SAGAMORE AMERICAN INN OF COURT
LINCOLN TEAM PRESENTATION
November 9, 2011

THE SAFETY DANCE: HIGHLIGHTING INDIANA RULES OF PROFESSIONAL CONDUCT 1.3 (Diligence), 1.4 (Communication), 1.5 (Fee Arrangements), 1.16 (Withdrawal)), and 3.2 (Expediting Litigation)

I. Diligence.

A. Introduction.

Due diligence means a professional standard of conduct and attention to the legal affairs of a client. Attorneys must practice due diligence without regard to their own inconvenience and attend to the required work to a reasonable extent. Ignoring the matter, or neglecting to take actions that the client legally requires, would be a violation of due diligence, and a cause for a malpractice action by the client.

B. Text of Controlling Rule: Diligence 1.3.

The Rule of Professional Conduct governing diligence is Rule 1.3, which is set forth, in full, as follows:

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

C. Commentary to Rule 1.3.

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not

preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Ind. Admission and Discipline Rule 23, Section 27 (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

D. Discussion and Application.

Rule 1.3 appears to be self-explanatory, but as in all ethical rules, it's the application of the rule which can be problematic. Comment [1] attempts to address some of the questions that can be raised by the application of Rule 1.3. To represent a client with "reasonable diligence" means a lawyer must take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Yet how far does a lawyer press his client's interests and when does a lawyer cross a line?

According to the comments to Rule1.3, there are ethical constraints on pressing the client's advantage and it is incumbent upon the lawyer to recognize that "winning" is not always the ultimate goal and as lawyers we are subject by a higher ethical standard. Comment [1] notes that "a lawyer is not bound, however, to press for every advantage that might be realized for a client" and that "a lawyer may have authority to exercise professional discretion and determine the means by which a matter should be pursued. See Rule 1.2." Furthermore, "the lawyer's duty to act with reasonable diligence does not require the use of offensive tactics."

What does it mean "to not press for every advantage"? Is litigation a "game" in which

you can press your advantage at all times towards the ultimate goal of victory? For example, assume you are in a mediation in a family law matter and you discover a calculation in a property settlement agreement that is a mistake that favors your client. Do you have an ethical obligation to advise the mediator and opposing counsel? If you are near the end of settlement negotiations in a personal injury claim and your client dies, if the client's death might materially affect the value of the claim, do you have an ethical obligation to advise the opposing party prior to agreeing to a final settlement? As a defense lawyer, if you know the plaintiff is elderly and in poor health, should you delay the case as much as possible with the expectation the plaintiff will die before the claim is resolved? For an example of a lawyer who took the idea of zealously representing their client and pressing for every advantage to the extreme, see the case of <u>In re the Matter of Frederick H. Shull</u> discussed below.

Finally, comment [1] also notes that, as officers of the Court and members of the Bar, we are to treat "all persons involved in the legal process with courtesy and respect." Is there ever any occasion in the legal process when it is ethical not to treat all persons with courtesy and respect?

Comment [2] to Rule 1.3 recognizes that a lawyer's workload may be so great that he/she cannot ethically represent each client competently. This may be a growing problem in the legal profession with the increased emphasis on billable hours, increasing competition for clients, the auditing of time records by clients and downward pressure on hourly rates. Consequently, there may be a temptation for law firms to accept responsibility for a greater number of clients per attorney. At what point is an attorney unable to represent every client competently? That will obviously vary with the ability and experience of each attorney and the matters for which they are responsible. However, if you are an attorney defending clients in litigation and you have responsibility for 100, 200, 300, or even, as some attorneys in Indianapolis do, 400 clients, is it realistic to expect the attorney is capable of representing each client competently and ethically?

Are plaintiffs' firms who have 1000 clients or more able to adequately represent each client's cause? As comment [2] notes, to adequately represent each client we must resist the temptation to look at our profession as a business and remember that we are providing individual service to an individual client - whether that is a person, a business, or an organization.

Comment [3] notes that perhaps the most common complaint against an attorney by a client is for procrastination, a violation of Rule 1.3. It is not just in substantive matters when procrastination is detrimental to a client's interests, such as the missing of a statute of limitations, but as the comment notes, even in minor matters procrastination creates anxiety for the client and it undermines their confidence in the lawyer and the lawyer's trustworthiness, and it reflects badly on the profession.

Comment [4] to Rule 1.3 notes that to represent a client with reasonable diligence and promptness means you follow through to conclude all manners undertaken for a client until you properly withdraw as that client's attorney. The client has a right to assume that the attorney is

representing their interests until proper notice of withdrawal. It is important that the attorney, in writing, clarify the attorney's role and if they intend to terminate the relationship or limit their representation in any way, it is clear.

An interesting issue raised by this comment and reflected in the case of In the Matter of the Termination of the Parent-Child Relationship I.B., minor and M.L., child's mother v. Indiana Department of Child Services discussed below concerns the limit of a lawyer's responsibility when communication with a client is difficult. If litigation has produced a result adverse to the client and the lawyer and the client have not agreed on whether the matter will be appealed, must the lawyer consult with the client before appealing the matter, if the failure to appeal would be detrimental to the client's interests? (See Rule 1.4(a)(2)).

Comment [5] is addressed to sole practitioners and emphasizes that a sole practitioner has a duty of due diligence under Rule 1.3 to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is need for immediate action. Citing *Indiana Admission and Discipline* Rule 23, Section 27, which provides for "court appointment of a lawyer" to inventory files and take other action in the absence of a plan providing for another attorney to protect the interests of the clients of a deceased or disabled lawyer. For sole practitioners, the failure to have a plan in place would be a failure to act with reasonable diligence in representing his/her client.

E. Representative Cases.

1. In The Matter of Martin H. Kenney

Respondent was appointed to file an appeal for a criminal defendant in the United States Court of Appeals. The Appellate Court ordered the Respondent to reply to a pro se motion for a stay of sentence. The Respondent did not reply as instructed and was again ordered to reply. Again, Respondent did not reply. The Appellate Court then issued a rule to show cause why the Respondent should not be cited for contempt for failing to prosecute the appeal. The Respondent did not answer to the rule to show cause. The Appellate Court then issued another rule for the Respondent to show cause why his name should not be stricken from the Court's roll of attorneys, be fined, and have his name forwarded for disciplinary action.

The United States Court of Appeals held the rule to show cause in abeyance and ordered the Respondent to file his brief. The brief was filed, but it did not comply with the Court's rules. The Respondent failed to include a jurisdictional statement. The brief was returned with directions to make necessary corrections and immediately resubmit the brief. The Respondent did not resubmit the brief. The Appellate Court again ordered the Respondent to show cause why disciplinary action should not be taken against him. The Respondent did not reply, but assured the Court in a telephone conversation that the brief would be corrected and resubmitted. He did not resubmit the brief.

