E.2d 522 (Ind. 1997). For a more in-depth discussion of nonrefundable retainers, see Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1 (1993).

3. Funds Belonging to Lawyer and Client: All funds in which the client, the lawyer, or third parties each claim an interest must be initially deposited into trust until such time as there is a division of interests in the funds. A good example is a personal injury settlement in the form of a check or insurance company draft made payable to the joint order of the client and the lawyer. These funds should be deposited to and held in trust until such time as a written disbursement statement is presented to and approved by the client showing all proposed disbursements and the net proceeds payable to the client. See Prof. Cond. R. 1.5(c).

4. Receipt of Aggregated Non-Trust and Trust Funds: Funds paid to the lawyer by a client in a single check or credit card transaction some of which belong in trust and some of which do not belong in trust should be initially deposited in trust and a trust account check written to promptly disburse the non-trust monies. Initial deposit of such a check or credit card transaction into an operating account should be avoided as it places those funds at risk, even if for a brief period of time.

5. Disputed Funds: All funds in which more than one person (including the lawyer) claim an interest should be held in trust until such time as there is a division of interests between or among the claimants. When a lawyer holds funds against which there is a valid security interest by a third party (e.g., subrogation lien, properly executed medical letter of protection), the lawyer should not issue the funds to the client, even though the client demands it, unless the competing, third party claim against the funds has been resolved. See, e.g., *In the Matters of Allen and Young*, 802 N.E.2d 922 (Ind. 2004). The lawyer may need to obtain assistance to mediate the dispute between the client and the third party or file an interpleader action to determine the respective rights and interests of the client and the

third party. On the other hand, if there is not a properly perfected security interest against the settlement, the lawyer should not disburse settlement funds to the client's creditors absent the express consent of the client.

6. Handling of Cash Belonging in Trust: Cash properly belonging in trust must not be held in a safe deposit box, a safe or any other supposedly "secure" place. A lawyer may not hold client funds in the form of cash without depositing them into trust. There is no audit trail or documented accountability for cash. Payments of cash to a lawyer for deposit into trust should be documented through the issuance of a receipt to the payor, with a copy retained by the lawyer, and promptly deposited.

B. What funds may go into the trust account?

Money to Defray Bank Service Charges: The lawyer may be able to arrange with a financial institution to not charge administration fees on a trust account. Even under this circumstance, it may be necessary for the lawyer to maintain $1.00 of personal funds in the account in order to keep it from being closed out during times when the account would otherwise have a zero balance. For non-IOLTA accounts, if there are monthly bank charges against a trust account holding pooled client funds, the lawyer should not allow them to be debited against the client funds that happen to be in the trust account on the day when the charges are debited. The bank may be willing to debit the trust account bank charges from another account containing the lawyer's personal or business funds. If such arrangements are not available, this is one exception to the general rule that the lawyer's own funds should never be held in trust. Prof. Cond. R. 1.15(c) recognizes this by allowing a lawyer to "deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account." In order to honor the proscription against maintaining a balance of lawyer funds that is not nominal, we recommend not holding in the trust account at any given time more than the estimated amount of funds necessary to defray bank charges for a three-month period. The balance of lawyer funds should be replenished approximately once every three months.

If a trust account is an IOLTA account, bank charges will usually be set off against interest. In the event the bank charges exceed the amount of interest earned on the account, those excess charges are not to be debited from the trust account principal, but are to be billed to the Indiana Bar Foundation.

There should be a subsidiary ledger reflecting the fact that the trust account contains funds belonging to the lawyer and that the purpose is to cover bank fees and charges or to maintain a nominal balance in order to keep the account open. Bank charges that are assessed against the account should be deducted from the balance on the lawyer's subsidiary ledger. Those funds should be replenished when they run too low to cover anticipated bank charges.

C. What funds must not go into the trust account?

1. Funds Belonging Exclusively to the Lawyer: Funds owned by the lawyer in which clients or third parties own no interest must not go into the lawyer's client trust account. The lawyer should never maintain a "cushion" of the lawyer's own funds in order to avoid overdrafts. Absent bank error, for which the lawyer has no responsibility, a properly managed trust account should never result in an ov erdraft.

2. Withdrawing Earned Fees from Trust Account: When there has been a division of interests in funds as among the lawyer, the client and any third parties, the lawyer's earned fees should be promptly withdrawn from trust. Maintaining earned fees in trust constitutes improper commingling. Generally, the best time to disburse earned fees is contemporaneously with disbursing net proceeds to the client.

3. Employee Payroll Taxes: Withheld employee payroll taxes must not be put into an attorney trust account. These are not funds being held in the lawyer's capacity as an attorney, but rather are being held pursuant to an employer-employee relationship. For business reasons, a lawyer/employer may wish to hold withheld taxes in a separate account, but it should not be the client trust account.

V. Handling Disbursements from Trust

A. Trust account disbursements should only be done by way of a fully documented transaction, i.e., a check made payable to a named payee or a bank wire transfer.

B. A trust check should never be made payable to cash or bearer.

C. Withdrawals from a trust account should never be made by way of a cash withdrawal from an automated teller machine.

D. Cash should never be received back at the time of making a trust account deposit. Rather, the entire check should be deposited into trust, and checks should be written for authorized disbursements.

E. Earned attorney fees should be paid out of trust in the form of a trust check written payable to the order of the lawyer or law firm and documented as being for earned fees. A trust check should never be issued directly to one of the lawyer's or law firm's personal creditors, even if it constitutes the disbursement of funds from trust that the lawyer has earned as fees. Rather, the entire amount of earned fees should be disbursed by check out of the trust account, deposited into the operating account, and checks written from the operating account to the lawyer's creditors.

F. Similarly, costs incurred by the lawyer on behalf of the client should be paid directly out of the trust account with a trust check payable to the order of the vendor of the goods or services. If the lawyer advances costs on behalf of the client, the check should be written out of the operating account because the advance is being made with the lawyer's funds.

VI. Conversion and Theft of Client and Third Party Funds

A. A lawyer's unauthorized use of client and/or third party funds will lead to serious disciplinary problems. A lawyer who is holding client or third party funds in his or her trust account must not invade those funds for any unauthorized purpose. A lawyer's unauthorized use of client or third party funds is a crime.

B. Ind. Professional Conduct Rule 8.4 (b) prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. I.C. 35-43-4-3 defines the crime of conversion as: "A person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion . . . ." I.C. 35-43-

4-2 defines the crime of theft as: "A person who knowingly or intentionally exerts unauthorized control over property of another person, with the intent to deprive the other person of any part of its value or use, commits theft . . . ." A lawyer who commits the crime of theft or conversion commits an act of dishonesty in violation of Ind. Professional Conduct Rule 8.4(c). *See*, e.g., *Matter of Towell*, 699 N.E.2d 1138, 1141 (Ind. 1998); *Matter of Wilson*, 715 N.E.2d 838, 841 (Ind. 1999).

C. Remember that a lawyer in possession of money belonging to a client or third party should never use those funds for his or her own benefit, for the benefit of another client, or for the benefit of anyone else. If a lawyer uses money belonging to a client or a third party for his own benefit, the benefit of another client, or anyone else, that lawyer commits the crime of conversion or theft. When a lawyer has possession of money belonging to a client or third party, he or she should never treat the money as his or her own. This money belongs in trust or should be paid to the appropriate party. Any other use of these funds, without authorization of the party who owns the funds, is a criminal act.

VII. Fundamental Concepts in Trust Account Management

A. Although client funds are often maintained in a pooled trust account, they must be treated as though each client's funds are held in a separate account.

1. The funds of one client can **never** be used to cover disbursements out of trust on behalf of another client.

2. The tool for maintaining the separate identity of each individual client's funds is a subsidiary ledger for each client who has funds in the trust account. Each client's subsidiary ledger must reflect all receipts and disbursements from the trust account on behalf of that client. It will indicate at all times the balance of funds held in the trust account on behalf of that client. Receipts to trust should not be recorded on the client ledger until they have been actually deposited. Disbursements from trust should not be made unless the client ledger has been checked to confirm that funds are available to support the disbursement. Some software accounting programs will not allow a disbursement from a client sub-account, even though there are sufficient funds to cover the disbursement in the trust account, unless there are sufficient funds on deposit attributable to that client sub-account. This is an excellent safeguard to avoid "robbing Peter to pay Paul."

B. Funds should never be paid out of trust on behalf of a client until the funds on which a trust check is written have been collected through banking channels. In other words, at the time funds are disbursed there should be minimal risk of a charge back to the trust account in the event a deposited instrument is not honored by the payor bank. Most banks will make deposited funds available for withdrawal on the first business day following the business day[5] on which the funds are deposited. This, of course, does not mean that a credited deposit will not be charged back to the account in the event the depository bank receives notice from the payor bank that the instrument has not been honored. Should a disbursement be made from the trust account in reliance on the deposit of funds that may

[5]Typically, business transacted after a defined point in time in the afternoon (typically 2:30 p.m.) will be considered a next business-day transaction by the bank.

yet be dishonored, the lawyer runs the risk that, upon a dishonored deposit being charged back to the trust account, other clients' funds will have been used to cover the disbursement. If there are not enough funds belonging to other clients in the trust account to cover the charge back, the account will go into overdraft status.[6] The best way to minimize the risks of a deposited item being dishonored and charged back to the trust account is to wait a prudent period of time before disbursing funds in reliance upon the deposited funds being good. An appropriate waiting period would be to follow the waiting periods defined by the Federal Reserve Board in Regulation CC for availability of funds. These waiting periods are set out below, but questions should be resolved by the lawyer consulting his or her banker or Regulation CC, 12 C.F.R. Part 229.

1. Funds available on the same business day as the business day of deposit:

   (a) Electronic direct deposits.

2. Funds available on the first business day after the business day of deposit:

   (a) U.S. Treasury checks payable to depositor.

   (b) Wire transfers.

   (c) Checks drawn on the depository bank.

   (d) Cash deposited in person with a bank employee.

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[6]It is not always possible to be 100% certain that deposited funds have been collected. One reason for this is that the banking system works in such a way that a depository bank is not notified when a deposited item has been honored by the payor bank. Rather, the depository bank will only receive notice from the payor bank if the instrument has been dishonored. Thus, the lawyer cannot contact his or her own bank and confirm that a deposited item has been collected. The only thing the depository bank will be able to report is that there has not been a notice of dishonor up to that point in time. The lawyer can always contact the payor bank and ask to confirm whether the item has been paid. For a more detailed discussion of the collection of bank deposits, see Robert D. Cooter & Edward L. Rubin, Orders and Incentives As Regulatory Methods: The Expedited Funds Availability Act of 1987, 35 UCLA L. Rev. 1115 (1988). See also, 12 CFR Part 229 (2004) (known generally as "Regulation CC--Availability of Funds and Collection of Checks"). At the extreme, if a deposited instrument has been forged, it could be several weeks before the victim of the forgery discovers it, the depository bank receives notice and charges the deposit back to the trust account. In the end, there is always some unavoidable, but miniscule degree of risk associated with the disbursement of funds upon the deposit of a check into a trust account. Use of conservative and prudent trust account management practices by the lawyer will minimize such risks. In the event a dishonor occurs that could not have been reasonably anticipated, resulting in the charge back of a deposit to a trust account, the lawyer will be faced with a confusing situation that will need to be promptly rectified in order to assure that other clients' funds have not been put at risk; however, culpability through the lawyer discipline system should not be one of the problems facing the lawyer at that point. Failure to use prudent trust account management practices, however, may be treated differently.

(e) State and local government checks payable to the depositor and deposited in person with a bank employee.

(f) Cashier's, certified, and teller's checks payable to the depositor and deposited in person with a bank employee.

(g) Federal Reserve Bank checks, Federal Loan Bank checks, and U.S. postal money orders payable to the depositor and deposited in person with a bank employee.

3. Funds available on the second business day after the business day of deposit:

(a) All instruments listed in paragraph 2(d) through (g) above that were deposited by some method other than delivery in person to an employee of the depository bank, e.g., deposit through an ATM or overnight deposit drop.

(b) All other local checks. A local check is a check written on a paying bank that is located in the same Federal Reserve check-processing region as the bank branch where the check is deposited. Your banker will be able to assist you in identifying local checks.

4. Funds available on the fifth business day after the business day of deposit:

(a) All other non-local checks. A non-local check is a check written on a paying bank that is located in a different check-processing region from the bank branch where the check is deposited.

5. Exceptions. The foregoing are general guidelines, and certain exceptions are applicable. The lawyer should check with his or her banker if there is any doubt about what availability period applies. Exceptional circumstances include:

(a) When your bank believes a deposited check will not be paid.

(b) When the lawyer deposits checks totaling more than $5,000 on any one day.

(c) When the lawyer re-deposits a check that has previously been returned unpaid.

(d) When the lawyer has overdrawn his or her account repeatedly in the previous six months.

(e) The bank has an emergency, such as failure of communications or computer equipment.

C. The lawyer should never issue a post-dated trust check on the assumption that it will be presented on a future date after deposited funds have been collected. The reason for this is that the deposited instrument might be dishonored and the deposit not credited to the trust account or charged back against the trust account balance. Thus, unless the lawyer can get the post-dated trust check returned or is able to stop payment on it, it may be debited against other clients' funds in the trust account or may be dishonored due to insufficient funds in the trust account.

D. New Jersey has recognized a very narrow exception to the prohibition against disbursing deposited funds from trust until they are collected in cases where the deposited instrument is in the form of a certified, bank or cashier's check and the funds are received in connection with a real estate or commercial property closing. See New Jersey Advisory Opinion 454, 105 N.J.L.J. 441 (May 15, 1980), as amended at 114 N.J.L.J. 110 (August 2, 1984). A reprint of these ethics advisory opinions is attached as ATTACHMENT G. New Jersey Advisory Opinion 454 was cited favorably by the New Jersey Supreme Court in *In re Moras*, 131 N.J. 164 (1993). Indiana has no direct authority on point.

E. Always maintain an audit trail.

1. An audit trail consists of source documents that reflect all transactions into and out of a trust account. Source documents include:

   (a) Copy of the deposit ticket, deposit receipt or bank credit memorandum;

   (b) Bank statement showing the credit of deposited funds;

   (c) Checkbook stub or checkbook register;

   (d) Check or bank debit memorandum;

   (e) Bank statement showing the debit of disbursed funds.

2. Deposit tickets should be annotated to identify each deposited item (whether cash or instrument), the client's name (or file number) and the source of the funds. No unidentified cash deposits should be made into trust.

3. Checks should be annotated to identify the client's name (or file number) and the purpose of the check. No check should ever be written on a trust account without the memorandum line being filled out to clearly identify the purpose of the check.

4. The deposit ticket and the check should be annotated well enough to direct the lawyer to the client matter file corresponding to the receipt or disbursement. In turn, the client matter file or other accounting files should contain adequate documentation to fully explain all deposits or disbursements.

F. Records pertaining to the handling of client trust funds must be maintained for a period of five years following termination of representation. Prof. Cond. R. 1.15(a); Admis. Disc. R. 23, sec. 29(a)(2) (effective January 1, 1997).

VIII. Mechanics of Trust Account Maintenance

The following is an outline of the steps lawyers should take maintain their client trust account. This outline is not a comprehensive discussion on the law of client trust accounts; it is intended as a guide for how a lawyer should handle trust account transactions.

A. Handling Deposits: When a lawyer receives funds in which a client or third party have an interest, the lawyer should immediately contact the client or third party to obtain the necessary endorsements. Then, the lawyer should deposit the client or third party funds into

his trust account. The lawyer should make an entry in the checkbook registry, the trust receipt book, and the client's subsidiary ledger. The lawyer should keep the following documents to record this transaction: deposit ticket (keep a copy), checkbook register, entry in trust receipts book, and entry in client's subsidiary ledger.

1. Receipt of funds.

2. Promptly notify client and obtain necessary endorsements.

3. Deposit into trust account.

   (a) Deposit slip prepared.

   (b) Funds deposited.

   (c) Checkbook register entry is made.

   (d) Duplicate deposit slip is maintained.

4. Entry is made into trust receipts book (see example at ATTACHMENT H).

5. Entry is made into client's subsidiary ledger (see example at ATTACHMENT I).

B. Handling Disbursements: After the funds have been collected by the bank (See, section VII (B) supra), the lawyer should promptly disburse the funds to the client and/or third party with the consent of the client. If the client refuses to consent to disburse funds owed to a third party, the lawyer should hold these funds in trust until the dispute between the client and the third party has been resolved. The lawyer should have the client consent to disburse the funds in writing. In case of a disbursement of funds from a contingent fee matter, the lawyer is required to provide the client with a written settlement statement showing the remittance to the client (See, Prof. Cond. R. 1.5(c)). After obtaining the consent of the client, the lawyer should prepare, sign, and issue the appropriate check(s). The lawyer should make an entry in the checkbook registry, trust disbursements book, and the client's subsidiary ledger. The lawyer should keep the following documents to record this transaction: check(s) (keep a copy), checkbook register, entry in trust disbursements book, and entry in client's subsidiary ledger.

