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Handling Divorce Cases from Start to Finish

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Ethical Perils In Divorce Practice

Submitted by Bryan Lee Ciyou and Julie C. Dixon

IV. ETHICAL PERILS IN DIVORCE PRACTICE

by **Bryan L. Ciyou and Julie C. Dixon**

A. Controlling Client Relations and Recognizing Dishonesty.

In all attorney-client relationships there is a fundamental division of authority. The client sets forth the legal objectives. On the other hand, the lawyer in consultation with the client determines the means to be employed to attempt to, or reach the objectives.

1. Rule of Professional Conduct, 1.2.

The controlling ethical rule is set forth as follows:

> "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
> (c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

B. When Withdrawal of Counsel is Appropriate.

The ethical rule governing withdrawal is best thought of as bifurcated for educational purposes. It has permissive and mandatory components.

Alternatively, Rule 1.16 may be viewed as consisting of four (4) major components related to withdrawal: (1) mandatory withdrawal; (2) permissive withdrawal; (3) withdrawal on tribunal conditions of withdrawal; and (4) withdrawing to protect client's interest. Ethical withdrawal is also enveloped by a wide array of local rules, practices, and customs.

1. Controlling Rule of Professional Conduct, 1.16.

As with any ethical issue the practitioner may face, the place to depart is the controlling ethical rule, Rule 1.16. This Rule 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."

2. Mandatory Withdrawal.

Mandatory withdrawal is required in three (3) contexts. The first is where continuation of representation will result in violation of ethical rules or other law.

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

The second type of mandatory withdrawal is found where continuation is materially impaired by the 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 third type of mandatory withdrawal should be apparent, and occurs where 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.

3. Permissive Withdrawal.

There are a number of circumstances where permissive withdrawal is allowed by the lawyer of his/her representation of the client, as follows:

First, the withdrawal can be accomplished without material adverse impact on client and his/her case.

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.

Second, the client insists on a course of action the lawyer believes criminal or fraudulent.

Third, the client has used the lawyer's services to perpetrate crime.

Fourth, the client insists on a course of action the lawyer believes repugnant or fundamental
disagreement.

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

Sixth, the continued representation will result in unreasonable financial burden on lawyer or is unreasonably difficult because of client.

Seventh, is a catch-all provision and allows withdrawal where other good cause exists for withdrawal.

4. Notice of Withdrawal and Permission.

In most circumstances, the client must be given notice of withdrawal a period of time

before same, it must be allowed by the tribunal, and it must comply with the following:

- Trial Rule 3.1(E).

- Local rules. [Including a range of time from no notice up to 21days notice of withdrawal in some Courts.]

5. Protecting Client's Interest.

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

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

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

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

6. Common Mistakes and Practice Tips.

To concluded this section, given improper withdrawal is the underlying claim on a substantial number of disciplinary complaints, common mistakes and tips round out these materials, as follows:

- **Assuming Withdrawal and Failing to Appear.**

The first common mistake the author has observed in domestic cases is a motion to withdraw by counsel, and before the withdrawal motion is granted, a hearing is held that the counsel is not present for.

So long as you are counsel of record, you must protect your clients interest or be in violation of the ethical rules. Further, not representing a client at a hearing for which the

attorney is still counsel of record, particularly if the client does not have substitute counsel, is a substantial malpractice risk.

- **Failure to Follow Local Rules.**

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

- **Failure to Act on Breakdown of Relationship.**

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

- **Failure to Withdraw on Completion of Representation.**

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

By way of conclusion, withdrawal may be mandatory or permissive. In any event, it must be done in compliance with the tribunals direction and protecting the client's interest. This is a high risk area, and the lawyer should understand timing of withdrawal and duties related thereto.

C. Avoiding Conflict of Interests.

Under the Rules of Professional Conduct, there are three (3) main types of conflicts 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.

The content of these Rules generally demonstrates the conflict to be avoided. Each rule is set forth, in pertinent part or whole, as follows:

1. 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."

