SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY: PROSECUTING ATTORNEYS AND BREACHING THE PUBLIC'S TRUST

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I. IMPROPER SEIZURE OF CRIMINAL DEFENDANT'S DEPOSITION NOTES

An important ethics decision by the Indiana Supreme Court during the survey period was actually a consolidated case involving two lawyers. In *In re Winkler*,[1] the respondent lawyers were serving as the elected Prosecuting Attorney for Washington County and her deputy, respectively.[2] In 2003, they were both present during a deposition in a criminal case.[3] During the course of the deposition, the defendant made notes and had discussions with his counsel while sitting across the table from the respondent prosecutors. When the defendant and his lawyer left the room for a discussion, he turned his notepad face down on the table. Respondent Goode then seized the notes, tore them from the legal pad and gave them to Winkler. Winkler, in turn, concealed them by placing them in a stack of files on the table. The respondent lawyers wanted to use the notes for an exemplar of the defendant's handwriting to compare with other evidence in the criminal case. When the defendant and his counsel returned to the deposition room, neither Winkler nor Goode told them that they had seized the notes. Both the defendant and his lawyer began a search for the notes and Winkler went as far as shuffling through her files as a pretense for looking for them. When the defendant saw the edge of a yellow piece of paper sticking out of the pile of files, he specifically asked respondent Winkler if that was his notes. She finally acknowledged having the notes and returned them to the defendant.[4]

The respondents were charged with a variety of violations, including: Indiana Professional Conduct Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person,[5] Indiana Professional Conduct Rule 4.4, which prohibits a lawyer from obtaining evidence by means that violate

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1. 834 N.E.2d 85 (Ind. 2005) (per curiam).
2. *Id.* at 87.
3. *Id.* at 88.
4. *Id.*
5.

> In the course of representing a client a lawyer shall not knowingly:
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [governing confidential communications].

IND. PROF'L CONDUCT R. 4.1.

the rights of a third person,[6] Indiana Professional Conduct Rule 8.4(c), making it misconduct for a lawyer to engage in conduct involving dishonesty,[7] and Indiana Professional Conduct Rule 8.4(d), making it misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.[8] After trial, they were both found to have committed all the violations as alleged. The Hearing Officer who took evidence in the case found respondent Winkler, the elected prosecutor, to be more culpable and recommended a ninety-day suspension from the practice of law.[9] Furthermore, he recommended that Goode receive a sixty-day suspension.[10] Although both lawyers asked the supreme court to review the case, Goode did not challenge the findings made by the Hearing Officer but, instead, asked that his sanction be made a public reprimand with no time suspended from the bar. The supreme court imposed the full sixty-day suspension on Goode, but increased the sanction on Winkler from the ninety days proposed by the Hearing Officer to 120 days.[11]

The supreme court used this opinion to discuss the important ethics issues associated with the criminal justice system. The court noted the important state interest in maintaining the confidentiality of communications between an attorney and client and noted that it is one of the cornerstones of the right to assistance of counsel guaranteed by the United States Constitution.[12] The court then criticized the respondents for infringing on that relationship by seizing a criminal defendant's notes without the benefit of a search warrant, subpoena, or court order of any kind.[13] Clearly, such behavior violated the rights of third person. The court also repeated an observation that it has made repeatedly in past cases: prosecutors are held to a higher standard in Indiana.[14] Although the court certainly did not like the idea of prosecutors taking another person's notes, it found the respondents' attempts to conceal their misconduct even more

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6.

(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.

(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.

Id. R. 4.4.

7. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" *Id.* R. 8.4(c).

8. "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice[.]" *Id.* R. 8.4(d).

9. *In re Winkler*, 834 N.E.2d at 88.

10. *Id.*

11. *Id.* at 90.

12. *Id.* at 88 (citing Maine v. Moulton, 474 U.S. 159 (1985)).