   1. Documentation supporting disbursement is received or created.

   2. Disbursement is made promptly after receipt of funds, once deposited funds are collected and the client has consented to the same.

      (a) Check is prepared and signed by lawyer.

      (b) Check is issued.

      (c) Checkbook register entry is made.

   3. Entry is made into trust disbursements book (see example at ATTACHMENT J).

   4. Entry is made into client's subsidiary ledger (see example at ATTACHMENT I).

C. Monthly Reconciliation and Trial Balances: Lawyers should do a monthly reconciliation of their trust account records. This monthly reconciliation is a three-way check to verify the accuracy of trust account records (See ATTACHMENTS K and L for examples).

1. Step 1: The balance of all trust receipts and disbursements is reconciled to the total of all individual client ledger balances.

2. Step 2: The total of all individual client ledger balances is reconciled to the checkbook register balance.

3. Step 3: The checkbook register balance (as adjusted for outstanding checks and deposits in transit) is reconciled to the balance on the monthly trust account bank statement.

IX. Other Issues in Trust Account Management

A. Interest on Trust Accounts.

1. Unless it is an IOLTA account, a pooled trust account should not be interest bearing. If a non-IOLTA trust account does earn interest, the interest belongs *pro rata* to the clients or third parties whose funds earned the interest, and not to the lawyer. *In re Pub. Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990). Thus, if the account is interest bearing, the lawyer will have the affirmative obligation to sub-account for the interest so that each person who had funds in trust during any part of the month in which interest is paid is credited with a *pro rata* share of the interest. The administrative costs of sub-accounting for the interest will typically outweigh the benefit to the account beneficiaries. Thus, rather than incur these administrative costs, pooled trust accounts are typically held in non-interest bearing accounts.

2. It may be cost beneficial for trust funds to be held at interest in a separate trust account for clients whose funds are being held in trust for a long period of time or where a substantial amount of client money is being held, even for a shorter period of time. These situations should be handled on a case-by-case basis in consultation with each individual client.

3. In no event should the lawyer treat any interest earned on trust funds as the lawyer's own funds. To do so would constitute conversion of those funds.

4. On October 22, 1997, the Indiana Supreme Court issued rules to implement an Interest on Lawyer's Trust Accounts ("IOLTA") program effective February 1, 1998. These rules are at found Indiana Rule of Professional Conduct 1.15(f) through (i). For a discussion of IOLTA, see materials in ATTACHMENT E. Generally speaking, by participating in the IOLTA program, a lawyer is allowed to earn interest on his or her pooled trust account so long as the interest proceeds, generally after setting off bank administrative charges against interest, are paid in to the IOLTA program, which is administered by the Indiana State Bar Foundation. The Indiana IOLTA program applies universally to all lawyers who operate trust accounts in their law practices, thereby making participation mandatory.

B. Trust Account Overdraft Reporting

1. Effective July 1, 1997, all Indiana lawyer trust accounts were required to be maintained in financial institutions that have been approved by the Disciplinary Commission for that purpose. Admis. Disc. R. 23, §29(a)(1). A bank will be approved as a depository for lawyer trust accounts upon entering into an agreement with the Disciplinary Commission to report to the Commission all overdrafts on any trust account. An overdraft occurs whenever any properly payable instrument is presented against a trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Admis. Disc. R. 23, §29(b). Thus, if the lawyer maintains a line-of-credit or some other back-up source of funds to cover overdrafts (a practice that should not be followed), there will still be an overdraft that will be reported to the Disciplinary Commission if the line of credit needs to be accessed to cover a shortfall. There will also be an overdraft report even though the bank exercises the business judgment to honor a check and allow the account to have a negative balance.

2. It is not the bank's obligation to guess whether or not an account is subject to overdraft reporting. Rather, it is the lawyer's obligation to provide notice to the bank of any accounts that are properly subject to overdraft reporting. Each lawyer associated in practice who shares a trust account has a joint and several responsibility to see to it that the bank receives the proper notice. See, *Matter of Anonymous*, 734 N.E.2d 583 (Ind. 2000). An account is subject to overdraft reporting if it includes funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Admis. Disc. R. 23, §29(a)(1). Thus, if a lawyer is acting purely in a fiduciary capacity that is not related to a legal representation, the fiduciary account is not subject to overdraft reporting. However, if the lawyer is acting in a legal representation capacity and also serves in another fiduciary capacity, the account is subject to overdraft reporting.

3. Upon receipt of a notice of overdraft, the Disciplinary Commission will send notice to the lawyer that a written and documented explanation of the overdraft is required within a period of ten (10) business days. After review of the explanation and such other materials as may be requested by the Commission, the inquiry will either be closed with a notice to the lawyer providing the reason for closure, or the inquiry will be referred to the members of the Disciplinary Commission to consider whether or not the circumstances of the overdraft should result in a formal investigation into possible lawyer misconduct. Attached as ATTACHMENT M is a report of the results of bank overdraft reports for the period from July 1, 1997 through June 30, 2006.

C. Unclaimed Trust Funds

1. Every effort should be made to promptly forward trust funds to their rightful owner. If a lawyer does not have a good reason to keep funds in trust, those funds should be promptly disbursed to their rightful owners so that the lawyer is relieved of the obligation to safeguard and account for the funds. It may happen occasionally that the lawyer loses track of a client and cannot pay funds from the trust account to the client. In these instances, the lawyer should proceed pursuant to the terms of IC 32-34-1-1, *et seq.*, the Unclaimed Property Act.

RULE 1.15. SAFEKEEPING PROPERTY (without comments)

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance in a client trust account.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Except as provided in paragraph (g) of this rule, a lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time so that they could not earn income for the client in excess of the costs incurred to secure such income (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

(1) Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income. A lawyer or law firm shall establish a separate interest-bearing trust account for clients' funds which are neither nominal in amount nor to be held for a short period of time and which could earn income for the client in excess of costs for a particular client or client's matter. All of the interest on such account, net of any transaction costs, shall be paid to the

client, and no earnings from such account shall be made available to a lawyer or law firm.

(2) No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

(3) The IOLTA account shall include all clients' funds which are nominal in amount or to be held for a short period of time.

(4) An IOLTA account may be established with any financial institution (i) authorized by federal or state law to do business in Indiana, (ii) insured by the Federal Deposit Insurance Corporation or its equivalent, and (iii) approved as a depository for trust accounts pursuant to *Indiana Admission and Discipline Rules*, Rule 23, Section 29. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay and without risk to principal by reason of said withdrawal.

(5) Participating financial institutions shall maintain IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account. All interest earned net of fees or charges shall be remitted to the Indiana Bar Foundation (the "Foundation"), which is designated in paragraph (i) of this rule to organize and administer the IOLTA program, and the depository institution submits reports thereon as set forth below.

(6) Lawyers or law firms depositing client funds in an IOLTA account established pursuant to this rule shall, on forms approved by the Foundation, direct the depository institution:

(A) to remit all interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, solely to the Foundation. The depository institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the depository institution must provide, for each individual IOLTA account, the

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information to the lawyer or law firm and to the Foundation required by subparagraphs (f)(6)(B) and (f)(6)(C) of this rule;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and such other information as is reasonably required by the Foundation;

(C) to transmit to the depositing lawyer or law firm a periodic account statement for the IOLTA account reflecting the amount of interest paid to the Foundation, the rate of interest applied, the average account balance for the period for which the interest was earned, and such other information as is reasonably required by the Foundation; and

(D) to waive any reasonable service charge that exceeds the interest earned on any IOLTA account during a reporting period ("excess charge"), or bill the excess charge to the Foundation.

(7) Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.

(8) The IOLTA program will issue refunds when interest has been remitted in error, whether the error is the bank's or the lawyer's. Requests for refunds must be submitted in writing by the bank, the lawyer, or the law firm on a timely basis, accompanied by documentation that confirms the amount of interest paid to the IOLTA program. As needed for auditing purposes, the IOLTA program may request additional documentation to support the request. The refund will be remitted to the appropriate financial institution for transmittal at the lawyer's direction after appropriate accounting and reporting. In no event will the refund exceed the amount of interest actually received by the IOLTA program.

(9) All interest transmitted to the Foundation shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by the Foundation and approved at least annually by the Supreme Court of Indiana, for the following purposes:

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(A) to pay or provide for all costs, expenses and fees associated with the administration of the IOLTA program;

(B) to establish appropriate reserves;

(C) to assist or establish approved pro bono programs as provided in Rule 6.5;

(D) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

(10) The information contained in the statements forwarded to the Foundation under subparagraph (f)(6) of this rule shall remain confidential and the provisions of Rule 1.6 (Confidentiality of Information), are not hereby abrogated; therefore, the Foundation shall not release any information contained in any such statement other than as a compilation of data from such statements, except as directed in writing by the Supreme Court.

(11) The Foundation shall have full authority to and shall, from time to time, prepare and submit to the Supreme Court for approval, forms, procedures, instructions and guidelines necessary and appropriate to implement the provisions set forth in this rule and, after approval thereof by the Court, shall promulgate same.

(g) Every lawyer admitted to practice in this State shall annually certify to this Court, pursuant to Ind.Admis.Disc.R. 23(21), that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm so that they could not earn income for the client in excess of the costs incurred to secure such income are held in an IOLTA account, or that the lawyer is exempt because:

(1) the lawyer or law firm's client trust account has been exempted and removed from the IOLTA program by the Foundation pursuant to subparagraph (f)(7) of this rule; or

(2) the lawyer:

(A) is not engaged in the private practice of law;

(B) does not have an office within the State of Indiana;

(C) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

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(D) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;

(E) has been exempted by an order of general or special application of this Court which is cited in the certification; or

(F) compliance with paragraph (f) would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographic distance between the lawyer's principal office and the closest depository institution which is participating in the IOLTA program, or on other compelling and necessitous factors.

(h) In the exercise of a lawyer's good faith judgment in determining whether funds of a client can earn income in excess of costs a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures;

(3) the capability of a financial institution, a lawyer or a law firm to calculate and pay income to individual clients;

(4) any other circumstances that affect the ability of the client's funds to earn a net return for the client; and

(3) the nature of the transaction(s) involved.

The determination of whether a client's funds are nominal or short-term so that they could not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(i) The Foundation is hereby designated as the entity to organize and administer the IOLTA program established by paragraph (f) of this rule in accordance with the following provisions:

(1) The Board of Directors of the Foundation (the "Board") shall have general supervisory authority over the administration of the IOLTA program, subject to the continuing jurisdiction of the Supreme Court.

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(2) The Board shall receive the net earnings from IOLTA accounts established in accordance with paragraph (f) of this rule and shall make appropriate temporary investments of IOLTA program funds pending disbursement of such funds.

(3) The Board shall, by grants, appropriations and other appropriate measures, make disbursements from the IOLTA program funds, including current and accumulated net earnings, in accordance with the plan of distribution approved by the Supreme Court from time to time referenced in subparagraph (f)(8) of this rule.

(4) The Board shall maintain proper records of all IOLTA program receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant selected by the Board. The Board shall annually cause to be presented to the Supreme Court a reviewed or audited financial statement of its IOLTA program receipts and expenditures for the prior year. The report shall not identify any clients of lawyers or law firms or reveal confidential information. The statement shall be filed with the Clerk of the Supreme Court and a summary thereof shall be published in the next available issue of one or more state-wide publications for attorneys, such as *Res Gestae* and *The Indiana Lawyer*.

(5) The president and other members of the Board shall administer the IOLTA program without compensation, but may be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties, and shall be indemnified by the Foundation against any liability or expense arising directly or indirectly out of the good faith performance of their duties.

(6) The Board shall monitor attorney compliance with the provisions of this rule and periodically report to the Supreme Court those attorneys not in compliance with the provisions of Rule 1.15.

(7) In the event the IOLTA program or its administration by the Foundation is terminated, all assets of the IOLTA program, including any program funds then on hand, shall be transferred in accordance with the Order of the Supreme Court terminating the IOLTA program or its administration by the Foundation; provided, such transfer shall be to an entity which will not violate the requirements the Foundation must observe regarding transfer of its assets in order to retain its tax-exempt status under the Internal Revenue Code of 1986, as amended, or similar future provisions of law.

Amended Oct. 22, 1997, effective Feb. 1, 1998. Amended and effective Sept. 30, 1998. Amended and effective Oct. 29, 1999; amended Sep. 30, 2004, effective Jan. 1, 2005; amended February 9, 2005, effective July 1, 2005.

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ADMISSION AND DISCIPLINE RULE 23

DISCIPLINARY COMMISSION AND PROCEEDINGS

Section 29. Maintenance Of Trust Funds In Approved Financial Institutions; Overdraft Notification.

(a) Clearly Identified Trust Accounts In Approved Financial Institutions And Related Recordkeeping Requirements.

(1) Attorneys shall deposit all funds held in trust in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts" and shall inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Commission.

(2) Every attorney shall maintain and preserve for a period of at least five (5) years, after final disposition of the underlying matter, the records of trust accounts, including checkbooks, canceled checks, check stubs, written withdrawal authorizations, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property held in trust.

(3) The "ledger" required by this rule shall set forth a separate record of each trust, client or beneficiary, the source of all funds deposited in that account, the names of all persons for whom the funds are, or were, held, the amount of such funds, the description and the amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed.

(4) All receipts shall be deposited intact, funds shall not be commingled with other funds of the attorney or firm, and records or deposits shall be sufficiently detailed to identify each item.

(5) Withdrawals shall be based upon a written withdrawal authorization stating the amount of the withdrawal, the purpose of the withdrawal, and the payee. The authorization shall contain the signed approval of an attorney. Withdrawals shall be made only by check payable to a named payee and not to "cash", or by wire transfer. Wire transfers shall be authorized by written withdrawal authorization and evidenced by a document from the financial institution indicating the date of the transfer, the payee and the amount.

ATTACHMENT B

(6) Only an attorney admitted to practice law in this jurisdiction or his or her designee shall be an authorized signatory on the account.

(7) Records required by this rule may be maintained by electronic, photographic, computer or other media provided they otherwise comply with this rule and provided further that printed copies can be produced.

(8) Upon dissolution of any partnership of attorneys or of any professional corporation of attorneys, the partners or shareholders shall make appropriate written arrangements for the maintenance of the records specified under this rule.

(9) Upon the disposition of a law practice, appropriate written arrangements for the maintenance of the records specified in this rule shall be made.

* * *

ATTACHMENT B

ADMISSION AND DISCIPLINE RULE 23.

DISCIPLINARY COMMISSION AND PROCEEDINGS

Section 29. Maintenance Of Trust Funds In Approved Financial Institutions; Overdraft Notification.

* * *

(b) *Overdraft Notification Agreement Required.* A financial institution shall be approved as a depository for trust accounts if it files with the Commission an agreement, in a form provided by the Commission, to report to the Commission whenever any properly payable instrument is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Commission shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not agree so to report. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days' notice in writing to the Commission.

(c) *Overdraft Reports.* The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors.

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(d) *Timing of Reports.* Reports under subsection (c) shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds.

(e) *Consent By Attorneys.* Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(f) *Costs.* Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable cost of producing the reports and records required by this rule.

(g) *Definitions.* For purposes of this rule:

(1) "Financial institution" means a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by attorneys.

ATTACHMENT C

(2) "Properly payable" means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.
(3) "Notice of dishonor" means the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.
(4) "Trust account" means any account maintained by an attorney admitted to practice law in the State of Indiana for the purpose of keeping funds belonging to clients or third parties separate from the attorney's own funds as required by Indiana Rule of Professional Conduct 1.15(a). It also means any account maintained by an attorney for funds held in trust in connection with a representation in any other fiduciary capacity, including as trustee, agent, guardian, executor, or otherwise.

ATTACHMENT C

ADMISSION AND DISCIPLINE RULE 23.

DISCIPLINARY COMMISSION AND PROCEEDINGS

Section 30. Audit of Trust Accounts

(a) *Generally*. Whenever the Executive Secretary has probable cause to believe that a trust account of an attorney contains, should contain, or has contained funds belonging to a client that have not been properly maintained or properly handled pursuant to Section 28, the Executive Secretary shall request the approval of the Commission to audit the accuracy and integrity of all trust accounts maintained by the attorney. In the event that the Commission approves, the Executive Secretary shall proceed to audit the accounts.

