

Recent rule changes of special interest to lawyers

The Supreme Court recently amended a number of rules applicable to professional responsibility and lawyer regulation that will take effect on Jan. 1, 2010. Here is a summary of those amendments.

Interest on Lawyer Trust Accounts (IOLTA)

Admission & Discipline

Rule 2(f), (g) and (h): Every lawyer is required to either certify that she has an IOLTA account or designate a reason why she is exempt from the obligation to keep small or short-held client funds in an interest-bearing trust account to benefit the Indiana Bar Foundation. The annual registration statement, including the IOLTA certification, and the annual registration fee are due by Oct. 1. If paid late, there are some rather steep delinquent fees. Subsection (f) of the rule now clarifies that if a lawyer does not make a timely IOLTA certification, the annual registration is not complete until it is returned to the Clerk with the certification. If that turns out to be after Oct. 1, delinquent fees for late registration, just as for late fee payment, will apply.

In keeping with the general notion that annual registration consists of the annual gathering of attorney registration information, in addition to collection of the annual registration fee, the title of Subsection (g) has been amended to refer to an "Annual Registration Notice" rather than an "Annual Registration Fee Notice."

When a lawyer's license is suspended for failing to file an annual registration statement or pay the annual fee, Subsection (h) requires a written application for reinstatement containing certain information. The IOLTA certification referred to above is now a stated requirement of that application.

Justice Rucker dissented from the IOLTA rule amendments without specifically stating his views.

Provisional and business counsel licensees

Admission & Discipline

Rule 6, sections 4 and 5: Foreign lawyers may gain admission without taking the bar exam by one of two methods: on a provisional five-year foreign license (sometimes called reciprocal admission or admission on motion); or on a business counsel license for the limited purpose of serving in-house for a single client.

These two groups of provisional licensees have always been required to take an approved 12-hour continuing education course described as an "annual Indiana law update seminar." Admis. Disc. R. 6(5) now clarifies that this is in addition to annual minimum continuing legal education requirements imposed on all Indiana lawyers. It also directs the Board of Law Examiners to publish a list of seminars that will satisfy this special requirement.

Admis. Disc. R. 6(4)(a) and (b) were amended to require that the first annual renewals of provisional and business counsel licenses must be accompanied by verified proof of compliance with the 12-hour law update requirement.

Admis. Disc. R. 6(4)(c) is a new subsection that expands on language previously found in subsections (a) and (b) and sets out annual renewal fee requirements for provisional and business license holders. As before, there is a \$50 annual renewal fee for provisional or business counsel license admission, which is now due by Nov. 1 of each year. The new rule adds delinquent fees of \$25 for payments made after Nov. 1 but on or before Nov. 15; \$50 for payments made after Nov. 15 but on or before

Dec. 31; and \$150 for payments made after Dec. 31. If failure to pay the annual fee continues into subsequent years, an additional surcharge of \$100 is added. These annual fees are in addition to the annual registration fee required of all lawyers.

Admis. Disc. R. 6(4)(d) is a new subsection stating that failure by provisional or business counsel licensees to pay the annual fee or to certify compliance with the initial annual law update requirement subjects the lawyer to license revocation, making continued practice of law subject to sanctions for contempt.

Admis. Disc. R. 6(4)(e) newly requires an annual renewal notice to be sent to the lawyer's address on file with the roll of attorneys on or before Sept. 1 of each year to provisional or business counsel licensees.

Admis. Disc. R. 6(4)(f) is a new subsection that permits provisional or business counsel licensees to tender an affidavit to relinquish their respective licenses if they no longer meet continuing eligibility requirements to hold the license. To do this, though, the lawyer must be current in all financial obligations associated with his license status. If the affidavit is in order, the executive director of the Board of Law Examiners will certify it to the Clerk who will adjust the roll of attorneys to show that the lawyer is no longer considered to be an Indiana lawyer. A voluntary relinquishment does not preclude the lawyer from seeking bar admission in Indiana under any category in the future. The same cannot be said for provisional or business counsel licensees who fail to maintain eligibility

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and have their licenses revoked under subsection (d).

Confidentiality of Board of Law Examiners' records

Admis. Disc. R. 19, section 3(c): A minor change was made to broaden the scope of the Board of Law Examiners' authority to release information to the National Conference of Bar Examiners. In addition to name, date of birth and Social Security number, the Board may release "other information relating to a bar application, an applicant, and the result of the bar application."

Lawyer discipline procedures

The Court did a fair amount of housekeeping in the way of amendments to Admission & Discipline Rule 23 governing lawyer discipline procedures. I will not burden you with a summary of the many stylistic changes, clarifications of obvi-

ous matters, or simple reorganization. Some of the amendments are more substantive or otherwise noteworthy.

Admis. Disc. R. 23, section 3(d): This subsection adds several categories of orders that trigger the Clerk's duty to notify other courts and entities of final orders relating to lawyer discipline, including resignations with disciplinary investigation or charges pending under Section 17, orders revoking probation or releasing lawyers from probation, and orders reinstating lawyers to practice after suspension. Further, the Clerk now must notify the Clerk of the United States Supreme Court of any order disbaring a lawyer, accepting a lawyer's resignation under Section 17, or suspending a lawyer for one year or more.