13. *Id.*

14. *Id.* at 89 (citing *In re* Seat, 588 N.E.2d 1262 (Ind. 1992)).

distressing. The court was very critical of respondent Winkler's deception to her opposing counsel in the criminal case and her lack of insight in failing to acknowledge her misconduct before the Hearing Officer in her discipline case.[15] Perhaps the most important language from the opinion was

> Prosecutors are not simply advocates, but they are also ". . . ministers of justice. . . . This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . ." As such we hold prosecutors to a high standard of ethical conduct. Here, blinded by their zealous quest to prosecute the defendant, respondents lost sight of basic ethical considerations. It is important that all lawyers understand that it is unacceptable to tolerate litigation premised on "the end justifies the means."[16]

As noted previously, this is not the first time the supreme court has been called upon to examine misconduct committed by prosecutors. The vast majority of such cases, however, involve personal misconduct on the part of the lawyer who by coincidence is also a prosecutor.[17] In *In re Winkler* the court recognized that there were valid ways in which the criminal defendant could be compelled to give a handwriting exemplar.[18] Extensive misconduct like that in *In re Winkler* is rare. In *In re Riddle*,[19] the respondent's service as a prosecutor happened to be the exact reason he committed misconduct. As a full time prosecuting attorney, a lawyer promises to devote his full professional efforts to the service of his client, the State of Indiana.[20] In *In re Riddle*, that lawyer tried to maintain a private practice in addition to his elected office and concealed the fact from the judges and other lawyers in the county by hiring a young lawyer to serve as a part time deputy prosecutor while purportedly taking over the respondent lawyer's private practice.[21] The respondent was charged with a variety of misconduct including committing the crime of ghost employment.[22] In its opinion permanently disbarring the respondent, the supreme court found that his offenses and steadfast lack of remorse struck at the very heart of public trust.[23] The same sentiment from the court echoes through its analysis in *In re Winkler*.

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15. *Id.* at 89-90.

16. *Id.* at 90 (internal citation omitted).

17. See *In re Oliver*, 493 N.E.2d 1237 (Ind. 1986) and *In re Schenk*, 612 N.E.2d 1059 (Ind. 1993), where two prosecutors were involved in alcohol related incidents while driving. In *In re Oliver*, the supreme court announced the elevated standard for examining the conduct of prosecuting attorneys based on their special status as enforcers of the law.

18. *In re Winkler*, 834 N.E.2d at 88.

19. 700 N.E.2d 788 (Ind. 1998).

20. *Id.* at 794 (citing IND. CODE § 33-14-7-19.5 (1998) regarding the full time prosecutor's exclusive duty to the State of Indiana).

21. *Id.* at 791-93.

22. *Id.*

23. *Id.* at 795.

II. FORBIDDEN ATTACK ON RACE AND ETHNICITY

Also during the survey period, the supreme court had an opportunity to examine and apply a relatively new provision to Indiana Professional Conduct Rule 8.4(g).[24] The provisions of Rule 8.4 govern the lawyer's conduct as a member of society. It prohibits, for example, engaging in acts of deceit or criminal acts.[25] In a nutshell, subsection (g) forbids a lawyer from manifesting bias or prejudice based on, inter alia, another person's race, gender, religion, age, or sexual orientation. In order to find a violation of the rule, a showing is required that the lawyer was acting in a professional capacity and that the acts cannot be attributed to legitimate advocacy.[26]

The first Indiana disciplinary case decided under this rule was *In re Thomsen*.[27] Although the case was tendered to the supreme court by an agreed settlement, the court issued a per curiam opinion on November 29, 2005. In its opinion, the court accepted the tendered resolution of a public reprimand to be imposed on the respondent lawyer. In *In re Thomsen*, the respondent lawyer represented the husband in a marriage dissolution action wherein the custody of the parties' children was a contentious issue in the case.[28] In the petition for custody that the respondent filed on behalf of the husband, she made repeated references to a man as a "black male" who had purportedly been seen with the wife and who also purportedly resided with the wife and children for a period of time. Furthermore, at three separate hearings, the respondent occasionally referred to this individual by his proper name, but also regularly referred to him as "the black guy" or "the black man."[29] She did not make or substantiate any argument to the trial court that the race of this individual was germane to the issues raised in the dissolution or custody case. In one speech excerpted in the opinion, the respondent had the following exchange: "Further, when the wife testified that a '. . . black kid across the street [was] yelling racial slurs at them . . . ,' respondent replied, 'Well, you're used to that. I mean you have them in your home.'"[30]

24.