(b) *Confidentiality*. Investigations, examinations, and audits shall be conducted so as to preserve the private and confidential nature of the attorney's records insofar as is consistent with these rules.

ATTACHMENT D

INDIANA SUPREME COURT DISCIPLINARY COMMISSION
RULES GOVERNING
ATTORNEY TRUST ACCOUNT OVERDRAFT REPORTING

INTRODUCTION

The following rules and procedures, issued pursuant to the authority granted to the Indiana Supreme Court Disciplinary Commission by the Supreme Court of the State of Indiana in Admission and Discipline Rule 23, Sections 24 and 29(b), govern the administration of an attorney trust account overdraft reporting program in the State of Indiana.

Rule 1. Definitions

As used herein:

A. "Financial institution" means a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by attorneys.
B. "Trust account" means any account maintained by an attorney admitted to practice law in the State of Indiana for the purpose of keeping funds belonging to clients or third parties separate from the attorney's own funds as required by Indiana Rule of Professional Conduct 1.15(a). It also means any account maintained by an attorney for funds held in trust in connection with a representation in any other fiduciary capacity, including as trustee, agent, guardian, executor, or otherwise.
C. "IOLTA (Interest on Lawyer Trust Account)" means an attorney trust account in a financial institution pursuant to Professional Conduct Rule 1.15(f).
D. "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of Indiana.

Adopted Dec. 23, 1996, effective July 1, 1997; amended effective Apr. 20, 2005.

Rule 2. Approval of Financial Institutions

A. Indiana Admission and Discipline Rule 23, Section 29(a)(1) requires that attorneys maintain trust accounts only in financial institutions that are approved by the Disciplinary Commission. A financial institution shall be approved by the Disciplinary Commission as a depository for trust accounts if it files with the Disciplinary Commission a written agreement, in the form attached hereto as Exhibit A, whereby it agrees to report to the Disciplinary Commission whenever it has actual notice that any properly payable instrument is presented against a trust account containing insufficient funds, irrespective of whether or not the instrument is honored.
B. The written agreement of any financial institution is binding upon all branches of the financial institution.

ATTACHMENT E

C. The Disciplinary Commission will maintain a public listing of all approved financial institutions and will publish the same each year in the December issue of Res Gestae, the monthly journal of the Indiana State Bar Association. The names of approved financial institutions will be available at other times by written or telephone inquiry to the Disciplinary Commission.
D. The written agreement of any financial institution will continue in full force and effect and be binding upon the financial institution until such time as the financial institution gives thirty (30) days notice of cancellation in writing to the Disciplinary Commission, or until such time as its approval is revoked by the Disciplinary Commission.

Adopted Dec. 23, 1996, effective July 1, 1997.

Rule 3. Disapproval and Revocation of Approval of Financial Institutions

A. A financial institution shall not be approved in the first instance as a depository for trust accounts unless it submits to the Disciplinary Commission an agreement in the form attached hereto as Exhibit A that is binding upon all of its branches and signed by an officer with authority to act on behalf of the institution. The refusal of the Disciplinary Commission to approve a financial institution due to its failure or refusal to submit an executed written agreement in the form attached as **Exhibit A** is not appealable or otherwise subject to challenge.
B. The approval of a financial institution shall be revoked and the institution shall be removed by the Disciplinary Commission from the list of approved financial institutions if it engages in a pattern of neglect or acts in bad faith in not complying with its obligations under the written agreement.
C. The Executive Secretary shall communicate any decision to revoke the approval of a financial institution in writing by certified mail to the institution in care of the officer who signed the written agreement. The notice of revocation shall include a specific statement of facts setting forth the reasons in support of the revocation decision. Thereafter, the financial institution shall have a period of thirty (30) days from the date of receipt of the notice of revocation to file a written request with the Executive Secretary seeking reconsideration of the revocation decision. In the event an institution timely seeks reconsideration, the Disciplinary Commission shall appoint one of its members to act as hearing officer to take evidence. The Executive Secretary or designee shall act to defend the revocation decision. The hearing officer, after taking evidence, shall report findings and conclusions for review by the full Disciplinary Commission, whose decision in the matter shall be final. The approved status of a financial institution shall continue until such time as the reconsideration process is final.
D. Once the approval of a financial institution has been revoked, the institution shall not thereafter be approved as a depository for trust accounts until such time as the institution petitions the Disciplinary Commission for approval and includes within the petition a plan for curing any deficiencies that caused its earlier revocation and for periodically reporting compliance with the plan in the future.

Adopted Dec. 23, 1996, effective July 1, 1997.

ATTACHMENT E

Rule 4. Duty to Notify Financial Institutions of Trust Accounts

A. Every attorney shall notify each financial institution in which he or she maintains any trust account, as defined above, that the account is subject to the provisions of overdraft reporting. For each trust account, a lawyer or law firm shall maintain a copy of each such notice throughout the period of time that the account is open and for a period of five (5) years following closure of the account.
   1) For IOLTA accounts as required by Professional Conduct Rule 1.15(f), notice by the attorney to the financial institution that the account is an IOLTA account shall constitute notice to the financial institution that the account is subject to overdraft reporting to the Disciplinary Commission.
   2) For non-IOLTA trust accounts as permitted by Professional Conduct Rule 1.15(h), every attorney shall notify each financial institution that the account is subject to overdraft reporting to the Disciplinary Commission by submitting a notice in the form attached as **Exhibit B** for each such account to the financial institution in which the account is maintained.

B. In the case of a law firm that maintains one or more trust accounts in the name of the firm, only one notice from a member of the firm need be provided for each such trust account. However, every member of the firm is responsible for insuring that notice of each firm trust account is given to each financial institution wherein an account is maintained.

Adopted Dec. 23, 1996, effective July 1, 1997; amended effective Apr. 20, 2005.

Rule 5. Duty of Financial Institutions

A. Each financial institution shall report to the Indiana Supreme Court Disciplinary Commission any properly payable attorney IOLTA or non-IOLTA trust account instrument presented against insufficient funds as set forth in Indiana Admission and Discipline Rule 23, Section 29(b) through (g) and these rules irrespective of whether the instrument is honored.

B. No financial institution shall be responsible for forwarding a report of any overdraft on an account about which it has not received notice pursuant to Rule 4(A)(1) or (2), above, from the depositor attorney that it is a trust account subject to overdraft reporting.

Adopted effective Apr. 4, 2005.

Rule 6. Processing of Overdraft Reports by the Commission

A. Whenever the Disciplinary Commission receives an overdraft notice from a financial institution, the Executive Secretary shall send a letter to the depositor attorney seeking a documented explanation of the overdraft within ten (10) business days. This letter is a demand for information, noncompliance with which is a violation of Professional Conduct Rule 8.1(b). If bank error is claimed by the attorney, a written statement from a bank officer must be submitted with the explanation. If office error is claimed by the attorney, affidavits from the appropriate office personnel must be submitted with the explanation.

ATTACHMENT E

B. If the depositor attorney does not provide a timely explanation or if the explanation provided does not document the existence of bank error or isolated office inadvertence, the Executive Secretary shall present the matter to the full Disciplinary Commission to consider the issuance of a grievance pursuant to Indiana Admission and Discipline Rule 23, Section 10(a). Thereafter, the procedures of Admission and Discipline Rule 23 for the processing of grievances shall apply.

Adopted Dec. 23, 1996, effective July 1, 1997; amended effective Apr. 4, 2005.

Rule 7. Miscellaneous Matters

A. Any attorney who is admitted to practice law in another jurisdiction having attorney trust account overdraft notification rules that are substantially similar to the Indiana rules governing attorney trust account overdraft notification may apply to the Disciplinary Commission for exemption from compliance with these rules to the extent that the attorney maintains trust funds belonging to Indiana clients in a trust account in a foreign jurisdiction that is subject to overdraft reporting under the rules of that jurisdiction. Any such application for exemption shall be in writing and shall include:
   1) a copy of the rules from the other jurisdiction governing attorney trust account overdraft notification;
   2) a copy of the agreement between the applicable financial institution and the agency in the foreign jurisdiction that administers the overdraft notification program verifying that the financial institution participates in the foreign jurisdiction's attorney trust account notification program;
   3) a list of the names of all financial institutions, account names, and account numbers of all trust accounts maintained by the attorney in the foreign jurisdiction; and
   4) a certification under oath by the attorney that each such foreign trust account has been properly identified to the foreign financial institution as an attorney trust account subject to overdraft reporting.

   Any attorney seeking exemption under the terms of this provision is under a continuing obligation to immediately report any changes in the information provided to the Disciplinary Commission.

B. Admission and Discipline Rule 23, Section 29(a)(6) contemplates that a designee who is not admitted to practice law in Indiana may be an authorized signatory on a trust account. In the event an attorney or law firm delegates trust account signature authority to any person who is not admitted to practice law in Indiana, such delegation shall be accompanied by specific safeguards, including at a minimum the following:
   1) All periodic account activity statements from the financial institution shall be delivered unopened to and reviewed by an attorney having supervisory authority over the non-attorney signatory; and
   2) Responsibility for conducting periodic reconciliations between internal trust account records and periodic trust account activity statements from the financial institution shall be vested in a person who has no signature authority over the trust account.

ATTACHMENT E

C. All communications from financial institutions to the Disciplinary Commission shall be directed to: Executive Secretary, Indiana Supreme Court Disciplinary Commission, 30 South Meridian Street, Suite 850, Indianapolis, Indiana 46204.

Adopted Dec. 23, 1996, effective July 1, 1997; amended Dec. 4, 1998, effective Jan. 1, 1999; amended effective Apr. 20, 2005

ATTACHMENT E

TRUST ACCOUNT OVERDRAFT REPORTING AGREEMENT

TO: INDIANA SUPREME COURT DISCIPLINARY COMMISSION
30 south Meridian Street
Suite 850
Indianapolis, Indiana 46204

The undersigned, being a duly authorized officer of _____, a financial institution doing business in the State of Indiana, and the agent of the named financial institution specifically authorized to enter into this agreement, hereby applies to be approved to receive attorney trust accounts in the State of Indiana. In consideration of the Indiana Supreme Court Disciplinary Commission's approval of the named financial institution, the institution agrees to comply with the reporting requirements for such institution as set forth in Indiana Admission and Discipline Rule 23, § 29(b) through (g) and the Rules Governing Trust Account Overdraft Reporting promulgated by the Disciplinary Commission, as now in effect and as hereafter amended from time to time.

Specifically, the named financial institution agrees:

(1) To report to the Indiana Supreme Court Disciplinary Commission in the event it has actual notice that any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored. (This obligation applies to both IOLTA trust accounts under Indiana Professional Conduct Rule 1.15(f)(1) and non-IOLTA attorney trust accounts under Indiana Professional Conduct Rule 1.15(f)(1).)

(2) That all such reports shall be in substantially the following format:
   (a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor and should include a copy of the dishonored instrument, if such a copy is normally provided to the depositor;
   (b) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the depositor attorney or law firm, the account number, the date of presentation for payment, the date paid, and the amount of the overdraft created thereby.

(3) That all such reports shall be made within the following time periods:
   (a) in the case of a dishonored instrument, simultaneously with, and within the time provided by law for, notice of dishonor;
   (b) in the case of an instrument that is presented against insufficient funds but which instrument is honored, within five (5) banking days of the date of presentation for payment against insufficient funds.

(4) To provide the Disciplinary Commission with the name and contact information of the financial institution's primary point of contact for matters pertaining to its responsibilities under this agreement, and to promptly update that contact information in the event it changes.

This agreement shall apply to all branches of the named financial institution and shall not be canceled except upon thirty (30) days notice in writing to the Executive Secretary, Indiana Supreme Court Disciplinary Commission, 30 South Meridian Street, Suite 850, Indianapolis, Indiana 46204.

Name, Address, and Telephone Number of Contact Person for Financial Institution:

_____

_____

_____

DATE:_____ _____
Signature of Authorized Official

CORPORATE _____
Printed or Typed Name of Authorized Official

SEAL

_____
Title or Position of Authorized Official

ACKNOWLEDGMENT

STATE OF _____)
) ss:
COUNTY OF _____)

On the _____ day of _____, 20___, before me, a Notary Public in and for the State of _____, personally appeared the above-named individual, known to me to be the person executing the foregoing instrument, and acknowledged and executed said instrument as his/her free and voluntary act and deed.

_____
Notary Public (signature)

_____
Notary Public (printed or typed)

My Commission Expires:_____ County of Residence:_____

ACCEPTANCE

The named financial institution is hereby approved by the Indiana Supreme Court Disciplinary Commission as a depository for trust accounts in the State of Indiana until such time as this agreement is canceled upon thirty (30) days' written notice to the Commission by the institution or is revoked by action of the Disciplinary Commission.

DATE: _____ _____
Executive Secretary, Indiana Supreme Court Disciplinary Commission

EXHIBIT A--ATTACHMENT E

ATTORNEY TRUST ACCOUNT NOTIFICATION

Name of Attorney _____ Attorney Number _____

Name of Law Firm _____

Business Address _____

City _____ State _____ Zip Code _____

Name of Financial Institution _____

Business Address _____

City _____ State _____ Zip Code _____

Name of Account _____

Account Number _____ ____ New ____ Existing

Type of Account:

____ Trust ____ Guardian

____ Escrow ____ Estate

____ Other _____
(Please Describe)

The undersigned hereby certifies that he/she is an attorney licensed to practice law in the State of Indiana and that the information indicated above provided to his/her financial institution is accurate. This information is provided to permit the financial institution to report all overdraft or insufficient funds occurrences to the Indiana Supreme Court Disciplinary Commission pursuant to Indiana Admission and Discipline Rule 23, Section 29.

Date:_____

_____
Signature

EXHIBIT B--ATTACHMENT E

IOLTA (Interest on Lawyers Trust Accounts) Program Questions & Answers

Background
Many Indiana lawyers maintain trust accounts in which funds are held on behalf of clients for distribution at a later date. In some cases, these fund balances are large and are held for long periods of time, but, more than likely, the balances are small and/ or are held for a short period of time. Traditionally, it has not been permissible for these types of short term or nominal balance trust accounts to earn interest.

In 1998, the Indiana Supreme Court amended Rule of Professional Conduct 1.15, thereby creating the Interest on Lawyer Trust Account (IOLTA) program in Indiana. In 2005, the Indiana Supreme Court further amended Rule 1.15, requiring attorneys to convert all trust accounts containing deposits that are of short duration and/or of a relatively small balance so that they could not earn income for the client in excess of the costs incurred to secure the income into IOLTA accounts. The resulting interest is paid to the Indiana Bar Foundation to be distributed for charitable purposes as delineated in Rule 1.15. The funds will be used primarily to support pro bono civil legal services for persons of limited means. Other distributions could include:

- the establishment of pro bono programs;
- to provide for equal access to civil justice to persons of limited means;
- to provide law-related education programs for the public;
- to assist in research about the legal system;
- to improve the administration of justice; and
- to fund other public service programs specifically approved by the Indiana Supreme Court.

Q: What Is IOLTA?

A: IOLTA is a relatively recent addition to the legal profession, and an even more recent addition to Indiana. IOLTA requires attorneys to place typically commingled nominal and/or short-term client trust funds that could not earn income for the client in excess of the costs incurred to secure such income into interest bearing trust accounts.

ATTACHMENT F

Financial institutions periodically remit the interest earned on these funds to a designated administrative body, which in Indiana is the Indiana Bar Foundation.

Q: How will money collected under IOLTA be spent?

A: A component of the IOLTA Program is the establishment of an approved pro bono program in each of Indiana's 14 judicial districts. In some areas, local bar associations have established programs. These may serve as the bases for those districts' plans. Funding from IOLTA helps develop these pro bono legal service programs for the poor. Each district funds programs tailored to meet the specific needs of the district. The Indiana Pro Bono Commission, created by the Indiana Supreme Court as a program of the Indiana Bar Foundation, serves to coordinate the efforts of the state's pro bono programs.

The local programs serve as liaisons between the lawyers providing pro bono services and the indigent individuals that need those services. Lawyers will continue to provide legal services to their pro bono clients, as in the past, but IOLTA funds streamline this process, by providing for such things as litigation costs, mediation costs, on-line legal research costs, and other services based on the special needs of the district, enabling services to be delivered more efficiently and helping to permit pro bono attorneys to focus on providing legal services, rather than some of the other issues which may arise in pro bono representation.

