The New Litigator's Guide to Trial Practice

Indianapolis, Indiana
February 28, 2008

Practical Tips and Battle Strategies from Veterans of the Courtroom

Presented by
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February 2008

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Managing Your Caseload

Submitted by Bryan Lee Ciyou

- Choose Wisely: Selecting The Right Cases
- Evidentiary Preparation: Procedure And Time
- How Case Themes And Plans Of Action Guide Your Success
- The Juggling Act: Secrets To Multiple Case Preparation
- Use Your Lifelines In Discovery
- Managing Billable Hours

I. MANAGING YOUR CASELOAD

A. Choose Wisely: Selecting the Right Cases.

Unfortunately, for lawyers in smaller firms (unlike medium and larger firms where complex conflicts screening automatically eliminates many potential clients, and screens the balance in a comprehensive manner), the client/case selection process is often too unstructured and not selective enough. Clearly, the sheer number of clients, or complexity of cases, is not the benchmark of good lawyering or a profitable law practice.

Every lawyer, from solo practitioner up should have case/client selection criteria. This is because every case may involve ethical issues to constitutional concerns, and, as such, the lawyer must be able to address this and/or desire to in the course of his professional life in order to be an effective advocate. This criteria to assess the proper selection of a case/client may be at a firm level that can evolve over time or be highly individualized and focused on practice area.

The following are the relevant considerations/questions that the lawyer should ask (they are not from any reference list, but those that the author has developed over time and uses daily with his firm, referrals, and the like) in selecting the right case?

1. All cases:

    a. Does the case and/or issues therein have merit?

    b. Is this case going to be (or is) in state or federal court? Am I admitted in that Court?

    c. What is the orientation of a case already pending?

    d. Are there any court dates or pre-trial orders?

    e. What is the statute of limitations? Do I even know what the time limit is for the statute of limitations? Is there any tolling provision?

    f. Who is the opposing counsel?

    g. Is the client reasonable in all ways? Can I handle the client? (see Rule of Professional Conduct 1.2).

    h. Is the law clear on the issue(s) (and what are the issues)?

    I. Do I understand who the client is (and is there any conflict of interest between multiple clients or present and past clients of the firm)?

    j. How will the legal fee be addressed? (see Rule of Professional

Conduct 1.5).

k. Do I have sufficient knowledge of this area of the law to competently advise the client, evaluate the case, and try the case?

l. Is this a bench or jury trial, and is there a choice?

m. Who is the opposing party and/or insurer (and how do they manage cases)?

2. Contingency cases:

a. Can I/we contribute the resources to bankroll this case?

I. Is co-counsel a possibility or a referral fee (see Rule of Professional Conduct 1.5(e))?

b. Do we have the experience to try the case (if it does not settle, this is not the time to make this inquiry)? (see Rule of Professional Conduct 1.1).

c. What will happen if we lose the case? Will it cause the firm financial harm? Will we be sued because we did not work the case up right or try it competently?

d. Is there any "deep" pocket to recover from (such as insurance)?

e. Is the time I will spend on this case worth the anticipated hours it will take and that limitation on other paying legal work, if any?

f. Does this case have interstate dimensions, and how does this factor into the decision to take the case?

g. Does the client have unrealistic/undefined expectations (for instance, $10,000 in soft tissue chiropractic bills)?

3. Hourly cases (civil):

a. Do I (my firm) handle this area of law, and if not, do we have a resource to consult with?

b. Is this case worth the time and responsibility relevant to other cases I may take or have in my caseload?

c. Can the client afford the representation, and have I given him/her a realistic range of the costs (a red flag is found when the client has a

difficult time or delay in paying the initial retainer)?

d. In what ways is this case likely to go off track, and am I willing and able to handle this?

e. Is the client a "red-flag" client: multiple prior attorneys, grievances, judicial complaints, expectations for result or costs? (see Rule of Professional Conduct 1.16 on mandatory and permissive withdrawal).

f. Are there companion cases? And if so, or they are expected to emerge, can I handle them?

g. Are there criminal dynamics that I have to understand to avoid criminal exposure and assert a 5th Amendment Privilege to?

h. Do I understand the rules of civil procedure and appellate rules well enough to do an effective job?

4. Hourly cases (criminal):

a. Am I competent to handle the substance and a jury trial, if necessary, to provide the constitutional right to counsel? *See, e.g., Strickland v. Washington*, 466 U.S. 668, 690, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *reh'g denied.*

b. Do I understand relevant search and seizure law to provide effective assistance of counsel?

c. Who is the client and who will that client want me to communicate with/through?

d. Do I have any moral issue with fully handling the case?

e. Do I have a working relationship with the court, prosecutor, police agency?

f. What is the omnibus date, and where are the time deadlines at present?

g. Should the client try to obtain a public defender?

h. Are there civil dynamics to the case? And if so, who is going to handle them; and is there insurance coverage that will provide a defense thereto? If so, how will concurrent criminal and civil cases be handled?

I. Do I understand the criminal rules of procedure and appellate rules well enough to do an effective job?

5. Flat fee cases (criminal or civil): In addition to the foregoing considerations, in a flat fee context, the lawyer must consider and account for:

a. Is a flat fee permissible? (see Rule of Professional Conduct 1.5(d)).

b. What if I want to or must withdraw? How is the fee handled?

c. What if the client(s) terminates my representation? How is the fee handled?

c. What exact representation am I contracting for with the client?

d. Do I understand the ethics of flat fees and when they are earned?

e. What are the contingencies that may arise and how will they be handled viz-a-vie the flat fee.

The bottom line is that every lawyer grows in knowledge and experience each day and with each case and client. Thus, with this and the foregoing, if at a "gut" level the lawyer finds himself/herself thinking, "I am going to regret this", is it wise to pass on the representation. The risk of malpractice, ineffective assistance of counsel, and/or grievance is simply not worth that risk.

