

INDIANAPOLIS LAW CLUB

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Legal News: Request for a new federal judgeship

The September 29th Indianapolis Star contained an editorial supporting a new judgeship for the Southern District of Indiana. It was noted that the weighted caseload per judge in the district is the 4th highest among the 94 federal districts. Each district judge has a caseload averaging 695 cases, double the load in many districts. Judge Barker stated: "This is a real crisis. And this is not simply some department of government with funding problems. This is the third branch of government, and the lack of funds is threatening its ability to deliver on its constitutional function." A request to add a judge to the Southern District has been pending in Congress for eight years.

Postscript on *Blakely*: The U.S. Supreme Court has granted certiorari in two post-*Blakely* cases and scheduled them for a two-hour oral argument on Monday October 4, the first day of the new term. The Indiana Supreme Court has scheduled a two-hour argument on November 10 to consider post-*Blakely* issues. It is expected that the decisions in these cases will clarify the implications of *Blakely* for sentencing procedures in federal and Indiana courts.

1. Worker's Compensation: *Bertoch v. NBD Corp.*, 813 N.E.2d 1159 (Ind. 8/25/04)(Boehm)

Larry Bertoch suffered a fatal heart attack while working as a security guard in a building. His body was found in a stairwell between the tenth and eleventh floors. The fire extinguisher was dislodged and the alarm pulled. His widow filed a claim for worker's compensation death benefits. The Worker's Compensation Board denied the claim, finding the evidence failed to establish the required causal nexus between the death and the services performed by the injured employee. The Board concluded that the cause of death was a pre-existing coronary condition and did not "arise out of" the employment. The Court of Appeals affirmed.

Bertoch's cardiologist offered the opinion that "stress, in the form of a fire in a patient with this extensive disease" could be fatal. The Court of Appeals found that this testimony was not based on a reasonable degree of medical certainty and therefore, was legally insufficient to prove causation.

The Supreme Court agreed that "when a doctor's testimony falls short of reasonable medical certainty, such evidence cannot by itself support a verdict." The Court, however, found additional support in the record in the autopsy report and in the death certificate of the required causal connection between the fire and the death.

The Supreme Court concluded that there was compelling evidence that the fire and Bertoch's attempted response to it aggravated his condition and contributed to his fatal heart attack. Accordingly, the Court reversed and awarded worker's compensation death benefits.

Lessons:

1. Although the Worker's Compensation Act appears to require that the injury or death occur by "accident," the notion of "accident" extends to any unexpected

injury or death. It does not require that there be an unusual event, only that the injury itself be unexpected. Worker's compensation may apply even when there is not an "accident" as that term is typically used.

2. There remains value in having a doctor opine to a reasonable degree of medical certainty.

2. Worker's compensation: *Global Construction, Inc. v. March*, 813 N.E.2d 1163, 175 (Ind. 8/25/04)(Boehm).

Daniel March was employed by Global Construction to service machinery at various facilities of Global's customers, including the Auburn Foundry in Auburn, Indiana. After servicing some machinery at the Auburn foundry, March drove his truck onto the public street that bordered the Foundry where picketing strikers had congregated. Objects were thrown by the strikers at his truck. When one of the objects cracked his windshield, March stopped his truck. A confrontation ensued and March was struck on the head with a 2 x 4 board and suffered significant injuries.

March filed a claim for worker's compensation. The Indiana Worker's Compensation Board found that the claim was covered by worker's compensation but the Court of Appeals reversed. The Supreme Court granted transfer.

The Court found that the injury occurred "in the course of" employment. Ordinarily, an injury to a worker who was on a public street (off the work premises) on his way home after work (not during work) would not be "in the course of" employment. Here, however, the public street adjacent to the Foundry where strikers had gathered was found to be "for all practical purposes an extension of the workplace and March was not on his own time until freed of the stress of exiting." The injury was incurred in a chain of events originating in the course of employment, sufficient to support coverage under the worker's compensation statute.

The Court also found that the injury met the requirement that it "arise out of" employment. Global argued that March had made an individual decision to exit the truck and confront the strikers and had been expressly warned to avoid the strikers. The Court rejected the argument, finding "as long as a causal connection exists between the injury and the person's employment, an employee may still recover for an injury sustained while performing personal acts. "Indeed, it seems obvious that March was struck because of his employment."

