# *How NOT To End Up In Front Of The Other Commission*

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Obama: Probe should be "thorough," "rigorous"
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# Losing Your Cool In Court

# Disrupting a Tribunal

- Rule 3.5(d): "A lawyer shall not … engage in conduct intended to disrupt a tribunal."

- A.K.A. “Disrupting a tribunal”
- A.K.A. Acting like a Fool in Front of a Judge or While a Tape Recorder is Running

# *Matter of K.M.*

- Attorney disrupted tribunal when immediately after a discussion in chambers with a judge, attorney grabbed and struck opposing counsel, thereby knocking him over the table in the judge's office.
- 60-day suspension

# *Matter of A.M.*

- Throwing soft drink at opposing counsel and restraining him in his chair in response to deposition questioning of attorney's wife, causing premature conclusion to deposition, is conduct intended to disrupt tribunal and that is prejudicial to the administration of justice.
- 60-day suspension

# *Matter of L.O.*

- Respondent told judge "unless you want to arrest me, I'm leaving. I do not believe in going in there in front of the jury and allow the State to railroad my client into a conviction by uncharged, unconvicted … misconduct."

# *Matter of L.O.*

- After disobeying the order to sit down, deputies assisted the respondent with handcuffs.
- The respondent yelled to his client: "Fire me, God dammit, fire me!"
- The defendant stated "I don't know what in the hell is going on."
- After the defendant fired the respondent, the respondent got up to leave stating "I have no client."
- These actions demonstrated an intent to disrupt a tribunal.
- 60-day suspension

# *Matter of R.B.*

- Respondent threatened to go to attorney's house and hit him in the head with a baseball bat. Told him "don't press your luck because you're not going to like me if I'm angry."
- Opposing counsel stated "you better kill me."
- Respondent stated "I will and I will get a medal for it."
- Violation of Rule 4.4 and 8.4
- Note: on the record

# Losing Your Cool in Writing

# 7 Deadly Words and Phrases

- “Ridiculous”
- “Ludicrous”
- “Disingenuous”
- “Preposterous”
- “Absurd”
- “Outlandish”
- “Absolutely False”

# Briefing

- "Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time."
- *Amax Coal Co. v. Adams*, 597 N.E.2d 350 (Ind.Ct.App. 1992).

# Briefing

- The appellant's brief on transfer stated: "indeed the opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for the appellee … and then said whatever was necessary to reach that conclusion. (Regardless of whether the facts or the law supported its decision.)"
- Public reprimand
- *Michigan Mutual Ins. Co. v. Sports*, Inc., 706 N.E.2d 555 (Ind. 1999).

# *Matter of M.W.*, 782 N.E. 2d 985 (Ind. 2003)

- "Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity."

- Rule 8.2: "A lawyer shall not make a statement that the lawyer knows to be false … concerning the qualifications or the integrity of a judge."

# Briefing

- Sadly, the ramifications of the Court's decision reads (sic) like a bad lawyer joke … "when is it okay for a lawyer to lie? When his lips are moving to an insurance adjuster."
- *VL Appliances & Services, Inc., v. McFerran*, 712 N.E.2d 1033 (Ind.Ct.App. 1999).
- Public reprimand

# Briefing

- The appellant called the opinion of the Court of Appeals "incomprehensible."
- The Court of Appeals quoted professor Monroe Freeman who stated that there should not be anything in the brief that is not calculated persuade the reader.
- *Bloomington Hospital v. Stofko*, 709 N.E.2d 1078, 1079 (Ind. 1999).

# What Sanction Did This Lawyer Receive?

- "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."
- The assertions of the Judge were "irrational" and "cannot be taken seriously."

# Answer: No Sanction

- Lawyer: Justice Scalia in *Atkins v. Virginia* and *Webster v. Reproductive Health Services*

# Abusing Discovery Rights

# Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

# Conduct in Depositions

- *Matter of O.C.*
- 11 day deposition of 82-year old man
- Shouted at deponent and pointed his finger in his face
- Accused opposing counsel of corruption
- Told opposing counsel he was going to put his head "in a toilet bowl."