B. Evidentiary Preparation: Procedure and Time.

Obviously, evidentiary preparation should be considered early on in the trial preparation (perhaps even at the initial meeting) process and should be an on-going consideration as discovery unfolds. The week, day, evening before, or day of trial is not the time for that fleeting thought, "Do I have _____ in admissible format (or at all)?" Few seasoned litigators are not able to recollect a horror story of critical evidence that did not make it into the evidentiary record.

The following ten (10) inquiries maximize the efficiency of evidentiary preparation throughout the case, and, ultimately, chances of success at trial focusing on broad to quite narrow pragmatic considerations:

1. Do you understand/know the law ***and*** facts of the case that determine the evidence under the standard? If not, what is missing to understand the full picture and properly determine the evidence?

a. Review caselaw.

b. Review statute.

c. Burden of proof.

2. Do you understand the evidentiary foundation to be set out to admit the evidence and what form it has to be in? Have you looked at the most recent caselaw and IRE applicable?

3. Have you explained the economics of the case and evidentiary development and procuring evidence into admissible format to the client (and the costs thereof to the client)?

4. Do I have pre-trial orders/case management orders with cutoffs (discovery cutoffs relevant to evidence).

5. Is a motion in-limine (discouraged by many courts or improperly used) or expert witness qualification hearing necessary?.

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6. Trial choice:

   a. Ask for 1st choice in civil matters due to preparation time wasted if bumped (length of trial, location of witnesses, and complexity significant to this consideration)? (civil trial only, and should not be confused with the criminal right to a speedy trial if incarcerated).

   b. Determine whose calendar it is on.

   c. Contact prior settings to see if they are going.

   d. Type of trial: bench or jury (do not just default to one or the other).

7. Experts:

   a. Flying in out-of-state experts and contingency plans.

   b. Getting them paid.

   c. CV.

   d. Pre-trial prep.

8. Statements of the Record Keeper/Keeper of the Records.

9. Trial scripting (dry trials)! (typically limited to lengthy trial or complex issues, see **Exhibit "1"**).

10. Evidentiary briefs on suspected challenges and offers of proof.

11 Jury instructions or findings request.

12. Stipulations.

13. Prepare the same way for every trial.

Practice Tip (Trial Bag Resources): Without question, every lawyer has been in trial and had an evidentiary or procedural question that needed to be answered right then and there. The following are items that should be in one's trial bag and taken to every trial:

1. *Indiana Rules of Court* (state or federal) (which has the IREs).

2. Code book.

3. Evidentiary manual: Depending upon the type of trial and sophistication of issues, the following are excellent resources used by the author:

   Indiana Rules of Evidence and Trial Objections Outline (Indiana Public Defender Council) (oriented to criminal cases).

   Evidentiary Foundations (5th Ed. by Imwinkelried and published by LexisNexis) (not state specific).

   Indiana Practice: Indiana Evidence (2nd Ed. by Miller and published by West) (most academic work).

   Indiana Trial Evidence Manual (5th Ed. by Tanford and published by LexisNexis) (this author's choice).

Practice Tip (Fluid Environment of Trial): Any seasoned trial attorney will easily relay a complete change in trial strategy based on trial dynamics. The lawyer should be constantly evaluating how to best try the case and not be afraid to change tactics as the evidence dictates. This sometimes makes the difference between winning and losing. The way this is accomplished is by knowing the case, organizing it in modules, and knowing the law such that instantaneous evaluation can be made.

Practice Tip (A Good Night's Sleep): A good night's sleep provides the mental acuity to make the subtle connections during the complexities of trial.

Practice Tip (Review IREs): Before any significant trial, the author re-reads the IREs.

With each such reading the rules become more connected and the ties from one to the other and trial practice become that much more clear. This is a simple practice that can make a collective difference to effective trial practice.

A final question that is often an issue of concern for the lawyer and the client is how long to prepare for trial. How much is enough? When is enough, enough? This is an age old question of living with a competent level of uncertainty that begins in law school and continues throughout one's career. This noted, the author believes a good rule of thumb is two (2) days preparation for every trial day.

C. How Case Themes and Plans of Action Guide Your Success.

One old adage and the comments of a veteran commissioner may guide every lawyer on this ***art*** of trial practice: Have a case theme ! This should exist in every criminal or civil trial, state or federal, as follows:

"Pound the law. Pound the facts. Or pound the table." [Which drives your theme?]

"Never have I heard so much, for so long, for so little" [No theme?]

In case after case, the author has watched good criminal and/or civil litigants and their lawyers argue against X outcome, which is most likely, without providing an alternate plan or theme to reach an alternate result. Thus, there is no theme or plan in which to elicit the evidence within the trial framework, yet lawyers and litigants are "surprised" when they do not prevail.

Criminal example (also see **Exhibit "2"** as discussed at the seminar that a theme can come from the basics in life if the lawyer is looking for such): Defendant WH is going to a probation hearing for a dirty drug drop. It is almost a certainty her probation will be revoked given prior dirty drops. With research into her insurance, and a number of resources, it was determined that in-patient re-hab was available to her. The court ordered this in lieu of revocation of probation.

A civil example (also see Trial Rule 52(A)): In a recent case regarding a pre-trial denial of a protective order, as such information was not reasonably calculated to lead to the discovery of admissible evidence, this was incongruous to the central issue and to the theme that there were limits on how much money this particular doctor could make and pay in extra-curricular activities above guideline child support. Through the trial, this discovered information, despite its apparently serious impact on the theme, was used graphically in the findings to further make the point, successfully.

General tips on how to develop and maintain a theme are enumerated and will be discussed, as follows:

1. Transcripts on multi-day trials.

2. Scripting.

3. Findings for bench trials and opening and closing on jury trial (the tie ups).

4. Do your homework on what is available re the case theme.

   a. Example: In one of the author's recent criminal appeals of a case (he did not handle at the trial court level) on a fixed plea on sentence, for which the Court followed the exact terms of the plea, save for placement, which defense counsel argued to be executed in Community Corrections, yet by statute, the defendant was specifically excluded from direct placement in community corrections because of his offense. This is the clearest example of not having prepared a theme and elicited evidence consistent with the plan on the theme.

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5. Mitigates temptation to ask just one more question.