> 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. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

IND. PROF'L CONDUCT R. 8.4(g).

25. *Id.* R. 8.4(c).

26. *Id.* R. 8.4(g).

27. 837 N.E.2d 1011 (Ind. 2005) (per curiam).

28. *Id.* at 1011.

29. *Id.* at 1012.

30. *Id.*

The court found the respondent's conduct appalling and found that her racially insensitive remarks could "only serve to fester wounds caused by past discrimination and encourage future intolerance."[31] It was careful to point out that legitimate advocacy respecting the factors spelled out in Rule 8.4(g) does not violate the Rules of Professional Conduct.[32] This respondent's comments, however, were "unnecessary," "inappropriate," and, as such, were "offensive, unprofessional and tarnish[ed] the image of the profession as a whole."[33] Where, as in this case, there is no *legitimate* reason for the conduct, it cannot be taken lightly. Hence, the court agreed to impose the disciplinary sanction proffered by the parties of a public reprimand. The court specifically noted, "[t]here is no place for such conduct in our courts."[34]

As noted in a prior professional responsibility survey article,[35] when the rule was adopted, Indiana's acceptance of a version of Rule 8.4(g) was neither unique nor a simple nod to political correctness. Many states have adopted such rules but, because of their newness, there was a dearth of decided cases on the issue.[36] The *In re Thomsen* case might be a good reminder to lawyers and law firms to review their thoughts and, if they exist, their policies regarding socially sensitive topics like race or sexuality in dealing with people within the law firm and outside of the law firm. In the opinion, the court made clear that there might be occasions when such references constituted *legitimate* advocacy. Neither the *In re Thomsen* opinion nor the rule defines the limits of *legitimate* advocacy in this regard but a law firm would be well advised to review this case with its members as a reminder about these issues.

III. LAWYERS' DUTY TO COOPERATE WITH THE DISCIPLINARY COMMISSION

Although procedural issues in discipline actions admittedly do not usually make for riveting reading, one decision during the survey period should catch lawyers' attention: *In re Clark*.[37] It covers an issue not frequently addressed in the procedural aspects of lawyer disciplinary actions: the duty to respond. Lawyers are required under Indiana Admission and Discipline Rule 23 to cooperate with the investigation of misconduct by the Disciplinary Commission.[38] In *In re Clark*, the respondent lawyer was charged with two counts of failing to respond to demands for information from the Disciplinary

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31. *Id.*

32. *Id.* The supreme court did not give specific acts it thought fell within the terms of the rule, but one obvious example where race, ethnicity, or other physical characteristics of an individual might come into play is identification of criminal defendants or witnesses.

33. *Id.* at 1012.

34. *Id.*

35. Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477 (2002).

36. *Id.* at 1485-87.

37. 834 N.E.2d 653 (Ind. 2005) (per curiam).

38. IND. ADMIS. DISC. R. 23(10)(e) (2005).

Commission.[39] Failing to respond is a substantive violation of the Indiana Rules of Professional Conduct and is found in rule 8.1(b).[40] Thus, the respondent lawyer in *In re Clark* found himself charged with two counts of misconduct. After the matter was tried to a Hearing Officer, the supreme court agreed and found that the respondent lawyer deserved to be suspended from the practice of law for ninety days.[41]