# Conduct in Depositions

- *Matter of Prosecutor*
- Q: You're lying. You're a damn liar. You're a waste of time. You're lucky you won't get charged with neglect of a dependent. Hopefully someone will take that kid from you before you destroy him … oh please, and you're probably on meth too. And your damn teeth.
- Q: Are you going to stand up or are you going to be a wuss? I guess that's already explanatory, right? That's what you are. You're not a stand up guy. You can't even stand up and tell the truth.

# Conduct in Depositions

- Court Reporter: Anything else?
- Q: I have no further questions.
- A: Finally.
- Q: Finally? You run your little smart ass with me, believe me you will end up getting charged with new emissions …
- Violation of Rule 4.4
- Public Reprimand

# Subpoenas

- Follow Rule 34: Notice to other party
  - *Matter of M.H.* – Public Reprimand
- Subpoenas can be issued for depositions, not interviews. *Matter of Anonymous*
- Subpoenas cannot be issued unless a cause is pending. *Matter of Anonymous*

# Watch What You Say
# In a “Professional Capacity”

# Rule 8.4(g)

It is professional misconduct for a lawyer to: (g) engage in conduct, in a *professional capacity*, manifesting, by words or conduct, **bias** or **prejudice** based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors.

# *Mullaney v. Aude (Md.)*

- Atty.(F): You got a problem with me?
- Atty.(M): No, I don't have any problem with you, babe.
- Atty.(F): Babe? You called me babe? What generation are you from?
- Atty.(M): At least I didn't call you a bimbo.

# *Be Careful What You Say Even if You Are Trying to Be Friend*

# Revealing Confidential Information

*In re: Anonymous*:

- Friend contacted attorney for referral.
- Client became prospective client and revealed confidential information regarding an altercation with her husband.
- Lawyer referred her to another lawyer.
- Lawyer encouraged a friend to reach out to prospective client because she was going through a hard time.
- Violation for revealing confidential information.

# Social Media

# Florida Case

- Stated Judge was trying "to make defendants waive their right to a speedy trial.“
- "evil, unfair witch"
- "seemingly mentally ill" and
- "clearly unfit for her position and knows not what it means to be a neutral arbiter."

# Advertising

# Rule 7.1 (effective 1/1/2011)

- "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."
- Includes omitting facts necessary to make a statement nonmisleading.

# No Unjustified Expectations

- A "Commitment to obtaining the best possible settlement."
- This is OK. *Matter of Benkie*
- "I can get obtain the best possible settlement."
- Not OK. *Matter of Wamsley*

# No Prediction Of Future Success

- Rule 7.1, Comment [2] (1/1/2011): No Statistical Data or Other Information Based on Past Performance.
- Even if quotations from newspapers. *Matter of Benkie*.

# More Rules

- You Can State the Following:
- Name and Name of Law Firm
- Place of Attorney's Birth
- That the Attorney Has Malpractice Insurance
- Smith & Jones Law Firm:
  - "Tough. Effective. Insured (Just in Case)."

# Do's And Don'ts

- No Prediction of future success
- Claims by third party lawyer could not make

# Do's And Don'ts

- Past results obtained creating expectation
- Dramatizations without disclaimer
- Testimonials/endorsements creating unjustified expectations
- Specialization
- Improper official influence
- BOTTOM LINE: Don't trust your law license to an advertising account representative

# Fees

# Fees

- 1.5(a): "a lawyer shall not make an agreement for, charge or collect an unreasonable fee."

# *Matter of M.E.*

- Client hired Respondent to defend him for striking two pedestrians with his vehicle after consuming alcohol, causing serious bodily injury.
- Fee was $25,000.
- Case pled to a misdemeanor three days later.
- Fee unreasonable.
- Public reprimand.