6. Know when to shut-up.

D. The Juggling Act: Secrets to Multiple Case Preparation.

The "juggling act" of multiple cases in criminal or civil trial practice can be found in many contexts. It can be as simple as two (2) or more hearings set at the same time and on the same day. Fortunately, with today's automated calendaring systems, they can be efficiently tracked and usually managed. This noted, however, there is a critical distinction between these simple juggling acts and those found in complex litigation, which any case being readied for trial may constitute, where there are multiple plaintiffs, defendants, cross and counter-claims, and intervening parties.

Black's Law Dictionary (8th Ed.), defines "complex litigation" as "[l]itigation involving several parties who are separately represented, and usually involving multifarious factual and legal issues." These are clearly cases that require great attention to legal detail (i.e., discovery and deadlines) and for which the lawyer (or his/her firm) must be equipped to handle a volume of records, but this is vastly different from the daunting task of multiple case preparation. Yet, most lawyers are trained for the basics of complex litigation in law school. Schedule conflicts and complex litigation are not the focus of this subject in this section of the seminar.

At a much more difficult level is multiple case preparation, which truly becomes a "juggling act." At the simplest level, this can be thought of as preparation of multiple cases for impending trial dates at the same time, yet this to is just a scheduling or tracking issue. This is also not the focus of this section of this seminar. Instead, it is the single event, or set of events, that triggers multiple cases at the same time. With such, there are inherent conflicts in the legal courses of action faced by at least the defense lawyers (civil and/or criminal) that presents a

daunting, if not impossible, challenge.

This is best illustrated by example.

> **Hypothetical:** A classic hypothetical example is a criminal act against a minor. Take the unfortunate, but all to common, example of a licensed day care provider allegedly kicking a child or giving him/her something improper (i.e., sleeping medication or alcohol) to stop a crying episode or otherwise battering the child. When discovered, which often occurs by a 911 call when the matter turns medically significant, the provider will be arrested and charged. The state will then seek to revoke the provider's license. The parents of the injured child will sue the provider. The insurance of the company of the provider will likely offer a civil defense to the provider. The insurance provider may also retain another unrelated counsel to bring a declaratory judgment action against its insured it is civilly defending based on routine intentional acts' exclusions of standard insurance policies.
>
> The difficulties faced by the lawyers for this civil and criminal defendant are readily apparent. In the criminal case, the defendant (typically) should invoke his/her right to silence and make the state prove its case. However, unless the timing just happens to land the right way, the lawyer(s) for the defendant are in a precarious situation. In the civil case by the parents, the defendant should assert his/her Fifth Amendment privilege (this is not available to document production and should be researched operationally by any lawyer facing this situation).
>
> However, this is going to cause the defendant problems given his/her duty to cooperate with his/her defense under the insurance policy, fueling the declaratory judgment action. If the defendant cooperates with the defense, he/she faces risk in the criminal action. If he/she does not cooperate, then presumably the declaratory judgment action will succeed leaving the defendant with no insurance and potentially a large judgment that cannot be easily discharged in bankruptcy given the intentional nature of the crime (different proof burdens also come into play here). Throw in a divorce action filed by the spouse of the provider and add that much more difficulty to the legal landscape.
>
> **Practice Tip:** This scenario may also exist with multiple cases against the same parties and/or class actions and suits by non-class members.

Unfortunately, there are no simple answers to this legal riddle. In the final analysis, it is a timing and risk-balancing question, squaring financial freedom against personal liberty. The following are considerations/tips focused on by the lawyer(s) for this hypothetical defendant. Clearly, the plaintiff (or state as the case may be) do not face this situation; they simply move their case forward (although good lawyering may assist the defense with "making" the plaintiff's counsel [and/or state] care about the other cases).

There are so many variants of multiple case litigation and it is so fact sensitive that the lawyer has to learn to think on his/her feet when facing this type of case, not apply some set formula/approach to manage such a case like might be available in complex litigation, as considering the following questions and/or practice tips:

1. What legal interests are competing against each other, and what is their importance to the defendant? In the most acute situation, like the hypothetical demonstrates, the interests are deprivation of freedom versus pecuniary interest.

2. Is the timing of each case at issue at this point? Typically, a criminal and civil case on the same underlying fact situation, such as demonstrated by the hypothetical, will run afoul of each other when the discovery stage begins. This may be driven by the plaintiff or the court in moving its calendar.

3. Is a stay possible in one or more of the civil cases pending the criminal trial and/or appeals? A variant of this is whether it is possible to slow down the civil litigation by educating the civil attorneys of the risks faced by continuing to prosecute the civil action. The plaintiff's counsel for the parents of the injured child loses a potentially deep pocket for recovery in the insurance if the declaratory judgment action is successful. The defendant's insurance company potentially risks suit for bad-faith or breach of contract in the declaratory action by pitting its insured between it and the constitutional right to remain silent.

4. Is a pre-trial conference with the court and counsels in each case to explain the situation advantageous?

5. Would a conference with the prosecutor regarding the case help, as presumably the denial of insurance could indirectly interfere with the remedy to the harm to the State by the defendant's alleged action, and thereby effectuate a plea, dismissal (in closer cases obviously), or otherwise?

Ultimately, diagraming the cases and meticulous attention to these conflicts, exhausting all avenues as noted above, may allow the lawyer to juggle these legal matters. If not, ultimately the client (and lawyer) face a tenuous situation. Such litigation is not for the faint-of-heart lawyer. Stated differently, success is hard to come by and is only possible by creative lawyering with a significant depth of legal understanding of the facts and law.

E. Use Your Lifelines in Discovery.

Whether it be with mandatory discovery in a criminal court, or formal or informal discovery of a civil case, discovery provides effectively the sole or major mechanism to obtain the evidence necessary to prepare a case. Typically, this right only begins with filing of an action, but is available in limited circumstance otherwise.

Unfortunately, over time, seasoned attorneys tend to gravitate toward relying on only one (1) or two (2) primary discovery methods in their caseload, perhaps to the expense of some

cases. All of the mechanisms of discovery should be considered in every case. It is akin to the auto mechanic having multiple tools in his/her tool box to use to fix a problem with more or less success and/or speed.