Q: Is the IOLTA program unique to Indiana ?

A: No, Indiana was the last state to adopt an IOLTA program. T he programs range from VOLUNTARY (which gives an attorney a choice to participate), to OPT-OUT to UNIVERSAL (mandatory). Indiana began with the opt-out program but now follows a Universal program. As a result of the 2003 United States Supreme Court decision upholding mandatory IOLTA programs, several other states are also converting their programs from opt-out to universal.

Q: How does Indiana 's Universal program work?

A: The program requires lawyers that hold Indiana client funds in trust accounts to convert their "pooled" nominal and/or

short term non-interest bearing client trust accounts into interest-bearing IOLTA accounts. Under the current Universal program, lawyers are unable to "opt-out", or formally decline to do this, as they were able to do in previous years. The current rule requires that any client funds held in trust by lawyers must earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: Do other states have universal programs?

A: More than half of the states have universal programs, and that number is expected to increase.

Q: Specifically, what must lawyers do to comply with the IOLTA Program?

A: Each August, an attorney will receive his or her Annual Registration Fee form from the Clerk of the Indiana Supreme Court. The attorney must fully complete the appropriate section on this form to indicate whether he or she has an active IOLTA account, or is exempt from participating.

For large (more than ten attorneys) law firms that are participating in IOLTA, a separate sheet may be attached to the firm's fee forms indicating the name of the bank holding the firm's IOLTA account and the name of the trust account at the bank, instead of completing this information on each individual fee form.

Lawyers that wish to enroll in the program need only complete a *Notice to Financial Institution Form* . This form is available from the Foundation upon request, or at the Foundation's web site (www.inbf.org/Pages/iolta_forms.html). Upon completion of the form, attorneys should send the form to the Foundation, rather than directly to the bank. The Foundation will forward the completed form to a designated individual at the attorney's bank.

Provisions are made either to open a new IOLTA account or convert an existing trust account to an IOLTA account. In the case of a new IOLTA account, to streamline the process, an attorney may wish to go to his or her local bank

and establish a non-interest bearing account for conversion, prior to completing the Notice form. All IOLTA accounts must be federally insured interest bearing negotiable order of withdrawal ("NOW") accounts or comparable demand deposit accounts.

Q: If I already maintain an IOLTA account does the new universal program affect me?

A: Generally speaking if you or your firm already maintains an IOLTA account in Indiana, then you will not be required to do much more in order to comply. The only additional things you may need to do involve IOLTA accounts which are affiliated with multiple attorneys as is common at many law firms. If you are affiliated with a law firm or other organization that maintains IOLTA accounts, you will now need to enclose a list of those attorneys affiliated with the firm's or organization's IOLTA accounts with your annual attorney registration statement from the Clerk of the Indiana Supreme Court. This will ensure that compliance with the IOLTA rule can be accurately recorded. In addition, you will need to ensure that all client funds held in trust earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: What happens if an attorney refuses to comply with the universal program?

A: The Indiana Bar Foundation will confirm that each attorney has correctly completed his or her annual registration fee form and is either matched with an existing IOLTA account or is exempt from participating in the IOLTA program. The Foundation has been directed to provide the Disciplinary Commission of the Indiana Supreme Court the names of those attorneys who do not fall into one of those two categories.

Q: What if I do not have a commingled non interest-bearing client trust account?

A: Lawyers who do not hold client finds in trust are exempt from the provisions of this Rule. Those lawyers simply signify this on their Annual Registration Fee forms by

checking the appropriate box(es).

Q: How will the universal IOLTA Program affect current trust fund practices?

A: This program will impose no new burdens upon lawyers. Lawyers have always exercised their discretion in determining whether a client's trust deposit was of sufficient size or duration to justify placement in a separate interest-bearing account, with the interest payable to the client. Lawyers will retain this discretion and continue to make these fiduciary decisions under the IOLTA Program. The lawyer's determination of whether a client's funds are nominal or short term so that they could not earn income in excess of costs rests in the sound judgment of the lawyer or law firm, and no lawyer will be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

Q: May lawyers still deposit individual client funds into accounts which pay interest that can be passed on to the client?

A: Yes. In fact, lawyers are expected to establish separate, interest-bearing accounts for individual client's funds when the sum is large enough and/or the duration is long enough to justify the cost of opening, administering and closing the account. Any interest accrued becomes the property of the client. If clients request their money be placed in a separate trust account, the lawyer is ethically bound to fulfill the clients' request. If the client funds are not large enough or the duration is not long enough to earn income net of the costs associated with the account, then the funds must be placed into an IOLTA account.

Q: Will there be a lot of lawyer time and money involved in participating in IOLTA?

A: Minimal administrative time and no money. The mechanics of converting to an IOLTA account are simple. All the attorney or law firm must do is complete a Notice to Financial Institution form and forward the form to the Foundation. There is no change to the operation of the trust account, and the firm is no longer responsible for regular administrative expenses on the account.

Q: What is the status of the U.S. Supreme Court review of IOLTA?

A: In March, 2003, the United States Supreme Court ruled 5 to 4 in favor of the constitutionality of mandatory IOLTA programs. The Court indicated that the taking of client property is constitutional if the taking is used for public purposes, and if the affected individuals are compensated appropriately. The Court ruled that IOLTA is clearly beneficial to the public good, in that hundreds of millions of IOLTA dollars each year are targeted for legal service programs throughout the country. Further, interest is earned on IOLTA accounts simply because they are IOLTA accounts; without IOLTA, these trust funds would be incapable of earning any net interest. Therefore, the affected clients lose nothing. The Court concluded that, as such, IOLTA programs throughout the country should proceed as they did prior to its ruling.

Q: Who notifies the banks?

A: The Indiana Bar Foundation notifies the lawyer's bank of the lawyer's intent to participate in IOLTA. In order to establish an IOLTA account, a lawyer or law firm should forward a copy of the *Notice to Financial Institution Form* to the Foundation, which will, in turn, forward a copy to the appropriate financial institution. This form specifically authorizes the financial institution to disclose to the Foundation necessary information necessary for the IOLTA account to be established, including, but not limited to, information designated by Indiana Rules of Professional Conduct Rule 1.15.

Q: How will my local bank learn about IOLTA?

A: At this point in time, most banks throughout Indiana are familiar with IOLTA. The Foundation will encourage banks not currently participating in the program to participate, especially if the Foundation has on hand completed Notice to Financial Institution forms to forward to the bank upon the bank's agreement to participate. The Foundation will distribute materials to these banking centers so that lawyers and law firms who ask questions can be assisted. These

financial institutions will also be encouraged to designate one IOLTA contact person who will serve as the liaison between that financial institution and the Foundation.

Q: I have a long-standing relationship with a bank that refuses to participate in IOLTA. Must I change to a bank that is participating?

A: It is the current policy of the Foundation that if after repeated efforts, the Foundation fails to enroll a bank to participate in IOLTA, lawyers and law firms that have a relationship with that bank will be exempted from participation. The lawyers should advise the Foundation of this situation in writing. We encourage lawyers to voluntarily consider switching to a participating bank and enrolling in the IOLTA program.

Q: It is extremely impractical for me to establish an IOLTA account. What should I do?

A: Describe your situation to the Indiana Bar Foundation in writing. Exemptions from participation may be granted, depending on the situation.

Q: Who pays the service charges or fees for the IOLTA account?

A: Monthly bank service charges are paid from the interest earned by the IOLTA account, ordinarily up to the amount of interest earned on that account. The majority of banks currently waive all fees in excess of interest earned. In the event that the banks bill the Foundation for fees in excess of interest earned on an account, the Foundation may affirmatively exempt that account from participating. Under no circumstances should the account principal be changed by IOLTA involvement, nor should the lawyer be billed for regular IOLTA-produced expenses. The attorney will still be responsible for any transactional fees associated with their IOLTA account.

Q: Must attorneys have new checks printed for IOLTA accounts?

A: No. Attorneys may continue to use their checks as they did prior to converting the account into an IOLTA account.

Q: Which banks may lawyers use?

A: Any bank that participates in the Trust Account Overdraft Notification Program required under the Indiana Rules of Professional Conduct may be used. All banks with at least one IOLTA account are approved for trust account overdraft reporting. Please contact the Foundation if you are unsure as to whether or not your bank qualifies.

Q: Must lawyers negotiate fees and charges on IOLTA accounts with the bank?

A: The Indiana Bar Foundation or its designees handles interest rate and fee discussions with the bank.

Q: Which tax identification number is used?

A: The financial institution is instructed to use the tax identification number of the Foundation, not the tax identification number of the lawyer or law firm. As such, the lawyer or law firm should never receive a 1099 form for IOLTA interest. This method of account identification will allow the earned interest to be recorded annually in the name of the Foundation and not in the name of the lawyer/law firm. The name on the account, however, is to be that of the lawyer or law firm.

Q: What about 1099 forms?

A: Financial institutions have been notified that the Foundation is a not-for-profit corporation, exempt from federal income tax. As a result, no 1099 forms are required for the IOLTA accounts and no W-9 form mailing is required. The financial institutions have been advised that rulings have been obtained by the Foundation from the appropriate federal regulatory agencies authorizing "NOW" or similar type accounts to be used for IOLTA accounts.

Q: Will data on individual IOLTA accounts be made public?

A: No. The information contained in financial statements to

lawyers and the Foundation shall remain confidential. (Rule 1.15 (f) (10). The Foundation may release only a compilation of data from such statements, which does not include any identifying information.

If you have any further questions about the IOLTA program please contact the Indiana Bar Foundation office at (317) 269-2415 or (800) 279-8772.

Last Updated Februay 16, 2005

ATTACHMENT F

NEW JERSEY ADVISORY OPINION 454, 105 N.J.L.J. 441 (May 15, 1980)

Attorney's Trust Account--Immediate Drawing Upon Depositing Client's Check

We are asked whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client. This practice usually arises in the context of a title closing, but there are, of course, many other circumstances in which this procedure is followed.

Rule 1:21-6(a)(1) and *DR*9-102 require than an attorney maintain a separate account for funds of his clients entrusted to his care. He must maintain an appropriate book in which the funds belonging to each client are separately identified. It goes without saying that the funds deposited for a particular client must be used for the benefit of that client and for no other purpose. Many attorneys have substantial sums in their trust account at all times, sums which belong to several clients. Some part of these monies are "collected funds," *i.e.*, funds which represent checks deposited in the account which have had ample time to clear and have thus been properly credited to the attorney's trust account. Depending usually on the distance the drawee bank is from the attorney's bank, it may take from five to ten business days for a check to clear, or from one to two calendar weeks. It is obvious, therefore, that a check drawn on the attorney's trust account for client A the same day client A's check is deposited in this account is drawn on funds which belong to other clients of the attorney.

We are aware of the fact that the foregoing practice is one of long standing in probably universal use not only in New Jersey but elsewhere. We also believe that most attorneys who follow this practice do so only where the checks involved are bank, cashier's or certified checks. Because this procedure is so widespread in title closings, to condemn it as unethical may lead to severe disruption in the handing of title closings and other matters. We suggest first, however, that there are other ways to handle these closings, none of which is entirely satisfactory. Three possibilities come to mind: (1) escrow closings in which no funds are disbursed and no closing completed until all funds have cleared; (2) pre-arrangement by the attorneys involved so that the necessary closing figures are known far enough in advance for the parties to provide funds in such a manner as to obviate the necessity of using the trust account (undoubtedly this would require cooperation of the bank-mortgagee which may be asked to provide mortgage funds in several checks); (3) establishment of an account by the attorney of his own funds which can be used to accommodate a client when there is no other solution. Recognizing the problems which would arise were the present practice disapproved in its entirety, it is our opinion that where one of the foregoing solutions is not feasible, the use of bank certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk.

The practice which is sanctioned by this opinion has the effect of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is closing. The reduction thus resulting in available trust funds is eliminated shortly thereafter when the bank, certified or cashier's check clears. The justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost non-existent risk that such bank, certified or cashier's checks will not clear along with the overriding commercial need of all clients that such a practice be continued. Because the practice is so well known and widespread, it is fair to assume that clients have implicitly consented to the negligible risk involved in drawing against such

ATTACHMENT G

checks which have not yet cleared. Of course, any client who explicitly requests that trust funds deposited for his benefit not be subjected to the practice is entitled to have his funds segregated. A consequence of such segregation would be that that client, if involved in a transaction where closing depends upon the issuance of trust checks that have not yet cleared, would have to make special arrangements similar to one of those suggested earlier in this opinion. In other words, a client who does not want to take the negligible risks involved in the unsegregated fund will not receive the substantial benefit of the practice discussed in this opinion. Approval of the practice referred to herein is limited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfers of property or interests in property whether they be real estate, personal property or a combination of both, including sales of businesses where it is either essentially or commercially desirable that trustee checks be issued against certified, bank or cashier's checks that have not cleared. Drawing on trust funds for other purposes, such as the disbursement of the settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

We wish to make it clear that the practice we are approving relates only to the use of bank, cashier's or certified checks. We consider the practice of drawing against personal checks to cover miscellaneous items at closing or for any other purpose, regardless of the amount, to be unethical. While these amounts may be small in relation to the size of some trust accounts, the checks creates a substantial risk of loss of trust funds deposited in the account for other clients, a risk not in any way justified by necessities of the situation. Accordingly, such practice is disapproved.

AMENDMENT TO NEW JERSEY ADVISORY OPINION 454,
114 N.J.L.J. 110 (August 2, 1984)

The Advisory Committee on Professional Ethics has received numerous inquiries concerning its holding in the above matter because the use of checks of savings and loan associations, state or federally-chartered, in connection with real estate or commercial closing transactions was not sanctioned. After careful review of the problems which have arisen because of this exclusion, the Committee has decided that the use of such checks should be approved. Therefore, the first sentence of the last paragraph of *Opinion* 454 is expanded to read as follows:

> We wish to make it clear that the practice we are approving relates only to the use of bank, savings and loan (state or federal), cashiers' or certified checks.

ATTACHMENT G

TRUST FUNDS RECEIPTS JOURNAL						
MONTH OF: September 1995						
DATE		SOURCE OF FUNDS	MATTER	FILE #	AMOUNT	DEPOSIT
SEP	1	Freds Insurance Co. (Settlement)	Hurt vs. Poor	94-217	$30,000.00	$30,000.00
	2	John and Mary Doe (Deposit)	Doe to Jones	95-312	$5,000.00	
	2	Debtors-R-Us, Inc. (Collection)	Acme vs. Debtors	95-256	$1,500.00	$6,500.00
	19	Hoosier National Bank (cert. ck.)	Buyer from Seller	95-314	$60,000.00	
	19	Earls Mortgage Co. (Cert.Ck.)	Buyer from Seller	95-314	$40,000.00	
	19	Susan Buyer (Cert. Ck.)	Buyer from Seller	95-314	$10,000.00	$110,000.00
	30	John Spouse (Retainer)	Spouse vs. Spouse	95-163	$2,000.00	$2,000.00
		TOTALS			$148,500.00	$148,500.00

ATTACHMENT H

CLIENT TRUST LEDGER						
Client:		Susan Buyer		File #:	88-314	
Address:		125 East Maple Street		Matter Type:	Real Estate	
		Hoosiertown, IN 46555				
Bs. Phn:		(317) 555-5555				
Hm. Phn:		(317) 555-1234				
DATE						
1995		EXPLANATION OF TRANSACTION	CK #	CHARGES	RECEIPTS	BALANCE
SEP	19	Hoosier National Bank (cert. ck.)			$60,000.00	$60,000.00
	19	Earls Mortgage Co. (cert. ck.)			$40,000.00	$100,000.00
	19	Susan Buyer (cert. ck.)			$10,000.00	$110,000.00
	20	White River Savings & Loan - Mtg. Payoff	815	$50,000.00		$60,000.00
	20	Jack and Jill Seller - Proceeds	816	$52,400.00		$7,600.00
	20	Hill and Dale Realty Co. - Commission	817	$7,000.00		$600.00
	20	Joe Lawyer – Fee	818	$600.00		$0.00

