

United States Court of Appeals
For the Armed Forces

Continuing Legal Education Program
2-3 March 2016

“Unprofessional and Undignified” Advocacy:
Things that are really not a Good Idea!

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Incivility to the Court of Appeals:

Maberry v. State,

748 N.E.2d 881 (Ind. Ct. App. 2001). Opinion on petition for rehearing following criminal conviction. Allegations in petition that court ignored an issue and set forth misleading facts “go beyond claims of error and imply intentional conduct on this part of this court. As such, they are unacceptable. We encourage counsel to, in future appellate endeavors, adopt a different tone—one that is no less zealous, but which conveys the appropriate respect for an appellate court of this state.”

Reed Sign Service, Inc. v. Reid,

760 N.E.2d 1102 (Ind. Ct. App. 2001). Opinion on petition for rehearing. Landowner asked for TRO to prevent billboard owner from placing billboard on adjoining property. After billboard owner violated TRO, landowner moved for contempt. On petition for rehearing, the court noted, “We suggest Reed Sign's counsel review the Rules of Professional Conduct. We note in particular language from the Preamble to those Rules: ‘A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.’”

B & L Appliances and Services, Inc. v. McFerran,

712 N.E. 2d 1033 (Ind. Ct. App. 1999). Opinion on rehearing. Pedestrian brought premises liability action against commercial tenant, and obtained default judgment. In petition for rehearing, commercial tenant referred to court of appeals opinion upholding the default judgment as a “bad lawyer joke.” The court stated, “[t]his court is certainly willing to reconsider its decisions when appropriate and encourages counsel to pursue rehearing or our reconsideration when warranted to zealously represent the interests of clients. However, in framing arguments in support of rehearing or reconsideration, counsel are obliged to maintain a respectful bearing towards this court. * * * We remind B & L's counsel that members of the bar are officers of the court. They are its assistants in the administration of justice, and so intimately related to our judiciary system, and so much a part of it, that thoughtful and self-respecting attorneys seldom allow themselves, however much they may feel aggrieved, to make public expression, in argument or otherwise, derogatory to the rectitude or good intentions of the bench.”

Bloomington Hosp. v. Stofko,

709 N.E.2d 1078 (Ind. Ct. App. 1999). Employer appealed from order of the Worker's Compensation Board. In its rehearing opinion, the court of appeals concluded with a footnote: “We would caution counsel for the Hospital that referring to an opinion as ‘incomprehensible’ when seeking reconsideration from the very judges who issued the opinion is unpersuasive and ill-advised.”

Worldcom Network Services, Inc. v. Thompson,

698 N.E.2d 1233 (Ind. Ct. App. 1998). Opinion on rehearing. Telecom company moved for preliminary injunction stopping adjoining landowners from disturbing cable. The appellate court observed, “[r]ighteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics. *See* Comment, Ind. Professional Conduct Rule 3.5.”

Local counsel beware -- Incivility to COA and free speech:

In the Matter of Michael Wilkins,

777 N.E.2d 714 (Ind. 2002). Appeal from suspension of attorney acting as local counsel. In his appellate brief, the attorney “stated that an opinion of the Indiana Court of Appeals left him wondering whether the Court of Appeals was determined to find for the adverse party, and whether it then said whatever was necessary to reach that conclusion.” The Supreme Court noted that the attorney, acting as local counsel, had edited the draft sent to him by national counsel and “toned down” the tenor of the brief. “We find today that such statements violated Ind. Professional Conduct Rule 8.2(a) and warrant the respondent’s suspension from the practice of law in this state.” The suspension was later amended to a public reprimand in *In the Matter of Michael Wilkins*, 782 N.E.2d 985 (Ind. 2003).

Incivility to trial court:

Redman v. State,

28 Ind. 205 (Ind. 1867). Appeal from conviction for assault and battery. In response to the court sustaining an objection to a question on cross examination, the attorney replied, in what the court regarded an “undignified and unprofessional manner:” “This is a cross-examination, and if we cannot examine our witness he can stand aside.” The court noted: “It is the duty of an attorney to abstain from all offensive personality, and to maintain the respect that is due to the court. To protect itself against a violation of these duties, as well as against a contempt of its authority, is a necessary incidental power of a court of justice, entrusted to it for the preservation of its respectability and independence.”