The following is an enumeration of the common discovery tools and relevant inquiries therewith:

1. Deposition upon oral examination, Trial Rule 30: Should this be a video deposition? Should signature be waived? Is a condensed version appropriate? (See Trial Rule 45 regarding subpoenas).

2. Deposition of witness upon written question, Trial Rule 31.

3. Interrogatories, Trial Rule 33.

4. Request for Production of Documents, Trial Rule 34.

5. Request for Physical or Mental Exam, Trial Rule 35.

Practice Tip (Other Vehicles for Discovery by Statute or Court Rules): Pursuant to statute or court rule, some "discovery" may be effectuated by statute. Careful consideration should be given to whether one mechanism is preferred over the other.

Practice Tip (Local Rules): Given the Supreme Court's active steps toward uniformity in local rules and access to same, more and more courts are making rules that govern discovery and limitations thereof. In every locale in which a lawyer practices, he/she must know local rules and customs. Such will aid development of evidence and ultimately trial presentation.

Finally, within the noted legal vehicles to obtain discoverable information and ultimately, admissible evidence, there are three (3) significant legal concepts that must always be kept in mind that mitigate the push and pull of information containment/release, which may make or break a case (and its budget!), as follows:

1. Is a protective order necessary? (see Trial Rule 26(C)).

2. Is the information discoverable? (see Trial Rule 26(B)).

   - Privileged?
   - Reasonably calculated to lead to the discovery of admissible evidence?
   - Unreasonable or for harassment purposes?

3. Is a motion to compel proper? (see Trial Rule 37).

F. Managing Billable Hours.

For lawyers, one of the most, if not the most, elusive element of practice confronting his/her day is capturing time spent. Are you using time as a friend or enemy? Are you using a computerized time management program? How do you view this topic and answer these questions?

This is properly the topic of an entire seminar in itself. However, the following are tried and true time management techniques to capture and manage billable hours:

1. Organize and prioritize the night before for the following day. Do things the same way. Make lists. Consciously evaluate the time burden of what you do. Look at every aspect of every day and decide how to shave time or eliminate wasted time.

2. Start the difficult projects, the "brain benders", first thing in the day when rested and mentally sharp. Numerous sleep deprivation studies demonstrates that a consistent routine of going to bed and getting up at the same time improve mental acuity. Thus, when well rested is the time to begin a complex project.

3. Actively manage your calendar/docket in such a way as to maximize efficiencies and minimize inefficiencies. Schedule meeting/client contact days and off-days for projects/catch-up. This is particularly important for litigators or legal writers.

4. Organize cases in the same way. Handle telephone calls and correspondence in the same way. Process and respond to mail the same way. [Depends upon firm size and latitude].

5. Keep time sheets in a uniform way each and every time.

6. Manage your clients, do not let them manage you. This should start in the initial meeting or engagement letter.

7. Do turn those cases away that you know in your "gut" are the wrong ones to take. And are you asking the right questions when taking a case, such as follows (see discussion on selecting the case/client *supra*):

    a. What court is it in?

    b. Whose calendar is it on?

    c. Who is the opposing counsel?

    d. Is the client a "red-flag" client: multiple prior attorneys,

grievances, judicial complaints, expectations for result or costs?

e. Hand-holding time?

8. Make sure the client understands how you communicate and charge to communicate and manage the file. Consider the following:

   a. What minute increments do you bill in?

   b. Do you charge for a monthly file review/audit?

   c. Are you capturing e-mails and drafting of e-letters?

   d. How do you charge for value-added items that do not reflect the actual time, if at all?

   e. Are you charging too much or too little?

9. Have you contracted for contingencies that are time wasters?

   a. Scope and issues of representation. For example, in a divorce case, will you be expected to advise and handle a criminal, protective order, CHINS, tax or bankruptcy case(s)?

   b. Documents requested later (years after the fact)?

   c. Replenishment retainers to ensure you are paid at the conclusion of representation?

   d. Emergency work hourly rate and retainer.

10. Do you actively keep evaluating what cases you are accepting based on the volume of traffic relevant to skills and overall market conditions? Typically, if the economies of consistency are realized and reduced to unconscious competency and action, each case will consume similar amounts of time. Thus, the higher paying cases, and fewer of them, will result in more net profit and free personal time.

Exhibit "1"

[Outline Used in Multi Day Trial]

[SMITH] TRIAL OUTLINE FOR XX/XX/07 (DAY #1)

Overall Introduction

I. General Information.

Child A (xx/xx/xx) and Child B (xx/xx/xx) are the children of the marriage.

Child Z, Mother's child, of a prior relationship.

S. Smith, Smith's mom.

II. Prep with Smith.

A. Mom's themes:

1. Wants raised Catholic, now including schools.
2. Paternal grandmother raises them.
3. X-Girlfriend's move out.
4. First right of refusal to babysit/extra requested visitation.
5. Her marriage and child.
6. Not sharing life events.

B. What his witnesses will say, and exhibits.

1. Little use of exhibits, other than Evaluator's report.

C. His theme:

Nothing has changed

D. Basis of Mother's Petition to Modify:

A - E.

E. Go through questions.

F. Study her discovery, his discovery, her petition, and her issues.

G. Cross-examination.

H. How a trial unfolds.

I. Cross.

J. Their burden.

K. Direct exam questions cannot be leading.

L. Questions:

1. Where does Child Z go to school (Catholic).

2. Witness 1/Witness 2, X-Girlfriend and attendance of children at Lutheran Church.

3. Go through their witnesses.

4. How often at your house Mother (goes to show she does not know S. Smith takes care of them).

Introductory Matters

I. Pre-Trial Matters.

A. Family evaluation [Move to Admit 31-17-2-12]. **CALL DR. Evaluator OUT OF ORDER.**

B. In-Camera interview.

C. Separation of Witnesses.

D. **MTC (Finances, Witnesses, Exhibits):** Renewed Motion to Continue, if Mother plans to call witnesses other than herself, and particularly if she seeks to admit any exhibits, since we still have not received an exhibit list through today.