ATTACHMENT I

TRUST FUNDS DISBURSEMENTS JOURNAL							
MONTH OF: September 1995							
DATE		CK #	PAYEE	PURPOSE	MATTER	FILE #	AMOUNT
SEP	12	806	John Hurt	Settlement	Hurt vs. Poor	94-217	$20,000.00
	12	810	Joe Lawyer	Fee	Hurt vs. Poor	94-217	$10,000.00
	13	811	-VOID-				----------
	14	812	Acme Office Supply	Proceeds	Debtors-R-Us, Inc.	95-256	$1,050.00
	14	813	Joe Lawyer	Fee	Debtors-R-Us, Inc.	95-256	$450.00
	15	------	Void Check #507 (2/12/88)		Maya Co.	94-322	($400.00)
	16	814	Aztec Corp.	Replace Ck.#507	Maya Co.	94-322	$400.00
	20	815	White River Svngs & Ln	Mortgage Payoff	Buyer from Seller	95-314	$50,000.00
	20	816	Jack and Jill Seller	Proceeds	Buyer from Seller	95-314	$52,400.00
	20	817	Hill and Dale Realty	Commission	Buyer from Seller	95-314	$7,000.00
	20	818	Joe Lawyer	Fee	Buyer from Seller	95-314	$600.00
	30	------	Bank Svc. Charges		Attorney Funds		$50.00
		TOTALS					$141,550.00

ATTACHMENT J

TRUST LEDGER CONTROL SHEET			
CONTROL			
1995			
TRUST FUNDS			
MONTH	RECEIVED	DISBURSED	BALANCE
Balance Forward			$45,200.00
JAN	$87,000.00	$126,500.00	$5,700.00
FEB	$322,000.00	$290,000.00	$37,700.00
MAR	$95,500.00	$121,500.00	$11,700.00
APR	$52,500.00	$55,650.00	$8,550.00
MAY	$78,900.00	$75,050.00	$12,400.00
JUN	$45,000.00	$50,550.00	$6,850.00
JUL	$125,000.00	$130,050.00	$1,800.00
AUG	$57,000.00	$55,750.00	$3,050.00
SEP	$148,500.00	$141,550.00	$10,000.00
OCT			
NOV			
DEC			

ATTACHMENT K

SCHEDULE OF CLIENTS' TRUST BALANCES						
REFLECTED IN CLIENTS' TRUST LEDGER						
AS OF THE MONTH ENDED						
SEPTEMBER 30, 1995						
AND RECONCILIATION WITH TRUST						
FUNDS ON DEPOSIT PER BANK STATEMENT						
NAME OF CLIENT						BALANCE
Smithville Credit Association						$450.00
Frederick Client						$1,995.00
John and Mary Doe						$5,000.00
Acme Office Supply						$455.00
John Spouse						$2,000.00
Attorney Funds (bank charges)						$100.00
*Total Per Clients' Ledgers						$10,000.00
	Add: Outstanding Checks					$500.00
	Less: Deposits in Transit					$2,000.00
Balance Per Bank Statement						$8,500.00
*This amount should agree with the checkbook balance and trust ledger control sheet						

ATTACHMENT L

REASONS FOR CLOSURE OF TRUST ACCOUNT OVERDRAFT INQUIRIES JULY 1, 1997 THROUGH JUNE 30, 2006

Reasons for Closure:

Bank Error	137
Disbursement From Trust Before Funds Deposited Into Trust	87
Referral for Disciplinary Investigation	76
Law Office Math or Record-Keeping Error	68
Disbursement From Trust Before Deposited Funds Collected	61
Inadvertent Deposit of Trust Funds to Non-Trust Account	45
Deposit of Trust Funds to Wrong Trust Account	33
Overdraft Due to Bank Charges Assessed Against Account	29
Overdraft Due to Refused Deposit for Bad Endorsement	26
Inadvertent Disbursement of Operating Obligation from Trust	16
Non-Trust Account Inadvertently Misidentified As Trust Account	11
Death, Disbarment or Resignation of Lawyer	5

2008-2009
ANNUAL REPORT

OF THE

DISCIPLINARY COMMISSION

OF THE

SUPREME COURT OF INDIANA

PUBLISHED BY THE

INDIANA SUPREME COURT DISCIPLINARY COMMISSION
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INDIANA SUPREME COURT DISCIPLINARY COMMISSION

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ROBERT D. HOLLAND

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I. INTRODUCTION

This is the annual report of the activities of the Disciplinary Commission of the Supreme Court of Indiana for the period beginning July 1, 2008 and ending June 30, 2009. The Disciplinary Commission is the agency of the Supreme Court of the State of Indiana charged with responsibility for investigation and prosecution of charges of lawyer misconduct. The Indiana Rules of Professional Conduct set forth the substantive law to which lawyers are held accountable by the Indiana lawyer discipline system. The procedures governing the Indiana lawyer discipline system are set forth in Indiana Supreme Court Admission and Discipline Rule 23. The broad purposes of the Disciplinary Commission are to "protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct." Admission and Discipline Rule 23, section 1.

The Disciplinary Commission is not a tax-supported agency. It is funded through an annual fee that each lawyer admitted to practice law in the State of Indiana must pay in order to keep his or her license in good standing. The current annual registration fee for lawyers in active status is $115.00. After paying the costs of collecting annual fees, the Clerk of the Supreme Court distributes the balance of fees to the Disciplinary Commission, the Commission for Continuing Legal Education and the Indiana Judges and Lawyers Assistance Committee to support the work of those Court agencies. In this fiscal year, of each $115 annual registration fee, after the Clerk's expenses for collecting fees, 66.37% was distributed to the Disciplinary Commission, 18.9% to the Continuing Legal Education Commission and 14.73% to the Judges and Lawyers Assistance Committee.

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

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

On May 5, 2009, the Supreme Court issued an order suspending **131** lawyers on active and inactive status, effective June 5, 2009, for failure to pay their annual attorney registration fees.

II. HISTORY AND STRUCTURE OF THE DISCIPLINARY COMMISSION

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

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

The Commission meets monthly in Indianapolis, generally on the second Friday of each month. In addition to acting as the governing board of the agency, the Disciplinary Commission considers staff reports on claims of misconduct against lawyers and must make a determination that there is reasonable cause to believe that a lawyer is guilty of misconduct which would warrant disciplinary action before formal disciplinary charges can be filed against a lawyer.

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

Name	*Hometown*	*First Appointed*	*Current Term Expires*
Sally Franklin Zweig, Chair	Indianapolis	September 2, 2001	June 30, 2011
Corinne R. Finnerty, Vice-Chair	North Vernon	July 1, 2003	June 30, 2013
Fred Austerman, Secretary	Richmond	July 1, 2003	June 30, 2013
Diane L. Bender	Evansville	July 1, 1999	June 30, 2009
Maureen Grinsfelder	Fort Wayne	July 1, 2005	June 30, 2010
Robert L. Lewis	Gary	July 1, 1999	June 30, 2009
R. Anthony Prather	Indianapolis	July 1, 2004	June 30, 2009
J. Mark Robinson	New Albany	April 11, 2001	June 30, 2011
Anthony M. Zappia	South Bend	September 9, 2001	June 30, 2011

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

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

The staff of the Disciplinary Commission during this year included:

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

In addition, the Disciplinary Commission employs part-time law students to assist in its work. Law clerks employed during this reporting period included Donald E. Thomas, Jr., Caroline Richardson, Sara A. Vorndran, Amber Malcolm and Lauren E. Berger.

The Disciplinary Commission's offices are located at 30 South Meridian Street, Suite 850, Indianapolis, Indiana 46204.

III. THE DISCIPLINARY PROCESS

A. The Grievance Process

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

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

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

B. Preliminary Investigation

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

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

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

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

C. Further Investigation

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

D. Authorizing Charges of Misconduct

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

E. Filing Formal Disciplinary Charges

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

F. The Evidentiary Hearing

Upon the filing of a verified complaint, the Supreme Court appoints a hearing officer who will preside over the case and who will submit recommended findings to the Supreme Court. The hearing officer must be an attorney admitted to practice law in the State of Indiana and is frequently a sitting or retired judge. Typically, the hearing officer is from a county close to the

county in which the respondent lawyer practices law. The hearing officer's responsibilities include supervising the pre-hearing development of the case including discovery, conducting an evidentiary hearing, and reporting the results of the hearing to the Supreme Court by way of written findings of fact, conclusions of law and recommendations. A hearing may be held at any location determined to be appropriate by the hearing officer.

G. Supreme Court Review

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

H. Final Orders of Discipline

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

- **Private Administrative Admonition.** A private administrative admonition is a disciplinary sanction that is issued by the Disciplinary Commission as an administrative resolution of cases involving minor misconduct. A private administrative admonition is issued as a sanction only when the Disciplinary Commission and the respondent lawyer agree to that disposition of a case. Unlike other disciplinary sanctions, the Supreme Court does not directly issue the admonition. However, the Court receives advance notice of the parties' intent to resolve a case by way of a private administrative admonition and may act within a period of 30 days to set aside such a proposed agreement. There is a public record made in the Office of the Clerk of the Supreme Court of every case resolved by a private administrative admonition, although the facts of the matter are not included in the public record.
- **Private Reprimand.** A private reprimand consists of a private letter of reprimand from the Supreme Court to the offending lawyer. The case does not result in a publicly disseminated opinion describing the facts of the case. The Court's brief order resolving the case by way of a private reprimand is a public record that is available through the office of the Clerk of the Supreme Court. In rare cases where a private reprimand is assessed, the Court may issue a *per curiam* opinion for publication styled *In the Matter of Anonymous*. While the published opinion does not identify the offending lawyer by name, the opinion sets out the facts of the case and the violations of the Rules of Professional Conduct involved for the edification of the bench, the bar and the public.
- **Public Reprimand.** A public reprimand is issued in the form of a publicly disseminated opinion or order by the Supreme Court setting forth the facts of the case

and identifying the applicable Rule violations. A public reprimand does not result in any direct limitation upon the offending lawyer's license to practice law.

- **Short Term Suspension.** The Court may assess a short-term suspension of a lawyer's license to practice law as the sanction in a case. When the term of suspension is six months or less, the lawyer's reinstatement to the practice of law is generally automatic upon the completion of the term of suspension. The Court may, and does from time to time, require that a lawyer who is suspended for a period of six months or less be reinstated to practice only after petitioning for reinstatement and proving fitness to practice law. The procedures associated with reinstatement upon petition are described later in this report. Even in cases of suspension with automatic reinstatement, for proper cause, the Disciplinary Commission may enter objections to the automatic reinstatement of the lawyer's license to practice law.
- **Long Term Suspension.** The Court may assess a longer term of suspension, which is a suspension for a period of time greater than six months. Every lawyer who is suspended for more than six months must petition the Court for reinstatement and prove fitness to re-enter the practice of law before a long-term suspension will be terminated.
- **Disbarment.** In the most serious cases of misconduct, the Court will issue a sanction of disbarment. Disbarment revokes a lawyer's license to practice law permanently, and it is not subject to being reinstated at any time in the future.

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

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

I. Resolution By Agreement

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

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

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

In a similar manner, a lawyer charged with misconduct may fully admit the allegations and consent to such discipline as the Court deems appropriate under the circumstances.

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 2008-2009

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, **1,456** grievances were filed with the Disciplinary Commission. Of this number, the Disciplinary Commission initiated **53** grievances. The total number of grievances filed was about one-hundred less than the number filed the previous year. **Appendix B** presents in graphical form the number of grievances filed for each of the past ten years.

There were **17,187** Indiana lawyers in active, good-standing status and **2,755** lawyers in inactive, good-standing as of June 30, 2009. In addition, **1,245** 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 **8.47** grievances for every one-hundred actively practicing lawyers. **Appendix C** presents in graphical form the grievance rate for each of the past ten years.

Distribution of grievances is not even. Far fewer than 1,456 separate lawyers received grievances during the reporting period, because many lawyers were the recipients of multiple

grievances. It is important to note that the mere filing of a grievance is not, in and of itself, an indication of misconduct on the part of a lawyer.

During the reporting period, **949** 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, 2009, or that were dismissed during the reporting year after investigation. Many grievances arise out of more than one type of legal matter or present claims of more than one type of alleged misconduct. Accordingly, the total numbers presented in Appendix D represent a smaller number of actual grievances.

Ranked in order of complaint frequency, the legal matters most often giving rise to grievances involve *Criminal, Domestic Relations, Tort, Personal Misconduct, Bankruptcy and Contract.* To understand the significance of this data, it is important to keep in mind that criminal cases make up 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 reflect the high number of cases of those types handled by lawyers in Indiana. The predominant types of legal matters out of which grievances arose during the reporting period are presented graphically in **Appendix E**.

Ranked in order of complaint frequency, the alleged misconduct types most often giving rise to grievances are *Poor Communications or Non-Diligence, Improper Withdrawal, Not Acting With Competence, Exercising Improper Influence, Misinforming, Excessive Fees and Conflicts of Interest*, with complaints about poor communications or non-diligence being close to 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, 2009, or that had been dismissed during the reporting period:

	DISMISSED	OPEN
Grievances filed before July 1, 2008	337	441
Grievances filed on or after July 1, 2008	1,173	283

Total carried over from preceding year:	938
Total carried over to next year:	724

This represents a reduction of more than 200 files in the number of grievances carried over into the following year

B. Non-Cooperation

A lawyer's law license may be suspended if the lawyer has failed to cooperate with the disciplinary process. The purpose of this is to promote lawyer cooperation to aid in the effective

and efficient functioning of the disciplinary system. The Commission brings allegations of non-cooperation before the Court by filing petitions to show cause. During the reporting year, the Disciplinary Commission filed **23** petitions to suspend the law licenses of **19** lawyers with the Supreme Court for failing to cooperate with investigations. The following are the dispositions of the non-cooperation matters that the Commission filed with the Court during the reporting year or that were carried over from the prior year:

Show cause petitions filed.....23

Name	City of Practice	Date of Admission
Barrett, Timothy D.	Spring Lake, MI	October 20, 2006
Beach, Steven A., Jr.	Anderson	May 20, 2005
Bowlin, Jimmie, D., Jr.	Crawfordsville	October 25, 1991
Corbin, Timothy L.	Indianapolis	October 31, 1994
Crotty, Brien P.	South Bend	November 9, 1998
Denney, Louis W.	Anderson	October 9, 1978
Doyle, Timothy A.	Indianapolis	December 21, 1999
Doyle, Timothy A.	Indianapolis	December 21, 1999
Engebretsen, Kjell P.	Lebanon	January 7, 2005
Engebretsen, Kjell P.	Lebanon	January 7, 2005
Gantz, D. Charles	Greenwood	September 22, 1971
Gifford, Ronald D.	Plymouth	October 13, 1976
Harris, Ronald D.	Jeffersonville	October 9, 1981
Harshey, Kenneth A.	Indianapolis	May 26, 1999
Kauffman, Gregory P.	Elkhart	January 23, 2001
Kias, Michael J.	Greenwood	September 19, 1962
Kilburn, James R.	Austin	October 9, 1981
Moore, Thomas C., II	Indianapolis	October 10, 1986
Moore, Thomas C., II	Indianapolis	October 10, 1986
Rawls, William J.	Indianapolis	October 18, 1985
Zakrzewski, Daniel M.	New Carlisle	June 1, 1984
Zirkle, Frederick Anthony	Crown Point	November 3, 1997
Zirkle, Frederick Anthony	Crown Point	November 3, 1997

Dismissed as moot after cooperation before show cause order 1

Kauffman, Gregory P.

Petition pending on June 30, 2009, without show cause order 0

Show cause orders with no suspension 24

Dismissed after show cause order due to compliance 15

Beach, Steven A., Jr.
Burch, Mark A. (from prior year)
Burch, Mark A. (from prior year)
Clark, Andrew E.

Denney, Louis W.
Doyle, Timothy A.
Doyle, Timothy A.
Doyle, Timothy A. (from prior year)
Engebretsen, Kjell P.
Gantz, D. Charles
Gifford, Ronald D.
Kilburn, James R.
Moore, Thomas C., II
Rawls, William J.
Zirkle, Frederick Anthony

Dismissed due to disbarment, resignation or suspension.....7

Burch, Mark A. (from prior year)
Burch, Mark A. (from prior year)
Burkett, Bradley K. (from prior year)
Harshey, Kenneth A.
Powell, Kimberly O. (from prior year)
Powell, Kimberly O. (from prior year)
Roberts, Robert E. (from prior year)

Show cause orders pending on June 30, 2009 2

Moore, Thomas C., II
Zirkle, Frederick Anthony

Suspensions for non-cooperation.....9

Non-cooperation Suspensions still in effect on June 30, 2009.....5

Barrett, Timothy D.
Corbin, Timothy L.
Crotty, Brien P.
Harris, Ronald D.
Zakrzewski, Daniel M.