In *In re Clark*, the Disciplinary Commission received a grievance against the respondent and asked him to respond to its allegations.[42] Despite repeated reminders, the respondent failed to respond, and in December 2001, the Commission filed a proceeding with the supreme court to have the lawyer suspended until such time as he responded.[43] At about that time, the respondent answered the grievance and the court granted the Commission's motion to dismiss its request for a suspension thereafter. After a similar situation arose in 2002 and the respondent did not answer the grievance for approximately six months, another proceeding was started that October to suspend him until such time as he responded to the grievance. In November, he answered the grievance and in December, the supreme court dismissed its show cause order. The Disciplinary Commission then filed a formal disciplinary action against Clark for failing to respond to a demand for information from the Commission.[44] The case was not settled, but instead, the matter was tried to a Hearing Officer. The

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39. *In re Clark*, 834 N.E.2d at 654.

40.

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: . . .
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> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

IND. PROF'L CONDUCT R. 8.1(b).

41. *In re Clark*, 834 N.E.2d at 656.

42. *Id.* at 654.

43. *Id.*; IND. ADMIS. DISC. R. 23(10)(f). This is what lawyers commonly refer to as a "show cause" petition. Once the action is begun, the supreme court issues an order to the respondent lawyer requiring him or her to "show cause" why he or she should not be suspended from the practice until such time as he cooperates with the Commission. If a lawyer is suspended on this basis for more than six months, the suspension becomes indefinite and requires the lawyer to petition for reinstatement. IND. ADMIS. DISC. R. 23(10)(f)(4).

44. *In re Clark*, 834 N.E.2d at 655. The significance is that there is a different procedure in so-called "failure to cooperate" cases that is relatively summary in nature. It is found in Indiana Admission and Discipline Rule 23 and brings the offending lawyer to the attention of the supreme court immediately, but only with respect to the cooperation issue. After Clark's failure to cooperate cases were dismissed, the conduct was considered by the full Disciplinary Commission for a determination as to whether it rose to the level of a violation of Indiana's Rules of Professional Conduct under Rule 8.1(b).

Hearing Officer found, and the supreme court agreed, that the respondent had, in fact, violated the rule.

> Here, respondent chose to repeatedly ignore the Commission's requests for information regarding grievances pending against him. Respondent has demonstrated an unwillingness to comply with even this basic professional obligation. The Commission went out of its way to give respondent the opportunity to comply with its requests before seeking action from this Court. Despite the Commission's generous grant of extensions and follow up letters, which is [sic] was not required to send, respondent still did not provide timely responses to the Commission.[45]

The court then engaged in a lengthy examination of similar cases and noted the respondent's prior history of failing to cooperate with the Commission's demands for information. That examination culminated with the recognition that the respondent had displayed "disdain" for the Commission that, by extension, was an expression of disdain of the court itself.[46]

What makes this case noteworthy in terms of this survey article is the explicit nature of the court's warning to this respondent and, vicariously, that portion of the bar that might be tempted to give the disciplinary process something less than the highest priority.

> [W]e advise respondent that he should be aware that future misconduct may warrant a sanction up to and including disbarment. *We also feel obliged to remind the bar in general that failure to cooperate with Commission requests for information may result not only in an order to show cause, but also a suspension from the practice of law. Ignoring the Commission's efforts to assist this Court in carrying out its duty to protect the public and uphold the integrity of the profession will not be tolerated.*[47]

After that, the court imposed a ninety-day suspension on the respondent lawyer.[48]

IV. UNAUTHORIZED PRACTICE OF LAW: NON-INDIANA LAWYERS

The Indiana Supreme Court also addressed an area not often examined in *In re Hughes*.[49] The respondent received a public reprimand for his agreed to misconduct. He maintained a law office in the town of Highland in Lake County, Indiana. During the relevant time, the lawyer represented the plaintiffs in a civil action in the Jasper County Superior Court. He appeared at the original case management conference and at the final pretrial conference. In between the two events, another individual appeared to handle other events, including taking

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45. *Id.*

46. *Id.*

47. *Id.* at 656 (emphasis added).

