

## A PRIMER ON LAWYER DISCIPLINE

2013 IPAC Winter Conference  
Sheraton North, Indianapolis

G. Michael Witte  
Executive Secretary  
Indiana Supreme Court Disciplinary Commission

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### The Discipline Process

- Administrative law. Admis. Disc. R. 23.
- Grievance filed with Commission
- Summarily dismiss or open/respond (Inquiry). Does it "raise a **substantial** question of misconduct"?
- Response submitted
  - Summarily dismiss, or
  - Finding of reasonable cause *by exec. sec.*; open investigation (Docketing)
- Investigate, write summary/brief, Commission agenda for discussion
  - Dismiss, or
  - 2<sup>nd</sup> reasonable cause finding *by Commission* for misconduct "**which would warrant disciplinary action**"; file VC (Charging)

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### Risk of Exposure

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**By the Numbers (fiscal 2012)**

- 1,730 - grievances filed
  - 60 - 65% come from \_\_\_\_\_?????
  - 996/734 - dismissals to request for response
  - 34/82 - VC's filed and # of counts
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- 17,857 active, in good standing (as of 6/30/12)
  - 2,935 inactive, in good standing
  - 3,281 pro hac vice (temporary admission)
  - 9.7 grievances for every 100 active lawyer

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**2013 Risk of Exposure:  
Prosecutors v. Defense Counsel**

<u>Prosecutor</u>		<u>Defense</u>
106	Grvs filed	408
105	Grvs summarily dismissed	405
1	Grvs open/respond (inquiry stage)	42
1	Grvs dismissed after inquiry	38
0	Grvs docketed (investigation stage)	4
0	Reas. cause of misconduct; VC filed	1

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**VC's Against Prosecutors Since 2010**

- | <b>Personal Misconduct</b>   | <b>Professional Misconduct</b>  |
|--|---|
| <ul style="list-style-type: none"> <li>• 11 VC's                             <ul style="list-style-type: none"> <li>• Sexual harassment, false signature, battery, marijuana, OWI (6)</li> </ul> </li> <li>• 2 VC's against prosecutor candidates                             <ul style="list-style-type: none"> <li>• Unreasonable fee, conflict of int., pos. of child porn</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• 6 filed by predecessor and finished by Witte,</li> <li>• 3 filed by Witte</li> </ul> |

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**Confidentiality**

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**??? Why Confidential ???**

- Unfounded accusations harm reputation
- Fields of representation with high anxiety and emotions that generate retaliation.
- High percentage of dismissals due to no alleged misconduct:
- Dismissed grievances confidential forever; even the fact one was filed
- Doesn't silence the grievant. Casts suspicion on motive of grievance.

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**Confidentiality**

- I.C. 5-14-3-4(a) – items exempted from Indiana Access to Public Records Act:
  - Documents made confidential by rule adopted by a public agency under specific statutory authority

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### Confidentiality

- Admis.Disc.R. 23 (22)(a) – items exempted from disclosure:
  - Proceedings and papers not resulting in VC.
    - *Interpreted to mean meetings of Commission are closed to public.*
  - Investigative reports and work product of ISCDC
  - Statements conditionally agreeing to discipline pursuant to Rule 23(11)(c).
    - *Similar to offers of settlement in civil cases not being admitted to prove the matter.*

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### Confidentiality

- Admis.Disc.R. 23(22)(b) – hearings before hearing officer open to public
  - Discretion to order closed hearing, e.g. Rule 1.6 violation (client confidences)
- Admis. Disc. R.23(17)(c) – affidavit supporting resignation or consent to discipline is confidential. The Order approving either is public record.
- Admis. Disc. R. 23(12)(a) and (b) - PAA

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### Reporting Lawyer Misconduct

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### Reporting Lawyer Misconduct

- A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

- Prof Cond. R. 8.3(a)

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### Reporting Lawyer Misconduct

- An attorney licensed to practice law in the State of Indiana who is found guilty of a crime in any state or of a crime under the laws of the United States shall, within ten (10) days after such finding of guilt, transmit a certified copy of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

- Admis. Disc. R. 23(11.1)(a)(2)

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### Reporting Lawyer Misconduct

- "The judge of any court in this state in which an attorney is found guilty of a crime shall, within ten (10) days after the finding of guilt, transmit a certified copy of proof of the finding of guilt to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission."