Incivility to opposing counsel:

Wisner, M.D. v. Laney,

984 N.E.2d 1201 (Ind. 2012). Appeal from judgment following jury verdict against doctor in medical malpractice case. Doctor moved for new trial on the grounds of unprofessional and prejudicial misconduct by opposing counsel. The denial of a new trial was affirmed, but the court of appeals noted: “[T]his decision does not lessen our dissatisfaction and frustration with the behavior of counsel during the trial, particularly plaintiff’s counsel. Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon

which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it. * * * All attorneys in Indiana take an oath and each and every statement in the oath is sacred. One particular statement is, "I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged." Ind. Admission and Discipline Rule 22. ... 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."

Leone v. Keesling,

858 N.E. 2d 1009 (Ind. Ct. App. 2006). Investors sued attorney who issued opinion that payphone scheme did not involve sale of securities. Circuit court dismissed case against attorney for lack of personal jurisdiction, but declined to award fees. In commenting on the attorney's appellate brief, the court stated, "Indeed, many pages of his brief appear to have been written in code, rather than in plain English, and seem calculated to cause the maximum expenditure of time and effort to read and comprehend. * * * Leone would do well to heed Alexander Pope's observation in *Essay on Criticism*: "Words are like leaves; and where they most abound, Much fruit of sense beneath is rarely found." * * * Leone's comparison of a civil lawsuit to a rape is patently offensive and crosses far over the line separating vigorous advocacy from inflammatory invective."

Lasater v. Lasater,

809 N.E.2d 380 (Ind. Ct. App. 2004). Former wife appeals order granting custody to former husband and limiting her visitation. In commenting on the former wife's brief, the court of appeals noted: "For the use of impertinent, intemperate, scandalous, or vituperative language in briefs on appeal impugning or disparaging this court, the trial court, or opposing counsel, we have the plenary power to order a brief stricken from our files and to affirm the trial court without further ado. * * * In the interest of evaluating the merits of Monica's issues on appeal, we choose not to strike [her brief]. Because we choose not to exercise our discretion to strike the brief, however, counsel should not confuse this with approval or condoning of the unprofessional, disrespectful, and at times outrageous remarks and allegations made in the body of the brief. We appreciate vigorous advocacy, but we will not countenance the sort of lawyering exhibited here."

Mid-Continent Paper Converters, Inc. v. Brady, Ware & Schoenfeld, Inc.,

715 N.E.2d 906 (Ind. Ct. App. 1999). Accounting firm brought action against client for unpaid fees; client counterclaimed for malpractice. The court noted: "We should indicate that the brief of Brady Ware was not presented in a spirit of collegiality between appellate counsel. We are not impressed by name-calling remarks. They add no merit to Brady Ware's argument and demonstrate a lack of professionalism not condoned by this court."

Fraud with regard to negotiations with opposing counsel

Fire Exchange Insurance Exchange, Ice Miller Donadio & Ryan and Scaletta v. Bell

643 N.E.2d 310 (Ind. Ct. App. 1994). Fire victim settled a case with homeowners insurance for what was purported to be policy limits of \$100,000. Subsequently, victim's attorney

discovered that the insurance company's attorney lied and policy limits were \$300,000. Victim sued, for fraudulent misrepresentation, the insurance company, its attorney and the attorney's law firm, maintaining it was an adversary and the victim's counsel had no right to rely on the statements of opposing counsel. Moreover he was negligent in not obtaining the actual "dec" sheet. With regard to the attorney and its law firm, the Supreme Court held the reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice. A lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness. It went on to discuss the Oath of Attorneys, the Code of Professional Conduct, The Seventh Circuit rules, the Indianapolis Bar association Tenets of Professional Courtesy and the International Association of Defense Counsel. The court held that Bell's attorney's right to rely upon any material misrepresentations that may have been made by opposing counsel is established as a matter of law

Incivility to a litigant:

Petition of Hauptly,

312 N.E.2d 857 (Ind. 1974). Appeal from the denial of a petition brought by a divorced woman seeking to return to her maiden name. In a concurring opinion, Justice Hunter criticized the attacks the State made in its brief, including: "Perhaps [the former wife] is claiming the woman's privilege that in an argument she does not have to use reason;" "[i]t can be reasonably inferred that [the former wife] believes that fact that she is the breadwinner of the family should be publicized so that all will know her husband has been emasculated and that she is the head of the family;" and "[n]amely, a sick and confused woman, unhappy and unsatisfied with her marriage, unable to determine what she wants to do with her life.' Judge Hunter concludes: "As a theoretical matter, emotional reactions are divorced from the rule of law, but I must reluctantly confess that my adverse reaction cannot be restrained here."