2. Specific Conflicts of Interest with Current Clients (Rule 1.8).

"(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 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 prohibit representation in tort cases in which investigation and any prosecution 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."

3. 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 client 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."

D. Confidentiality and Disclosure Issues.

The attorney-client confidences, enforced by a near absolute evidentiary privilege is a, if not ***the***, hallmark of the American legal system. (emphasis added).

The point to start with any issue of attorney confidentiality is with understanding the ethical rule, and its exceptions.

More advanced inquiry delves into the corresponding bodies of law that give same force and effect: attorney-client privilege and work product doctrine.

1. 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 reasonable believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(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."

2. Disclosure of Confidential Information to Third Parties.

Consistent with the basic level program, this topic turns to disclosure of confidential information. This may arise in many contexts in domestic litigation. In fact, an effective attorney-client relationship involves and anticipates some disclosure. Some of the more common are identified and discussed.

a. Third Party Payors.

Perhaps the most common situation where a third-party may become involved and confidential information must be protected 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.

Where the client is authorizing release of this information, an acknowledgment or consent should be obtained. In addition, the central tenant of the professional rules with an acknowledgment or consent is that it is *informed* consent.

b. Parents and Significant Others.

In addition to the financial realities of domestic litigation, which may cause a third party to be involved as addressed *supra*, sometimes the client's need for emotional support and a sounding board for the case outside the lawyer is critical to effective advocacy. For this reason, it is somewhat common for third-parties to be involved in the case.

Where this is the case, the attorney-client confidence, privilege, and work product must be carefully explained to the client. Any impairment by such third parties must be based upon informed consent.

A smaller number of these cases involved clients with diminished capacity and allow for disclosure under a different ethical rule.

c. Settlement.

Broadly, confidentiality, and the legal evidentiary privilege giving effect thereto, including the nearly absolute protection afforded to mental impressions and work product, are the legal concepts unique to the legal profession.

For cases to settle, however, some confidential information must be shared and this is included in the controlling ethical rule. On the other hand, if after disclosure the proceeding does not result in settlement, it is problematic. There are a number ways to maintain settlement confidentiality.

This is addressed in Rule 1.6 *supra*: "(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)."

Nevertheless, few advocates would (or could) engage in settlement negotiations if they faced the realistic possibility such discussions would be used against his position at trial. Furthermore, many litigants would not settle if all of the facts of the matter in dispute would still be aired in public. That said, the formal ADR rules, and broader rules of evidence prevent this.

i. ADR Rules.

The ADR rules gather the various means and types of negotiations that may be engaged in to resolve a case. Ind. Rule Alternative Dispute Resolution 1.1. These rules are not exhaustive, and may be supplemented by other dispute resolution procedures. Ind. Rule of Alternative Dispute Resolution 1.10.

The ADR rules go on to enumerate specific types and processes of negotiations to resolve cases, each embodying confidentiality and integrating and cross-referencing the evidentiary privilege related thereto. *See* Ind.Rule of Alternative Dispute Resolution 2.11 (mediation).

ii. Rules of Evidence. Rule 408. Compromise and Offers to Compromise.

More broadly applicable than the ADR rules, the Indiana Rules of Evidence prevent settlement offers to be revealed in trial by making them inadmissible:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to provide liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negotiating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution." Rule 408.

iii. Confidentiality Agreement.

In addition to rules, ADR rules and rules of evidence, confidentiality of the terms of the settlement itself may be maintained by a companion confidentiality agreement. This is a contractual agreement to not discuss the settlement, and typically embodies a provision that if inquired about, each or any party thereto agrees to state "the matter has been agreeably resolved between the parties", nothing more or less.

Violation is remedied by liquidated damage provisions and/or injunctive relief as a general matter. It is critical to note, however, this does not make the underlying trial court motions, papers and pleadings file confidential. *See* Indiana Administrative Rule 9.