- Admis. Disc. R. 23(11.1)

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### Summary or Interim Suspension Prior to Adjudication of Misconduct

- Summary Suspension [ADR 23(11.1)(a)(3)]
  - Upon **lawyer's** conviction of felony
  - Notice from Executive Secretary; rt. to respond
  - No hearing; summary order
- Interim Suspension [ADR 23(11.1)(b)]
  - Continuation of practice during pending investigation or proceeding may pose a substantial threat of harm to public, clients, potential clients or admin. of justice
  - 2/3 vote of DC to approve filing petition
  - Action argued to Supreme Court

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### Role of the Prosecutor

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### Minister of Justice

- Prof. Cond. R. 3.8, Comment 1
  - "A prosecutor has the responsibility of a **minister of justice** and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."
  - "...[K]nowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4."
- Special rules, not special privileges

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### Minister of Justice – Rule 3.8

- Don't charge if no probable cause
- Assure accused advised of rt. to counsel, procedure for obtaining counsel, and given reasonable opportunity to obtain counsel.
- Don't seek waiver of important pretrial rts. from unrepresented person.
  - Comment 2: "... should not seek to obtain waivers of prelim. hearings or other important P/T rts from unrepresented accused persons."
  - "...[D]oes not apply...to an accused appearing pro se with the approval of the tribunal."
- Timely disclosure to defense of exculpatory evid.

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### Competitive Drive or Losing Focus of Minister of Justice Role?

- Other side engages in misconduct, so why can't I?
  - *In re Lawrence Newman*, 958 N.E.2d 792 (Ind. 2011)
  - "...[T]he fact that the Commission has not pressed misconduct charges against other attorneys would not relieve Respondent of being answerable to this Court for his."
  - "Lack of insight"
- Ends justify means. We're going after bad people so we should get a break on ethical misconduct.

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### Engagement With Defense Counsel

- Don't aid and abet misconduct
  - E.g. Negotiate with unadmitted counsel; acquiesce to defense conflict of interest.
- Don't pit defense counsel against client such that attorney must choose between self-interest and client's interest
  - E.g. Release confiscated cash to counsel for fees if def. agrees to plea deal.
- Charging/Pleading to crime that knowingly was not committed
  - E.g. Amending OWI to FAWI

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Misconduct or Appealable Error?

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Misconduct or Appealable Error?

- Every case where appellate court finds prosecutorial misconduct (published or unpublished) is reviewed.
- Misconduct but not fundamental error.
  - Not a standard of review for DC.
    - Is it misconduct at all? If so, is it substantial misconduct?
    - Is it misconduct under Rules of Professional Conduct or misconduct (error) in discretionary view of judge(s)?
  - Misconduct resulting in fundamental error will heighten scrutiny by DC.

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Case Backlog

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### Delay - Backlog of Summaries

- July 2008: 352 awaiting writing of summary
- March 2010: 277 awaiting writing of summary
- August 2013: 49 awaiting writing of summary
- Avg. Commission meeting reviews 7-10 misconduct summaries
- 2008 – 3+ yrs backlog
- 2010 – 2+ yrs backlog
- 2013 – 5 mos. backlog

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### Other Matters Before the Commission

#### Commission

- Reinstatements
- Commission grievance
- Non-cooperation suspensions
- Reconsideration of dismissed actions
- Consideration of conditional agreements
- Review of recent Court decisions
- Administrative business of the agency
- Contempt
- UPL

#### Commission Staff

- Trust account overdraft investigations
- Continuing education speakers
- Felony summary suspensions
- Reciprocal suspensions
- Inquiries from other jurisdictions
- Self-request for discipline history
- Advertising filing

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