48. *Id.*

49. 833 N.E.2d 459 (Ind. 2005) (per curiam).

depositions.[50] That individual was a lawyer in Michigan, but not in Indiana.[51] In essence, the respondent had used a nonlawyer to practice law from his office. He also put the Michigan lawyer's name on his letterhead as one of the Indiana lawyers and the phone message at the firm identified the nonlawyer as a member of the firm. The court found that the respondent not only assisted in the unauthorized practice of law in violation of Rule 5.5(b),[52] but engaged in a violation of Rule 7.2(b)[53] by holding the Michigan lawyer out to the public as someone who was able to practice law in Indiana.[54] Because the matter was settled through the respondent's cooperation with the Disciplinary Commission, the respondent may very well have avoided a much more serious sanction at the end of this case. The practice of law in Indiana by someone who may hold the title of lawyer in another state is not a small matter to be overlooked. The supreme court has extensive rules regarding who may practice in Indiana. This includes those who would practice on a *pro hac vice* basis.[55] The Michigan lawyer at issue in *In re Hughes* also did not qualify as one engaged in Multijurisdictional Practice ("MJP") as that term is used in the Indiana Rules of Professional Conduct.[56] MJP is an extensive scheme of rules and presumptions that allow non-Indiana lawyers to practice here in certain specific circumstances that are identified in the rule. Indiana lawyers are similarly able to engage in the practice of law in those states that have their own MJP rules. That kind of practice was not a consideration in *In re Hughes*.

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50. *Id.* at 460.

51. *Id.* That lawyer's name was Nick Zotos.

52.

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

IND. PROF'L CONDUCT R. 5.5(b).

53.

> (b) A lawyer shall not, on behalf of himself, his partner or associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

Id. R. 7.2(b).

54. *In re Hughes*, 833 N.E.2d at 461.

55. IND. ADMIS. DISC. R. 3 explains the manner by which a non-Indiana lawyer can get temporary admission to practice in a specific Indiana court for a specific matter by applying through the office of the Clerk of the Supreme Court.

56. IND. PROF'L CONDUCT R. 5.5 and 8.5 cover the topic and were new, effective January 1, 2005. These were covered in Donald R. Lundberg & Charles M. Kidd, *Survey of the Law of Professional Responsibility You Say You Want an Evolution?: An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 IND. L. REV. 1255 (2005).

V. UNAUTHORIZED PRACTICE OF LAW: NON-LAWYERS

The court also addressed the unauthorized practice of law issue. Under Indiana Admission and Discipline Rule 24, the Indiana State Bar Association and other entities have the authority under the rules to bring actions for the unauthorized practice of law ("UPL") in this state, and they have done so throughout the years. Most recently, the association did so in *State ex rel. Indiana State Bar Ass'n v. Diaz*.[57] In *Diaz*, the Indiana Supreme Court was asked to examine the practices of a woman named Ludy Diaz[58] in Goshen, Indiana. Although born in Puerto Rico, she has lived in northern Indiana for many years and has identified herself as an "immigration counselor" and offered translation services for at least the last ten years. She also owned and used immigration form software and attended seminars on immigration related topics. On the outside of her office, she had a sign that read, "notary public."[59] The Spanish translation of those words is literally "notario publico," but the term has a specific connotation for those from Mexico and other Latin American countries.[60] Diaz had her Indiana notary certificate framed and hanging in her office and used the term "Notario Publico" on her business cards. She did not advise people that she was not a lawyer or a notario as that term of art is used but advertised her services in El Puente, a Spanish language publication in Elkhart County.[61]

The primary problems with Diaz's practices revolved around her work on immigration law matters. More specifically, Diaz filled out forms for people and made pleas for mercy on their behalf before the various agencies that have dealt with immigrants' residency status over the years. These included the Immigration and Naturalization Service ("INS") and its successor agencies like the Bureau of U.S. Citizenship and Immigration Services ("USCIS") and the Bureau of Immigration and Customs Enforcement ("ICE").[62] As any lawyer would immediately surmise, dangers lurk around every corner when an untrained or inexperienced person is dealing with these agencies. Thus, problems arose when Anjelica Hernandez and Fructuoso Espinoza hired Diaz to help Espinoza remain in the U.S. lawfully. Diaz took a fee and completed forms for them to file

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57. 838 N.E.2d 433 (Ind. 2005) (per curiam).

