

Lawyers Are Ethically Bound to Civility and Professionalism

By Oran F. Whiting, Litigation News Associate Editor – March 6, 2013

“Professionalism and civility must be the foundation of the practice of law,” according to the Indiana Supreme Court. The court made that pronouncement in reprimanding attorneys’ boorish behavior and explained that lawyers practicing in Indiana have an ethical duty of professionalism and civility to the profession, judges, clients, jurors, and each other. *Wisner v. Laney* [PDF].

Inappropriate Behavior by Both Counsel

The lawyers in *Wisner* litigated over a medical negligence claim. Dr. Wisner initially diagnosed plaintiff Laney with vertigo due to an inner ear infection. Within days after seeing Dr. Wisner, Laney apparently suffered an ischemic stroke, preventing her from using the right side of her body. Laney sought damages caused by Dr. Wisner’s alleged misdiagnosis.

An extremely contentious five-day trial transpired requiring the trial court to repeatedly admonish both counsel for their unprofessional behavior. During the trial, the attorneys’ inappropriate behavior included excessive and repeated objections, despite adverse trial court rulings, and unnecessary comments to and outright contemptuous conduct of each other. The attorneys also frequently interrupted each other and accused each other of misrepresenting facts and lying while in the jury’s presence. Plaintiff’s counsel also repeatedly questioned witnesses about issues deemed objectionable and inappropriate by the trial judge.

Defense Motion for New Trial

A jury returned a verdict in Laney’s favor and against the defendants for \$1.75 million. The defendants moved for a new trial pursuant to [Indiana Trial Rules 59\(J\)](#) and [60\(B\)\(3\)](#), which allow the trial court to correct any error it determines “prejudicial or harmful,” and to relieve a party from a judgment for “fraud . . . misrepresentation, or other misconduct of an adverse party.” Defendants sought relief from the trial court, claiming it erred by failing to order a mistrial based on the cumulative effect of the consistent, unprofessional, and prejudicial conduct of plaintiff’s counsel, which deprived defendants of a fair trial. The trial court denied defendants’ motion finding that the defendants were not deprived of a fair trial. The defendants appealed.

The Court of Appeals affirmed, and the Indiana Supreme Court granted transfer, to determine, among other issues, whether the trial court erred by denying defendants’ motion for a new trial based upon the cumulative effect of plaintiff’s counsel’s alleged unprofessional conduct during the trial.

The Supreme Court of Indiana Admonishes Attorneys

The Supreme Court of Indiana affirmed the lower courts’ rulings, finding that it could not conclude the trial court’s decisions were against logic and the facts. The supreme court moved beyond the affirmance, however, to admonish the attorneys’ behavior and to reinforce the behavioral and ethical requirements of the legal profession.

The court highlighted one particular statement in [Indiana’s Admission and Discipline Rule 22](#), which reads, “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.” The court pointed out that counsel’s poor behavior actually began with personal attacks in the deposition phase of

the case, with defense counsel remarking that no competent lawyer would conduct a deposition in the manner the plaintiff's counsel did.

The court noted that this type of behavior continued through trial, post-trial motions, and appeals with more severe personal attacks, noting that the plaintiff's counsel actually bragged to and taunted defense counsel about court imposed sanctions having no effect on him. The court concluded that based on counsel's behavior, a jury trial is not a "free-for-all," and cautioned attorneys to resist becoming too emotionally involved in a client's cause or making the case a personal matter. Otherwise, the court warned, attorneys risk harm to their clients, their reputations, and the profession.

Bad Behavior Can Get You Fired

Some in-house counsel would consider replacing trial counsel if personal acrimony between their counsel and opposing counsel reached a certain level. "Look, it is not counsel's job to be friends with opposing counsel," states Victoria T. McGhee, Houston, member of [ABA Section of Litigation's](#) Council and in-house counsel at Shell Oil Company. "However, I would fire counsel in a minute if counsel's behavior was contrary to Shell's trial strategy or was alienating the trial judge."

Resist the Urge to Match Inappropriate Conduct

"This case illustrates how, with respect to bad lawyer conduct, attempts to fight fire with fire can be a self-defeating strategy," according to John C. Martin, Chicago, cochair of the Section of Litigation's [Ethics and Professionalism Committee](#). "The opinion gives the sense that, faced with unprofessional behavior from both sets of counsel, the Indiana Supreme Court felt justified in throwing up its hands and affording sympathy to neither. Defendants' arguments that proceedings were prejudiced by the 'consistent, unprofessional, and prejudicial conduct of plaintiff's counsel,' warranting a mistrial, were met by a finding that since both counsel 'committed fouls,' there was no basis for reversal."

"The Indiana Supreme Court's opinion is unusual because it directly addresses professionalism," according to Gregory R. Hanthorn, Atlanta, cochair of the Section of Litigation Ethics and Professionalism Committee. "Although the court affirmed the trial court's decision that no misconduct took place that required reversal, the court still used the decision as a way to remind the bar that '[p]rofessionalism and civility are not optional behaviors to be displayed only when one is having a good day,'" continued Hanthorn.

"The Indiana Supreme Court's decision to address the need for professional behavior for an additional eight or so pages makes clear that the court wished to send a message to Indiana's attorneys. That same message should resonate with attorneys in other jurisdictions: Professionalism is not optional; it is part of being a lawyer," opines Hanthorn.

Keywords: professionalism, civility, ethics

Related Resources

- » [Wisner v. Laney](#) [PDF], No. 71S03-1201-CT-7 (Ind. Dec. 12, 2012).
- » [Outback Steakhouse of Florida, Inc. v. Markley](#), 856 N.E.2d 65, 72 (Ind. 2006).
- » [McCullough v. Archbold Ladder Co.](#), 605 N.E.2d 175, 180 (Ind. 1993).
- » [Indiana Trial Rules 59\(J\) and 60\(B\)\(3\)](#).
- » [Ind. Admission and Discipline Rule 22](#).