# What Happens If You Charge Too Small Of A Flat Fee?

- 1.8(f): "a lawyer shall not accept compensation for representing a client from one other than the client unless:"
  - Informed consent
  - No interference with independence
  - Confidence protected under 1.6

# Rule 1.8

- A lawyer shall not enter into a business transaction with a client UNLESS
  - The terms are in writing and reasonable
  - The client is advised to get advice from outside counsel

# Rule 1.8 - Comment

- Rule applies when lawyer renegotiates initial fee arrangement after representation begins
- And new fee agreement is more advantageous to lawyer

# Non-Refundable Fees

- Non-refundable fees are usually unethical.
- *Matter of M.K.*, 804 N.E.2d 1152 (Ind. 2004).

# Refunds

- If fired in the middle of the case:
  - Hourly billing is easy to refund.
- Flat fee:
  - Commission takes position that some refund is due.

# Attorney Liens / Keeping The File

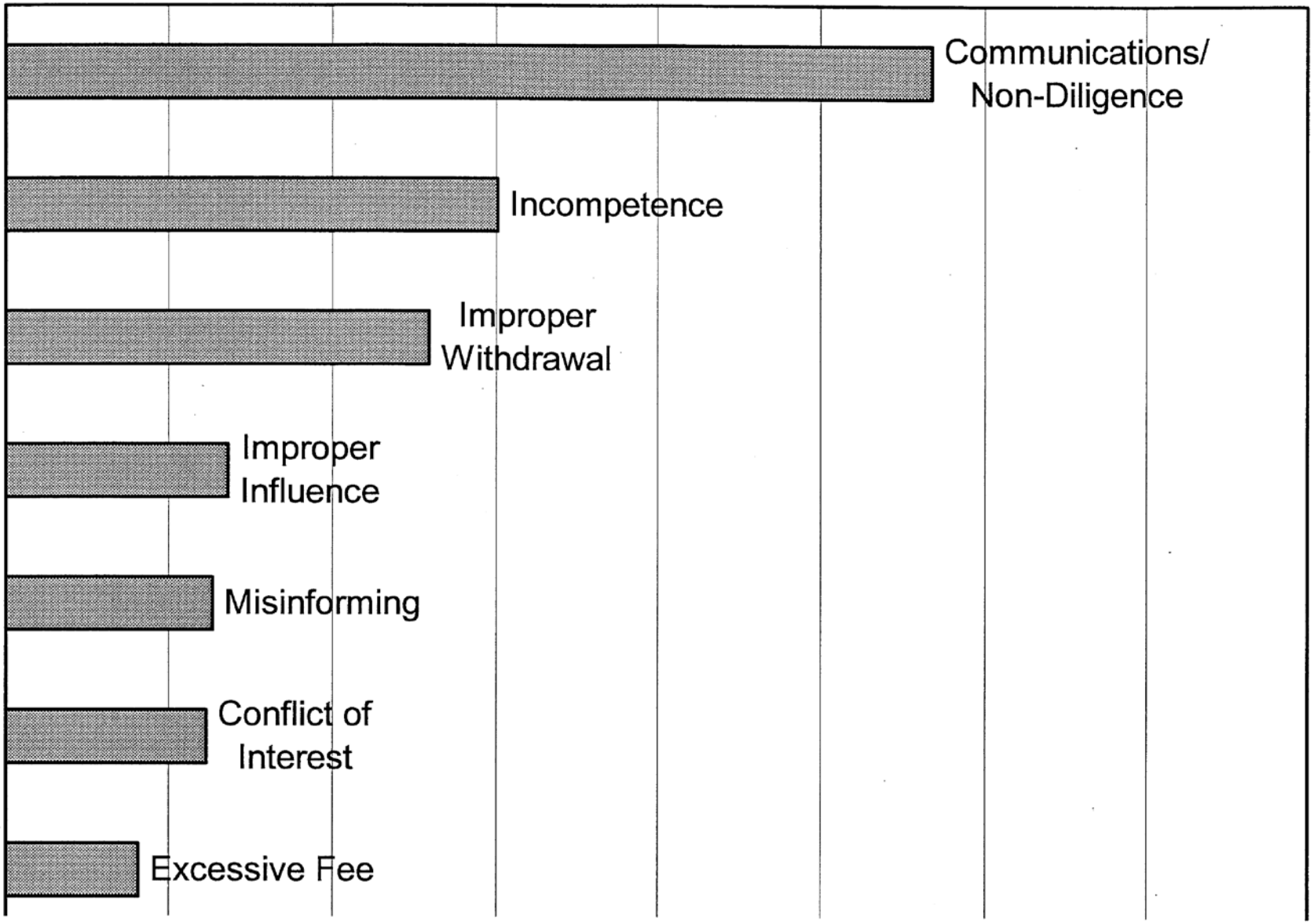
- Commission's position:
  - File is the client's property.
- Attorney liens are legal, but …