3. Advanced Considerations.

As noted at the outset of this topic *supra* the legal evidentiary privilege and work product doctrine substantially augment the legal concept that what a client tells his or her attorney will remain confidential.

For those who seek additional, more advanced information on this topic, the following material is provided from an NBI presentation by the Authors in May, 2010. The topic of analysis was "What to do With Accidentally Divulged Privileged Information."

This material begins with work product and legal privilege analysis and then concludes with the broader topic of confidential information (this was an advanced NBI presentation). This is set forth in full as follows as it appeared in that seminar manual:

[**What to do With Accidentally Divulged Privileged Information**

Discovery is perhaps the most likely legal circumstance in which a privilege may occur in domestic practice and cause accidental disclosure of privileged information. Such is the general focus of these materials. This noted, the threshold issue for the attorney is the critical understanding of the difference between the attorney-client communication privilege and the work-product doctrine and its privileges.

A. Communications Privilege and Work Product Privileges.

These legal privileges, which protect disclosure of certain information, spring from common law origins; and they inherently embody the need for the attorney to be able to address a matter with a client without fear of being forced to disclose it, and ultimately used against the client, in a court of law.

Under the current state of the law, the attorney-client communications privilege is narrower than the work product doctrine and its privileges, which are not limited to attorney-client communications. *See, e.g., Burr v. United Farm Bureau Mutual Insurance Company*, 560 N.E.2d 1250, 1256 (Ind.Ct.App.1990).

1. Statutory Attorney-Client Communications Privilege.

The attorney-client (and privileges of physicians, clergymen, and spouses) communications privilege is embodied in statute: "Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (1) Attorneys, as to confidential communications made to them in the course of their professional

business, and as to advice given in such cases . . . ." Ind.Code § 34-46-3-1.

This privilege "applies to all communications between the client and his attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities." *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721, 724 (Ind.Ct.App.1995). However, the attorney-client privilege is to be narrowly construed because the privilege may prevent the disclosure of relevant information. *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind.Ct.App.1995).

2. Work-Product Doctrine and its Privileges.

The work product doctrine, and privileges emanating therefrom, are embodied and set forth under Ind. Rule of Trial Procedure 26(B)(3). Under the umbrella of work product, one type of information is subject to a qualified privilege and the other an absolute evidentiary privilege.

a. Materials Prepared in Anticipation of Trial.

With ordinary work product, a party may obtain discovery of materials prepared in anticipation of litigation or for trial in limited circumstances: "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of his case and he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.*

b. Mental Impressions, Conclusion, Opinions, or Legal Theories.

This noted, while ordinary work product materials may be discoverable upon a special showing, "a party seeking discovery is never entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation." *Penn Cent. Corp. v. Buchanan*, 712 N.E.2d 508, 516 (Ind.Ct.App.1999). This material is often called opinion work product, and is entitled to absolute protection from discovery. *Id.*

B. Application and Scope of the Privileges.

These distinctions noted, a communication between an attorney and client may be privileged under either or both. By way of example, a conversation between the attorney and client on theories of the case, memorialized in writing, may be protected under both.

On the other hand, the work product doctrine may apply and not involve any attorney-client communication. A letter to an insurance company, its insured's defense, and a potential expert and his or her report may be protected work product.

The work product doctrine extends to a party or representative of a party. If this is then covered by a letter with a theory of defense, it may constitute a mental impression and be subject to a nearly absolute immunity from disclosure.

C. Discovery Production and Deposition (Oral or Interrogatory).

1. Documents.

As practically applied in discovery, the attorney-client privilege and/or work product doctrine is asserted with regard to the discovery material sought. However, the assertion should be on a document by document basis, not a blanket assertion. *See, e.g., Petersen v. U.S. Reduction Co.*, 547 N.E.2d 860, 862 (Ind.Ct.App.1989). The parties are then expected to informally try to reach a resolution. Ind. Rule of Trial Procedure 26(F).

