

# Judicial Officers: Authority and Responsibility

## Judge's Role in Lawyer Admission and Discipline

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Trial judges have various roles in the lawyer admission and discipline, beyond service as a hearing officer in lawyer discipline formal proceedings. This chapter identifies the variety of judicial functions in the admission and discipline process.

### Foundation for Judiciary's Role

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Article 7, Section 4 of the Indiana Constitution states:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

The Supreme Court delegates to trial court judicial officers many actions related to the admission and discipline process. All judges, both trial and appellate, are vested with the inherent power of contempt. That power can be utilized to discipline lawyers and might not need intervention from the Supreme Court Disciplinary Commission.

Other admission and discipline tasks delegated throughout the branch include service as a character and fitness interviewer for new admittees, discretion to grant temporary admission on foreign license (also known as *pro hac vice* admission), and the authority to strike a lawyer's improper entry of appearance. Within the formal lawyer discipline process, judicial branch officers are given affirmative duties to report certain lawyer misconduct to the Disciplinary Commission. They also can serve as hearing officers in several types of action in the formal discipline process. Finally, application for appointment of a surrogate attorney is also a part of the admission and discipline process and begins with the filing of a petition with a trial court.

The Disciplinary Commission is the agency of the judicial branch vested with the authority to pursue formal sanctions against a lawyer's license. However, not all corrective action has to result in a sanction against the lawyer's license. Some corrective action handed out by a trial judge might be sufficient to address certain conduct.

## **The First Line of Enforcement of Lawyer Correction**

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Trial judges are at the front line of observing lawyer misconduct and are the first line of enforcement of lawyer corrective actions. The most common example of first line enforcement is the use of the contempt power<sup>1</sup> against an attorney. Other examples include the imposition of sanctions arising from lawyer conduct, such as discovery sanctions or sanctions for failing to obey court deadlines.

A common question is whether a judge should report to the Disciplinary Commission a contempt finding rendered against a lawyer. If the contempt is criminal, then the judge is obligated to report it to the Commission pursuant to Ind. Admission & Discipline Rule 23, §11.1(a)(1). In other instances, it is better to err on the side of caution and report the matter to the Commission and let it exercise its judgment as to whether lawyer discipline should be sought. The Commission might be knowledgeable of a pattern of misconduct by the lawyer, whether locally or in other jurisdictions, to which the judge may not be privy.

Trial judges are sometimes requested to strike the appearance of an attorney because: 1) the lawyer has a conflict of interest in the matter pending before the judge; or 2) the attorney does not maintain an Indiana license and has not properly sought temporary admission. In these instances, the judge's action addresses a problem with an immediate remedy. The judicial action addresses misconduct or potential misconduct immediately. There is little or no impact on the parties or the legal matter. The judge can address the misconduct without delay or prejudice.

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<sup>1</sup> The contempt power is fully discussed in Chapter \_\_\_ of this publication.

These situations do not need the intervention of the Disciplinary Commission. These situations do not call for a pause in the legal matter's progress to initiate a formal discipline investigation. A trial judge might want to report to the Disciplinary Commission the conclusive action taken against a lawyer in these instances, but it is not mandatory. If a lawyer's most recent episode is part of a pattern of misconduct, then the judge should report the pattern of misconduct to the Disciplinary Commission.

## **Assisting in Lawyer Licensing and Admission**

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Judges frequently are called upon to serve on the State Board of Law Examiner's Committee on Character and Fitness. <sup>(OBJ)</sup> This Committee is tasked with conducting a personal interview with every applicant sitting for the Indiana bar examination. Judges can ensure that the newest lawyers do not pose a challenge to good character or offensive personality. <sup>(OBJ)</sup> The interview allows the judge to weigh the good moral character and fitness of a bar applicant. The interview should inquire into possible character warning signs, such as the applicant's financial dealings or driver's license record. The inquiry also should delve into the applicant's understanding of the Rules of Professional Conduct, especially in the areas of conflict of interest, confidentiality, *ex parte* communication, and fiduciary responsibilities.

Judges are delegated the discretionary responsibility to grant temporary admission to a foreign licensed attorney. This is restricted to a particular legal matter and is not a blanket waiver of the formal bar application process (*pro hac vice* admission). <sup>(OBJ)</sup> A separate Notice of Temporary Admission must be filed with the Clerk of the Supreme Court for each case or proceeding in which a court grants permission to appear. Also, there must be an entry of appearance from a member of the Indiana bar to act as co-counsel. This role is not that of a sponsor. The Indiana lawyer serves as co-counsel and takes on all the responsibilities of counsel in the legal matter.

