Two Parties…One Oath

The Defense Trial Counsel of Indiana and The Indiana Trial Lawyers Association have joined to present a seminar on civility at the Robert H. McKinney School of Law on May 24, 2012 entitled "Two Parties…One Oath – A Conversation on Civility." Justice Steven H. David of the Indiana Supreme Court and Judge Larry J. McKinney of the United States District Court of the Southern District of Indiana, both tireless advocates of civility, are featured speakers and will be joined by DTCI's John Trimble and Donna Fisher and ITLA's John Feighner and Peter Palmer in presenting the program.

As the title suggests, the program will consist of a frank discussion on concepts of civility in Indiana and an exchange of ideas on how to enhance civility. The program's theme is derived from our Oath: "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.

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 where 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 causes 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. *Matter of Alfred E.*

McClure, 652 N.E. 2d 864 (Ind. 1995). Likewise, unnecessarily embarrassing a party undermines the culture of civility. *Linenburg v. Linenburg*, 948 N.E. 2d 1193 (Ind. Ct. App. 2011). Attacks on the integrity and competence of counsel in court proceedings is 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 the incivility of static 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 brief 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 (Ind. Ct. App. 2004).