# 1.5(c)

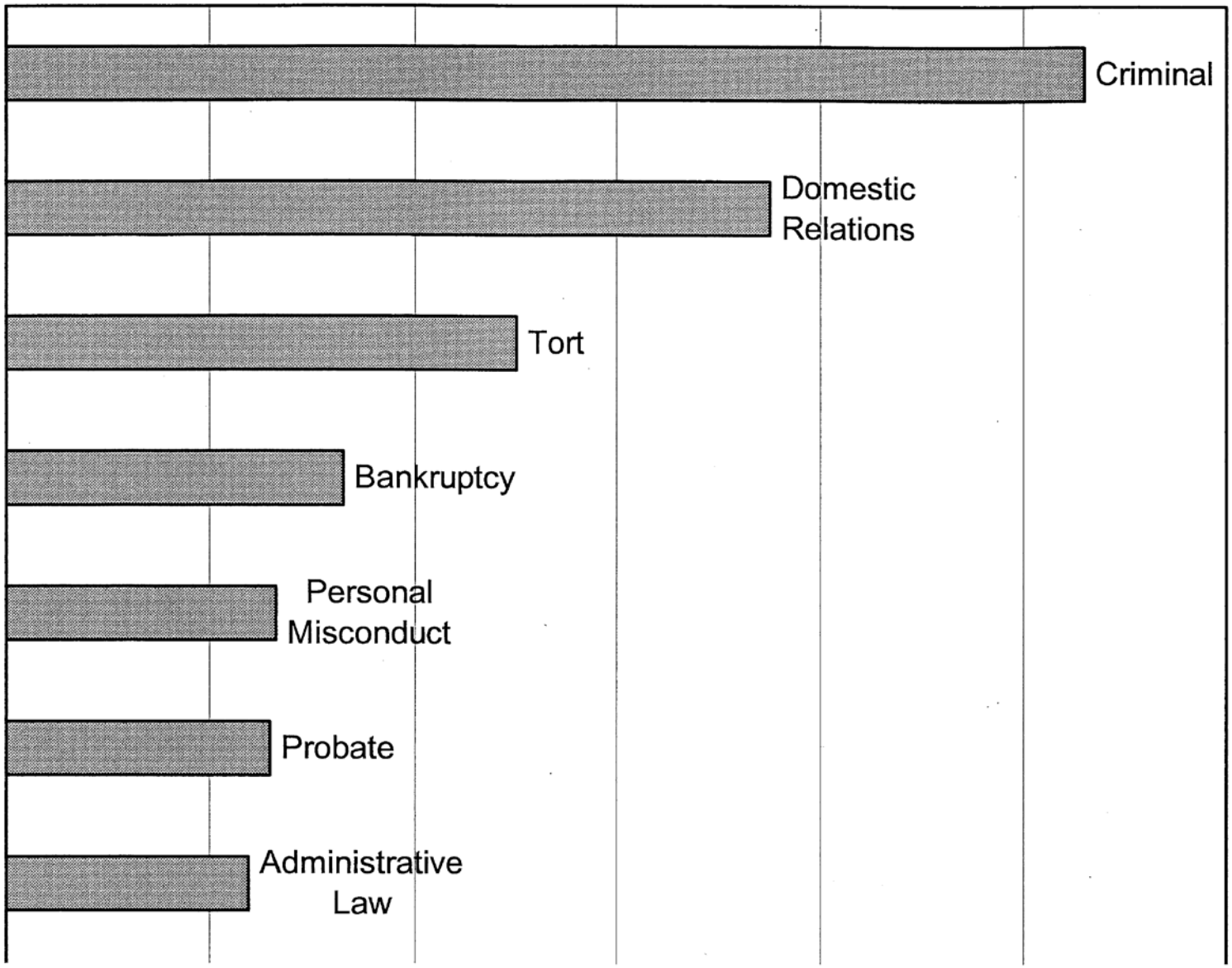
- Contingency fee must be in writing.
- Always recommended.
- Regular billings – no surprises.