Subsection 2(a)(4) of the rule creates a checklist of elements that the applying lawyer must meet and the judge should review before deciding whether to allow temporary admission. The list includes:

- (i) The attorney's residential address, office address, office telephone number, electronic mail address, and the name and address of the attorney's law firm or employer, if applicable;
- (ii) All states or territories in which the attorney has ever been licensed to practice law, including the dates of admission to practice and any attorney registration numbers;
- (iii) The attorney is currently a member in good standing in all jurisdictions listed in (ii);
- (iv) The attorney has never been suspended, disbarred or resigned as a result of a disciplinary charge, investigation, or proceeding from the practice of law in any jurisdiction; or, if the attorney has been suspended, disbarred or resigned from the practice of law, the petition shall specify the jurisdiction, the charges, the address of the court and disciplinary authority which imposed the sanction, and the reasons why the court should grant temporary admission notwithstanding prior acts of misconduct;
- (v) No disciplinary proceeding is presently pending against the attorney in any jurisdiction; or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule shall have a continuing obligation during the period of such admission promptly to advise the court of a disposition made of pending charges or the institution of new disciplinary proceedings;
- (vi) A list of all cases and proceedings, including caption and case number, in which either the attorney, or any member of a firm with which the attorney is currently affiliated, has appeared in any court or administrative agency of this state during the last five (5) years by temporary admission.
- (vii) Absent good cause, repeated appearances by any person or by members of a single law firm pursuant to this rule shall be cause for denial of the petition. A demonstration that good cause exists for the appearance shall include at least one of the following:
  - (a) the cause in which the attorney seeks admission involves a complex field of law in which the attorney has special expertise,

- (b) there has been an attorney-client relationship with the client for an extended period of time,
  - (c) there is a lack of local counsel with adequate expertise in the field involved,
  - (d) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or
  - (e) such other reasons similar to those set forth in this subsection as would present good cause for the temporary admission.
- (viii) A statement that the attorney has read and will be bound by the Rules of Professional Conduct adopted by the Supreme Court, and that the attorney consents to the jurisdiction of the State of Indiana, the Indiana Supreme Court, and the Indiana Supreme Court Disciplinary Commission to resolve any disciplinary matter that might arise as a result of the representation.
- (ix) A statement that the attorney has paid the registration fee to the Clerk of the Supreme Court in compliance with subdivision (a)(3) of this rule, together with a copy of the payment receipt and temporary admission attorney number issued by the Clerk of the Supreme Court pursuant to subdivision (3). ~~OBJ~~

Item (vii) above emphasizes that temporary admission is not intended to be a repeated method for appearing in Indiana on a foreign law license. Absent good cause as set forth in the rule, temporary admission is not a method of avoiding permanent admission through the formal bar application and admission process. Judges should be cautious if a foreign licensed attorney exhibits a pattern of temporary admissions throughout the state.

After a court grants a temporary admission petition, the lawyer must file within thirty (30) days of the granting of permission a Notice with the Supreme Court Clerk. Failure to timely file the Notice shall result in automatic exclusion from practice within this state. Also, the temporary admission must be renewed, including payment of the annual registration fee, as of January 1 of each year. This is different than the October 1 due date that applies to all permanent members of this state's bar. Judges should periodically check the Roll of Attorneys to ensure that a foreign licensed attorney is maintaining proper admission. The judge does not want to be an unwitting enabler of the unauthorized practice of law.

## Reporting Misconduct – Criminal Convictions

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There is a common misunderstanding among the bench and bar that the duty to report criminal convictions only applies to felony convictions. This is not accurate. The duty applies to all criminal convictions – misdemeanor and felony. It does not apply to infraction offenses.

