

## Civil ≠ Zealous?

By Lonnie D. Johnson

By rule and opinion the Indiana system of justice mandates civility. Indeed, Indiana lawyers take an oath of civility.

“I do solemnly swear and affirm that...I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness...”

Indiana Admission and Discipline Rule 22.

Justice Steven David of the Indiana Supreme Court recently admonished Indiana lawyers that:

Professionalism and civility must be the foundation of the practice of law. Upon this foundation we lay competency, honesty, dedication to the rule of law, passion, and humility. Every lawyer and every judge is charged with the duty to maintain the respect due to the courts and each other. Our clients and the public expect it. Our profession demands it.

*Wisner v. Laney*, 984 N.E.2d 1201, 1205 (Ind. 2012).

Members of the defense bar, the plaintiffs bar, and the judiciary express concern over the erosion of civility in civil litigation. There are those who respond that the good old days were never quite that good. Indeed, century-old decisions cite to a lack of civility in the Indiana Bar: “Counsel has need of learning the ethics of his profession anew if he believes that vituperation and scurrilous insinuation are useful to him or his client in presenting his case.” *Pittsburgh, C., C. St. L. Ry. Co. v. Muncie & Portland Traction Co.*, 77 N.E. 941 (Ind. 1906).

However, various studies and surveys provide empirical data that contemporary lawyers sense a decline in the level of civility in the practice of law. See the Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit (West 1992), reprinted in 143 F.R.D. 441 (1992) (42% of all attorneys felt incivility to be a problem). As a matter of unscientific clinical observation, nearly every civil litigator in Indiana whose practice spans three decades or more, if pressed, will cite a precipitous decline in civility as perhaps the most significant change in the practice of law in Indiana. More importantly, those uniquely positioned to observe and critique the behavior of Indiana lawyers publically comment on the decline of standards of civility in Indiana. U.S. Magistrate Judge V. Sue Shields of Southern District is one of those uniquely positioned, and shortly before retiring from an historical career that spanned a good part of Indiana legal history, she commented on the state of civility in Indiana:

The magistrate judge, having spent forty years as a judge in this state, recalls a time when law was practiced with civility and grace; a time when simple disputes were resolved by a telephone call and agreements between counsel were sealed with a handshake; a time when disputes not so resolved were brought before the court in a manner that minimized expense and strife, recognizing that reasonable people can, at times, reasonably disagree. As the instant dispute so clearly demonstrates, that time is no more. The magistrate judge mourns its passing.

*Paul Harris Stores, Inc. v. Pricewaterhouse Coopers LLP*, No. 1:02-CV-1014-LJM/VSS, slip op. at 1 (S.D. Ind. Jan. 31, 2005).

Scholars and practitioners alike maintain that civil litigation in particular has been infected by incivility. See Raymond M. Ripple, *Learning Outside the Fire: Need for Civility and Instruction in Law School*, 15 Notre Dame J.L. Ethics & Pub. Pol’y 359 (2001). The root cause of incivility is much debated. To many, the decline in civility in litigation is tied to incivility in society at large. As one judge informed the Committee on Civility:

Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings none should be surprised that the courtroom is less tranquil.

Academics tend to point to legal institutions which spawn conflicting notions of the concept of zealous advocacy within the adversary system of justice. As observed by Justice Brent E. Dixon of the Indiana Supreme Court, “numerous causes are likely: client expectations based on frequent media portrayal of excessively aggressive lawyer styles, increased competition from growing number of attorneys, increasing law firm size with resulting losses of senior partner mentoring and role modeling, new emphasis on advertising, increased number of colleagues with resulting relative anonymity and institutional incentives for aggressive utilization of procedure rules.” Brent Dickson, Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 Val. U. L. Rev. 531 (1994).

Writing as the Executive Secretary of the Indiana Supreme Court Disciplinary Commission, Donald Lundberg addressed the amorphous nature of the duty of civility inherent in a higher calling and succinctly set forth the framework for thinking in terms of civility. See Donald R. Lundberg, *Zealotry v. Zeal: Thoughts about Lawyer Civility*, 51-DEC Res Gestae 32 (2007). As he writes, “It’s an odd thing, civility.” Lundberg instructs that being civil is not the same as being ethical. The Professional Rules of Conduct establish minimum standards of behavior, what it means to be merely compliant – ethical. Civility is a higher calling, requiring temperament and judgment in excess of obedience to black letter rules. “Civility is part of the culture of law practice as defined ‘lawyer-by-lawyer, act-by-act.’ Everything we do as lawyers either adds to a culture that fosters civility or detracts from it.” *Id.* The meaning of civility is generally defined by legal observers as treating opponents, litigants and judges with courtesy,

dignity and kindness.” See *Learning Outside the Fire*. However, as Lundberg emphasizes, as applied to lawyers, “civility has more substance than the bland notion that you ought to be a nice person.” See *Zealotry v. Zeal*, \*32.