Tactics can backfire:

Smith v. Johnston,

711 N.E.2d 1259 (Ind. 1999). Appeal from a default judgment against a doctor, where the attorney for the doctor was not notified that a complaint had been served on doctor, despite extensive pre-suit negotiations. "The [Rules of Professional Conduct] are guidelines for lawyers and do not spell out every duty a lawyer owes to clients, the court, other members of the bar and the public. * * * Thus lawyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. * * * These considerations alone demand that [the plaintiff suing the doctor] take the relatively simple step of placing a phone call to [the attorney for the doctor] before seeking a default judgment. In addition, Rule 8.4(d) explicitly states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. The administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment. For these reasons,

we conclude that the default judgment was obtained by actions that were prejudicial to the administration of justice and therefore constitute misconduct warranting relief under Trial Rule 60(B)(3).”

Trying to Hoodwink the Court

Brazier d/b/a Brazier Painting v. Maple Lane Apartments I, LLC, ___ N.E.3d ___ (Ind. Ct. App. 2015) 2015 WL 6388642, was an appeal from a suit for work done at an apartment complex. Attorney Fox appealed and asked the court for permission to file a corrected brief limited to the Table of Contents and Table of Authorities. After noting the significant deficiencies in Appellant’s Corrected Brief, in footnote 4 noted “Counsel's failures to follow even the simplest rules regarding the content of an appellate brief have made our review of this case unnecessarily difficult. We commend Maple Lane for largely refraining from comment on the quality of the brief and endeavoring to respond to the legal arguments. Were it within our purview to do so, we would order Brazier's counsel to verify to this court her attendance at a continuing legal education program regarding appellate practice before submitting any further briefs to this court. Although it would be within our purview to order counsel to show cause why she should not be held in contempt for willful violation of this court's order granting leave to amend the brief to correct technical errors only and specifically prohibiting any substantive changes, counsel does not appear to frequently represent clients on appeal nor has she been previously cited for poor briefing practices. Therefore, we have chosen not to take such extreme measures at this juncture. Nonetheless, we admonish counsel in the strongest possible terms to carefully review the appellate rules and fully conform her briefs to their requirements in the future.”

Hedge v. County of Tippecanoe, 890 F.2d 4 (7th Cir. 1989). This was an appeal from a case in which the County of Tippecanoe should have been successful based on the doctrine of qualified immunity which the Plaintiff/Appellant argued that the Indiana Supreme Court had previously held it did not enjoy. The appellate court held that “...the County ..., had the ethical responsibility to inform the district court of Supreme Court case law that directly controls the qualified immunity defense issue. At best it was incompetent and at worst deceptive for the County to attempt to rely upon a defense that is directly precluded under the controlling case law and is unaccompanied by a good faith argument for the reversal of this case law. Governmental attorneys, including County attorneys, have an absolute duty under the rules of professional responsibility to bring directly controlling legal precedent to the attention of the court before whom they litigate. The County compounded this problem in waiting until the eleventh hour to file its motion for summary judgment.”

Offensive Personality:

Bradley v. Fisher, 80 U.S. 335 (1871). Former attorney sued former judge for ordering his removal from the roll of practicing attorneys because the attorney threatened the judge with personal chastisement.

“[T]he obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.” Thus, the threat to a judge, for his conduct during the trial, is grounds for striking the attorney practicing in the court, and the order is a judicial act for which the judge is not liable to the attorney in a civil action.

Honesty:

Fire Ins. Exchange v. Bell by Bell,

643 N.E.2d 310 (Ind. 1994). Action against insurer and his counsel, claiming counsel for insurer misrepresented policy limits of fire policy, resulting in fraudulent settlement. Indiana Supreme Court held that under these facts, plaintiff had a right to rely on representations regarding the policy limits as a matter of law. The Supreme Court noted: “This Court has a particular constitutional responsibility with respect to the supervision of the practice of law. Ind. Const. art. VII, § 4. The reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice. A lawyer’s representations have long been accorded a particular expectation of honesty and trustworthiness. Commitment to these values begins with the oath taken by every Indiana lawyer; it is formally embodied in rules of professional conduct, the violation of which may result in the imposition of severe sanctions; and it is repeatedly emphasized and reinforced by professional associations and organizations. The Indiana Oath of Attorneys includes the promise that a lawyer will employ ‘such means only as are consistent with truth.’ Ind. Admission and Discipline Rule 22. Indiana Professional Responsibility Rule 8.4 declares that it is professional misconduct for a lawyer to ‘engage in conduct involving dishonesty, fraud, deceit or misrepresentation.’”