- Earmarked last Tuesday and Wednesday to prepare for trial base on W&Es and never received and assumed that only calling herself.

- Never received any exhibits.

- Tried to resolve by phone call when received Wednesday night, but put into voice mail and call on Thursday went from indicating we had not served to "in practice two minutes". Put in writing.

E. **EXCLUSION (Finances, Witnesses, Exhibits):** Renewed Motion to Exclude Witnesses and Exhibits. Beyond clear cutoff. No exhibits ever provided even in discovery request either. *Rohr v. State*, 866 N.E.2d 242 (Ind.2007).

- No exhibits listed on the Witness & Exhibit List filed with this Court.
- No exhibits listed in the Interrogatories [Interrogatory #28]
- Witnesses four (4) days late. [Mother's Interrogatory #26]

[Called after denying even received and then personally attacked]

F. **TAXES:** Motion to Exclude Mother from presenting any case on modification of child support for not providing the tax returns as they are required under Marion County Family Law Rule 504(D) since she claims by her financial declaration she makes no income and trial Rule 34.

- Required to maintain as a matter of law.
- Her argument no one would produce anything.
- Reasonably available to her under Trial Rule 34.
- Cannot invite error and wait till production and say don't have.
- Remedy was a protective order under Trial Rule 26, if that were not proper.
- Reasonably available, as for discovery rule, stated right in the local rule.
- Policy.

G. **MEDICAL RECORDS:** Order to Mother to sign three (3) [Dr. F, Dr. G, Dr. H] medical releases for medical records to be obtained by Smith for her doctors.

- Cannot contrary to her assertion in objection obtain through third-party without a release by her.
- Trial Rule 34 reasonably available to her.
- Mental health at issue (and resisted this before with Dr. 1st Evaluator, p. 19).

- Cannot invite error and wait till production and say don't have.

- Remedy was protective order under Trial Rule 26, but custody statutes put mental health at issue; it is here; and subject to discovery.

- Order sign releases and we will obtain and determine if need to re-open under 60(B) based on evidence therein and what was relayed to Dr. Evaluator. *Smith v. City of South Bend*, 399 N.E.2d 899 (Ind.Ct.App.1980).

H. Findings.

I. Evidence occurring before last order (31-17-2-21).

II. Opening.

The central issue before this Court, at least to Dr. Evaluator evaluation, is whether Smith is intentionally circumventing the parties' agreement that the children be raised catholic.

This is a legal custody matter.

The testimony of Mother and Smith will be (based on discovery #17) that this issue was resolved in mediation in XX, 2007, and the Children have attended Catholic services every weekend, even during the time of Smith's parenting, by Smith's allowance of Mother to take them to Catholic Church.

Smith is also taking Child A to CCD.

There is no basis for modification based on a substantial change.

The other bases Mother alleges are only tangentially related to changing anything with the Children, but instead the parties' own lives and the children are doing well and thriving.

III. Objections.

A. Evidence Before the Decree.

31-17-2-21

B. Refreshing Recollection. [Tanford 211]

1. Not disclosed on the exhibit list.

2. Based on hearsay.

3. No firsthand knowledge.

Asked and answered.

Assumes facts not in evidence.

Argumentative.

Hearsay.

MOTHER'S CASE IN CHIEF

CROSS-EXAM OF MOTHER

A. Agreement to be raised in the Catholic faith? (Modification Petition "A").

Isn't true that you attended Catholic and Lutheran church with Smith during the divorce?

Isn't it true that Smith is taking Child A to CCD class in Smithburg now and this was occurring before the Modification/Contempt Petition you filed on XX XX, 2006?

Isn't it true that CCD is the first training class for this religion that allows you receive communion and confirmation in the Church?

So isn't it true Smith is taking the steps to ensure the Children are raised Catholic and accepted into the Church.

Isn't it true that you never told him you thought the agreement required he had to take the children to Catholic Church when he had them over the weekend before your Modification/Contempt you filed on XX XX, 2006?

Isn't it true that once Smith knew this was an issue with you at the time you filed, or mediation, shortly thereafter he offered to allow you to take them to Catholic Church every weekend, including his?

Isn't it true that neither child has told you they are confused about going to Lutheran and Catholic Church?

B. Respondent Relegating Raising Children and First Right (Modification Petition "B")

Isn't it true that you live 1 ½ hours away from Smith's home making first right of refusal to babysit impossible or impractical?

Isn't it true that this exact same problem will exist if you have custody with the distance?

Isn't it true that you also use your husband, Step-Parent, and your daughter, Child Z, to babysit?

Isn't it true that you do not visit Smith's home with any frequency so you have no first-hand knowledge of your allegation that he relegates their care to S. Smith?

C. Respondent is Relegating Care of Children to Grandmother (Modification Petition "C")

Isn't it true you have a new born infant to take care of?

Isn't it true you have a teenage daughter to take care of?

Isn't it true you have no income to even meet their needs?

Isn't it true that Child B and Child A would be in school and spend just as much time with you as with Smith?

Isn't it true that what has changed is not with the girls but that you quit your job, don't work, and want all of your children together?

Isn't it true that this is your change not that of the girls?

Isn't it true that even when you were married S. Smith has some care-giving role for the children?

Isn't it true that you are and have been estranged from the rest of your family and do not have this network?

Isn't it true that while you have married and gained Step-Parent as a husband you have become re-estranged from your mother?

