

Ethics Update

Indiana Prosecuting Attorneys Council

Indianapolis Marriott North

May 17, 2013

Indiana Rules

- Admin & Discipline Rule 6, § 2: Business Counsel
- Admin & Discipline Rule 6, § 3: Foreign License Fees
- Admin & Discipline Rule 23, § 26: Duties of Disbarred, Suspended, and Attorneys who Resign
 - *In re Nehrig*, 973 N.E.2d 567 (Ind. 2012)
- Rule of Professional Conduct 5.5: pro hac vice

- 2013, so far . . . Appointment of Counsel in Juvenile Cases

Rule 1.8(I)

A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.

Indiana Disciplinary Cases

- *In re Nehrig*, 973 N.E.2d 567 (Ind. 2012)
- *In re Martinez-Suarez*, -- N.E.2-- (Ind. 2 Apr. 2013)

Rule 8.4(d)

Conduct Prejudicial to the Administration of Justice

- *In re Schalk*, -- N.E.2d – (Ind. 15 April 2013)
– *Schalk v. State*, 943 N.E.2d 427 (Ind. 2011)
- *In re Hemphill*, 971 N.E.2d 665 (Ind. 2012)
- *In re Dimick*, 969 N.E.2d 17 (Ind. 2012)

Ineffective Assistance of Counsel

- *Chaidez v. United States*, --U.S.--, 113 S.Ct. 1103, 185 L.Ed. 2d 149 (2013)
– *Padilla v. Kentucky*, 559 U.S. 356 (2010)
– *Teague v. Lane*, 489 U.S. 288 (1989)
- *Carrillo v. State*, 982 N.E.2d 461, 463 (Ind. Ct. App. 2013):
Defense counsel testified “that [because] he had filed a motion for Carrillo’s resident alien identification to be returned to him . . . there was ‘a really good chance’ that he knew Carrillo was not a United States Citizen.”

– See also, *Clarke v. State*, 974 N.E.2d 562 (Ind. Ct. App. 2013); *Gulzar v. State*, 971 N.E.2d 1258 (Ind. Ct. App. 2012); *Suarez v. State*, 967 N.E.2d 552 (Ind. Ct. App. 2012)

Prosecutorial Misconduct

Two Bins

Raised at Trial ("Two" Step Analysis)

- Must ask for admonishment and
- If admonishment not adequate [or not given], ask for mistrial
 - Error is now preserved for direct appeal
- Was there misconduct?
- If there was, did it place the defendant in grave peril?

Not Raised at Trial ("One" Step Analysis)

- [Was there misconduct?]
- Does it amount to fundamental error?

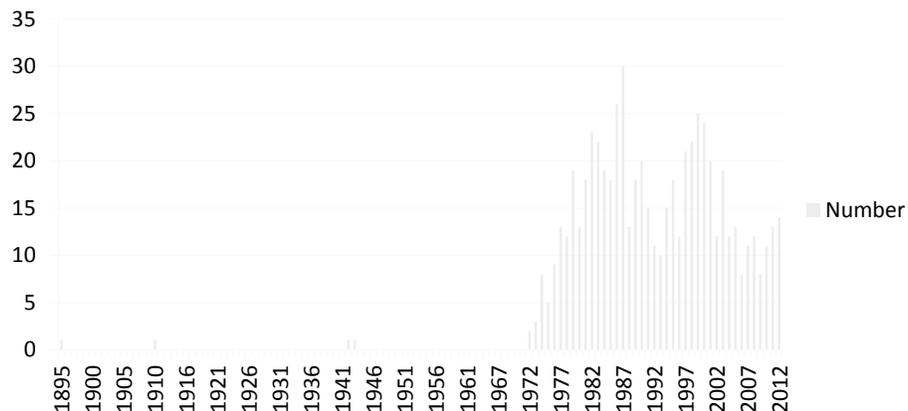
What is/is not "Grave Peril?"

- It "is the same standard . . . trial courts observe in ruling on mistrial motions."
- It is "not . . . misconduct [that] determined the outcome of the trial."
- It "is determined by the probable persuasive effect of the misconduct on the jury's decision, not by the degree of impropriety."
 - *Maldonado v. State*, 265 Ind. 492, 498-9, 355 N.E.2d 843, 848 (1976)
- It is not the same as fundamental error.
 - *Booher v. State*, 773 N.E.2d 814, 817-8 (Ind. 2002)

What is “Fundamental Error?”

- It “is an extremely narrow exception that allows a defendant to avoid waiver of an issue.”
 - *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)
- It is something that “make[s] a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process, [or] . . . present[s] an undeniable and substantial potential for harm.”
 - *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002)
- Again, it is not the same as “grave peril.”
 - *Booher*

Published Decisions



Indiana Prosecutorial Misconduct

- *Castillo v. State*, 974 N.E.2d 458 (Ind. 2012)
 - Asking jury to consider matters outside what can be considered for sentence to LWOP
 - 3-step analysis
 - Was it misconduct?
 - Did it “place[] the defendant in a position of grave peril to which . . . she would not have been subjected”? (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)).
 - If not properly preserved, was it nonetheless fundamental error?

Prosecutorial Misconduct, cont’d

- *Castillo*, cont’d
 - “[D]o not compare what you’re evaluating, the aggravating factor and these mitigating factors that the defense has brought. Do not compare Engelica Castillo’s pathetic miserable childhood to the life of that two-year old.”
 - “[T]he prosecutor urged the jury to act contrary to the law” and to consider matters that were not proper aggravators – e.g., the defendant’s “unsavory character.”
 - Violates RPC 3.3(a)(1)
- *Hollin v. State*, 970 N.E.2d 147 (Ind. 2012)
- *Ward v. State*, 969 N.E.2d 46 (Ind. 2012)

Prosecutorial Misconduct, cont'd Court of Appeals Decisions

- *Malloch v. State*, 980 N.E.2d 887 (Ind. App. 2012)
- *Neville v. State*, 976 N.E.2d 1252 (Ind. App. 2012)
- *Kindred v. State*, 973 N.E.2d 1245 (Ind. App. 2012)
- *Feyka v. State*, 972 N.E.2d 387 (Ind. App. 2012)
- *Huls v. State*, 971 N.E.2d 739 (Ind. App. 2012)