58. Although Diaz could be referred to as "respondent" because she is so designated in the opinion that bears her name, she will be referred to Diaz in this article simply as a convention to distinguish that she was not a lawyer. She is referred to as Diaz throughout the court's decision as well. The term respondent is used throughout the balance of the survey article to denominate the lawyers that were the subject of disciplinary action.

59. *Diaz*, 838 N.E.2d at 438-39.

60. *See id.* at 447. Used in the latter sense, a "notario" is a quasi-public official who is an experienced lawyer who has passed rigorous additional examinations beyond law school. The court's opinion devotes an extensive part of its body to describing important points of immigration law and the importance of "notarios" in Latin American society and such an exposition will not be provided here.

61. *Diaz*, 838 N.E.2d at 439.

62. *Id.*

with federal agencies in an attempt to change Espinoza's residency status to one that would allow him to remain with Hernandez and their child in this country. During their second trip from northern Indiana to Indianapolis for interviews with the INS, the couple was separated and Hernandez was informed that Espinoza was being detained for subsequent deportation.[63]

Hernandez contacted Diaz and obtained a copy of Diaz's file on Espinoza's matter. Diaz told Hernandez to just "send a letter" to INS and that a lawyer would "charge a lot of money and it would not do any good."[64] Diaz did not recognize at the time she worked for Espinoza that a prior incident in which he used false documentation in an immigration matter was a serious offense. Diaz's services for other immigration "clients" are generally described in the court's opinion as well.[65]

In analyzing Diaz's conduct, the court gave a detailed examination of two UPL cases in particular: *State ex rel. Indiana State Bar Association v. Indiana Real Estate Ass'n*.[66] and *Miller v. Vance*.[67] In *Indiana Real Estate*, the Indiana State Bar Association initiated a case against a realtors trade group alleging that the assisting of person in filling out real property transfers constituted the unauthorized practice of law.[68] The bar association claimed that in so doing, the realtors were engaging in acts that only an attorney could do. In *Miller*, the court was asked to consider whether the filling out of a mortgage instrument by a nonlawyer bank employee was also the unauthorized practice of law.[69] In both cases, the court recognized the important interests at stake in the acts being performed by nonlawyers, but found that in the cases presented, those acts did not constitute the unauthorized practice of law because the chance for errors was low.[70] The situation in *Diaz* was different because there was nothing in the cases presented that suggested the services being provided were "routine transactions" in any sense.[71]

> [E]ach case is unique and the procedures can be complex. The choice of a form and the information to include in its blanks can turn on subtle facts that may not be apparent to those without legal training.
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> Moreover, Diaz's immigration services went far beyond the use of

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63. *Id.* at 440-41.

64. *Id.* at 442.

65. *Id.* at 440-41.

66. 191 N.E.2d 711 (Ind. 1963).

67. 463 N.E.2d 250 (Ind. 1984).

68. *Ind. Real Estate*, 191 N.E.2d at 713.

69. *Miller*, 463 N.E.2d at 251.

70. See *Diaz*, 838 N.E.2d at 444, for the court's discussion of some of its past unauthorized practice of law ("UPL") cases. The opinion recited that which the court so often observes in UPL cases, that the "core element of practicing law is the giving of legal advice to a client." *Id.* (citing State *ex rel.* Disciplinary Comm'n v. Owen, 486 N.E.2d 1012, 1013 (Ind. 1986)).

71. *See id.* at 445.