Reinstated due to cooperation after suspension 4

Bowlin, Jimmie D., Jr.
Engebretsen, Kjell P.
Kelly, Daniel S. (from prior year petition)
Kilburn, James R. (from prior year petition)

Non-Cooperation Suspensions Converted to Indefinite Suspensions 8

Name	City of Practice	Date of Admission
Burkett, Bradley K. (from prior year petition)	Portland	January 24, 1984
Harshey, Kenneth J. (from prior year petition)	Indianapolis	May 26, 1999
Johnson, Theodore J. (from prior year petition)	Valparaiso	October 22, 1993

Johnson, Theodore J. (from prior year petition)	Valparaiso	October 22, 1993
Johnson, Theodore J. (from prior year petition)	Valparaiso	October 22, 1993
Kias, Michael J.	Greenwood	September 19, 1962
Molin, Emil J. (from prior year petition)	Tucson, AZ	October 14, 1988
Smith, Michael J.	Wabash	October 8, 1993

C. Trust Account Overdraft Reporting

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

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

Inquiries Carried Over From Prior Year	36
Overdraft Reports Received In Current Year	125
Inquiries Closed In Current Year	130
Reasons for Closing:	
Bank Error	37
Deposit of Trust Funds to Wrong Trust Account	2
Disbursement from Trust Before Deposited Funds Collected	16
Referral for Disciplinary Investigation	12
Disbursement from Trust Before Trust Funds Deposited	17
Overdraft Due to Bank Charges Assessed Against Account	2
Inadvertent Deposit of Trust Funds to Non-Trust Account	9
Overdraft Due to Refused Deposit for Bad Endorsement	3
Law Office Math or Record-Keeping Error	22
Death, Disbarment or Resignation of Lawyer	1
Inadvertent Disbursement of Operating Obligation From Trust	6
Non-Trust Account Inadvertently Misidentified as Trust Account	2
Fraudulent Office Staff Conduct	1
Inquiries Carried Over Into Following Year	31

D. Litigation

1. Overview

In 2008-2009, the Commission filed **62** Verified Complaints for Disciplinary Action with the Supreme Court, fifteen more than in the previous year. These Verified Complaints, together with amendments to pending Verified Complaints, represented findings of reasonable cause by the Commission in **81** separate counts of misconduct during the reporting year.

Including two dismissals and one finding for the respondent, in 2008-2009, the Supreme Court issued **74** final dispositive orders, compared to 53 in the previous year, representing the completion of **110** separate discipline files compared to the completion of 66 discipline files by court order in the previous year. Including six private administrative admonitions, **76** unique

lawyers received final discipline in the reporting year, compared to 61 in the previous year. **Appendix G** provides a comparison of disciplinary sanctions entered for each of the past ten years.

2. Verified Complaints for Disciplinary Action

a. Status of Verified Complaints Filed During the Reporting Period

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

Verified Complaints Filed During Reporting Period.....62
Number Disposed Of By End of Year 20
Number Pending At End of Year.....45

In addition, the Disciplinary Commission authorized the filing of **10** verified complaints during the reporting period that had not yet been filed by June 30, 2009.

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

During the reporting year, the Disciplinary Commission filed Notices of Felony Guilty Findings and Requests for Suspension pursuant to Admission and Discipline Rule 23, Sec. 11.1(a) in **7** cases.

b. Status of All Pending Verified Complaints

The following reports the status of all formal disciplinary proceedings pending as of June 30, 2009:

Cases Filed; Appointment of Hearing Officer Pending.....7
Cases Pending Before Hearing Officers 30
Cases Pending On Review Before the Supreme Court.....5
Total Verified Complaints Pending on June 30, 2009.....42

Of cases decided during the reporting year, **8** were tried on the merits to hearing officers at final hearings, **45** cases were submitted to the Supreme Court for resolution by way of Affidavit for Resignation, Conditional Agreement for Discipline or Consent to Discipline, and **5** cases was submitted by hearing officer findings on an Application for Judgment on the Complaint.

3. Final Dispositions

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

Dismissals of Verified Complaint 2

Findings for Respondent on Merits.....1

Private Administrative Admonitions 6

Private Reprimands.....4

Public Reprimands.....24

Name	City of Practice	Date of Admission
Benkie, Scott A.	Indianapolis	October 18, 1985
Brewer, Tia R.	Marion	January 6, 2004
Burns, Leo T., Jr.	Logansport	May 30, 1986
Campiti, Vincent M.	South Bend	November 3, 1997
Collins, David A.	Bloomington	October 16, 1987
Cook, Gary A.	Kokomo	December 11, 1998
Crawford, Douglas A.	Indianapolis	October 10, 1986
Denmure, Douglas R.	Aurora	May 18, 1966
Drake, MacArthur	Gary	May 5, 1976
Edwards, Antonio P.	Martinsville	May 19, 2003
Eslinger, Stephen L.	South Bend	May 30, 1980
Grubbs, Robert A.	Fort Wayne	October 18, 2004
Hagedorn, Michael H.	Tell City	October 9, 1974
Kahre, Gregory A.	Evansville	October 12, 1978
Litz, Steven C.	Monrovia	October 12, 1984
Loomis, J. Michael	Fort Wayne	June 4, 1982
Marshall, Kevin W.	Hobart	June 8, 1987
Miller, Roger L.	Frankfort	May 17, 1967
Price, Jeffry G.	Peru	October 10, 1973
Rader, Carolyn W.	Indianapolis	May 29, 1981
Smith, C. Jerome	Hammond	December 4, 1957
Toland, Shane A.	Indianapolis	June 18, 2001
Warr, Alistair J.	Indianapolis	June 7, 1991
Wray, Robert J.	Fort Wayne	January 21, 1980

Suspensions With Automatic Reinstatement.....4

Name	City of Practice	Date of Admission	Suspension
Baylor, Paul E.	Anderson	November 9, 1998	30 days
Blaising, Thomas R.	Battle Creek, MI	May 1, 1974	215 days
Doyle, Ricky D.	Greenwood	June 9, 1991	30 days
Shaw, Douglas L.	Schererville	May 12, 2006	30 days

Suspensions With Reinstatement on Conditions.....13

Name	City of Practice	Date of Admission	Suspension
Boyd, Elaine P.	Indianapolis	October 10, 1980	90 days[1]
Bryan, Lon D.	Muncie	June 9, 1989	1 year[2]
Butsch, David R.	Connersville	October 4, 1979	6 months[3]
Earls, William W.	Terre Haute	November 4, 1996	180 days[4]

[1] 90-day suspension, all stayed conditioned on compliance with terms of probation for 1 year.
[2] 1 year suspension, all stayed conditioned on compliance with terms of probation for 2 years.
[3] 6-month suspension, 4 months stayed conditioned on compliance with terms of probation for 36 months.
[4] 180-day suspension, all stayed conditioned on compliance with terms of probation for 24 months.

Falls, Margaret S.	Fort Wayne	October 18, 1985	90 days[5]
Followell, Douglas S.	Sullivan	May 1, 1974	180 days[6]
Green, James R.	Greenwood	October 9, 1974	90 days[7]
Holbrook, Neil E.	South Bend	October 7, 1983	6 months[8]
Katic, Peter	Munster	October 11, 1977	180 days[9]
Spielman, Kim H.	Fort Wayne	June 8, 1987	30 days[10]
Stites, Michael G.	Rockville	November 8, 2002	6 months[11]
Tolliver, Jason W.	Indianapolis	November 19, 2001	180 days[12]
Woods, Alexa L.	Indianapolis	November 8, 1999	120 days[13]

[5] 90 day suspension, all stayed conditioned on compliance with terms of probation for 24 months.
[6] 180-day suspension, 150 days stayed conditioned on compliance with terms of probation for 36 months.
[7] 90-day suspension, all stayed conditioned on compliance with terms of probation for 2 years.
[8] 6-month suspension, 2 months stayed conditioned on compliance with terms of probation for 18 months.
[9] 180-day suspension, 120 days stayed conditioned on compliance with terms of probation for 30 months.
[10] 30-day suspension, all stayed, conditioned on compliance with terms of probation for 1 year.
[11] 6-month suspension, 2 months stayed conditioned on compliance with terms of probation for 36 months.
[12] 180-day suspension, all stayed conditioned on compliance with terms of probation for 30 months.
[13] 120-day suspension, all stayed conditioned on compliance with terms of probation for 30 months.

Suspensions Without Automatic Reinstatement 19

Name	City of Practice	Date of Admission	Suspension
Beach, Steven A., Jr.	Anderson	May 20, 2005	90 days
Buehner, Constance L. Runner	Louisville, KY	October 15, 1990	Indefinite[1]
Burkett, Bradley K.	Portland	January 24, 1984	Indefinite
Evans, Fara P.	Pittsburgh, PA	October 20, 1989	2 years
Forbush-Moss, Bethanni E.	Louisville, KY	May 30, 2000	Indefinite[2]
Gifford, Ronald Dean	Plymouth	October 13, 1986	9 months
Graham, Craig W.	Jeffersonville	June 12, 1992	90 days
Harshey, Kenneth A.	Indianapolis	May 26, 1999	Indefinite
Jackel, Katherine E.	Ann Arbor, MI	November 3, 1997	2 years
Jarrett, Ray W.	Brazil	May 19, 2003	90 days
Johnson, Theodore J.	Valparaiso	October 22, 1993	Indefinite
Johnson, Theodore J.	Valparaiso	October 22, 1993	Indefinite
Johnson, Theodore J.	Valparaiso	October 22, 1993	Indefinite
Kias, Michael J.	Greenwood	September 19, 1962	Indefinite
Laterzo, Marc C.	Gary	October 22, 1999	180 days
Rosales, Leigia R.	Indianapolis	June 9, 2000	2 years
Molin, Emil J.	Tucson, AZ	October 14, 1988	Indefinite
Patheja, Jaipal	Valparaiso	December 29, 1997	6 months
Smith, Michael J.	Wabash	October 8, 1993	Indefinite

[1] Not eligible to seek reinstatement until readmitted in Kentucky.
[2] Not eligible to seek reinstatement until readmitted in Kentucky.

Accepted Resignations 4

Name	City of Practice	Date of Admission
Crabtree, William G., II	Schererville	October 25, 1991
Collesano, Stanley F.	Indianapolis	June 4, 1999
Auger-Marchand, Ruben	Indianapolis	June 9, 2000
Kauffman, Gregory P.	Elkhart	January 23, 2001

Disbarments 3

Name	City of Practice	Date of Admission
Powell, Kimberly O.	Indianapolis	May 19, 2003
Lehman, Robert E.	Indianapolis	May 31, 1977
Ucherek, David M.	Chicago, IL	December 29, 1997

Reinstatement Proceedings

Disposed of by Final Order 6

Granted 4

Cloyd, Casey D., Indianapolis (w/ 2 years probation)
Scott, Vincent L., Carmel
Rayle, Merrick Scott, Pacific Grove, CA
Webb, Scott L., Anderson

Denied 1

McLin, William C., Indianapolis

Petition Withdrawn 1

Harlowe, Stuart Clay, New Albany

Findings of Contempt 1

Name	City of Practice	Date of Admission
Patterson, Douglas W.	Evansville	June 9, 1989

Emergency Interim Suspension 0

Temporary Suspensions (Guilty of Felony) 7

Name	City of Practice	Date of Admission
Auger-Marchand, Ruben	Indianapolis	June 9, 2000
Lehman, Robert E.	Indianapolis	May 31, 1977
Recker, James R., II	Indianapolis	November 3, 1997
Record, Terry J.	Indianapolis	October 20, 2006
Riga, Deborah A.	Schererville	September 28, 1993
Snyder, Ryan W.	Indianapolis	September 26, 2005
Wallingford, Anthony J.	New Albany	October 23, 1995

V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES

	2008-09	2007-08	2006-07	2005-06	2004-05
Matters Completed	1,456	1,541	1,463	1,599	1,692
Complaints Filed	62	47	34	42	41
Final Hearings	8	12	10	15	8
Final Orders	74	53	60	52	60
Reinstatement Petitions Filed	4	5	11	8	4
Reinstatement Hearings	5	6	6	3	4
Reinstatements Ordered	3	9	1	1	4
Reinstatements Deny/Dismiss	2	3	7	2	2
Income	$1,715,474	$1,765,488	$1,984,450	$1,870,208	$1,785,247
Expenses	$1,915,389	$1,706,111	$1,814,736	$1,766,748	$1,629,153

VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE

A. Admission and Discipline Rules

Admission and Discipline Rule 3

On September 9, 2008, effective January 1, 2009, the Supreme Court amended Admis. Disc. R. 3, dealing with temporary admission of out-at-state lawyers, i.e., *pro hac vice* admissions. When an out-of-state lawyer is temporarily admitted, admission must be renewed by payment of an annual fee in January of each calendar year that participation in the matter continues. Failure to renew results in automatic exclusion of the foreign lawyer from practice in Indiana, after which reinstatement is upon petition to the Supreme Court. The amendment to Admis. Disc. R. 3(f)(2) implements a late fee for lawyers who are automatically excluded for failure to timely pay the annual renewal fee (currently $115). The amount of the late fee is $115.

Admission and Discipline Rule 23

On September 9, 2008, effective January 1, 2009, the Supreme Court amended Admis. Disc. R. 23, section 27, to make some clarifications to the section dealing with surrogate attorneys. It amended section 27(b)(2) to indicate that lawyers who practice in "fiduciary entities" (in effect, law firms) are required to designate an attorney surrogate. They were previously "deemed" to have appointed their firms as the attorney surrogates. With this amendment, lawyers who practice in firms must designate their firms as their attorney surrogate designees in the designated place on the annual attorney registration statement.

B. Rules of Professional Conduct

The Supreme Court made no changes to the professional conduct rules in the reporting year.

VII. OTHER DISCIPLINARY COMMISSION ACTIVITIES

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

VIII. FINANCIAL REPORT OF THE DISCIPLINARY COMMISSION

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

IX. APPENDICES

BIOGRAPHIES OF DISCIPLINARY COMMISSION MEMBERS

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

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

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

Maureen I. Grinsfelder, a native of Whitley County, retired on January 1, 2009 after fourteen years as Executive Director of the Questa Foundation for Education, Inc., a non-profit foundation that helps finance college for Allen County students. She is a graduate of the University of Michigan, where she was selected for membership in Scroll and Wyvern women's honor societies. For twenty-two years, she was employed by NBD Bank, NA and its predecessor banks