The Respondent was discharged as court-appointed counsel and his name was submitted for disciplinary action.

The Indiana Supreme Court found that the Respondent had violated Rule 1.3 because of his repeated failures to comply with the instructions of the United States Court of Appeals which led to unnecessary delay of his client's appeal.

In Count II, the Respondent was charged with violating Rule 1.3 for the failure to act with reasonable diligence and promptness in drafting and filing a client's dissolution of marriage decree. In Count II, the finding was that at the conclusion of the final hearing on dissolution, the Respondent was instructed to draft and submit the final decree. The Respondent did not file the final decree until repeated requests by the trial court. The Supreme Court held that the failure to submit a proposed final decree in a dissolution matter for 18 months and taking 11 months to submit a proposed modification order is not acting with reasonable diligence.

It is important to note that the finding by the hearing officer was that there was no "actual harm flowing from the misconduct." Despite that fact, and because there was a pattern of neglect, the Court suspended the Respondent from the practice of law for a period of 120 days.

- *In Re Kenney, 605 N.E.2d 172* (Ind. 1993)

2. In the Matter of Paula Thrun Kight

The Respondent met with the client for a marital dissolution. The dissolution was filed and the client and the Respondent appeared at the hearing. The dissolution hearing was set for a call of the docket, but was later dismissed by the court for the failure to prosecute. The Respondent never notified the client of the dismissal.

The Court found that by allowing the dissolution case to be dismissed for failure to prosecute, the Respondent failed to act with reasonable diligence and promptness in representing the client in violation of Rule 1.3.

In Count II, the Court found that the Respondent entered an appearance on behalf of the client in a post-dissolution matter. A contempt hearing was scheduled and the client was ordered to appear to show cause why she should not be held in contempt for failing to comply with the property settlement. The Respondent and the client failed to appear and the Respondent's client was found in contempt. Thereafter, the Respondent failed to return the client's telephone calls. For failing to appear at the contempt hearing, the Respondent violated Rule 1.3.

In Count III, the Court found the Respondent was hired to defend her client against a criminal charge. The Respondent entered an appearance, appeared at a bench trial, and the client was convicted and sentenced. The Respondent informed her client that she would file the necessary paperwork to stay the client's sentence pending an appeal. Although the Respondent

filed a Praecipe for Record of Proceedings with the trial court, she never filed an appeal on behalf of the client or attempted to stay the sentence pending appeal. The Court found that her conduct in Count III also violated Rule 1.3.

The Respondent was suspended from the practice of law for a period of not less than three years, although there were aggravating circumstances and there were other Rules of Professional Conduct violated by the Respondent.

-*In Re The Matter of Paula Thrun Kight*, 685 N.E.2d 472 (Ind. 1997).

II. Communication.

A. Introduction.

Regardless of the nature of a lawyer's practice, the heart of the attorney-client relationship is communication between the lawyer and the lawyer's clients. First, the attorney-client relationship cannot even be formed without adequate communication between the prospective client and the attorney who has been contacted. Second, communication from the client to the lawyer is essential before the lawyer can even begin to formulate advice, which is always an important element, if not the critical element, of the relationship. Third, the attorney must then communicate that advice back to the client. Finally, there will likely be lots of additional communications, including bills, correspondence, copies of pleadings, and a closing letter when the matter is concluded.

Whatever the context, therefore, the duty to communicate is a functional prerequisite to the existence, the implementation, and the termination of the attorney-client relationship. It is also both an ethical and a legal duty of a lawyer.

B. Text of the Controlling Rule: Rule of Professional Conduct 1.4.

The Rule of Professional Conduct governing communication is Rule 1.4, which is set forth, in full, as follows:

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

permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).

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

C. Commentary to Rule 1.4.

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

1. Communicating with Client

Comments 2-4 deal with communicating with clients.

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

2. Explaining Matters

Comments 5 and 6 discuss an attorney's obligation to explain matters to the client.

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

3. Withholding Information

Comment 7 discusses when it is alright for an attorney to withhold information from a client.

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

D. Discussion and Application.

As noted previously, the Indiana Disciplinary Commission's statistics show that the failure to communicate and nondiligence as the leading cause of disciplinary complaints filed against attorneys in Indiana. Usually Rule 1.3 and Rule 1.4 go hand in hand in these disciplinary cases. When an attorney fails to diligently and promptly represent a client, invariably the attorney also fails to communicate with the client. The attorneys in these cases seem to get into a downward spiral where they fail to diligently represent a client and apparently

recognizing their error, stick their heads in the sand and do not want to admit the error to their clients. As a result, the attorney refuses to respond to the client's inquiries regarding the status of their case or to return their telephone calls until it is too late and disciplinary action has been filed. Remarkably, this pattern sometimes continues even during the disciplinary commission hearings in which the attorney also fails to promptly respond to attempts to communicate by the hearing officer or the disciplinary commission. The majority of the disciplinary complaints could easily be prevented if the attorney would not procrastinate, would not assume a workload too great to insure that each matter can be handled competently, treat all persons involved in the legal process with courtesy and respect, and promptly respond to clients' telephone calls and requests for information.

Comment [1] recognizes that the attorney-client relationship is a symbiotic relationship and it is necessary for there to be communication between the lawyer and client for the lawyer to effectively represent the client. It is impossible to represent your client without ongoing communication concerning the client's desires and objectives in your representation. Those desires and objectives can change over time and it is important that the attorney recognize that possibility through open and ongoing communication with the client.

Comment [2] presents a common example of circumstances when communication with a client is essential. Where a lawyer who receives from opposing counsel an offer of settlement in a civil matter or a proffered plea bargain in a criminal case must promptly inform the client of its substance, unless the client previously indicated that the proposal will be acceptable or unacceptable, or has authorized the lawyer to accept or reject the offer.

Rule 1.4 (a)(2) and comment [3] acknowledge that while it is the lawyer's responsibility to "reasonably consult with the client," there are some situations which require the attorney to take action prior to consultation. The example given is trial strategy or decisions made during a trial which must be made immediately. However, in those cases in which the client is not consulted because of the exigent circumstances, the lawyer must act "reasonably" to inform the client of the actions taken on the client's behalf. This includes "significant developments affecting the timing or the substance of the representation."

Comment [4] notes that it should be the practice of the lawyer to have regular communication with his clients. This includes having procedures in the office for regular communication with clients and to ensure the clients are alerted to new changes or developments in their case. However, on those occasions when a client makes a reasonable request for information, Rule 1.4 requires a prompt response, either by the lawyer or by the lawyer's staff, and recognizes that client telephone calls should be promptly returned or acknowledged.