> forms. She held herself out as providing immigration services. She advised clients on many aspect of immigration law, she wrote letters, motions, and appeals to immigration officials on behalf of clients, and she accompanied clients to the immigration office. Beyond immigration law, she ventured into drafting contracts, a pleading, and at least one will. In many cases, her understanding of the underlying law was incomplete, her advice or the documents she prepared were faulty, and her clients suffered.
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> The Court also notes that Diaz promised absolute confidentiality to her clients. However, because she is not an attorney, the sensitive information her clients disclose to her regarding their immigration status and other matters is not protected by the attorney-client privilege. The fact that she promised such confidentiality further suggests she was holding herself out as a "notario," rather than a "notary."[72]

The court, of course, enjoined Diaz from engaging in any activity that might be considered the practice of law and spelled out a number of those activities in the opinion.[73] In general, the court was very critical of the misuse of the concept of "notary public" as a possibly deliberate attempt to confuse it with the more complex services provided by a "notario," for which there is no corresponding entity in the United States.[74]

This case is not only important for its impact in protecting the public from those who should not be practicing law, but it also provides important insight into the supreme court's thinking about protecting segments of the public that might be uniquely vulnerable. It has a number of citations to resources about legal thinking on this specific problem. For example, the court refers to, inter alia, a *Harvard Latino Law Review* note on the exploitation of vulnerable Latino immigrants.[75] In the end, the court concluded,

> The answer to these unmet needs, however, is not permitting unqualified practitioners to provide inadequate services. Incompetence in the complexities of immigration law can have disastrous results because filing the wrong document, missing a deadline, or misjudging the relief available to a client can mean the difference between legal status and deportation (which, for asylum seekers, may carry the risk of death if returned to their native lands.)[76]

Diaz was permanently enjoined from the unauthorized practice of law.

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72. *Id.* at 445-46.

73. *Id.* at 448.

74. *Id.* at 446.

75. Anne E. Langford, *What's in a Name?: Notarios in the Unites States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115 (2004).

76. *Diaz*, 838 N.E.2d at 446.

VI. LAWYER-CLIENT RELATIONSHIP: FORBIDDEN POST-MORTEM ESTATE PLANNING

In a curious act of wrongdoing, a lawyer in *In re Gofourth*[77] assisted in the creation of a Last Will and Testament for a man who was already dead. In November 2004, a man died without a will.[78] His estate was valued between $50,000 and $100,000. Having died intestate, his estate should have been divided equally between his heirs: his mother, his father, and his brother. Several weeks after the man's death, his father, who was an acquaintance of the respondent, approached the lawyer about drafting a will for the decedent. The lawyer then drafted such an instrument giving the bulk of the estate to the father.[79] The father forged his dead son's signature on the will in the respondent's presence. The decedent's mother contested the will. The respondent lawyer initially insisted the will was genuine, but eventually admitted the plot and confessed his misconduct to the local circuit court judge.[80] Respondent was later charged with forgery and perjury and ended up pleading guilty to perjury, a Class D Felony. The court found he violated Indiana Professional Conduct Rule 1.2(d)[81] for assisting a client in a fraudulent act; Indiana Professional Conduct Rule 8.4(b) for committing a criminal act that reflects adversely upon a lawyer's honesty, trustworthiness, or fitness as a lawyer;[82] and Indiana Professional Conduct Rule 8.4(c) for committing an act involving dishonesty.[83] He was suspended from the practice of law for three years, without automatic reinstatement to the Bar.[84] Justice Dickson dissented, saying the respondent should have been disbarred.[85] Essentially, that means the respondent may petition to reinstate his license in three years, but if he were disbarred, he could never get his license back.[86]

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77. 839 N.E.2d 690 (Ind. 2005).

78. *Id.* at 690.

79. *Id.*

80. *Id.*

81.

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

IND. PROF'L CONDUCT R. 1.2(d).

82. "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" *Id.* R. 8.4(b).

83. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" *Id.* R. 8.4(c).

84. *GoFourth*, 839 N.E.2d at 690.

85. *Id.* at 691 (Dickson, J., dissenting).

86. *See* IND. ADMIS. DISC. R. 23(3) (2005).