[Hearing Prep for Damages after Multi-Day Bifurcated Trial On Issue by Issue]

JONES DAMAGES HEARING FOR XX XX, 2007

PLAINTIFF'S CASE

I. **Plaintiff Cross:** Get time line straight.

A. Gravel road built in 1995 (188) and talked with Defendant A at this time summer (1995).

B. Started noticing ponding of water in 96-98 and getting worse.

C. Photo of standing in 96-97 (Tr. 192, Exhibit 65).

D. $27,000 repair to home in 97? (194).

E. Mitigate damages by this repair.

F. Why not rent then?

F. Now problem continues?

G. How rent then now?

H. Empty from 96-98.

F. 96 sump pump. 195.

G. 98-07 rented. How different from 96-98.

II. **Fees.**

A. Objection to testimony and fee exhibit of Attorney A:

1. Not on witness list.

2. Not on exhibit list.

3. Excluded even one of this counsels.

B. Objection if fails to relevancy (Go to Directed Verdict).

INVOLUNTARY DISMISSAL MOTIONS

I. Directed verdict or involuntary dismissal under Trial Rule 41(B) of Treble Damages Claim for as a Matter of Law for costs, actual damages, and attorneys fees.

Renew Motion to Strike filed XX XX,2001 with motion for dismissal with this formal Motion for Involuntary Dismissal made at the outset of the damages hearing of XX XX, 2006, under Trial Rule 41(B).

A. As a Matter of Fact.

Must establish elements of crime of Criminal Mischief or Trespass by civil preponderance. *Excel Industries, Inv. V. Signal Capital Corp.*, 574 N.E.2d 946.

But cannot here was no criminal mens rea of specific intent for criminal act shown by recklessly, knowingly, or intentionally damaging property of another by criminal mischief (35-43-1-2) or trespass (35-43-2-2-) shown by Plaintiff's case in chief because she did not have any possessory interest in the dispute part of when this was alleged to occur before the agreed to restraining order and Lot 11 ownership is still not determined today. *Lamert Engineering Co., v. Monroe Auto Equipment*, 444 N.E.2d 859 (Ind.Ct.App.1983).

This is because Plaintiff failed to follow the quiet title statutory provisions. Ind.Code 32-30-3-14.

There is no title in the west side yard of Lot 11.

B. As a Matter of Law.

Despite Plaintiff's argument when this was raised at the outset of this damages hearing in XX, that, "It's not necessarily that the trespass, they know who owns the land at the time he trespasses upon the land, just have the intent to go upon that land. The statute says the land of another." Tr. p. 5.

The penal code makes clear in its real property definition that, Property is that "of another person" if the other person has a possessory in it. . . . ." Ind.Code 35-41-1-23. It is not her real property for which to recover damages.

This definition applies to the trespass and criminal mischief statutes. Ind.Code 35-41-1-3.

Therefore, Plaintiff's treble damages provisions is not applicable for damages or fees. In fact, legal ownership is still undecided.

II. Directed verdict or involuntary dismissal under Trial Rule 41(B) of Plaintiff's damages to her alleged finger system on Lot 11 and installation of a new finger system and relocation of her well with new finger system and any damages caused thereby to home.

Taking all of the facts of her case as true, it establishes that as a matter of law IV should be granted; there is no evidence of a finger system:

None known of and testified to by Defendant A. Tr. p. 34.

None testified to by Surveyor. Tr. P. 63-73.

No fingers found by Contractor, Plaintiff's contractor and licensed to install in Jones County. Tr. 81.

No fingers found by Witness Y, who had worked at Jones County Soil & Water Office. Tr. 127.

No fingers found by Witness S, Professional Engineer, for Jones County Soil and Water Conversation District. Tr. 158.

No fingers established by Plaintiff as found by the Court. Tr. p. 197.

No fingers established to determine if they were there to be damaged or:

If they ever worked.

If they were the right type since Witness S indicated a mound system would be required.

If they worked properly given the topography.

Given the soil type.

If beyond use life.

III. Directed verdict or involuntary dismissal under Trial Rule 41(B) on water damage to Plaintiff by any damage to drain tile as there was no causation that tile problem was caused by Defendant.

Causation of tile damage if any by Defendants did not causally establish damage to Plaintiff's home.

Defendant A:

Didn't think there was one.

Witness Y did not testify about a drain tile.

Witness Y:

> Could be beyond its use life. Tr. 96.
> Has no idea whether that tile works anywhere except. Tr. 97.
> Never permitted. Tr. 109.

Witness S:

> Never located drain tile personally. Tr. p. 126.
> Could have been tile anywhere causing problem. Tr. p. 137.
> Only way to know is dig up. Tr. p. 137.

Witness T:

> As far as why drain not working now, it is fair to say that you do not have any idea of why it is not working and that is correct. Tr. p. 158.
> Dig it up. Tr. p. 157.

Plaintiff relied upon locations of Witness Y and Witness S and did not excavate. 189.

III. Directed verdict or involuntary dismissal 41(B) on damages to any drain pipe running under crushed rock road.

Taking all facts of Plaintiff's case as true, no evidence that damage if caused by Defendant to any drainage tile itself allows Plaintiff relief.

Un-refuted Contractor admits to driving box truck. Tr. 39, 68, 71-72

Un-refuted Defendant's testimony that county steam roller drove on the road. Tr. 40.

Un-refuted that some traffic had been back in this areas or cars stored here by Defendant's testimony. Tr. p. 20.

ιNo proof that drain tile even on Plaintiff's property and may have been Defendant's property, certainly had surveyor's to locate this.

No proof that had any value to any landowner if there (use life).

IV. Directed Verdict on Lid.

DIRECT EXAM QUESTIONS FOR DEFENDANT A

Name?
Direct your attention to Plaintiff's testimony at the prior hearing that from the period of 1996 through December 1998 she was unable to rent the home on Lot 11 due to water damage?

Did you have an opportunity to observe the home during this time?

Was it occupied if you know?

Do you know why?

Exhibit "2"

Trial theme that was used by attorney for multi-week federal drug trial that was found on a 2007 desk calendar: "In a four hour round of golf, you spend about 10 minutes hitting the ball."

Courtroom Ethics

Submitted by Bryan Lee Ciyou

- Rules Of Professional Conduct
- Meritorious Claims And Contentions
- The Attorney-Client Relationship
- Candor Toward The Tribunal

III. COURTROOM ETHICS

For all of recorded history, what has brought barbaric groups of people together into organized societies is the rule of law. And in a profound nod to the importance of a legal system formed of laws, courts, and lawyers, former Federal Reserve Chairman, Alan Greenspan, in his latest book, "The Age of Turbulence: Adventures in a New World," repeatedly links economic health, growth, and development of any country to the uniform, fair, and impartial application of the rule of law. Legal ethics maintain the integrity of the law.