If not resolved thereby, the party seeking to avoid this production may seek a protective order under Ind. Rule of Trial Procedure 26(C). The party seeking the information would file a motion to compel. Ind. Rule of Trial Procedure 37(A).

Under Ind. Rule of Trial Procedure 26(C) and 37 (A), the trial court is vested with a wide range of tools and discretion to order relief. The burden to prove the application of the privilege is on the party who asserts it. *Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind.Ct.App.2004).

In the alternative, depending upon the relative risks, if the material tendered is subject to a claim of privilege or protection as trial-preparation material, a party making such claim may notify any party that received the information of the claim and basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved.

A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

2. Statements.

If the legal privilege becomes an issue during the course of a deposition, the attorney may instruct the deponent not to answer, objection noted, and have the question certified by the Reporter. Thereupon, the question, with the objection, when so certified shall be delivered to the party requesting the certification who may then proceed under Ind. Rule of Trial Procedure 37(A).

D. Confidentiality of Information.

A final point of consideration is that confidentiality is far broader than evidentiary privileges. Most broadly, 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 otherwise authorized. Indiana Rule of Professional Conduct 1.6.

The line between confidential information and a legal evidentiary privilege may become

blurred. For instance, mediation (ADR) is confidential and is treated as a compromise or offer to compromise under Indiana Rule of Evidence 408. While confidential, if a statement or conduct made in settlement negotiations was sought to be admitted in court, it is inadmissible and privileged. Indiana Rule of Evidence 501. The strength of a privilege differs from privilege to privilege.

With any statement or document the lawyer faces, he or she must continually filter this through the screen of confidentiality, privilege, and strength of such privilege.]

Ultimately, confidentiality and disclosure work in tandem in any given case as an attorney uses the means at his or her disposal to move toward the client's legal objective. Indeed disclosure may be beneficial to a case.

E. Calculating Fair Attorneys Fees.

The threshold consideration and key legal point is a legal fee that is reasonable under the controlling ethical rule may be much different than a reasonable attorney-fee award ordered by a court, particularly in the domestic context. With this, the material turns to the applicable ethical rules.

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

This noted, the controlling ethical rule 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 in 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 (2005).

2. The Components of Ethical Rule 1.5.

In considering and calculating fair attorney's fees globally, a number of important ethical concepts may be distilled from Rule 1.5 itself. These are enumerated as follows:

a. 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.

b. Reasonable Expenses.

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.

c. Oral Versus Written Contract to Fees.

Oral notification of fee is permissible, but not advisable, under Rule 1.5(b). Given the complexities of domestic cases, the preferred method is to have the representation agreement in writing.

d. Scope of Representation.

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

Second, in many 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 such may be specified in the contract. Such permutations and potentials should be discussed with the client at the outset.

e. Basis or Rate of Legal Fees and Expenses.

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 the 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 where a written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

f. Change in Basis or Rate of Fees.

A lawyer must communicate with the client in the event of a change in the basis or rate of fee. This may not seem germane to those new to domestic practice, but often times these cases span multiple years.

g. 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. In other words, a lawyer may enter into a contingency fee contract to collect child support judgments.

3. Disciplinary Cases.

An additional dimension may be added to understanding of calculating a fair fee by reviewing the disciplinary cases on point. Stated differently, where the attorney, client and/or court clash over reasonable fees, they may spark a disciplinary inquiry.

Actionable and representative disciplinary cases on attorneys fees are thus addressed:

- *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 deliver 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.

4. Other Caselaw.

It is important to understanding and mastering the material to recognize that a disciplinary complaint is only one mechanism by which the reasonableness of a fee may be addressed. Civil litigation may also occur between attorney and client (or his or her successor in interest).

Examination of these cases highlight many of the concepts of this Ethics section.

i. Information Regarding Client's Fee not Privileged.

An example of this is found in *McClure & O'Farrell, P.C. v. Grigsby*, (Ind.Ct.App.2009). In this case, 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.