Admis. Disc. R. 23, section 4(d): This section deals generally with the procedures for reinstate-

ment after suspension without automatic reinstatement. A new subsection (d) explicitly states that the Court has flexibility to reinstate a lawyer "on other terms and by other procedures than those set forth above, such as reinstatement conditioned only on the attorney's submission of proof of compliance with a requirement for reinstatement." This is more than just a statement of the obvious: that a Court whose first name is "Supreme" has a great deal of flexibility. It accommodates some amendments to Section 28 dealing with reinstatement of lawyers reciprocally disciplined in Indiana based on discipline ordered by another jurisdiction.

Admis. Disc. R. 23, section 11.2: Most filings in a lawyer discipline case require an original plus five copies for matters directed to the Court or an original plus one copy for matters directed to the hearing officer. Subsection (c)(2) now specifies certain documents that, while directed to the Court, only require an original plus one copy, including motions for extension of time, appearances, motions to withdraw appearance, petitions to show cause for not cooperating with the discipline process under subsection 10(f) and motions to dismiss subsection 10(f) petitions.

Admis. Disc. R. 23, section 11.3: This new section essentially incorporates the parallel appellate rules pertaining to computation of time into the disciplinary procedures. Subsection (a) defines "business day" to mean any day except Saturday, Sunday, a state holiday or a day the office of the Clerk is closed. Subsection (b) provides that, in complying with time requirements, days are to be counted starting the day after a triggering event and including the day of the end of the time period unless it is

not a business day, in which event the final day moves to the end of the next business day. For periods less than seven days, nonbusiness days are not counted. Finally, subsection (c) incorporates the three-day automatic time extension to reply to party documents served by mail or third-party commercial carrier. It cautions that this extension does not apply to time periods triggered by hearing officer filings or court orders.

Admis. Disc. R. 23, sections 13 and 14: Admis. Disc. R. 23(13)(a) used to require a merits hearing be held within 60 days of a hearing officer's appointment. This standard was recognized by case law as being non-jurisdictional and often proved itself to be unworkable in light of timeframes for answering complaints, the availability of discovery and other litigation realities. Instead, a new Admis. Disc. R. 23(14)(f) requires the hearing officer to enter an order, within 30 days of appointment, scheduling the matter for final hearing on a date within 90 days of the hearing officer's appointment "absent good cause to the contrary."

Admis. Disc. R. 23(13)(c) formerly directed hearing officers to render findings of fact and a permissive recommendation on sanction. The hearing officer's obligation has been expanded to include reporting conclusions of law to the Court, codifying an already universal, if not explicitly required, practice.

A conflict in the language of Admis. Disc. R. 23(14)(a) and (b) has been resolved in favor of describing the pleading requirement for affirmative defenses using mandatory ("shall") language, rather than permissive ("may") language.

Admis. Disc. R. 23, section 15: This section deals with the Supreme Court's review of hearing officer

reports and contemplates a right of either party to file petitions for review and supporting briefs to point out claimed hearing officer errors to the Court. The amendment formally recognizes as a right the recently developed practice of the parties to brief the Court as to the appropriate sanction, even

when the hearing officer's factual and legal determination is not challenged.

Admis. Disc. R. 23, section 17: This section deals with two methods for resolving discipline cases without hearing: 1) resignation by

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an affidavit that makes a full admission of the misconduct under investigation or formally charged; 2) consent to discipline by affidavit, which also makes a full admission of misconduct under investigation or formally charged, but leaves the appropriate sanction up to the Court. The rule was changed to clarify that such affidavits are submitted to the Court through the Supreme Court Administrator's Office, with a copy served to the Disciplinary Commission. In other words, it bypasses the Clerk's office, is not filed and is not a matter of public record or available for public disclosure absent an order of the Supreme Court. Finally, Admis. Disc. R. 23(17)(b) was amended to provide an opportunity for both the consenting lawyer and the Commission to file briefs addressing the appropriate sanction within 30 days after a consent to discipline is submitted.

Admis. Disc. R. 23, section 17.1: Previously, following a term of probationary practice as part of a disciplinary sanction, probation would be terminated when the lawyer served on the executive secretary of the Commission an affidavit of successful compliance and an application for termination of probation. The executive secretary had 10 days to serve the lawyer with objections. In the absence of any objection, probation was deemed terminated. In the event of any objection, the resolution was subject to Court order. This was an awkward process in part because the record of application and objection, if any, was not on file with the Clerk. The amendments to this section create a new probation termination procedure that is more transparent. Initially, Admis. Disc. R. 23(17.1)(a) clarifies that the terms of probation remain in effect until the lawyer takes affirmative action to terminate it. Termination

is by petition filed with the Clerk and served on the Commission with an affidavit attesting to successful compliance. The Commission must file any objection within 15 days. The lawyer has 15 days to file a response, and the Commission has 10 days to file a reply. Probation remains in effect if there is an objection until the dispute is resolved by Court order. If the Commission does not object, "the petition shall be deemed granted with no further action required by the Court." The Clerk must cause the lawyer's status on the roll of attorneys to show that the lawyer is no longer on probation.