A trial judge who presides over a matter in which a lawyer has been found guilty of a crime has an affirmative duty to report the conviction to the Disciplinary Commission. The report must include a certified copy of the conviction and must be submitted to the Commission within ten (10) days after the finding of guilt. <sup>(OBJ)</sup>

A practice tip in these instances is to inform the lawyer that you will be reporting the conviction to the Disciplinary Commission within ten (10) days. Instruct the lawyer that it would be better if the Commission first learned of the conviction from the lawyer's self-report of the conviction. Also, advise the lawyer that the lawyer has an affirmative duty to self-report any criminal conviction to the Commission whether it be a misdemeanor or a felony. <sup>(OBJ)</sup>

## Reporting Misconduct – Non-criminal Misconduct

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Rule 2.15(A) and(B) of the Code of Judicial Conduct establishes two distinct standards for reporting both lawyer and judicial misconduct. The first standard hinges upon a judge having knowledge that another judge or lawyer has committed misconduct that raises a substantial question regarding the person's honesty, trustworthiness, or fitness in other respects. The Rule requires the judge to report the misconduct to the appropriate authority. The element of actual knowledge of misconduct is the key to this standard. It is recommended that the determination of whether the misconduct raises a substantial question about the person's honesty, trustworthiness, or fitness be left to the discipline authority to decide in its professional judgment. If the misconduct involves an Indiana attorney, the judge should feel free to contact a staff attorney with the Judicial Qualifications Commission to determine whether a mandatory report is required.

Rule 2.15 (C) and (D) of the Code of Judicial Conduct establish a less stringent standard if the judge receives credible information (i.e., not actual knowledge) indicating a substantial likelihood that another judge or lawyer has committed misconduct. In these instances, the judge is to take appropriate action. Since this standard specifically differentiates taking “appropriate action” from the stricter standard of reporting to the “appropriate authority,” it is implied that local judicial intervention into the matter could be an appropriate action. Addressing the matter in chambers with a stern warning might be an appropriate action in situations of this sort.

## **Service as a Discipline Hearing Officer**

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Both judges and practicing attorneys are eligible to serve as a hearing officer in discipline matters. Disciplinary hearing officers can preside over a misconduct trial. They are also utilized in reinstatement hearings for suspended lawyers seeking to be re-admitted to the practice of law. Hearing officers are also used in disability proceedings against a lawyer and in contempt actions against lawyers or non-lawyers in violation of an Order of Discipline issued by the Supreme Court. Finally, a hearing officer can preside over an interim suspension proceeding when the Commission is seeking an immediate suspension prior to any finding of misconduct at trial.

The discipline process is administrative. The standard of proof is clear and convincing evidence. The administrative procedure is set forth throughout the sections of Admis. Disc. R. 23. A judge should recognize that some of the procedural safeguards and case administration tools utilized in statutory and substantive law proceedings are not present in the administrative hearing process. For example, mediation is not a resolution tool in lawyer discipline actions. A hearing officer serves as the eyes and ears of the Supreme Court and issues findings of fact and conclusions of law after hearing evidence. A hearing officer does not establish policy or interpret the application or validity of a rule.

The findings and conclusions are filed with the Clerk of the Supreme Court in a written document titled “Hearing Officer’s Report.” The report must be filed with the Clerk within thirty (30) days of the conclusion of the hearing. The parties are permitted to contest the findings and conclusions directly to the Supreme Court by filing a Petition for Review with

the Clerk. The Court has the power of *de novo* review of the trial transcript. The Court can accept, reject, or modify the findings and conclusions of the hearing officer.

A hearing officer may, but is not required to, make a recommendation for sanction. Therefore, the Commission will present evidence in two phases to the tribunal. First, Commission staff lawyers will present their case in chief. This is followed by evidence relevant to a possible sanction. Even though the hearing officer has not yet made a determination on the merits of the case, the evidence relevant to sanctions is presented to the tribunal if the findings and conclusions are favorable to the Commission. This allows a sanction recommendation to be included in the Hearing Officer's Report to the Supreme Court. The Court is not bound by the sanction recommendation.

Admis. Disc. R. 23, §§ 13 and 14 set forth the powers and duties of the hearing officer, as well as the procedures applied by the hearing officer in administering the case. Section 13 allows the hearing officer to administer oaths, conduct hearings, and make findings of fact and conclusions of law.

Holding to the theme of a discipline matter being administrative in nature, section 14(a) indicates that "the rules of pleading and practice in civil cases shall not apply." It further provides that "[n]o motion to dismiss or dilatory motions shall be entertained." Section 14 is a comprehensive case administration guide. It sets forth timelines for filings, trial setting, and issuance of the Hearing Officer's Report. It also establishes procedures for answering the complaint, engaging in discovery, issuing subpoenas, seeking default judgment, deeming facts admitted, and conducting a pretrial conference. The Section also prohibits the parties from bypassing the hearing officer and seeking relief from other courts or judicial officers in the State.