The important legal concept emanating from this case is not the amount of the fee itself. Instead, it 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 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.

ii. Retaining Liens not Tied to Reasonableness of Fee.

In a 2011 case, *Grimes v. Cockrom, et al.* (Ind.Ct.App.2011), the Court of Appeals reinforced an attorney may exercise a retaining lien over a file. Critically, Judge Najam indicated the simplicity under which it attends: "Indeed, a retaining lien is complete and effective without notice to anyone". "And the reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established."

5. Local Rules.

Finally, local rules are playing an ever-increasing role in all facets of civil practice, including attorney fees. The attorney must know and follow 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. Although not technically linked to fair fees, some counties do have proposed amounts that are presumptive fees to be awarded as a matter of custom or local rule.

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

A fair attorney fee is ultimately weighed by a vast number of considerations. The foregoing frame the basics of the analysis.

Completing The Divorce

Submitted by Bryan Lee Ciyou and Julie C. Dixon

- Drafting And Review Of The Marital Settlement Agreement
- Final Divorce Wrap-Up Checklist
- Final Judgment Or Decree Of Divorce
- Appealing The Judgment Or Divorce Decree

V. COMPLETING THE DIVORCE

by **Bryan L. Ciyou and Julie C. Dixon**

A. Drafting and Review of the Marital Settlement Agreement.

Before, during, or after mediation or other ADR, most divorce cases settle. The critical instrument to untangling the marriage and setting the parties on a proper course to live life apart is the settlement agreement. In this section of the NBI, settlement agreement, terms and considerations, are addressed in detail and a wide range of perspectives.

1. Key Components of the Successful Settlement Agreement.

Clearly, each and every divorce presents unique facts, legal applications, and problems. Nevertheless, there are a number of key components that ensure any settlement agreement provides a reasoned measure of protection for litigants. These are provided in checklist format:

- ✔ Elements of dissolution act, waiver, and decree.
- ✔ Encompassing specificity on issues the parties may disagree.
- ✔ Legal and physical custody designations:
  - Physical custody.

    Regular parenting time special issues.

    Holiday parenting time special issues.

    Summer parenting time special issues.

    Step children.
  - Legal custody.

    Joint.

    Sole.

    Hybrid.
  - Child support.
    Worksheet.

    Deviation findings.

- Miscellaneous:

  Educational records, school pictures.

  Relocation.

  Tax forms and deductions/exemptions, rotation and phase out.

  Higher education.

  Health insurance cards.

  Extracurricular activities.

✔ Including entire marital estate (assets and liabilities):

Vehicles.

Student loans.

Credit card debt.

Personal property.

Real property.

Financial accounts (stocks, bonds, retirement, checking, savings).

Tax liabilities/refunds.

Life insurance.

✔ Squaring or stipulating to imprecise or unclear matters, such as support arrearage.

✔ Compliance with Administrative Rule 9 and local rules (such as VNS parenting class).

2. Incorporating Necessary and Standard Clauses.

As a corollary to the key components or considerations of a contractual settlement agreement, there are a number of necessary identifications that need to be made and standard clauses to be included. The more common are provided in a check list format, as follows:

✔ Personal property list as exhibits.

✔ Child support and worksheet as exhibit.

✔ Legal/common real property descriptions.

✔ Redacted account designations and date of valuation (cognizant of volatility in global markets at this time and what caselaw has held)

✔ Boiler plate provisions:

a. Initial Provisions.

- Residence.
- Marriage date.
- Separation date.
- Pregnancy.
- Children of marriage.
- Statutory basis.
- Passage of statutory waiting period.
- Scope of the agreement and if bifurcated or otherwise.
- Considerations if not approved.
- Voluntariness.

b. Concluding Provisions.

- Full disclosure.
- Instruments of conveyance, bills of sale, and the like to execute agreement.

3. Practical Considerations.

Broadly, to reach a settlement agreement that is agreed to by the parties and ordered by the Court is probably not that difficult view from a myopic standpoint: Take what the parties can agree to and write it up.