Admis. Disc. R. 23, section 20: In the past, individuals communicating with the Disciplinary Commission about matters of mutual interest and concern have enjoyed qualified immunity from civil liability for the content of those communications, whether "sworn" or written, if made "without malice." This section has been amended to create absolute immunity for such statements. "Sworn" statements are now described as "oral" statements, meaning the immunity extends to oral statements that are not made under oath. The immunity continues to apply only to the extent the communications are to the Commission. Similar statements made to others will not enjoy the same immunity.

Justices Dickson and Rucker dissented to the immunity amendments without expanding on their views.

Admis. Disc. R. 23, section 22: As noted in the above discussion of Admis. Disc. R. 23(17), affidavits of resignation and consent to discipline are not public (although the orders that accept resignations or order discipline are). Another mechanism for resolving a lawyer discipline case is a conditional agreement for discipline through

which the parties propose directly to the Supreme Court a specific disciplinary sanction in the case on the basis of stipulated facts and rule violations. The Court is not bound to accept such an agreement, but if it does, it issues an order of final discipline ordering the agreed sanction. It has not been clear in the past whether conditional agreements for discipline (but not the orders accepting them) should be confidential. The policy reasons supporting confidentiality of affidavits of resignation or consent to discipline are largely the same for keeping conditional agreements for discipline confidential. This amendment clarifies that these agreements are also confidential and not public.

Admis. Disc. R. 23, section 28: As do most other jurisdictions, Indiana applies full faith and credit principles and imposes “identical” discipline on Indiana-licensed lawyers as imposed by other jurisdictions without re-litigating the merits. The “identical” language presented occasional problems when, for example, the disciplinary sanction structure in another jurisdiction differed from Indiana’s or there was probation ordered in a foreign jurisdiction where the lawyer was a resident. The Court has substantially altered its approach to domesticating foreign discipline orders. Procedures are largely the same, but the end result is now somewhat different. References to “identical” discipline have been replaced with “reciprocal” discipline. Foreign discipline, unless there is a showing to the contrary, will be met with an indefinite suspension from practice in Indiana, lasting at least as long as the foreign suspension. (Indiana has no reciprocal discipline for a reprimand or other sanction that does not include a suspension.) After the lawyer is reinstated in the

foreign jurisdiction and files a verified motion, she can be reinstated in Indiana. The Indiana suspension will be deemed to begin when the foreign suspension begins only if the suspended lawyer promptly self-reports the foreign discipline to Indiana and voluntarily suspends his own practice in Indiana as of the beginning date of the foreign suspension. Otherwise, the Indiana suspension will begin when the Supreme Court orders it to begin. If reinstatement to practice in the foreign jurisdiction is subject to probation conditions, reinstatement in Indiana will also be probationary, subject to complying with the foreign jurisdiction’s conditions.

Limited liability law firms

Admis. Disc. R. 27, section 3: Law firms practicing as limited liability entities are required to initially register with the Board of Law Examiners and annually renew the registration. The rule has been amended to change the due date for annual renewals from Nov. 30 to June 30 and to impose a delinquent fee for late renewals in addition to the \$50 annual fee. The late fee is \$25 if paid between July 1 and 15; \$50 if paid between July 16 and Aug. 31; and \$150 if paid after Aug. 31. An additional \$100 surcharge applies for each consecutive year the registration is paid late. The transition to an earlier due date means no annual renewal fee will be required from Nov. 30, 2009 to June 30, 2010.

Admis. Disc. R. 27, section 4: The deadline for limited liability law firms to report changes in officers, directors, shareholders, members, partners, equity owners or lawyer employees and to pay a \$10 fee to the Board of Law Examiners has been extended from 10 days to 30 days. A new \$10 delinquent fee is owed for notice given after 30 days

of the change, and a new \$25 surcharge will be added for each consecutive time that late notice is given.

Admis. Disc. R. 27, section 7: This new section allows limited liability law firms who are no longer eligible to register or who no longer function as such to forego annual registration requirements by tendering an affidavit of relinquishment by June 30. If the executive director finds it to be in order, she will notify the Secretary of State; if not, she will notify the firm of the reasons why.

Admis. Disc. R. 27, section 5: If a limited liability law firm fails to renew or relinquish its registration, its certificate of registration may be revoked and the Court may punish continued practice as a limited liability law firm as contempt. Reorganization as a limited liability law firm will require starting over with the initial registration process as a new entity.

Admis. Disc. R. 27, section 6: Perhaps in order to offset the toughness of the newly imposed delinquent fees, the executive director of the Board of Law Examiners will send annual renewal forms to all registered limited liability law firms by May 1. The notice will be sent to the roll of attorneys address for the firm’s registered agent. ⚖️

The views expressed in this column do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.