A practice tip is to utilize the Hearing Officer's Guidebook prepared by the Supreme Court Administrator's office. The Guidebook assists the hearing officer with navigation of Admis. Disc. R. 23 and guides the hearing officer in the drafting of findings and conclusions.

Hearing officers are entitled to compensation for their service. The rate of compensation is established by Supreme Court order and is subject to occasional modification. The judge is also entitled to reimbursement for expenses, such as mileage or overnight



expenses. The judge should keep time records and receipts to make a claim for compensation and reimbursement.

## **The Attorney Surrogate Process**

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The attorney surrogate rule<sup>2</sup> comes into play when a lawyer dies, disappears, becomes disabled, or is disbarred or suspended. It is applied primarily for solo and small firm lawyers. The rule creates a continuation plan of accountability for a lawyer's cases and files beyond the lawyer's disability or demise. The rule allows an attorney surrogate to:

- (i) take possession of and examine the files and records of the law practice, and obtain information as to any pending matters that may require attention;
- (ii) notify persons and entities who appear to be clients of the Lawyer that it may be in their best interest to obtain replacement counsel;
- (iii) apply for extensions of time pending employment of replacement counsel by the client;
- (iv) file notices, motions, and pleadings on behalf of the client when jurisdictional time limits are involved, and other legal counsel has not yet been obtained;
- (v) give notice to appropriate persons and entities who may be affected, other than clients, that the attorney surrogate has been appointed;
- (vi) arrange for the surrender or delivery of clients' papers or property;
- (vii) as approved by the court, take possession of all trust accounts subject to Ind. Professional Conduct Rule 1.15(a), and take all appropriate actions with respect to such accounts;

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<sup>2</sup> Admis. Disc. R. 23, §27

- (viii) deliver the file to the client; make referrals to replacement counsel with the agreement of the client; or accept representation of the client with the agreement of the client; and
- (ix) do such other acts as the court may direct to carry out the purposes of this section. <sup>OBJ</sup>

It is a common misconception that an attorney surrogate is substitute counsel for all the pending matters of the former lawyer. The role of the attorney surrogate is that of a caretaker of files and records and not that of substitute counsel.

The trial court judge's role in this process involves the appointment of an attorney surrogate when a lawyer has not previously designated an attorney surrogate or when a designated attorney surrogate seeks ratification of the former lawyer's decision. The judge can issue orders to protect the former lawyer's files and clients, as well as the public as it relates to the former lawyer's cases and files. Also, the judge presides over a final report and accounting of the attorney surrogate and issues a final order that discharges the attorney surrogate from further duties. Finally, the judge can allow fees and expenses for the attorney surrogate and enter a judgment for these amounts against the former lawyer's person or estate.

Judges should be aware that a cause of action for the appointment of an attorney surrogate can be filed in their court if the former lawyer maintains or maintained a principal office in that county. <sup>OBJ</sup>

Judges should be prepared to call upon a lawyer or senior judge to serve in the surrogate role. A handbook titled *Indiana Attorney Surrogate Rule Best Practices and Forms* can be acquired or accessed from the Indiana State Bar Association. Any interested person, including a local bar association or a designated attorney surrogate, has standing to file a verified petition for the appointment of an attorney surrogate.<sup>3</sup>

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<sup>3</sup> Admis. Disc. R. 23, §27(c)(1)

A judge who is presiding over a case or cases of the former lawyer must be aware that the rule creates an automatic extension of certain time limitations applicable to each case.<sup>4</sup> Applicable statute of limitations, deadlines, time limits, or return dates for filing are extended to a date 120 days from the date of the filing of the surrogate appointment petition.

The rule specifies that a senior judge or other member of the bar in good standing can serve as an attorney surrogate. If a senior judge is appointed as surrogate, then special provisions exist for compensation. A senior judge may receive senior judge credit and compensation at the per diem rate for senior judges so long as the senior judge is not being otherwise compensated for the surrogate services. The senior judge must make the election to receive senior judge credit and compensation within sixty days of the appointment as Attorney Surrogate by filing a notice with the appointing trial court. ~~OBJ~~

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<sup>4</sup> Admis. Disc. R. 23, §27(e)