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

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

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

APPENDIX A

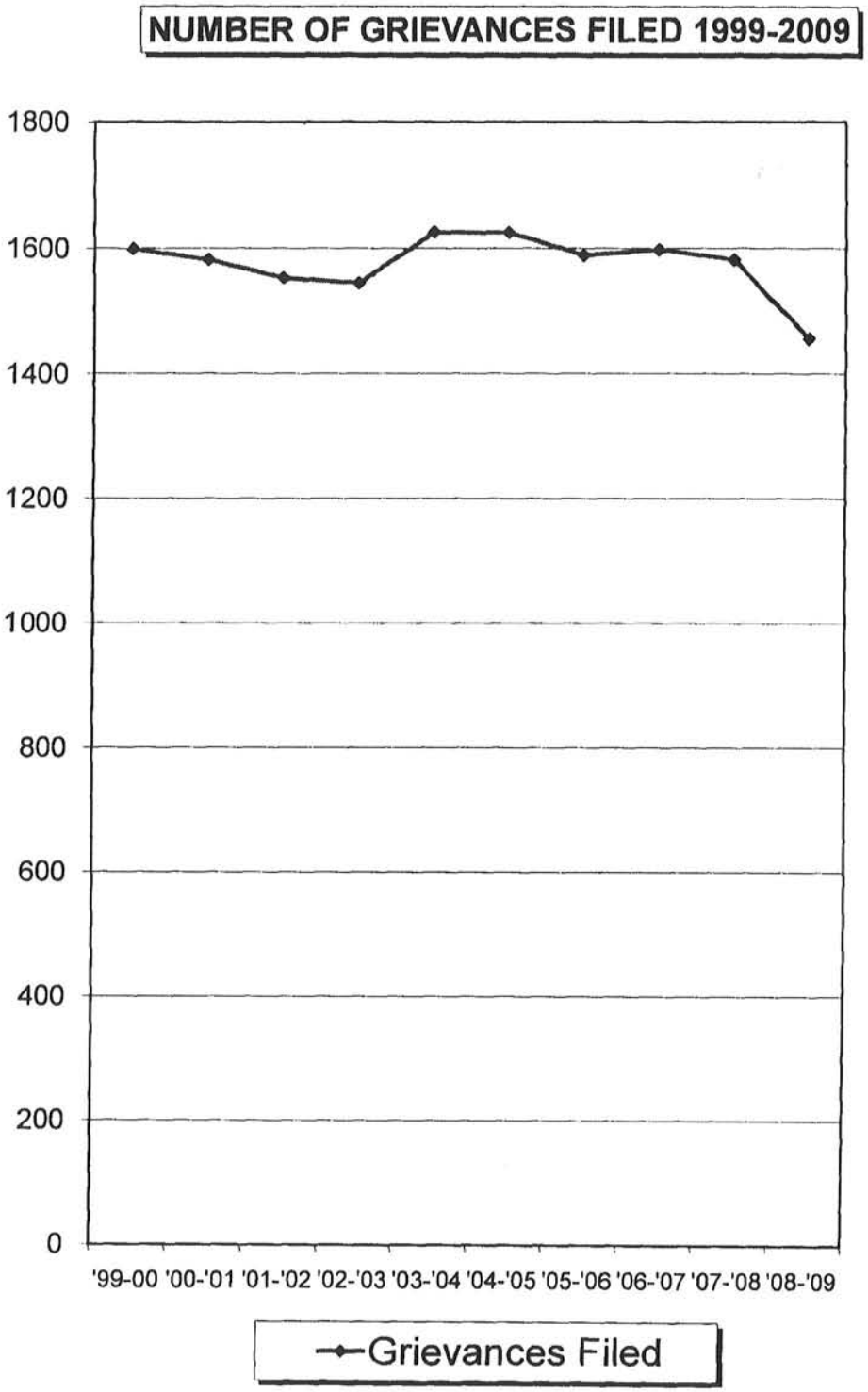
J. Mark Robinson is the managing attorney of the New Albany office of Indiana Legal Services, Inc. He received his B.S. in Civil Engineering from Purdue University in 1969, his law degree from the University of Louisville School of Law in 1973, and a Master of Divinity from the Louisville Presbyterian Theological Seminary in 1974. He was admitted to practice in the Commonwealth of Kentucky in 1974, the State of Indiana in 1975, and the United States District Courts for the Southern District of Indiana and the Western District of Kentucky. Mr. Robinson has served as in-house counsel to Chemetron Corporation, a staff attorney for the U.S. Army Corps of Engineers, and has spent the past twenty-nine years with Indiana Legal Services. His professional memberships include the Clark and Floyd County Bar Associations; the Indiana State, Kentucky, and American Bar Associations. He is the current president of the Clark County Bar Association, past president of the Clark County Board of Public Defenders, has served Clark County in the Indiana State Bar Association House of Delegates for the past ten years, and has served on the Indiana State Bar Association Board of Governors (2004-2006). He is also a Master Fellow of the Indiana Bar Foundation and present member of its board of directors. He was appointed a Sagamore of the Wabash in 1999. In his civic life, he serves as President of the Board of Directors of the River Ridge Development Authority, and is past trustee of the Southern Indiana Economic Development Council. As a Presbyterian minister, Mr. Robinson served small rural parishes in southeastern Indiana for thirty-two years. He served for six years on the Indiana Pro Bono Commission, and was appointed to a five-year term as a member of the Disciplinary Commission that expired on June 30, 2006. He was re-appointed to a second term on the Commission beginning July 1, 2006. He has previously served as Secretary, Vice-Chair and Chair of the Disciplinary Commission.

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

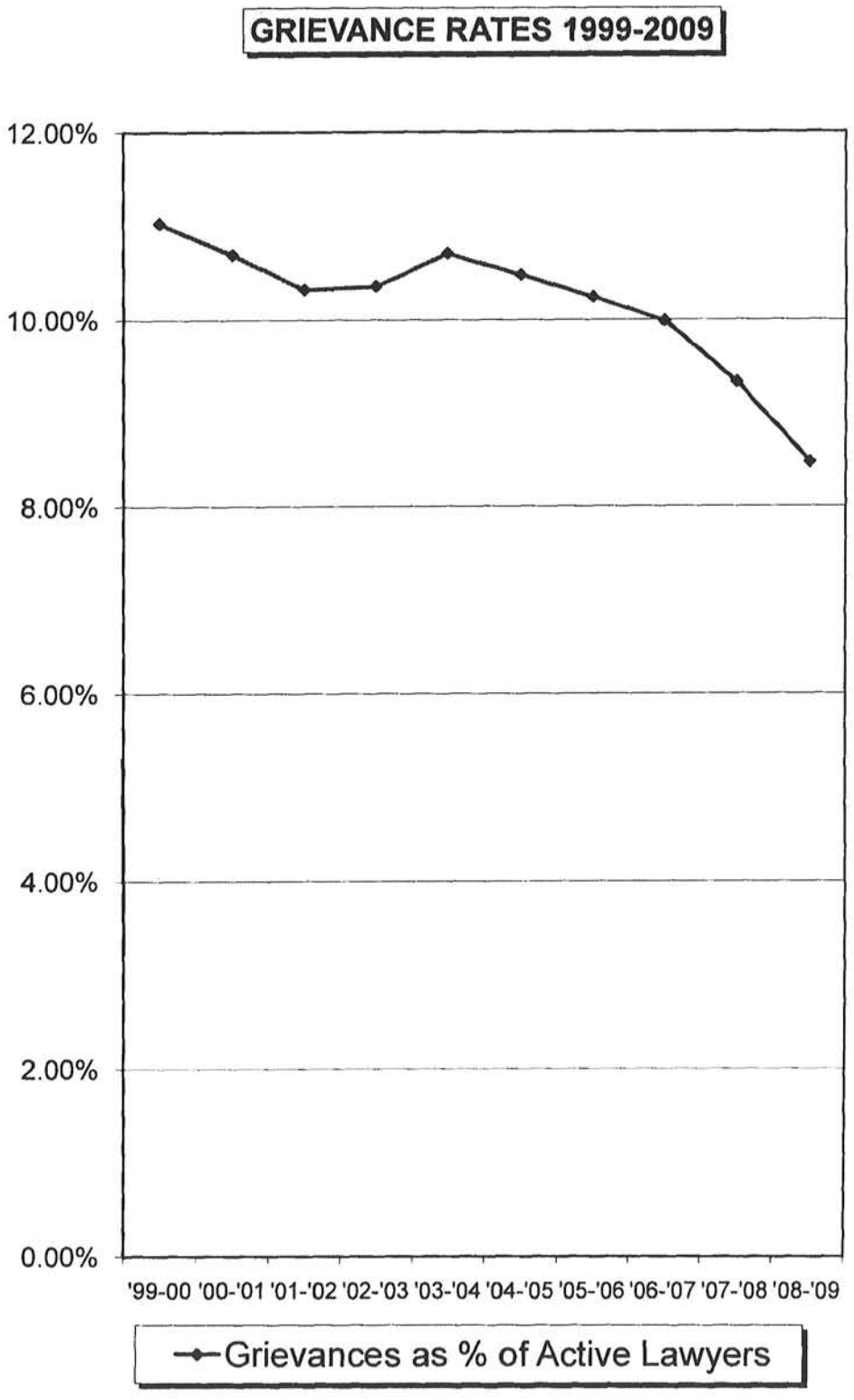
Sally Franklin Zweig is a partner of the law firm of Katz & Korin P.C. in Indianapolis. She obtained her undergraduate degree from Washington University in St. Louis in 1971 and received her law degree from Indiana University School of Law at Indianapolis in 1986 and was admitted to practice that same 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 has served as a lecturer for the Bar Review presented by the Indianapolis Bar Association. She is also a Fellow of the Aspen Institute [1997] and the Oxford Center for Social Justice [1998]. Her civic service includes mayoral appointments to the Executive Board of the Greater Indianapolis Progress Committee and as past co-chair of the Race Relations Leadership Counsel of Indianapolis. She also presently serves on the boards of directors of the Festival Musical Society and At Your School Services. She was appointed to a first five-year term as a member of the Disciplinary Commission expiring on June 30, 2006, and reappointed to a second term beginning July 1, 2006. A former Secretary and Vice-Chair of the Disciplinary Commission, Ms. Zweig served as Chair of the Commission in this reporting year.

APPENDIX A


NUMBER OF GRIEVANCES FILED 1999-2009
1800
1600
1400
1200
1000
800
600
400
200
0
'99-00 '00-'01 '01-'02 '02-'03 '03-'04 '04-'05 '05-'06 '06-'07 '07-'08 '08-'09
Grievances Filed

APPENDIX B


GRIEVANCE RATES 1999-2009
12.00%
10.00%
8.00%
6.00%
4.00%
2.00%
0.00%
'99-00 '00-'01 '01-'02 '02-'03 '03-'04 '04-'05 '05-'06 '06-'07 '07-'08 '08-'09
Grievances as % of Active Lawyers

APPENDIX C

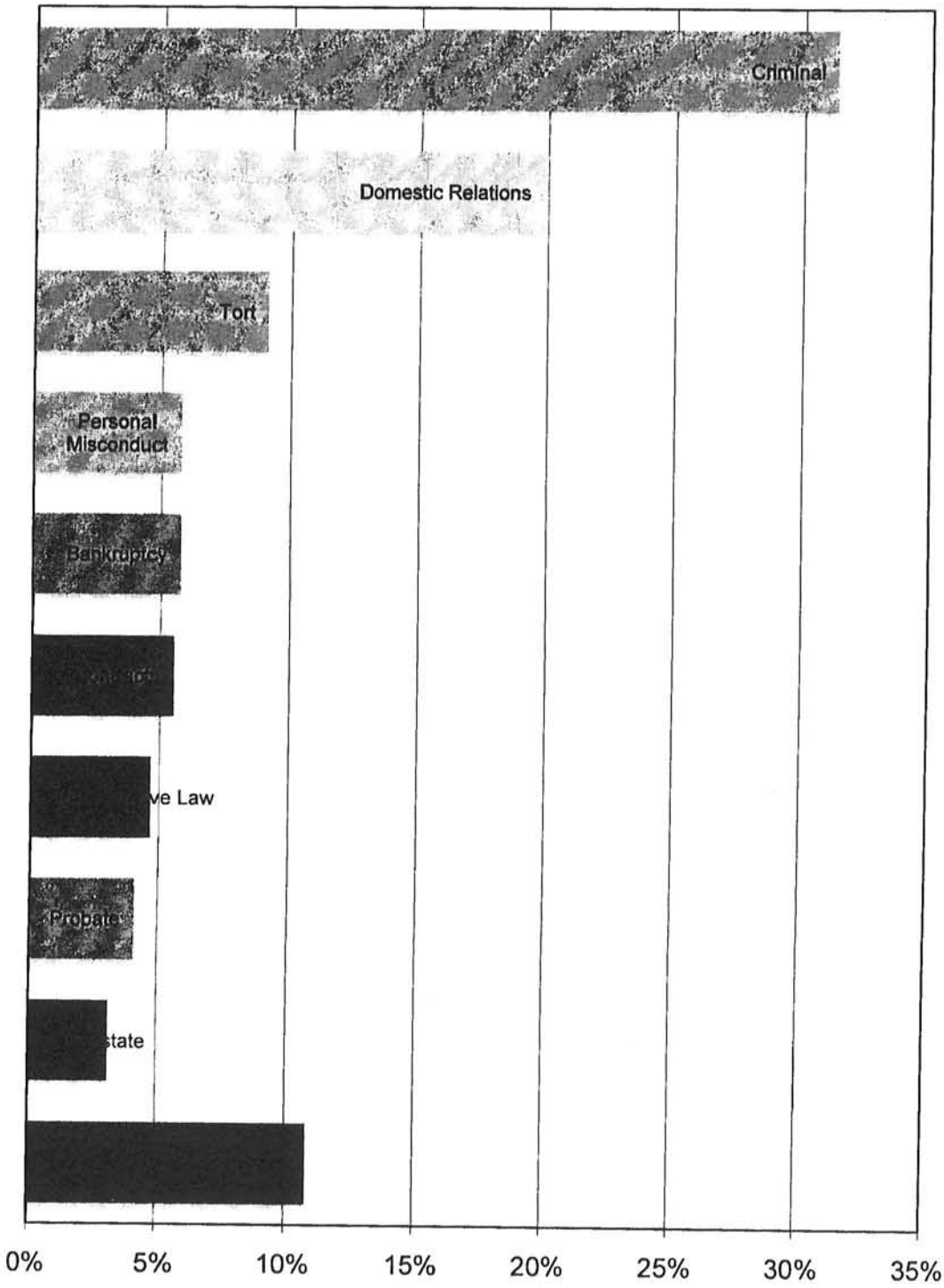
GRIEVANCES BY CASE TYPE AND MISCONDUCT ALLEGED (2008-2009)

Type of Legal Matter	Number	% of Total
Administrative Law	62	4.7%
Adoption	6	0.5%
Bankruptcy	76	5.8%
Collection	27	2.0%
Condemnation	0	0.0%
Contracts	73	5.5%
Corporate	20	1.5%
Criminal	413	31.3%
Domestic Relations	262	19.8%
Guardianship	10	0.8%
Other Judicial Action	22	1.7%
Patent, Copyright	5	0.4%
Personal Misconduct	76	5.8%
Real Estate	41	3.1%
Tort	120	9.1%
Probate	54	4.1%
Worker's Compensation	12	0.9%
Zoning	2	0.2%
Other	39	3.%
TOTAL	1320	100.0%

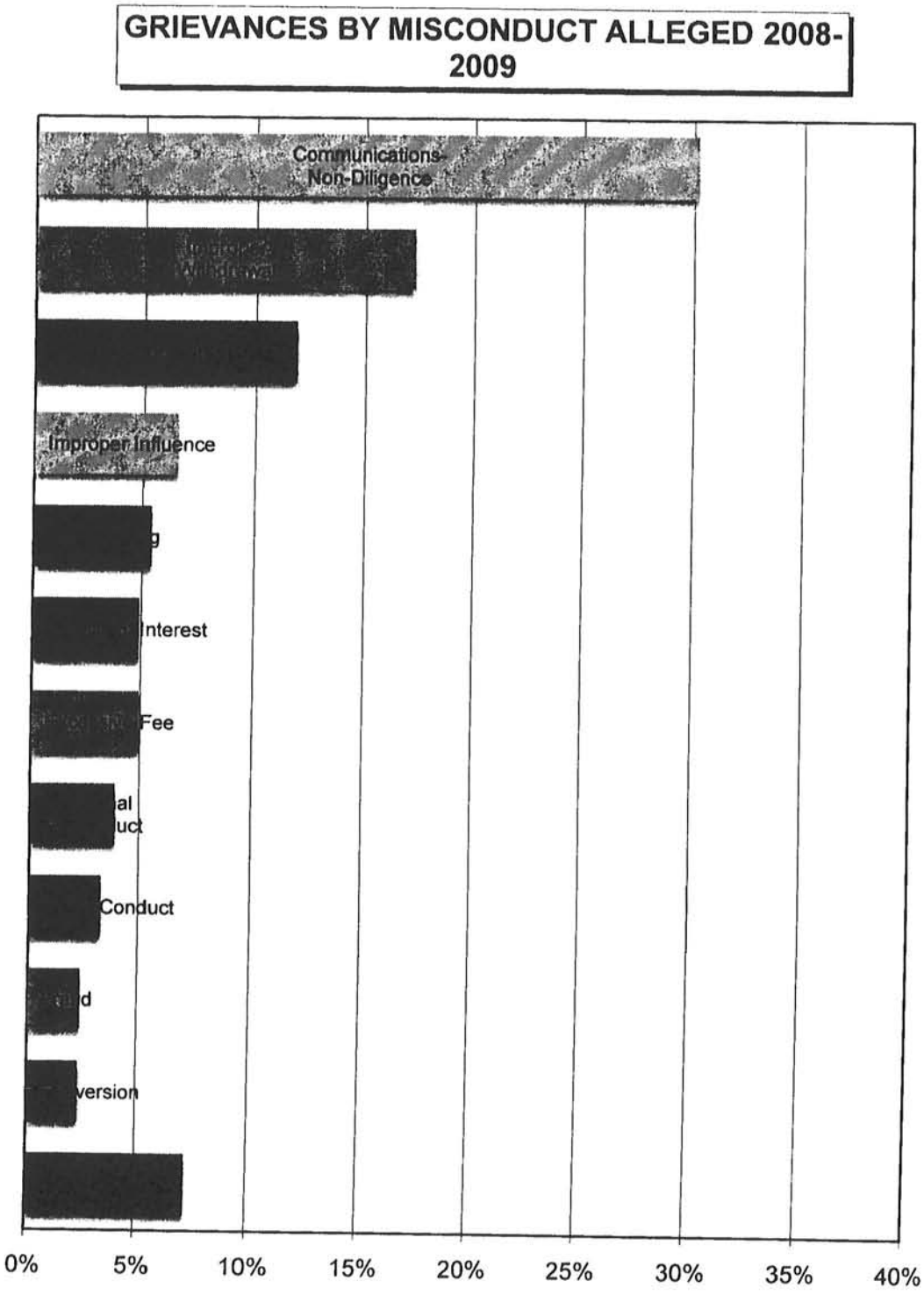
Alleged Misconduct	Number	% of Total
Action in Bad Faith	9	0.4%
Advertising	14	0.7%
Bypassing Other Attorney	16	0.8%
Communications/ Non-Diligence	607	30.2%
Conflict of Interest	98	4.9%
Conversion	47	2.3%
Disclosure of Confidences	16	0.8%
Excessive Fee	99	4.9%
Fraud	48	2.4%
Illegal Conduct	66	3.3%
Improper Influence	131	6.5%
Improper Withdrawal	346	17.2%
Incompetence	238	11.8%
Minor Disagreement	0	0.0%
Minor Fee Dispute	46	2.3%
Misinforming	108	5.4%
Overreaching	39	1.9%
Personal Misconduct	78	3.9%
Solicitation	5	0.2%
TOTAL	2011	100.0%