Comment [5] notes that the "guiding principal" in determining whether a client has sufficient information to participate intelligently in decisions is that the lawyer should fulfill "reasonable client expectations for information consistent with the duty to act in a client's best interests..." This is similar to comment [1]. The difference is the emphasis on explaining to a

client the general strategy and prospects for success, particularly if the tactics are likely to result in significant expense or to injure or coerce others. Furthermore, it recognizes that when a lawyer asks a client to consent to a representation involving a potential conflict of interest, the client must give written, informed consent.

Comment [6] addresses those instances where a client is a child or suffers from diminished capacity. (See Rule 1.14). In those cases, the amount or nature of the information that is to be provided may be adjusted according to the capacity of the client to understand. Furthermore, when a client is an organization or a group, it is not possible to inform every one of its members and for the lawyers to address communications to the appropriate officials of the organization.

In comment [7] to Rule 1.4, the lawyer may fulfill his ethical obligations in failing to provide information to a client in those instances where it may be in a client's best interests. The example given is a psychiatric diagnosis of a client when the psychiatrist indicates disclosure would harm the client. Further instances in which a lawyer may withhold information include rules or court orders governing litigation which provide the information supplied to a lawyer may not be disclosed to the client (see Rule 3.4).

E. Representative Cases.

1. In the Matter of Kathleen Ransom Radford.

The Respondent agreed to represent various clients in a variety of legal matters, including bankruptcies, the creation of a trust, collection matters, wage dispute, guardianship, etc. Many of the clients paid the Respondent retainer fees. After agreeing to handle the clients' legal matters, the Respondent failed to take meaningful action on their behalf. On some occasions, the Respondent advised the clients their pleadings had been filed before a tribunal, or that their cases were otherwise proceeding when in fact she had taken no action. Later, the clients were unable to contact the Respondent to learn anything about their legal matters in the Respondent's care. The Respondent was disbarred.

-*In the Matter of Radford*, 746 N.E.2d 977 (Ind. 2001).

2. In the Matter of the Termination of the Parent-Child Relationship, I.B., minor child and M.L., child's mother v. Indiana Department of Child Services.

This is a somewhat different case because it does not involve a disciplinary action, but nevertheless, the Supreme Court looked to Rule 1.4 for guidance in making its ruling. This is an excellent example of the dilemma an attorney may face when attempting to apply ethical rules which seem simple on their face, but can, depending upon the circumstances, be more complicated to implement.

For failure to justify reasons, the state terminated Mother's services and recommended termination of Mother's parental rights. Although the Mother did not appear at any of the termination proceedings, the court appointed counsel to represent her. Before the start of the termination hearing, counsel moved to withdraw, explaining that he had never met the Mother, had no contact with her and did not know how to locate her. The court declined counsel's request to withdraw.

The juvenile court later held a termination hearing in which counsel participated. Based on the evidence presented at the hearing, the court issued an order terminating the Mother's parental rights.

Counsel for the Mother filed a Notice of Appeal and moved for the appointment of appellate counsel. Counsel admitted that he had never had contact with the Mother and did not know whether she wanted to file an appeal. Counsel stated that he did not wish to do the appeal, and he filed a Notice of Appeal because he "was obligated under the terms of his contract."

The juvenile court denied the motion to appoint appellate counsel, but appointed counsel to appeal the decision. The Court of Appeals affirmed the juvenile court's denial of the motion to withdraw as counsel. The counsel for the Mother appealed and sought transfer.

The Indiana Supreme Court recognized that the Indiana Code provides parents the right to representation by counsel in termination proceedings, including appeals. They noted that the case presents the dilemma counsel faces where, after a client's parental rights have been terminated, the client does not communicate or cooperate with instructions with respect to an appeal through the attorney. It recognizes that in ordinary civil cases, in contract and tort, an attorney cannot proceed without a client's instructions. But, it also recognized the issue as "should that be the case in termination cases where so much is at stake for both parent and child?"

The Court then looked at the Rules of Professional Conduct for guidance, including, in addition to other rules, Rule 1.4(b) and Rule 1.3; Rule 1.4 for requiring a lawyer to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation and Rule 1.3, providing that "the lawyer shall act with reasonable diligence and promptness in representing the client."

After reviewing the relevant case law, and the Rules of Professional Conduct, the court found that if a lawyer is unable to locate the client with due diligence or if the lawyer cannot get clear instructions from the client with respect to an appeal, the lawyer should not file a notice of appeal. Consequently, the lawyer had no business filing an appeal and the trial court was correct not to appoint appellate counsel for Mother.

Although this case is narrow on its facts, it can provide guidance in other contexts, such as when a lawyer is unable to communicate with a client, despite due diligence, the lawyer is

justified in not taking action, even if it may be detrimental or prejudicial to the client.

-In the Matter of the Termination of the Parent-Child Relationship, I.B., minor child and M.L., child's mother v. Indiana Department of Child Services, No. 03505-1004-JV-218 (Ind. 2010).

III. How Rules 1.3 and 1.4 Work Together.

A. Representative Cases.

1. In the Matter of Hugh Erskin Cherry

The Respondent's client, committing the crimes of robbery and confinement, informed the Respondent that he wished to proceed with post-conviction remedies promptly upon the conclusion of appeals of his convictions. The Respondent, with no legitimate basis for doing so, then delayed for 5½ years after the conclusion of the appeals process before filing the petition for post-conviction relief for that client. The family of the defendant retained the Respondent to pursue the post-conviction remedies. Between 1990 and 1995, the defendant's mother attempted to contact the Respondent more than 50 times, but was able to talk with him on only one-third of those occasions. The defendant telephoned the Respondent between 20 and 30 times and was able to speak with the Respondent only on about one-half of those occasions. Despite the client's request for appeals, the defendant's conviction concluded in July 1991 and the Respondent did not file a PCR petition on his behalf until January 9, 1997. After reviewing the violation of multiple Rules of Professional Conduct, including Rule 1.4(a), the court suspended the Respondent from the practice of law for a period of 120 days.

-In the Matter of Hugh Erskin Cherry, 715 N.E.2d 382 (Ind. 1999).

2. In the Matter of Bruce R. Snyder.

The Respondent was retained to defend two mortgage foreclosures and collect an outstanding promissory note. The Respondent told his client he had filed the case. Two years later, after checking the court records, the client learned that his case had not yet been filed. After two attempts to arrange meetings with the Respondent, the client requested the return of his file and the Respondent complied.

In Count II, the Respondent was hired to represent an estate. After completing an inventory of the estate, the Respondent failed to respond to court orders to file the estate's tax returns. The heirs filed an action against the Respondent which resulted in a settlement agreement. When the Respondent failed to meet his obligation from the settlement agreement, the heirs obtained a stipulation of judgment.