The "ethics" of every respectable lawyer should permeate every aspect of any law practice. This limitations on conduct, and self-regulation thereof, by professional ethics are set out in the Indiana Supreme Court's Rules of Professional Conduct. In no uncertain terms, without these boundaries and guidelines, the law would rapidly fall into arbitrary distinctions and swing the pendulum toward erosion of a society and chaos (often this cycle plays out in a short time frame in some African countries, such as Zimbabwe, resulting in a myriad of negative consequences from civil unrest to hyper-inflation to departure and collapse of business).

Perhaps professional ethics and their practice are most tested in the courtroom, which is the end-game for each and every dispute lawyers cannot resolve. Literally, lives and fortunes often hang in the balance. Even when the stakes are not so high, it is fair to say the process (and certainly outcome) is of critical concern and importance to the litigants. Given this, lawyers must not lose sight of courtroom ethics. While "winning" is what a client may desire (and certainly the lawyer as well), it is losing and maintaining ethics that ensures the legal system, not a gun or riot, is the ultimate arbitrator of disputes–courts, through lawyers, must "work" well overall each and every time.

Therefore, it is not overstating the point to posit that courtroom ethics is the lifeblood of litigants, judges, and lawyers, and an anvil upon which a continuing society is forged, shaped, re-shaped, and maintained. What follows in these materials is an overview and summary of courtroom ethics, found in the rules thereof set out in the Indiana Rules of Professional Conduct, and following, discussion of selected issues/problems that commonly arise in courtroom litigation: meritorious claims, matters of dispute in the attorney-client relationship, and candor toward the tribunal.

A. Rules of Professional Conduct.

The general topic of legal courtroom ethics introduced, the discussion begins with the Indiana Rules of Professional Conduct. In order for courtroom ethics to be effectuated, it is important that the lawyer understand the overall purpose of the Rules is 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. 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. For example, take Rule 1.16, addressing permissive and mandatory withdrawal. It specifically integrates ethical conduct therewith on following local rules and guidance of the trial court: "(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.

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 of problem or basis for grievance are well organized and presented in each annual report of the disciplinary commission. The 2005-2006 Annual Report of the Disciplinary Commission of the Indiana Supreme Court is enclosed at **Exhibit "3"**. Giving the 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 therein related to this topic area will be addressed.

With regard to courtroom ethics precisely, a number of rules should be considered by the lawyer regarding trials, including those precisely incorporated and analyzed in this CLE's following subsections of this part (*infra*), 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.

Meritorious claims and contentions, the attorney-client relationship, and candor toward the tribunal are specifically addressed since they are so critical to trial processes.

B. Meritorious Claims and Contentions.

1. Introduction.

Turning to the first specific issue of this seminar, Meritorious Claims and Contentions[1], the lawyer's first point of reference in evaluating a case through trial, where merit of the case is in issue, is with determining what ethical rule(s) is controlling.

Practice Tip (Commentary): There is substantial commentary annotated to the Rules of Professional Conduct, and a number of common situations are addressed in various reference books. Additionally, the Indiana Supreme Court Disciplinary Commission's staff attorneys are generally very willing to talk through ethical issues with inquiring attorneys.

The controlling ethical rule is Rule 3.1, which is set forth, in full, as follows:

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

Practice Tip (Criminal Case Exception): In cases where incarceration could result, the lawyer has the absolute right to defend in the proceeding despite the facts and law. This is because of the profound importance our society places on deprivation of the liberty interest of freedom.

Practice Tip (Extension of the Law): Given that the lawyer must provide competent representation, he/she should balance the basis in law and fact, and extension of the law, by many variables, including underlying policy

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[1] A practitioner facing issues relating hereto should also research related legal concepts and terms, including, but not limited to, the following: "frivolous", "vexatious", and "bad faith."

considerations. However, where merited, the lawyer should not be unnecessarily restrained in arguing for extension, or otherwise, on a particular matter because where such has validity, this rule should not be violated as a policy matter because it would have a chilling effect on development of the law.

2. Definitions.[2]

With this enumeration of Rule 3.1, and its allowance for argument for extension of the law based on the facts and law applied to a given case, the lawyer may also be guided in determining if the case is meritorious, by reference to definitions of "meritorious," and related concepts, as found in legal texts and caselaw.

In *Black's Law Dictionary* (8th Edition) the term "meritorious" is defined as " . . .having legal worth."

This noted, however, the nature of the claim itself may direct how much latitude is given to whether the claim is meritorious (not frivolous), and not in violation of Rule 3.1 (and not the subject of an attorney fee award, see analysis *infra*). For instance, it is clear that a claim based on a fundamental right or substantial due process claim is afforded more leeway. *See, Nagy v. Evansville-Vanderburgh School Corporation*, 870 N.E.2d 12 (2007), *reh'g denied.*

Practice Tip (Ethical Violation/Discipline and Fee Award): A violation of Rule 3.1, and the bringing of a case or claim without merit, may result in an ethical grievance and any of a number of types of disciplinary action against the attorney for violation of the ethical rule. However, other rules and statutes may also provide pecuniary relief to an aggrieved party against the litigant ***and*** his/her attorney, which is the focus of the next sub-part of this discussion. Inasmuch, an ethical violation may or may not occur (or at least be raised) with the litigation of a meritless case or issue.

3. Statutes and Rules.

A related concept to the ethics of a meritorious case and its issues are statutes and court rules for violation of such that allow attorney's fees to be awarded or otherwise. These statutes and rules are very broad and applicable to most all types of litigation, but can be quite narrow and limited to specific practice areas, such as domestic relations. In essence, they modify the American Rule that requires each side to pay his/her own fees. The application depends upon the facts of the case, the type of case, and where the case is pending (i.e., state or federal court). A number of these provisions are enumerated herein.

a. Federal Court.