# Neglect and Lack of Communication

# GRIEVANCES BY MISCONDUCT ALLEGED 2006-2007



# GRIEVANCES BY CASE TYPE 2006-2007



# *Matter of C.C.*, 862 N.E.2d 648 (Ind. 2007)

- Respondent filed lawsuit
- Took no action
- Lawsuit dismissed for failure to prosecute 2 years later
- Statute of limitations expired
- Respondent filed an appeal to have case reinstated
- Appeal unsuccessful
- Respondent did not tell his client about the dismissal or the failed appeals

# *Matter of C.C.*, 862 N.E.2d 648 (Ind. 2007) Continued

- Respondent concealed dismissal
- Told client the depositions were planned and that the case was set for trial
- Respondent took client on tour of courtroom where the case would be tried and explained the trial process
- 6 years after a lawsuit was filed, client finally learned that the case had been dismissed 4 years earlier

# *Matter of C.C.*, 862 N.E.2d 648 (Ind. 2007) Continued

- Violations:
  - Rule 1.3
  - Rule 1.4
  - Rule 8.4(c)
- Sanction:
  - Suspension without reinstatement

# *Matter of M.K.*, 814 N.E. 2d 250

- Respondent failed to advise appellate client that Court of Appeals affirmed conviction.
- Failed to communicate right to petition for transfer.
- Client was particularly vulnerable and reliant on respondent.
- Public reprimand.

# Components of Communication

- The communication death spiral
  - Non-diligence
  - Communication avoidance-client viewed as a pest
  - “White” lies
  - Outright falsehoods
  - Defrauding the client
- Communicating preemptively
- Communicating in times of inactivity

# Other Communication Tips

- Creating realistic client expectations
- Prompt and candid notice of negative events
- Defensive communications/documentation
- Making and keeping promises
  - Use caution about making promises
  - Keep them when you make them

# *Possible Causes of Neglect*

- Are you drowning in ignorance?
- Substance abuse/Mental Health problem?
- Not Getting Paid?
  - You are either in or out

# Failure To Be Candid With The Tribunal

# Preamble to the RPC

"In the nature of law practice … Conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."

# Who is the most important person in your case?

# Rule 3.3(a)3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly … offer evidence that the lawyer knows to be false.

If [a witness] … called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

# *Matter of Scahill,* 767 N.E.2d 976 (Ind. 2002)

- Public reprimand for failing to disclose a material fact to the tribunal when disclosure was necessary to avoid assisting a fraudulent act against a tribunal.
- Martial asset was placed on financial declaration. Client stated he lost the proceeds when he fell asleep in the mens' restroom of a local restaurant.

## *Matter of P.P.*, 774 N.E.2d 49 (Ind. 2002)

- Lawyer received public reprimand when he failed to inform the Court that client had lied under oath about driving a car within the last nine years, while attempting to obtain a hardship license.

# Failure to Supervise Staff

Bad Excuse:

“It was my secretary’s fault.”

# Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

- With respect to a nonlawyer … associated with a lawyer:
  - (a) a lawyer [with] … managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligation's of the lawyer

# Rule 5.3 Cases

- Trust Account Violations
  - *Matter of Anonymous*, 876 N.E.2d 333 (Ind. 2007)
  - *Matter of G.P.*, 742 N.E.2d 924 (Ind. 2001)
  - *Matter of S.S.*, 894 N.E2d 543 (Ind. 2008)