In Count III, the Respondent was hired to assist in the administration of an estate. Among

other deficiencies, the Respondent failed to collect any of the estate's assets on behalf of the personal representative, and at the time of the closing of the estate, none of the estate's assets had been transferred or distributed to the heirs. Attempts by the personal representative to contact the Respondent went unanswered and eventually the personal representative was forced to retain other counsel to conclude the estate.

The Supreme Court found that through his repeated failures to act on his client's behalf, his failure to keep his client informed of the status of his claims, and his failure to provide information to help him make informed decisions, the Respondent violated Indiana Professional Conduct Rules 1.3 and 1.4(a) and 1.4(b). The Respondent was suspended for six (6) months without automatic reinstatement.

-*In the Matter of Bruce R. Snyder*, 706 N.E.2d 1080 (Ind. 1999).

IV. Attorneys' Fees.

A. Introduction.

Fee related matters account for a statistically significant amount of grievances filed against lawyers. If the lawyer is to ethically charge and collect his/her fee, and avoid unnecessary liability, the rules, disciplinary statistics, cases, and concepts from all must be understood and practically applied.

B. Text of the Controlling Rule: Rule of Professional Conduct 1.5.

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

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

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

(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 ©.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
    (1) the division is proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.
    (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
    (3) the total fee is reasonable."

C. Commentary to Rule 1.5.

Beyond the text of Indiana Rule of Professional Conduct 1.5, the Comments also provide

attorneys guidance as to important factors to consider in regard to fees. The Comments to Rule 1.5 touch on everything from Basis or Rate of Fee to Fee Division.

Comment [2] deals with Basis or Rate of Fee, and, in part, advises that, "Generally, 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 general nature of the legal services to be provided, 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 the representation". This, along with the requirements of the rule, allow the client to see the full picture of the representation, and understand not only the nature of the fees, but also the responsibility of both the client and attorney.

Comment [3] expands on Contingent Fees. The Comment notes there may be imposed limitations on contingent fees by law, such as a ceiling on the percentage permissible or an attorney may need to offer clients an alternative basis for the fee. So, along with being clear and detailed, an attorney must also look for limitations on the contingent fee agreement and not overreach those limits.

Comment [5] discusses the Terms of Payment, and notes that an attorney should not create a contract with a client that caps services to be provided only up to a stated amount when the attorney believes and foresees that more extensive services will likely be necessary without adequately explaining this cap to the client. The attorney is acting properly when he or she defines the extent of services to be rendered based on the client's ability to pay. These points allow clients to get the most out of their representation. The client and attorney will be on the same page regarding the extent of the representation, and the client won't have to look for another attorney mid-representation or be caught in a position where they owe for extensive services not understood at the outset.

Comment [9] prescribes more information on fee disputes, noting that if a "procedure has been established for resolution of fee disputes, such as arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory" and should likely consider complying with these procedures if voluntary. Following procedure helps attorneys avoid mistakenly violating the Rules where the law has prescribed a set method for fee disputes or determinations.

D. Fee Splitting.

1. Fee Sharing

Indiana Rule of Professional Conduct 1.5 (e) addresses the Rule on division of fees between attorneys as referenced in the "Safety Dance" video. Along with the Rule, the Comments give further insight into the division of fee allowance. First, the comment defines that "a division of fee is a single billing to a client covering the fee of two or more lawyers who are

not in the same firm". This definition gives lawyers a starting point to know if there is going to be a fee division issue. The Comment also notes that fee division is most commonly used when a referring lawyer and a trial specialist have consulted and combined forces in a single matter. And, while the Rule discusses joint responsibility for the representation, the Comment clarifies that this is not just a general concept. Joint responsibility "entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership". This shared responsibility with another attorney is a serious commitment, and attorneys should know of the other attorney's reputation and background before agreeing to a fee division. Being partners with another attorney may seem limited in scope, but the sharing of responsibility makes this partnership one that should be examined closely before being entered into.

i. Representative Case: *Fitzpatrick v. Kenneth J. Allen and Associates, P.C.*, 913 N.E.2d 255 (Ind.Ct.App. 2009)

The splitting of fees can be a complex and difficult matter, even with a solid written agreement. In the case of *Fitzpatrick v. Kenneth J. Allen and Associates, P.C.*, Attorneys Fitzpatrick and Allen and their respective firms entered into an agreement to split the contingency fee of a personal injury case 50/50 with Fitzpatrick and his firm doing the products liability work and Allen doing the medical malpractice work. When the case settled, the clients fired Allen but stated that the "termination didn't apply to the medical negligence action...". However, Allen withdrew at this point stating there was an "irretrievable breakdown of the attorney-client relationship". Then, Allen sued Fitzpatrick for his share of the settlement. After Fitzpatrick denied to disclose the settlement amount numerous times, the Court entered a default judgment against Fitzpatrick. Allen received 50% of 33 1/3% o the over $8 million settlement. Fitzpatrick appealed, and the fee-splitting agreement was upheld. The Court did modify the payments to include a third attorney who was owed fees, but allowed the agreement under Rule 1.5. The Court did note that Allen did the work he had contracted for, and he earned his share of the settlement.

2. Referral Fees

This seems to be covered by Rule 1.5 (e) and Comment [7] to Rule 1.5. Again lawyers should be sure the parties they are contracting with are competent and the client has agreed to be represented by the referred attorney or firm in writing. Comment [7] notes that the "lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1". So, the responsibility of referral means either prior knowledge or research on the part of the referring attorney that they know the attorney being referred is able to handle the case.

i. Representative Case: *In re Stochel*, 792 N.E.2d 874 (Ind. 2003)

In the Matter of Robert E. Stochel, Stochel was referred to the clients by another attorney who had met with the clients once and then ceased communication with the clients after the

referral to Stochel. Stochel procured a settlement of the case, but when the first payout of the settlement was given, the attorney took $50,000 of the $60,000 first payment for his attorney's fees, paying $16,000 to the referring attorney. The Court found the attorney violated the Rules by not reducing the contingency fee agreement to writing and not communicating the basis of the fees to his clients. Also, the Court found that the attorney should not be allowed to take over 80% of the first payout unless the clients and attorney had a written agreement to that effect. The attorney was publicly reprimanded, and the $16,000 paid to the referring attorney was paid back to the client.

E. Disciplinary Commission Statistics on Grievances Filed Over Fees.

Some insight into how attorneys may run afoul of Rule 1.5 is found in the annual reports of Disciplinary Commission. In this material, the 2008-09 Annual Report of the Disciplinary Commission of the Supreme Court of Indiana is referenced for statistics.