Arguments that the court might find generally offensive

Sprunger (Mother of Alyssa B. Guernsey) v. Egli, M.D.

____ N.E.3d ____ (Ind. Ct. App. 2015), 2015 WL 5306452, AG, a minor child, who had been declared a CHINS died while in a foster home in which she was placed by DCS. Mother sued the doctor for malpractice for failure to diagnose the injuries and to report the same. The Appellate Court held that although the lawsuit was predicated on a failure to make a correct diagnosis, it was really a suit about the failure to report which does not provide for a private right of action. The suit was dismissed. The doctor also made a second argument for dismissal which the court noted in a footnote, noting: In the alternative, Dr. Egli argues that Sprunger is barred from recovering because she was “contributorily negligent as a matter of law in a manner that contributed to [Guernsey]’s death.” Brief of Appellee at 20. Dr. Egli contends: “It is undisputed that Sprunger placed [Guernsey] in a position to be abused by Shaffer when she abandoned her resulting in the court finding that [Guernsey] was a

CHINS.” *Id.* We find this argument inappropriate and note that the purpose of a CHINS adjudication is to protect children, not establish parental culpability. *In re N.E.*, 919 N.E.2d 102, 105 (Ind. 2010). Sprunger admitted that she was suffering from substance abuse and left her children in the care of a family member because she recognized that she herself was not capable of caring for them at that time. Thereafter the juvenile court approved Guernsey’s placement with Shaffer. Foster care is supposed to provide a safe, stable, and nurturing environment for children who can no longer remain in their homes. *About Foster Care*, INDIANA DEPARTMENT OF CHILD SERVICES, <http://www.in.gov/dcs/2983.htm> (last visited Aug. 12, 2015). The system failed Guernsey, and the suggestion that this failure was somehow Sprunger’s fault is tantamount to victim blaming.

Carter v. State,

___ N.E.3d ___ (Ind. Ct. App. 2015) 2015 WL 5472568. Appeal from a conviction of the rape of a prostitute. One of defendant’s argument was that she was a prostitute and thus could not be raped. The court did not find that argument persuasive and in a footnote stated, Carter contends he “did nothing more with A.M. than what she was attempting to contract to do for money,” as if his actions amount to a theft of services. ... In *Commonwealth v. Harris*, 443 Mass. 714, 825 N.E.2d 58, 75 (2005) (Marshall, C.J., concurring in part and dissenting in part), then Chief Justice Margaret Marshall of the Massachusetts Supreme Court reflected upon “the difficulty of obtaining convictions in rape cases because of court room prejudice against alleged rape victims,” particularly in cases in which the victim has engaged in prostitution: Prejudice or disbelief occurs with particular intensity when the complainant is a prostitute.... Prostitutes are frequent victims of rape. See, e.g., Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L.Rev. 51, 113 & n. 367 (2002) (citing studies substantiating that more than seventy per cent of prostitutes are victims of rape). Yet societal beliefs persist that prostitutes cannot be raped, or that they are not harmed by rape, or that they somehow deserve to be raped. *Id.* at 75–76 (citations omitted). To the extent that Carter relies on these archaic cultural attitudes, such arguments have no place in our analysis. A.M.’s involvement in prostitution, in and of itself, does not render her testimony incredibly dubious.

Ineffective Arguments

Coleman v. State,

38 N.E.3d 1012 (Ind. Ct. App. 2015) Appeal from a conviction for murder. The conviction was affirmed by the Indiana Supreme Court. In a Post Conviction Relief appeal, the court affirmed finding that none of the errors alleged by the defendant amounted to ineffective assistance of counsel. However, the court noted in a footnote: We have counted seventeen allegations of ineffective assistance of counsel, which we have consolidated as appropriate. As the Ninth Circuit has said: Like other mortals, appellate judges have a finite supply of time and trust; every weak issue in an appellate brief or argument detracts from the attention a judge can devote to the stronger issues, and reduces appellate counsel’s credibility before the court. For these reasons, a lawyer who throws in every arguable point – “just in case”—is likely to serve her client less effectively than one who concentrates solely on the strong arguments. *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).