However, to best serve a client and allow the settlement agreement to serve as a template to move forward in life, any prudent settlement must be considered from the outset of the attorney-client relationship formation and to settling. This requires considering some or all of

the following dimensions to the specific-client:

- ✔ Tax consultation.
- ✔ Bankruptcy consult.
- ✔ Verison of Indiana Parenting Time Guidelines and Child Support Rules utilized (re consideration of future changes).
- ✔ Provision for underwater marital residence.
- ✔ Who will handle time intensive post-decree matters, such as QDROs and timeline.
- ✔ Name change.
- ✔ Financial planning.
- ✔ Appraisals or real property or significant personalty (i.e., collections, jewelry).
- ✔ Valuations of "retirement accounts".

B. Final Divorce Wrap-Up Checklist.

The day ***the divorce*** is final is a finish line of sorts most litigants focus upon, ranging from the date to re-marry or to file individual bankruptcy petition. However, skilled advocates spend ever-more time attending to post-divorce decree matters. Common items on a careful advocate's post-divorce checklist are as follows:

- ✔ Drafting, revising, submission, approval, and implementation of QDROs for pensions and 401(k)s.
- ✔ Quitclaim.
- ✔ Division/transfer of IRA.
- ✔ Refinance or sale of marital residence.
- ✔ Transfer of personal property.
- ✔ Wage withholding order.
- ✔ Life insurance beneficiary changes.
- ✔ COBRA.

✔ Estate plan update.

✔ Credit report monitoring.

C. Final Judgement or Decree of Divorce.

In order to be an effective advocate, the lawyer must first understand the difference between any order of an interlocutory nature and final order. A final order is what triggers the time to file a Motion to Correct Error or Notice of Appeal.

In addition, final orders as to property are effectively unable to be challenged or modified at a future date past the time for a Motion to Correct Error or Notice of Appeal. It is thus critical that all assets and liabilities be included.

D. Appealing the Judgement or Divorce Decree.

As divorce involves a myriad of non-legal dynamics, litigants who perceive themselves aggrieved frequently seek to challenge the divorce decree. This section lists out the ways to challenge the decree initially, which is a motion to correct error or appeal or both.

In certain cases, scriveners errors may be corrected by Trial Rule 60(A). Fraud and other good reasons may be afforded relief under Trial Rule 60(B). Nevertheless, where children are involved, the order of the decree may be modified later (unlike property division) if a court grants a modification petition.

The are set out in checklist format as follows:

1. Typical methods to challenge a divorce decree:

    a. Motion to correct error. Ind.Trial Rule 59.

    b. Notice of appeal and appeal. Ind.App. Rule 9.

2. Other considerations to challenge divorce decree:

    a. Trial Rule 60(A) (typically scriveners error).

    b. Trial Rule 60(B) (fraud or similar showing).

3. Child custody and support modification:

    a. Modification of child support. Ind. Code § 31-16-8-1.

    b. Modification of legal custody. Ind. Code § 31-17-2-21

    c. Modification of physical custody. *Id.*

E. Tackling Post Divorce Logical Problems.

Where the parties to a divorce have minor children, it is a legal certainty issues will arise in the future. A careful advocate advises his or her client to be aware of the on-going jurisdiction of a trial court and the burdens and duties for the routine post-decree, child-related matters, set out in summary format as follows (with the applicable statute):

Relocation. Ind.Code § 31-17-2.2-1 *et seq.*

Emancipation. Ind.Code § 31-16-6-6.

PC orders.

Child support modification. Ind. Code § 31-16-8-1.

Physical custody modification. Ind. Code § 31-17-2-21.

Legal custody modification. *Id.*

Higher education.

Contempt and/or injunction for interfering with parenting time. Ind. Code §§ 31-17-4-4, -5, -8.

Contempt for non-payment of child support. Ind.Code § 31-16-12-6.