Precisely, statistically significant grievances by case type and misconduct alleged are set forth as follows to orient fees in the context of ethical rule violations:

- Criminal: 413 or 31.3%
- Domestic Relations: 262 or 19.8%
- Tort: 120 or 9.1%
- Communications/Non-Diligence: 607 or 30.2%
- Conversion: 47 or 2.3%
- Excessive Fee: 99 or 4.9%
- Minor Fee Dispute: 46 or 2.4%

F. Representative Cases.

1. *In re Powell*, 953 N.E.2d 1060 (Ind. 2011)

Attorney removed trustee of special needs trust set up for client and dissolved the trust in exchange for one-third of the trust funds. The contingency fee ended up being $14, 815.55 paid to the attorney, but involved no complex or time-consuming issues as originally thought. *Respondent suspended for 120 days without automatic reinstatement for collecting an unreasonable and exploitive fee from a vulnerable client.*

2. *In re Hammerle*, 952 N.E.2d 751 (Ind. 2011)

Attorney charged a "retainer/flat fee" of $35,000 plus an hourly fee of $250 if the trial last more than 5 days. The attorney was convinced the client would be convicted, so after several months, the parties renegotiated for an additional flat fee of $20,000 and dropped the hourly billing (attorney did not advise client to confer with another attorney regarding the fee change). Soon after, the client accepted a plea on attorney's advice. *Attorney was found to have charged an unreasonable fee and was publicly reprimanded.*

3. *In re O'Farrell*, 942 N.E.2d 799 (Ind. 2011)

Attorney charged 2 clients nonrefundable "engagement" fees in cases with an Hourly Fee Contract and a Flat Fee Contract. The Court found that while a retainer could be used to secure an attorney's availability, just calling a fee a retainer or nonrefundable doesn't make it automatically fall into the retainer realm. Not allowing the client a refund goes against public policy as it then makes it difficult/impossible for the client to fire the attorney. *The Court concluded that by charging nonrefundable flat fees, the attorney violated Rule 1.5 for unreasonable fees and imposed a public reprimand.*

4. *In re Lauter*, 933 N.E.2d 1258 (Ind. 2010)

Attorney and client entered into a contract which provided for a contingency fee payment (1/3 if settled before trial, 40% otherwise) and an engagement fee of $750. There was then added a handwritten note allowing for additional retainer fee if the client and attorney agreed to file federal court litigation-the client initialed this. They went to federal court and the attorney charged the client $4250 under the handwritten addition (no calculations or advice to talk to another attorney), the case settled, and the attorney took the 1/3 contingency fee. *The Court found Rule 1.5 had been violated because the attorney didn't adequately communicate the basis of his fee to the client, and the attorney was publicly reprimanded.*

5. *In re Kray*, 938 N.E.2d 218 (Ind. 2010)

Attorney asked client to advance $3000.00 toward legal expense, but the attorney didn't put the money in a trust account (in fact, he didn't have one at all). *The Court found Rule 1.5 was violated in that there was a failure to communicate the basis or rate of the fee and a contingent fee agreement was used in a dissolution case. The attorney received a public reprimand.*

6. *In re Beacham*, 934 N.E.2d 735 (Ind. 2010)

Written fee agreement required a nonrefundable retainer of $5000.00 and a term that the attorney would get $200/hour or 25% of the net recovery-whichever was greater. Despite this agreement, the client just paid $1000.00/month, but the work the attorney did wasn't providing any value to the client (poor quality, rambling). Attorney sent a bill to the client (who had sought

new counsel and settled the case) for $233, 484. *The Court found the attorney violated Rule 1.5 by charging a nonrefundable retainer and a fee that is unreasonable in amount and suspended him for a period of not less than 180 days without automatic reinstatement.*

7. *In re Shirley*, 930 N.E.2d 1135 (Ind. 2010)

Attorney represented a client and the client's corporation (in potential and direct conflict with each other). The attorney charged substantial fees to the corporation without obtaining the knowing consent of necessary principals of the corporation (in fact, he helped his other client oust the siblings and other board members of the corporation and tried to get the corporation held in contempt). *The attorney was found to have charged an unreasonable fee and was given a 30 day suspension with automatic reinstatement.*

8. *Reeder v. Reeder*, 917 N.E.2d 1231 (Ind.Ct.App. 2009)

Firm represented wife and charged her $245,000 in attorney's fees. Through other court proceedings, the husband was ordered to pay the wife's attorney's fees, but in doing so, wife wasn't getting money from him for living expenses because the attorney payments took up all his income. The firm filed a "Notice of Intent to Hold Lien for Attorney's Fees and Motion to Assert Attorney's Lien". The wife then argued at the hearing on the Notice and Motion from the firm that the fees were unreasonable. *The Court found that when the wife thought the husband would pay off the fees, she found them reasonable, and they found the fees to be reasonable and needed to be paid.*

9. *In re Moore*, 915 N.E.2d 973 (Ind. 2009)

Attorney took case for minimum non-refundable retainer fee of $15,000. Then the attorney requested another $5000, and another $1,500, but never did the attorney advise the client to consult with independent counsel regarding the new fees. *The Court found the attorney charged an unreasonable fee and he was given a public reprimand.*

10. *In re Zirkle*, 911 N.E.2d 572 (Ind. 2009)

Attorney filed a huge omnibus motion in regards to his disciplinary matter that the court concluded should all be denied. The attorney had multiple infractions including multiple violations resulting in improper fee arrangements, use of nonrefundable retainers, improper billing practices, failure to refund unearned fees, charging a minimum of 1/4 hour for any work (including reviewing a short e-mail), and charging inappropriately for work. *The attorney was found to have charged an unreasonable fee and was suspended from practicing law for 2 years without automatic reinstatement.*

11. *In re Holland*, 911 N.E.2d 574 (Ind. 2009)

Attorney allowed balance in his attorney trust account (on more than one occasion) to drop below the amount of client funds he was supposed to hold and even overdrew the account. The attorney also commingled the funds, allowing contingent fees to remain in the account too long. *The attorney was found to have collected an unreasonable fee and was suspended for a period of at least 12 months, without automatic reinstatement.*

12. *Stewart v. TT Commercial One, LLC*, 911 N.E.2d 51 (Ind.Ct.App. 2009)

The main crux of the case involved a lease disagreement, but the court ordered the Stewarts to pay attorneys fees of TTCO as part of the findings. The trial court awarded to TTCO $32,792 plus another $3569.41, but there was no information regarding hours spent by attorneys working or their hourly rates. The attorneys only drafted a complaint and some discovery and summary judgment motions and responses. *The Court found that based on the record, they could not determine whether the fees charged were reasonable and remanded.*

G. Relevant Considerations Distilled from Ethical Rules, Grievances, Caselaw.

1. Written or oral agreement as to fees

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

- **Commentary**: "Generally, it is desirable to furnish that client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding." Comment 2.