Numerous Indiana opinions address the particulars of bad behavior and establish a broad framework for assessing the type of over-the-top antics deemed uncivil. As a starting point, throwing a soft drink cup at your opponent during a deposition and grabbing him “near or around his neck” is uncivil pursuant to Indiana’s legal culture, or likely any culture for that matter. *Matter of Alfred E. McClure*, 652 N.E.2d 864 (Ind. 1995). Likewise, unnecessarily embarrassing a party undermines the culture of civility. *Linenburg v. Linenburgh*, 948 N.E.2d 1193 (Ind. Ct. App. 2011). Attacks on the integrity and competence of counsel in court proceedings are viewed by courts as uncivil conduct violating Indiana’s culture of civility. *Stewart v. Stewart*, 474 N.E.2d 1010 (Ind. 1985); *Goodner v. State*, 714 N.E.2d 638 (Ind. 1999). Indiana courts also have become very sensitive to incivility in briefing. In *Amax Coal Co. v. Adams*, 597 N.E. 2d 350, 352 (Ind. Ct. App. 1992), the Court of Appeals condemned at length the practice of including “launched rhetorical broadsides” in briefs as not only violative of the decorum of lawyers but inefficacious as well. Indeed, briefs “permeated with sarcasm and disrespect” are filled with “impertinent, intemperate, scandalous or vituperative language” are subject to the court’s power to order such briefs stricken. *Lasater v. Lasater*, 809 N.E.2d 380, 404 (Ind. Ct. App. 2004).

In *Laney*, Justice David articulates the broad standard of civil conduct expected of Indiana lawyers:

It is important that attorneys not lose control of their passion for their client or cause and become too emotionally involved and make the cause personal. In such circumstances they risk harm to their client, their reputation, and our profession.

*Laney*, 984 N.E.2d at 6.

But exactly what does it mean to be civil? As the Chief Justice of Wyoming the Supreme Court noted, civility is a lot like pornography in that “as Justice Stewart famously opined pornography is difficult to define, but ‘I know it when I see it.’” John M. Burman & William U. Hill, *Professionalism and Leadership*, 27 Wyo. Law. 16, 17 (2004).

Generally speaking, traditionally *civility* as applied to the practice law has been characterized “as treating others – opposing counsel, the court, clients, and others – with courtesy, dignity, and kindness.” *Id.* This traditional definition, particularly the inclusion of the noun “kindness,” invites criticism and implies that civility is incompatible with zealous advocacy in the modern-day practice of law. Many equate being civil with being a “push over,” being “faint of heart,” and “weak,” while others proclaim that the only way to successfully litigate is through the use of aggressive tactics. Bronson D. Bills, *To Be or Not To Be Civility in a Young Lawyer*, 5 Conn.

Pub. Int. L.J. 31 (2005). Many lawyers, and even a few scholars agree with an often quoted statement of an attorney made in an article appropriately and poignantly entitled *Be Civil? I'm a Litigator!* This “naysayer,” in dismissing the value and role of civility, said that he:

get[s] annoyed, and sometimes genuinely infuriated, at these self-anointed “civility” police who lately have pitched their tents at our local bar associations. Seemingly every lawyers’ group in America now has a “civility” committee, chock full of patriotic citizens scolding their fellow practitioners into the belief that our highest duty is no longer to win for our clients, but rather to be nice to our adversaries.

Shawn Collins, *Be Civil? I'm a Litigator!*, Nat'l L.J. Sept. 20, 1999, at A21.

However, such statements are based on the faulty premise that civility and zealous advocacy are mutually exclusive. The word “zeal” (actually, “warm zeal”) appeared in the very first ABA Canons of Professional Ethics in 1908. Under the heading “How Far a Lawyer May Go in Supporting a Client’s Cause,” Canon 15 said, “The lawyer owes ‘entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,’ to the end that nothing be taken or be withheld from him save by the rules of law, legally applied.” Paul Sanders, *Whatever Happened to ‘Zealous Advocacy?’*, New York Law Journal, Volume 245 – No. 47 (2011).

But what exactly does *zealous* itself mean? According to popular dictionaries, *zealous* is being:

Ardently active, devoted, or diligent; full of, characterized by, or due to zeal. **Synonyms:** enthusiastic, eager, fervid, fervent, intense, passionate, warm. **Antonyms:** apathetic; lackadaisical.

As a matter of semantics, lexicology and good old common sense, there is no contradiction in being diligent, devoted, intense and passionate while also acting with courtesy, dignity and, yes, even kindness. Indeed, many psychologists suggest that litigators who claim it is necessary to be discourteous, disdainful and unkind in advocating their client’s case would likely have made ill-tempered and unpleasant plumbers, teachers or blackjack dealers.