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[2] A number of terms are defined in the Rules of Professional Conduct, but such do not include a definition of "meritorious" or "frivolous".

I. 28 U.S.C. § 1927.

In the federal system, three (3) provisions are the most common to consider where a practitioner faces the issue of meritless litigation. The first is 28 U.S.C. § 1927, set out, in full, as follows:

> ***"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and reasonable attorneys' fees incurred because of such conduct."***
>
> **Practice Tip (Scope of Statute):** Courts are not permitted to sanction parties under this statute. There is a split in decisional law as to if this applies to law firms.

II. Federal Rule of Procedure 11.

Unlike its Indiana state-court counter part, Federal Rule of Procedure 11 has some "teeth" to its ability to redress meritless claims and issues brought in the federal court system. Rule 11 is set forth, in part, as follows:

> ***". . . . (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, – (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information and belief. (c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. . . ."***
>
> **Practice Tip (Broad Scope of Statute):** Under Rule 11, the sanctions may extend, subject to delineated exceptions, to the attorney, client, and law firm, unlike some statutory provisions.

Practice Tip (Discretionary Apportionment of Sanction): Typically, the sanctions between attorney and client are left up to the discretion of the district court in which it occurred. In such a circumstance, the attorney would be in an inherent conflict of interest with his/her client.

III. Inherent Power to Manage Affairs.

Aside from the noted statute and rule, the federal courts possess wide powers to manage the affairs and operations of their courts. The includes sanctions of contempt, attorney's fees, and otherwise (including case dismissal) against parties and counsel for cases and issues without merit.

b. State Court.

In typical Indiana state court civil proceedings, the lawyer's most powerful weapon to address a frivolous case or issue is codified at Ind.Code § 34-52-1-1, which is stated, in part, as follows:

> ***". . . . (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party: (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith. (c) The award of fees under subsection (b) does not prevent a prevailing party from bringing an action against another party for abuse of process in any part on the same facts. However, the prevailing party may not recover the same attorney's fees twice."***

Practice Tip: In close factual cases, where the call is a narrow one, depending upon the working relationship with opposing counsel and the Court, the attorney faced with a case, or particular issue therein of questionable merit, that may be tried by virtue of other issues, may insulate himself/herself by informal agreement.

Unlike the federal court system, Indiana's Trial Rule 11 does not allow an attorney fee award. The relief is limited to disciplinary action by the Disciplinary Commission: "For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

c. Other Remedies.

There are a number of other statutes that may, in part, address cases or issues without merit (and other policies supporting fees other than cases without merit), although that is not their central purpose, which include, but are not limited to, the

following:

Indiana's Racketeer Influenced and Corrupt Organizations Act, Ind.Code § 35-45-6-1.

Indiana's Wage Payment Statute, Ind.Code § 22-2-5-1.

Civil Rights Actions, 42 U.S.C. § 1988.

Indiana's Dissolution Act, Ind.Code §31-16-11-1.

Offer of Settlement, Ind.Code § 34-50-1-6.

Indiana's Crime Victim's Act, Ind.Code § 34-23-3-1.

4. Conclusion.

In cases where a practitioner faces an issue of the merits of a case or issue therein, he/she has a wide variety of resources to evaluate the matter. In the circumstance where a determination is made that a lawyer is advocating a frivolous case, dismissal to withdrawal should be considered. For the lawyer facing a meritless claim or issue, a number of remedies are available at the state and federal level that may result in a fee award to make the aggrieved party whole, to outright dismissal of the case. In all circumstances, an ethical grievance may be made.

C. The Attorney-Client Relationship.

The most fundamental relationship in courtroom ethics is that of attorney to client. There are a multitude of fact sensitive issues that may raise ethical issues in each case. Three (3) of the more common examples are enumerated and analyzed below:

1. Client with diminished capacity, Rule 1.14: While the objectives of litigation are typically the sole choice of the client, in consultation with the lawyer, who selects the means therefore (Rule 1.2), a lawyer may face a situation where his/her client is impaired by mental or physical disability. In such circumstances, the lawyer may take reasonably necessary protective action. Where this unfolds in a courtroom, this can be quite dramatic and place the attorney in effectively an adversarial relationship with the client. The lawyer facing this situation must be confident in his/her abilities to handle such a case. It is well to remember that in a normal attorney-client relationship, the client may well be taking action that the lawyer disagrees with professionally and believes is in not in the client's interests. This is permissible. It is only in the context of a GAL that the attorney acts in the client's best interests. This is an acute problem where

the client is under a disability, which may allow the attorney to act against the client's wishes but in his/her best interests.

Example of *In the Guardianship of R.G.*

2. Organization as a Client, Rule 1.13: Lawyers in the situation of organizations as clients typically work with a contact person for the organization or a legal department. However, this is not the client, and in failure to recognize this, when that person is acting in a way that is a violation of the legal obligation of the entity, the lawyer may lose sight of who he/she serves and correspondingly what to do. It is the entity the lawyer serves.

Example of probate estate: In estate cases, the testator/testatrix is clearly not the client; it is the estate. In these emotionally charged situations, this issue can become problematic. That is, if executor was closest to the deceased and if there was any undue influence during that period, the case can become quite interesting and ripple the waters of the typically placid world of probate litigation.' The attorney's client is the estate.

3. Withdrawal, Rule 1.16: There is permissive and mandatory withdrawal. Where a trial date is looming, this can present unique problems for the lawyer and the court. If the lawyer seeks to withdraw, in most circumstances, he/she should seek to continue the trial to protect the client's interests.

In no uncertain terms, the attorney-client relationship is the building block of a successful trial and trial practice.

D. Candor Toward the Tribunal.

Like meritorious claims, candor toward the tribunal has a specific ethical rule governing same. This rule, Rule 3.3, is enumerated, in full, as follows:

"(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (b) A lawyer who represents

a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Through a number of hypothetical examples, based on actual Indiana cases, this matter will discussed as a group with the judge co-presenter.

Practice Tip: Oral agreements should be reduced to memorandum or placed on the record.