2. Contingent fees must be in writing and are prohibited where they violate public policy

3. Proposed/potential contractual language in non-contingent fees cases

- **Expenses.**

- **Draw-down provision.**

- **Emergencies.**

- **Billing increments.**
- **Billable events (e.g., time).**

4. **A lawyer shall not charge an unreasonable amount of expenses**

   Note: This rule change effective January 1, 2005 is focused on in-house expense.

5. **A lawyer shall relate not only the rate of the fee, but also the scope of the representation.**

   Commentary: "The scope of the representation . . . shall be communicated with the client." Rule 1.5(b).

6. **Local rules, as being ethical is hinged upon following rules of tribunal**

In domestic cases in particular, many courts have local rules governing fees awards. By way of example, the Marion County Local Rule 509 is set forth:

A. Preliminary Attorneys Fees. Attorney fees may be awarded based on evidence presented by affidavit or oral testimony at a preliminary hearing. Affidavits shall be admissible subject to cross-examination. The following factors may be considered:
   1. The number and complexity of the issues;
   2. The nature and extent of discovery;
   3. The time reasonably necessary for the preparation and conduct of contested hearings;
   4. The attorney's hourly rate; and
   5. The amount counsel has received from all sources.

B. Preliminary Appraisal and Accountant Fees. Appraisal and accounting fees may be awarded based on evidence presented by affidavit or oral testimony at a preliminary hearing. The following factors may be considered.
   1. An itemized list of property to be appraised or valued; and
   2. An estimate of the cost of the appraisals and the retainer required

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

H. Conclusion.

The avoid unnecessary peril, legal fees should be considered in the context of the ethical rules, caselaw, and local rules. In addition, a better practice is to have a contract, confirmed in writing, even if not specifically required.

V. Withdrawal of Counsel.

A. Introduction.

The ethical rule governing withdrawal is lengthy and somewhat difficult to grasp as a whole. Analytically, it is perhaps best thought of as bifurcated. It has permissive and mandatory components. These are it core blocks.

Alternatively, this view of Rule 1.16 may be refined by analysis consisting of four (4) major components related to withdrawal: (1) mandatory withdrawal; or (2) permissive withdrawal; plus (3) withdrawal on tribunal conditions of withdrawal; taking care in (4) withdrawing to protect client's interest.

Withdrawal is also enveloped by a wide array of local rules, practices, and customs, as well as the trial rules. Thus on top of Rule 1.16 compliance, practitioners must also follow local rules, which range widely in terms upon which the tribunal prescribes withdrawal, from very specific terms requiring fourteen (14) or thirty (30) days written notice[1] to no requirements at all.

Further, a point generally covered by withdrawal, but nevertheless is a separate point of law is Trial Rule 3.1(E), which mandates as follows:

"In a motion for leave to withdraw appearance, an attorney shall certify the last known address and telephone number of the party, subject to the confidentiality provisions of Sections (A)(8) and (D) above, before the court may grant such motion."

B. Text of the Controlling Rule: Rule of Professional Conduct 1.16.

As with any ethical issue the practitioner may face, the place to begin is the controlling ethical rule, Rule 1.6. 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.

[1] St. Joseph County Rule 204.2.

(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."

C. Mandatory Withdrawal.

Mandatory withdrawal from a case is required in three (3) contexts. While these are set out in the ethical rules, it would be an incorrect assumption that these are exclusive and exhaustive. For example, local rules may also require withdrawal, such as upon completion of a domestic case, even if it is a certainty the case will have post-divorce litigation.[2]

The first type of mandatory withdrawal is where continuation of representation will result in violation of ethical rules or other law.

The second type is found where continuation is materially impaired by the lawyer's physical or mental abilities. For example, 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.

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[2] Marion County Rule 512(A).

The third type of mandatory withdrawal should be apparent, and occurs where the lawyer is discharged. For example, *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.

D. 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 a material adverse impact on client and his/her case.

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 lawyer believes criminal or fraudulent.

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

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

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

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

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

E. Notice of Withdrawal and Permission.

In most circumstances, the client must be given notice of withdrawal a period of time before same. The attorney must withdraw in accordance with the permission of the tribunal, and when ordered to do so, the lawyer must continue even with cause if the court orders the attorney to do so.

F. Protecting Client's Interest.

Upon withdrawal, attorneys must take steps to protect the client's interest, including returning unused fees and property.

G. Commentary to Rule 1.16.

The Comments to Indiana Rule of Professional Conduct 1.16 also give lawyers more information as to a complex topic. Comment [1] expands on the idea of accepting representation in a matter, stating that an attorney should not accept a matter unless he or she knows it can be "performed competently, promptly, without improper conflict of interest and to completion". Before thoughts of withdrawal even enter one's mind, thoughts of proper representation must be addressed. Think about whether you are sure you can represent a potential client fully and competently before moving forward into other checklists of the representation.

If a Mandatory Withdrawal is necessary, Comments [2] and [3] to Rule 1.16 provide more advice. Notably, Comment [2] states that even though the Rule states a lawyer "must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law", a client simply suggesting an illegal course of action or a path that would result in a violation of the Rules of Professional Conduct does not mean the lawyer must withdraw. The client may not know what they are requesting is illegal and likely does not know when his or her request might result in a violation of the Rules of Professional Conduct. The attorney must not allow these requests to go forward, but communication with the client as to their inappropriate requests is acceptable. Immediate withdrawal is not required in that situation.

Comment [3] notes that even when mandatory withdrawal is necessary and appropriate, certain parties must be notified before withdrawal is sought. Usually, court approval or notice by the lawyer withdrawing is necessary before a lawyer withdraws from litigation that is pending/ongoing. If the attorney has been appointed to represent a client and must withdraw, the attorney must ordinarily receive approval by the appointing authority. Notifying these parties allows everyone to realize the withdrawal. If the Court requests further explanation regarding the withdrawal, the attorney has the difficult task of remaining committed to Rules regarding both the protection of attorney-client privilege and obligations to the Court. Comment [3] notes that the attorney should be mindful of his or her obligations to both the client and Court, but that usually stating to the Court that the attorney must withdraw due to professional considerations should be allowable.

Client or attorney discharge is another area that Comments [4], [5], and [6] touch on, as the rules are not the same for clients and attorneys. A client can discharge a lawyer whenever and for whatever reason (or no reason). The client is still responsible for paying the attorney's fees for services rendered. However, if a client has appointed counsel he or she wishes to discharge, the client may face more steps and hurdles based on applicable law. The client should

be warned of the consequences of discharging appointed counsel and that he or she may be required to represent themselves in later portions of the representation. If a client has severely diminished capacity, he or she may not be able to make the decision to discharge counsel. Therefore, the attorney should "make a special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14". So, whether an attorney is discharged or wishes to discharge a client, look closely at the Rules and understand each parties' consequences and responsibilities before moving forward with termination of the relationship.