The Court observed: "Although 'arising from' and 'in the course of' are usually discussed as independent factors, in practice the two are not and should not be applied entirely independently. The stronger the causal link to employment, the weaker the showing required to find an injury to be incurred 'in the course of' employment."

Lessons: Depending on the circumstances, worker's compensation may still apply to an injury even though it occurs (1) after work, (2) off work premises, and (3) results from the personal act of the worker.

3. Worker's Compensation: *Knoy v. Cary*, 813 N.E.2d 1170 (Ind. 8/25/04)(Boehm)

Joseph Cary was employed by the Gemtron Corporation, a manufacturer of tempered glass shelving for refrigerators and other appliances. Cary was injured while volunteering in a cleanup project at a Vincennes city park that Gemtron had sponsored as a good corporate citizen to help out the community. Cary sued Donald Knoy for the injury, claiming that Knoy had been negligent while driving his tractor. Knoy also was employed by Gemtron and a volunteer in the cleanup project.

Knoy moved to dismiss the complaint, arguing that Cary's exclusive remedy was under the Worker's Compensation Act. The trial court denied the motion and an interlocutory appeal followed. The Court of Appeals affirmed (with Judge Friedlander dissenting) and the Supreme Court granted transfer.

In affirming the trial court, the Court of Appeals reasoned that for an after-hours activity to fall within the ambit of employment, participation must be mandatory and the employer must receive some direct business benefit from the activity. The Supreme Court rejected the notion that attendance be mandatory. It was sufficient that Gemtron encouraged attendance by posting notices of the project on employee bulletin boards and inviting employees to participate. Gemtron also provided tools and refreshments for the participants.

On the issue of direct business benefit, the Supreme Court found that criteria to be satisfied by the fact that the park cleanup project would enhance Gemtron's public image, foster a good relationship with the local community, and foster team building among its employees.

The judgment of the trial court was reversed and the case remanded with instructions to dismiss the complaint.

Lessons:

1. No good deed goes unpunished. (Actually, in finding worker's compensation coverage, the effect is "sometimes to the employer's benefit by denying a tort recovery and sometimes to its detriment by awarding worker's compensation benefits.")
2. The notion of "direct business benefit" is sufficiently broad to apply to virtually any situation in which a corporation is involved in an activity.

4. Expert Testimony: *Lytle v. Ford Motor Company*, 814 N.E.2d 301 (Ind. Ct. App. 9/7/04)(Baker)

During a 1987 accident, Kyong Lytle was thrown from a Ford Ranger and suffered permanent brain damage. Suit was brought against Ford alleging a defectively designed seat belt. The trial court granted Ford's third motion for summary judgment after finding that plaintiff's proffered expert testimony failed to meet the standard required by Rule 702(b).

Thomas Horton is a mechanical engineer who had worked on the design of vehicle restraint systems for General Motors for ten years and for TRW, a seat belt manufacturer, for seven years. Horton criticized the Ford seat belt for being susceptible

to “inadvertent unlatch” but, in the Court’s opinion, failed to provide a scientific analysis to support his theory. The unlatch required a convergence of several variables including force, direction or duration of the contact, the rotation of the belts, and the web tension of the belts but Horton did not measure or test these variables and could not establish that such a convergence occurred at the time of the accident. There was perceived to be an analytical gap between Horton’s data and his conclusions, making his testimony unreliable as a matter of law.

Dr. Anil Khadilkar was also proffered as an expert by plaintiff in support of the inadvertent unlatch theory. Dr. Khadilkar had performed hundreds of crash tests and tested many models of safety belt buckles. However, none of the research that he had done supported this theory and he could identify no literature in support of the theory. His opinion was based on ten minutes of “testing”: he placed a buckle against a table in his office and “eyeballed” the depression necessary to release the latchplate. He never documented the amount of depression that was necessary. He made no effort to measure the force, web tension, direction or rotation that would occur in the type of accident in question. Nor did he “favor the trial court with any other evidence establishing that the seatbelt assemblies moved toward one another, moved with any particular force or load, twisted into position, or that any other object contacted the passenger’s button at all, let alone with sufficient force, direction, duration, rotation, and load conditions to release the buckle.” Accordingly, there was a not a reliable basis for his conclusions.

The expert testimony of Horton and Khadilkar was held to have been properly excluded and the summary judgment in favor of Ford was affirmed.

Lessons:

1. Whenever possible, support theories with tests, measurements, data and relevant literature.
2. Connect the theory to the circumstances of the accident: prove a nexus.