# Potential Pitfalls

**Rule 1.6: Confidentiality of Information**

**Rule 4.2: Speaking with Represented People**

**Rule 4.4: Respect for Rights of Third Persons**

# Unauthorized Practice of Law

**IC 33-43-2-1**

**Engaging in practice by person not admitted**

**Sec. 1. A person who:**

**(1) professes to be a practicing attorney;**

**(2) conducts the trial of a case in a court in Indiana; or**

**(3) engages in the business of a practicing lawyer; without first having been admitted as an attorney by the supreme court commits a Class B misdemeanor.**

# *In re Thonert*, 693 N.E.2d 559 (Ind. 1998)

- <u>Unauthorized Practice of Law</u>
  - "The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs is left solely in the hands of the attorney."
    - *Thonert*, 693 N.E.2d at 563

# Guideline 9.2. Permissible Delegation

"Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a non-lawyer assistant or paralegal any task normally performed by the lawyer."

# Guideline 9.3. Prohibited Delegation

A lawyer may not delegate to a non-lawyer assistant:

(a) responsibility for establishing an attorney-client relationship;

(b) responsibility for establishing the amount of a fee to be charged for a legal service; or

(c) responsibility for a legal opinion rendered to a client.

# Practical Considerations

- When do problems arise?

# Inadvertent Disclosure

- Rule 4.4(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

# Speaking With Represented People

- Rule 4.2
- In representing the client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order

# *Matter of S.L.*, 55S00-0706-DI-241

- Deponent was represented
- Attorney for deponent could not attend deposition
- Deponent nevertheless appeared in spite of attorney's advice
- Deponent was advised of her Miranda rights and was advised not to proceed without counsel being present

# *Matter of S.L.*, 55S00-0706-DI-241 Continued

- Incriminating statements were elicited from deponent
- Violation Rule 4.2
- Sanction:  Public reprimand

# *Matter of Uttermohlen*

- "The Rule applies even though the represented person initiates or consents to the communication."

## *PT Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729 (Ind.Ct.App. 2002)

- "We join with the majority of jurisdictions that have analyzed this issue and hold that Indiana's Rule 4.2 does not prohibit an attorney from contacting the former employee of a party adverse to the attorney's client in litigation."

# Sex With Client

# Rule 1.8(j)

A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

# 770 N.E.2d 273

Respondent "personally manifested his romantic interest in [client] during appointments … Three times he hugged and kissed her during the pendency of the dissolution and bankruptcy."

# 770 N.E.2d 273

Respondent violated Indiana Professional Conduct Rule 1.7(b) by continuing to represent the client after expressing and promoting his personal and romantic interest in her.

# 770 N.E.2d 273

Footnote: "It was the respondent's expression of personal and romantic interest in the client that led to the respondent's conflict of interest. Had the expression been manifested in more strenuous fashion, the appropriate discipline would have been more severe."

# *Matter Grimm*, 674 N.E.2d 551 (Ind. 1996)

- Hired May of 1987 for divorce case
- February 1988 sexual relations begin and continue
- Conducts trial for the client in April 1988
- Assures her that the bill is "taken care of"

# *Matter Grimm*, Continued

- August 1988 client terminates personal relationship because it's not "appropriate"
- Respondent begins sending a bill
- Files attorney lien
- Client goes to the Disciplinary Commission

# *Matter Grimm*, Continued

- Response to Grievance: Called Client's accusations:
- "Nothing more than the raving of a lazy, promiscuous, greedy, psychotic bitch."

# Only Thing Worse to Send

Dear Don:

# *The Florida Bar v. Tipler*

- Attorney represented 18-year old woman.
- Lawyer charged client flat fee of $2,300.
- As part of fee agreement, reduced balance by $200 every time client had sex with him or $400 every time client arranged for another woman to have sex with him.
- Pled guilty to one count of solicitation of prostitute.
- Disbarred.

## *Matter of Inglimo,* 740 N.W. 2d 125, 139 (Wis. 2007)

- Wisconsin Supreme Court held lawyer did not have sexual relations with client within the meaning of the Rules of Professional Conduct.
- Rules prohibit sexual relations "with" clients.
- Lawyer had sex with third party who was simultaneously having sex with lawyer's client.

# The End