Comments [7] and [8] offer further information regarding Optional Withdrawal. Comment [7] allows withdrawal "if the lawyer's services were misused in the past even if that would materially prejudice the client". Comment [8] permits withdrawal if the client will not adhere to the terms of the attorney-client agreement regarding representation, including if the client refuses to pay fees or court costs or tries to make the attorney act beyond the limits of the scope of the representation laid out in the agreement for representation.

Comment [9] gives further advice about how to treat clients after a withdrawal has occurred. Although it may be a difficult time, the lawyer still has a duty to the client. Comment [9] states, "Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for fee only to the extent permitted by law". So, even if there is a situation that has not ended on the best terms, the lawyer must continue his or her advocacy of the client to a degree.

H. Disciplinary Commission Statistics on Grievances Filed over Withdrawal.

The types of legal matters that generate the most grievances are noted *supra*. Two (2) significant areas may highlight improper withdrawal:

- Improper Withdrawal: 346 or 17.2%.
- Incompetence: 238 or 11.8%.

I. Representative Cases.

1. *In re Anonymous*, 914 N.E.2d 265 (Ind. 2009)

Attorney was appointed as client's public defender and they met to discuss a proposed plea agreement. The attorney went over discovery materials with the client, but didn't provide him copies. The client accepted the guilty plea, and didn't given any indication to the attorney he wanted to appeal, and the attorney, thinking the request for discovery by the client earlier was now moot, thought the matter was over. A few months later, the client requested a copy of discovery and all other court documents, but didn't tell why he was requesting them. The attorney wrote back that they weren't going to spend time and money on PCR and didn't send the documents. *The Court found the attorney violated Rule 1.16 by not providing the client a copy of*

discovery documents and the attorney received a private reprimand.

2. ***In re Thomsen*, 911 N.E.2d 575 (Ind. 2009)**

Attorney represented a client in a matter where she filed no answer despite 2 time extensions. Generally, the attorney failed to act, didn't withdraw her appearance, and failed to refund unearned fees. The Court found the attorney violated 1.16 in failing to withdraw from representation when the lawyer's physical or mental condition materially impairs the ability to represent the client and failure to refund unearned fees promptly. *The attorney had medical problems, but also a duty to withdraw, and the attorney was suspended for at least 120 days without automatic reinstatement.*

3. ***In re Kelly*, 917 N.E.2d 658 (Ind. 2009)**

Attorney took 2 cases to defend people in criminal matters when he knew he was suffering from depression and substance abuse and was aware his professional abilities were impaired. *Attorney was found to have violated 1.16-representation of a client when the lawyer's physical or mental condition materially impairs the lawyer's ability to do so and was suspended for not less than 6 months without automatic reinstatement.*

4. ***In re Greene*, 922 N.E.2d 617 (Ind. 2010)**

Attorney was appointed by trial court to represent criminal defendants in appeals, but became overwhelmed and missed deadlines, neglected the appeals, and didn't communicate with clients. Attorney continued to take appointments and failed to withdraw even though he knew he was having great difficult completing his assigned appeals. *The attorney was found to have violated 1.16 in that he failed to withdraw from representation when the lawyer's ability to represent the client is impaired, and was suspended for not less than 6 months without automatic reinstatement.*

5. ***In re Mattson*, 924 N.E.2d 1248 (Ind. 2010)**

Attorney was appointed to represent a criminal defendant on appeal, but even after several extensions he filed defective documents and was found in contempt by the Court of Appeals and replaced by other counsel. The attorney blamed his misconduct, in part, on his depression (which he had been treated for since). *The attorney was found to have violated 1.16 failure to withdraw from representation when the lawyer's physical or mental condition materially impairs the ability to represent the client, and was suspended for 6 months (30 days actively served and the remainder stayed subject to completion of 2 years probation).*

6. ***Pigg v. State*, 929 N.E.2d 799 (Ind.Ct.App. 2010)**

Pigg pled guilty to 2 murders and later retained counsel to look at options for appeal or

PCR. Pigg's mother paid Attorney $5000 retainer and an hourly rate of $175. The attorney filed a notice of appeal and requested a time extension. After further review, the attorney advised the client that he probably shouldn't go forward with an appeal or PCR because he could be convicted on both murders and get a harsher sentence. 15 years later, the client demanded his retainer back. In Court, the attorney said he found the file, but not the billing information for Pigg, but that he believes he likely spent more time than the money given. *The attorney was found to have earned the money and the retainer was not returned.*

7. ***In re Fillenwarth*, 933 N.E.2d 1288 (Ind. 2010)**

Attorney represented client through prenup and divorce. However, attorney and client's wife were often exchanging emails and expressing romantic interest. When client learned of attorney's relationship with his wife, he immediately discharged the attorney, who then withdrew. *The attorney was found to have violated 1.16 in that he failed to withdraw from representation when representation would result in violation of the Rules of Professional Conduct, and was suspended for 90 days.*

8. ***Bronaugh v. State*, 942 N.E.2d 826 (Ind.Ct.App. 2011)**

Bronaugh was charged after he broke into a house with multiple criminal counts. An attorney was appointed, but quickly filed a motion to withdraw which was denied by the trial court. The attorney told the Court the client and his family couldn't come up with any money for depositions, so the attorney then told the Bronaughs, the best thing to do was for him to withdraw and for the Public Defender to pay for the depos. The attorney filed another Motion to Withdraw a few months later (after the defendant claimed the attorney didn't communicate with him), saying the client had fired him by letter. The Court again denied attorney's motion. The Court found that the deposition issue was remedied when the Court said that the Marion County Public Defender could provide deposition services. *The Court affirmed the denial of the Motion to Withdraw and determined it was not an abuse of discretion.*

9. ***In re Zielinski*, 943 N.E.2d 809 (Ind. 2011)**

Criminal defendant hired the attorney for a flat fee of $15,000. Attorney prepared for trial multiple times, conducted plea negotiations, prepared documents and motions. Client was convicted of 2 felonies, and the attorney told the client he had done much more work than expected and needed additional money. The client gave the attorney $17,000 (there was no renegotiation in writing and no advice from attorney to consult outside counsel). Attorney worked on an appeal, but the client soon terminated the attorney (attorney didn't return any of the $17,000 until Commission filed a complaint-then he returned $5000). *The attorney was found to have violated 1.16 in failing to refund an unearned fee and sentenced to public reprimand.*