5. Expert testimony: *Burnett v. State*, WL 2161863 (Ind. Ct. App. 9/28/04)(Najam)

Burnette was convicted of kidnapping and robbery based in part on fingerprint evidence. On appeal, Burnette challenged the admissibility of testimony from the State’s fingerprint expert.

Burnette argued that the police officer who testified was not sufficiently qualified because he had not been certified as a latent fingerprint examiner, had not read the books required to take the examination and had not been working long enough in the field to sit for the examination. He also did not know the error rate of the methodology he was using or whether the FBI used the same methodology. The Court of Appeals rejected the argument, finding that there was sufficient evidence of expertise based on his experience as a crime scene manager and his training in fingerprint identification, to support the trial court’s finding that he was an expert.

On appeal, Burnette also challenged the expert’s methodology under the reliability standard of Rule 702(b) as amplified by the Daubert factors. The Court of Appeals held that this issue had been waived because Burnette had not raised a specific objection under Rule 702(b) at trial. The Court, nonetheless, addressed the issue on the

merits. The expert used the ACE-V methodology for fingerprint analysis. There was testimony that this methodology was generally accepted by an international organization in the field and was used by fingerprint experts in several states. This testimony was held to be sufficient to establish that the methodology was generally accepted within the relevant field of study. The Court of Appeals also noted that the federal courts in Indiana have found the methodology is reliable under Federal Rule of Evidence 702, and judicial notice could be taken of that finding. Accordingly, the trial court did not abuse its discretion in admitting this expert testimony.

Lessons:

1. Rule 702(a) recognizes that a witness may be qualified as an expert by virtue of “knowledge, skill, experience, training, or education.” Only one of these characteristics is necessary.
2. The absence of certification in the relevant field will not preclude qualification as an expert.
3. When challenging expert testimony on both qualifications and methodology, specify that objections are being raised on grounds of both 702(a) and 702(b)

6. Cross-claim/service of process/strategem: *Gill v. Pollert*, 810 N.E.2d 1050 (Ind. 6/30/04)(Dickson)

Onyx sued to collect for demolition services that it provided following a fire that destroyed the Centennial Hotel in Seymour on December 25 (Christmas day), 1998. On May 9, 2000, defendant Centennial filed an amended answer with a cross-claim against Pollert, its insurance agent, and mailed a copy to counsel for Pollert. It did not, however, move for leave of court to file the amended answer and cross-claim.

Pollert did not file a response to the cross-claim for many months and then on January 31, 2001, he moved to dismiss the cross-claim for failure to obtain leave of court. Brent and Marina Gill, owners of the Centennial Hotel (who had been substituted as parties for Centennial), immediately moved for leave to file the cross-claim. The court promptly granted leave. Pollert then filed an answer and moved for summary judgment on statute of limitations grounds. The trial court reluctantly granted the motion, believing that the relation back conditions of Trial Rule 15(C) were not met. The Supreme Court agreed that these conditions were not met (there was no mistake concerning the identity of the proper party) but held that these conditions operate only when a new party is brought in by the amended pleading. Since Pollert was already a party and had been timely served with the cross-claim within the statute of limitations, the summary judgment on statute of limitations grounds was reversed.

It was also argued that the cross-claim was invalid for failure to make service of process as with a new complaint. The Supreme Court rejected the argument, finding no need to obtain additional service of process for a cross-claim against persons who are already parties in the case.

The Court also considered an argument by Onyx that the Gills were responsible for payment of demolition services based on the authorization of Pollert, who Onyx contended was an agent of the Gills. In support of an agency relationship between the

Gills (owners of the hotel) and Pollert (the insurance agent who authorized Onyx to proceed with the demolition), Onyx relied on testimony of Pollert. The Court relied on old case law, holding that statements of an agent are not sufficient to establish an agency relationship. Since that's all Onyx relied upon, the Court concluded there was nothing to prove the alleged agency relationship.