APPENDIX D

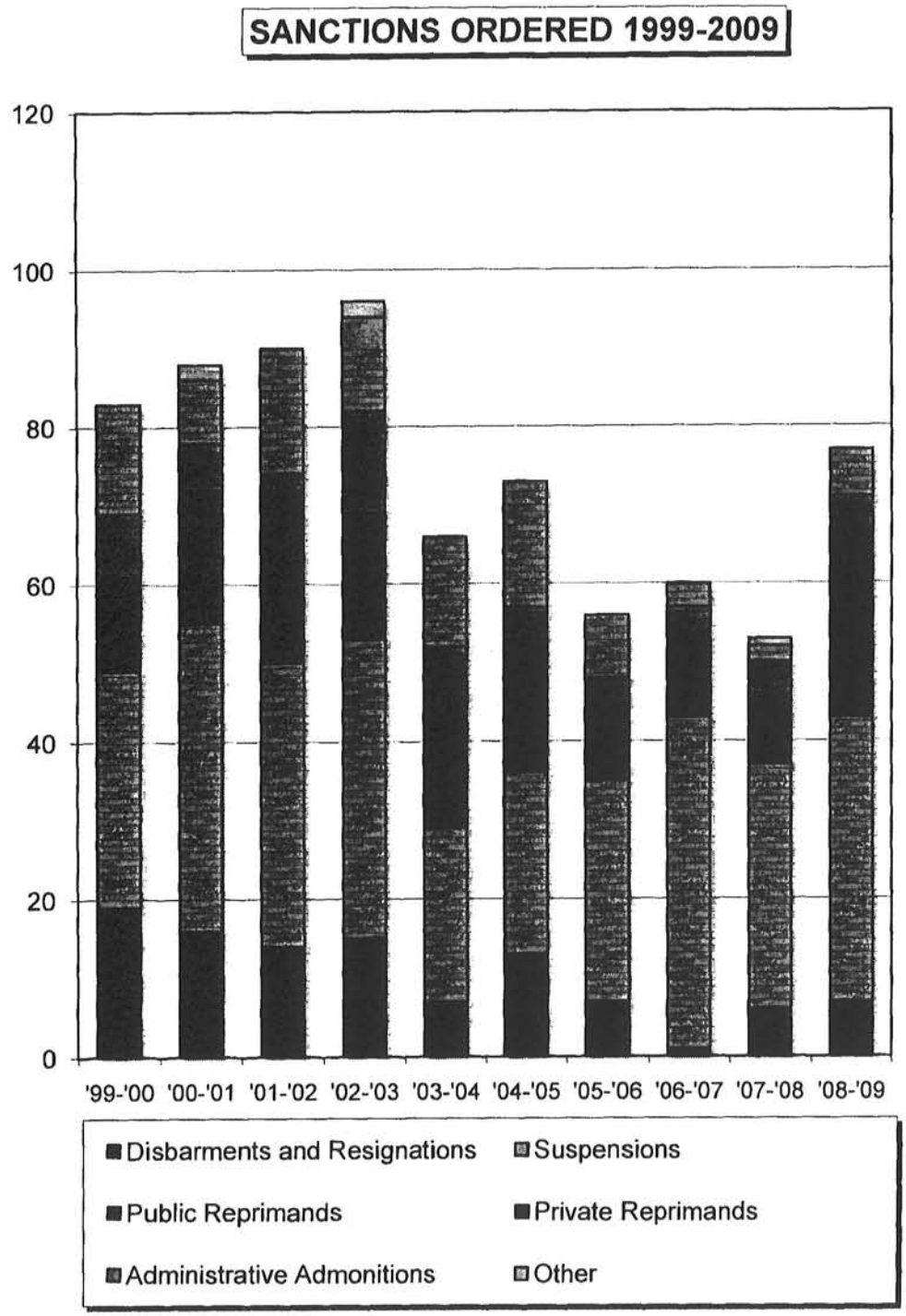
GRIEVANCES BY CASE TYPE 2008-2009



APPENDIX E


GRIEVANCES BY MISCONDUCT ALLEGED 2008-2009
Communications-Non-Diligence
Improper Influence
Interest
Fee
Conduct
0%
5%
10%
15%
20%
25%
30%
35%
40%

APPENDIX F


SANCTIONS ORDERED 1999-2009
120
100
80
60
40
20
0
'99-'00
'00-'01
'01-'02
'02-'03
'03-'04
'04-'05
'05-'06
'06-'07
'07-'08
'08-'09
Disbarments and Resignations
Suspensions
Public Reprimands
Private Reprimands
Administrative Admonitions
Other

APPENDIX G

PUBLIC AND BAR IMPROVEMENT AND EDUCATION ACTIVITIES 2008-2009

Author	*How Unappealing: Ethics Issues In Appointed Appellate Representation*, Vol. 52, No. 1 RES GESTAE 37 (July/August 2008)	Lundberg
Author	*Trust Accounts in a Time of Bank Failures*, Vol. 52, No. 2 RES GESTAE 33 (September 2008)	Lundberg
Author	*Divided Duty: Reporting Misconduct (Part I)*, Vol. 52, No. 3 RES GESTAE 29 (October 2008)	Lundberg
Author	*Divided Duty: Reporting Misconduct (Part II)*, Vol. 52, No. 4 RES GESTAE 36 (November 2008)	Lundberg
Author	*Warning! Scam Artists At Work*, Vol. 52, No. 5 RES GESTAE 21 (December 2008)	Lundberg
Author	*Top Ten 2008 Professional Responsibility Stories*, Vol. 52, No. 6 RES GESTAE 23 (January/February 2009)	Lundberg
Author	*Dancin' With Them What Brung Ya: Electing Appellate Judges*, Vol. 52, No. 7 RES GESTAE 31 (March 2009)	Lundberg
Author	*What's In Your Trust Account? When Clients Pay By Credit Card*, Vol. 52, No. 8 RES GESTAE 26 (April 2009)	Lundberg
Author	*Sex and Intimacy: Emotional Entanglements With Clients*, Vol. 52, No. 9 RES GESTAE 33 (May 2009)	Lundberg
Author	*Will You Take Fries For That? Bartering for Legal Services*, Vol. 52, No. 10 RES GESTAE 32 (June 2009)	Lundberg
Author	*2008 Survey of the Law of Professional Responsibility*, 42 INDIANA LAW REVIEW (2009)	Kidd
JUL 25, 2008	Presenter: "Ethics in Workers Compensation Cases," Indiana Trial Lawyers Association, Indianapolis	Kidd
JUL 30, 2008	Panelist: State Lawyer Discipline Counsel Panel, Professional Responsibility Officers' Conference, U.S. Department of Justice, National Advocacy Center, Columbia, SC	Lundberg
AUG 6, 2008	Panelist: "Use and Abuse of an Ethics Expert in Disciplinary Proceedings," Annual Meeting, National Organization of Bar Counsel, New York, NY	Lundberg
AUG 14, 2008	Presenter: "Ethics for Neutrals," School of Public and Environmental Affairs, Indianapolis	Kidd
AUG 19, 2008	Presenter: "Ethics for Neutrals," Indiana University School of Law—Indianapolis	Kidd
AUG 20, 2008	Presenter: "Ethical Issues for Paralegals," Indiana Paralegal Association, Indianapolis	Kidd
AUG 21, 2008	Co-Presenter: "Legal Ethics Issues for 2008 and Beyond," Fulton County Bar Association, Rochester	Lundberg

APPENDIX H

AUG 22, 2008	Presenter: "Update on Ethics Cases," Indiana Trial Lawyers Assoc. Women's Seminar, Indianapolis	Kidd
SEP 9, 2008	Co-Presenter: "Professional Responsibility," Annual Law Update, Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
SEP 18, 2008	Presenter: "Avoiding Trouble in the First Place," Marion County Public Defender Agency, Indianapolis, IN	Iosue
SEP 25, 2008	Co-Presenter: "Vignettes of Legal Ethics," Indiana Continuing Legal Education Forum, South Bend	Kidd
SEP 27, 2008	Guest Lecturer, Civil Practice Clinic, Prof. Wolf, Indiana University School of Law, Indianapolis	Lundberg
OCT 2, 2008	Panelist: "Ethics in Problem Solving Courts," Indiana Judicial Center, Indianapolis	Pruden
OCT 3, 2008	Presenter: "Ethical Concerns for Business Lawyers," Annual Mtg., Indiana State Bar Association, Indianapolis	Kidd
OCT 6, 2008	Presenter: "Legal Ethics and the Federal Prosecutor," U.S. Attorney's Office, Northern District of Indiana, South Bend	Lundberg
OCT 6, 2008	Presenter: "Ethics Update," Evansville Bar Association, Evansville	Pruden
OCT 8, 2008	Co-Presenter: "Vignettes of Legal Ethics," Indiana Continuing Legal Education Forum, Indianapolis	Kidd
OCT 10, 2008	Presenter: "Ethics Review for Bankruptcy Trustees," Indianapolis	Pruden
OCT 13, 2008	Presenter: "Ethics for Family Law Practitioners," Indiana Continuing Legal Education Forum, Indianapolis	Kidd
OCT 16, 2008	Co-Presenter: "Legal Malpractice and Grievances: Understanding the Causes of Malpractice," Family Law Institute, Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
OCT 17, 2008	Presenter: "Attorney Surrogates," Indiana Public Defender Council, Indianapolis	Rice
OCT 17, 2008	Co-Presenter: "Ethics Issues in Federal Criminal Defense," North Dist. Public Defenders Office, Plymouth	Kidd
OCT 21, 2008	Co-Presenter, "Time Mastery for Lawyers," Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
OCT 28, 2008	Presenter: "Ethics: Listen, Do You Want to Know a Secret?," Advanced Appellate Skills, Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
OCT 29, 2008	Presenter: "Ethical Issues for Business Lawyers," Business Law Section, Lake County Bar Association, Merrillville	Lundberg
NOV 3, 2008	Co-Presenter: "Legal Advertising Ethics Webinar," Law & Politics, Indianapolis	Kidd
NOV 5, 2008	Co-Presenter: "Vignettes of Legal Ethics," Indiana Continuing Legal Education Forum, Terre Haute	Kidd
NOV 6, 2008	Co-Presenter: "Vignettes of Legal Ethics," Indiana Continuing Legal Education Forum, Evansville	Kidd

APPENDIX H

NOV 12, 2008	Presenter: "Ethical Issues, Ex Parte and Bypass Communications," Annual Real Estate Institute, Indiana Continuing Legal Education Forum	McKinney
NOV 14, 2008	Presenter: "Recent Developments in Conflicts of Interest, Trust Accounting and Attorney Fees," 14th Annual CLE Program, Boone Circuit Court/Boone County Bar Association, Lebanon	Lundberg
NOV 21, 2008	Presenter: "Trust Accounts," Applied Professionalism, Indiana Continuing Legal Education Forum, Indianapolis	Lundberg
NOV 21, 2008	Co-Presenter: "Vignettes of Legal Ethics," Applied Professionalism Course, Indiana Continuing Legal Education Forum Indianapolis	Pruden
DEC 1, 2008	Presenter: "Ethical Issues for Government Attorneys," Legal & Ethics Conference, Office of Inspector General and State Ethics Commission, Indianapolis	Lundberg
DEC 2, 2008	Presenter: "Ethics in Family Law Matters," Indiana Continuing Legal Education Forum, Indianapolis	Kidd
DEC 4, 2008	Co-Presenter: "Ethics Year In Review," Indiana Continuing Legal Education Forum, Indianapolis	Kidd
DEC 5, 2008	Co-Presenter: "First Amendment Rights of Lawyers," American Civil Liberties Union of Indiana, Indianapolis	Lundberg
DEC 5, 2008	Presenter: "Unbundling Legal Services," Heartland Pro Bono Services, Franklin, Indiana	Iosue
DEC 9, 2008	Presenter: "Trust Account Management," Applied Professionalism Course, Lake County Bar Association, Merrillville	Pruden
DEC 10, 2008	Presenter: "Conflicts of Interest 101: A Flyover from 30,000 Feet", Marion County Bar Association, Indianapolis	Lundberg
DEC 12, 2008	Presenter: " Disciplinary Process," Marion County Public Defender Agency, Indianapolis, IN	Iosue
JAN 8, 2009	Presenter: "Ethics for Neutrals," Indiana University School of Law—Indianapolis	Kidd
JAN 20, 2009	Presenter, "Ethics in Trial Court Practice," Bar Leadership Series, Indianapolis Bar Association, Indianapolis, IN	Lundberg
FEB 3, 2009	Guest Lecturer: "The Lawyer Discipline System"," Course in The Legal Profession, Maurer School of Law at Indiana University, Prof. Frohman, Bloomington	Lundberg
FEB 14, 2009	Panelist: "Strict Liability vs. Scienter: Filling the Mental State Gaps in the Model Rules," National Organization of Bar Counsel and Association of Professional Responsibility Lawyers, Boston, MA	Lundberg
FEB 20, 2009	Co-Presenter: "Ethics Update," Bingham McHale, Indianapolis	Kidd
MAR 6, 2009	Presenter: "Hey! Could We Have a Little Civility In Here?," Women's Bench-Bar Conference, Indiana State Bar Association, Culver	Lundberg

APPENDIX H

APR 24, 2009	Panelist: "Current Topics in Legal Ethics," Bench-Bar Conference, Allen County Bar Association, Fort Wayne	Lundberg
MAY 27, 2009	Presenter: "Professional Responsibility Review," Allen County Bar Association, Fort Wayne	Kidd
MAY 29, 2009	Panelist: "Discretion in Discipline: How Much Room Do Bar Counsel Have and How Do They Use It?," 35th Annual Conference on Professional Responsibility, Center for Professional Responsibility, American Bar Association, Chicago, IL	Lundberg
JUN 5, 2009	Panelist: "Ethics of Fee Agreements and Billing," Solo and Small Firm Conference, Indiana State Bar Association, Bel Terra Resort	Lundberg
JUN 17, 2009	Presenter: "Lawyer Discipline In Mortgage Foreclosure Mediation," Indiana Supreme Court, Evansville, IN	Iosue
JUN 19, 2009	Panelist: "Attorney Professionalism and Civility—The Role of the Judiciary," Indianapolis Bar Association Bench-Bar Conference, French Lick	Rice

APPENDIX H

INDIANA SUPREME COURT DISCIPLINARY COMMISSION FUND
Statement of Revenues and Expenses (Unaudited)
Fiscal Year Ending June 30, 2009

BEGINNING DISCIPLINARY FUND BALANCE		$1,343,171
REVENUES:		
TOTAL REGISTRATION FEES COLLECTED		$1,677,010
REVENUE FROM OTHER SOURCES:		
Court Costs	$18,582	
Reinstatement Fees	2,000	
Investment Income	6,330	
Rule 7.3 Filing Fees	10,350	
Other	1,203	
TOTAL REVENUE FROM OTHER SOURCES		$38,465
TOTAL REVENUE		$1,715,474
EXPENSES:		
OPERATING EXPENSES:		
Personnel	$1,613,710	
Investigations/Hearings	38,198	
Postage and Supplies	21,840	
Utilities and Rent	139,095	
Travel	40,636	
Equipment	27,834	
Other Expenses	34,076	
TOTAL OPERATING EXPENSES		$1,915,389
TOTAL EXPENSES		$1,915,389
NET INCREASE (DECREASE) IN FUND BALANCE		($199,915)
ENDING DISCIPLINARY FUND BALANCE		$1,143,256

APPENDIX I