10. ***Grimes v. Crockrom*, 947 N.E.2d 452 (Ind.Ct.App. 2011)**

Client hired attorney for medical malpractice action, and attorney obtained medical records as part of that claim (maintained in the client file). Attorney withdrew and the client hired a new attorney. The new attorney determined she needed the medical records and they couldn't be obtained from any other source by the original attorney. The original attorney refused to give over the medical records until the client paid him attorney's fees owed (the original attorney called this a "retaining lien" in the file). The trial court ordered the original attorney to hand over the documents, and the fees remained unpaid. *The Court held that the original attorney had a valid retaining lien over the medical records. The Court also found the trial court didn't abuse its discretion when it ordered the records produced, but did err when it did so without first providing security for the attorney's fees owed. The case was remanded for a hearing on the issue of attorney's fees.*

12. *In re Powell*, 893 N.E.2d 729 (Ind. 2008)

Attorney was alleged to have committed 15 counts of misconduct over 4 years (including, failing to communicate with clients, failing to appear at hearings, missing deadlines, and charging unreasonable fees). The attorney also failed to withdraw from child custody and dissolution matters after the attorney gave improper and incorrect advice and terminated the representation implying the client had an outstanding balance, when she actually had a credit. *The attorney was found to have many violations, including failure to withdraw from representation after being discharged-failure to file motion to withdraw after deciding to end representation and failure to refund advance payment of fees and expenses that have not been earned or incurred. The attorney was disbarred for her multiple violations and bad conduct.*

J. Common Mistakes and Practice Tips.

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

1. Assuming withdrawal and failing to appear.

The first common mistake 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 client's 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.

2. 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.

3. Failure to act on breakdown of relationship

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

4. 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 tribunal's 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.

K. Conclusion.

Like charging ethical fees, withdrawal is not contained to one set of considerations found in the ethical rules. In is a complex intermix of the caselaw, local rules, judicial discretion, and timing. Failure to be cognizant of the multiple-layers of analysis is imprudent. It is hoped this text provides some model to following in considering withdrawal.

VII. Expediting Litigation

I. Introduction.

It is imperative that a lawyer make reasonable efforts to expedite litigation consistent with the interests of the client.

II. Text of Controlling Rule.

The Rule of Professional Conduct expediting litigation is Rule 3.2, which is set forth, in full, as follows:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

III. Commentary.

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

IV. Discussion and Application.

Rule 3.2 can be violated in a similar manner as Rules 1.3 and 1.4. An attorney who does not pursue his client's interests diligently and communicate with his client is also likely to fail to make reasonable efforts to expedite litigation consistent with the interests of the client. However, Rule 3.2 emphasizes the abuse of process and procedures by attorneys in litigation and the justification for the seeking of continuances and enlargements of time. Comment [1] notes that it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Obviously, there are occasions where the attorney must seek a postponement or continuance of a matter for his or her own convenience, such as when trials are scheduled during previously scheduled vacation times or of course when the attorney is ill. This also addresses the question previously raised; is it proper for attorneys to delay proceedings when it frustrates opposing parties right to redress? It is incumbent upon attorneys as officers of the court, whether plaintiff or defendant, to expedite either party's attempt to obtain redress in the courts. It is not proper to attempt to "game" the system simply to obtain an upper hand and win the case.

Comment [1] summarizes the approach attorneys should take to analyzing whether he/she is acting within the ethical guidelines. The attorney should ask if there is some "substantial purpose" other than delay in seeking a postponement of a court matter. If there is not some substantial purpose other than delay, then clearly the action is in violation of Rule 3.2.

V. Representative Cases

1. *In the Matter of David Bunner, 814 N.E.2d 251* (Ind. 2004)

In this case, the client hired the Respondent to represent him in a dissolution of marriage action. A final hearing was held and the court directed the Respondent to file the appropriate entry. More than two months later, the court contacted the Respondent regarding the filing of the entry and the Respondent advised the court that the entry would be filed in ten days. Three months later, the court again contacted the Respondent's office and an additional 60 day extension was requested and granted. 90 days later, the court scheduled the matter for a hearing, unless the Respondent filed the entry. The Respondent filed the entry nearly nine months after the final hearing.

The court found that the Respondent violated Indiana Professional Conduct Rule 3.2 for his failure to make reasonable efforts to expedite litigation consistent with the interests of the clients.

The court suspended the Respondent 180 days without automatic reinstatement.

2. *In The Matter of Frederick H. Shull*, 741 N.E.2d 723 (Ind. 2001)

As mentioned previously, *In the Matter of Frederick H. Shull* is an extreme example of a violation of Rule 3.2 with some rather bizarre facts. The Respondent intentionally skipped seven (7) court proceedings at which he was scheduled to appear to defend his case against criminal charges. The Respondent first appeared on behalf of his client at a telephonic pre-trial conference. The Respondent did not appear for the second pre-trial conference. He also did not appear for subsequently scheduled court hearings.

The trial court then ordered the Respondent to appear. The Respondent again failed to appear. The court set the matter for trial and ordered that the trial would proceed "in absentia" if the Respondent and his client did not appear.

The Respondent never advised his client of the various court dates or the consequences of failing to appear. Consequently, the client was not present at any of the hearings, including his trial. The trial court proceeded to hear the state's evidence and took the matter under advisement. Ultimately, the court dismissed the criminal charges against the Respondent's client.

The Supreme Court found aggravating circumstances from the Respondent's acknowledged practice of missing court appearances as a means of manipulating the judicial system to his or her client's advantage. In testimony before the hearing officer, the following exchange took place:

Hearing officer: I'd like for you to speak to sanction briefly if you would. We had talked about the kernel of this being attorney neglect, and you're saying, it was neglectful, I knew what was going on, and it ultimately turned out alright.

Respondent: You know this would have been well done, atta boy, you know, that's what we meant to do, we did it. Oh, I'm sorry. No, there's no sanctions. I should get a compliment on this. I mean that's what we set out to do. That was the tactic that we did. That's what worked ...

Hearing officer: Okay. So, you're arguing for no sanctions?

Respondent: Yes. I think a compliment is in order for the results obtained on this case.

The Supreme Court declined the Respondent's invitation to congratulate him and instead entered a finding of aggravating circumstances. The court stated "misconduct of this kind delays the administration of justice, inconveniences all others involved in the proceeding, wastes judicial resources, potentially compromises the interests of clients, and subjects the attorney to possible charges of contempt or professional misconduct."

The court then found the Respondent violated Rule 1.4 of the Rules of Professional Conduct for failing to inform his client of the hearings and the Respondent's failure to attend those hearings and Professional Conduct Rule 3.2 for breaching his duty to expedite litigation consistent with his client's interests, among other violations and ordered him suspended for a period of six months without automatic reinstatement.