Lessons:

1. The trial court and Supreme Court did not like the gamesmanship of Pollert's counsel who apparently knew that the cross-claim had not been properly filed and took no action in response for many months as "a conscious strategem to mouse-trap the Cross-claimants with the statute of limitations." Although Pollert's counsel never "expressly lied," they allowed Cross-claimants to believe that the response to the cross-claim would be an admit/deny answer. The trial court noted its "dislike for the practice of law as sport." It appears that the Supreme Court does not like it either and will strive to help a perceived victim.
 2. Be careful to request leave of court when filing an amended pleading after the deadline for amending as a matter of course pursuant to Trial Rule 15(A).
 3. When seeking to prove an agency relationship, don't rely solely on evidence from the purported agent.
- 7. Insurance—Diminution in Value: *Allgood v. Meridian Security Ins.*, 807 N.E.2d 131 (Ind. Ct. App. 4/28/04), affirmed on rehearing, 812 N.E.2d 1065 (Ind. Ct. App. 8/4/04)(Robb)**

Christina Allgood brought a class action lawsuit seeking to collect the diminution in value of insured vehicles after repairs under automobile policies that cover "accidental loss." The trial court dismissed the case and Allgood appealed. On April 28, 2004, the Court of Appeals reversed, holding that diminution in value was a recoverable loss under the language of such policies. In reaching this decision, the court considered numerous decisions from other jurisdictions on both sides of the issue.

Meridian moved for rehearing with *amicus* support from several associations of insurance companies. They argued that there will be dire consequences if the prior decision stands, including an unworkable framework for determining a vehicle's diminished value, a flood of class action lawsuits, and a substantial increase in insurance premiums. The Court granted the request for rehearing but affirmed its prior decision, finding that instead of the dire consequences predicted, the most likely consequence is that new policies will be written with an additional specific exclusion for diminution in value. Judge Hoffman dissented.

Meridian has petitioned for transfer to the Indiana Supreme Court.

Lessons:

1. At least until the Supreme Court decides to the contrary, additional recovery should be available for diminution in value under many auto insurance policies. The insured will need to prove the difference in value.

2. Insurance companies who don't want to provide such coverage should immediately amend their policies to provide for a specific exclusion.
3. The weight of authority in other jurisdictions and the recency of those decisions were not determinative. The decisions in other jurisdictions relied upon by Allgood were rendered between 1959 and 2001. The decisions relied upon by Meridian were rendered in 2002 and 2003.

8. Common law duty: *Housing Authority of the City of South Bend v. Ricky Grady*, WL2106429 (Ind. Ct. App. 9/22/04)(Hoffman)

Ricky Grady was injured when he fell through an upstairs floor in a residence where the rent was partially paid by the Housing Authority. Grady argued that the Housing Authority owed a duty of care to Grady, a live-in guest in the residence. The trial court denied the Housing Authority's motion for summary judgment on the issue and the Housing Authority appealed. The Court of Appeals analyzed the factors articulated in *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991), for determining whether a duty exists at common law and found no such duty. It also found that the Housing Authority had not gratuitously assumed such a duty and that federal law preempted any claim based on the Housing Authority's alleged failure to follow federal regulations requiring, inter alia, inspections for structural safety.

Lesson: Providing rent money to a tenant will not, without more, give rise to liability for unsafe premises.

9. Motion to Correct Error, filing deadline: *In re: the Marriage of Dawn Carter-McMahon v. Danny W. McMahon*, WL2106539 (Ind. Ct. App. 9/22/04) (Crone)

In this dissolution case, the wife lost on previous appeal and the case was remanded to the trial court. On September 3, 2003, the trial court entered an "Order on Remand for Award of Attorney Fees." Thirty-three days later, on October 6, 2003, the wife filed a motion to correct error as to this order. Upon motion to strike filed by the husband, the trial court dismissed the motion to correct error. The wife appealed.

The wife argued that she was entitled to the additional three days allowed when served by mail as provided in Trial Rule 6(E) to file her motion to correct error. The Court of Appeals concluded otherwise. For a motion to correct error, the 30 day time limit runs not from the date of "service" but from the date of "entry of a final judgment or an appealable final order." The extra three days allowed by Trial Rule 6(E) applies only to time periods prescribed based on "service" of a notice or other paper.

Lessons:

1. On a motion to correct error, file within 30 days of entry of the final order.
2. This same rule holds as to other deadlines like filing a notice of appeal within 30 days from "entry of a Final Judgment."

3. Always read the underlying rule carefully before adding three days for service by mail. If the time limit is based on anything other than “service,” you will probably not be entitled to the extra time.
4. This is true in federal court as well as state court. Under federal rules, a motion to alter or amend the judgment must be filed within 10 days after “entry of the judgment.”

Note: In a footnote, the Court granted the husband’s motion to strike statements of fact in the wife’s brief that were unsupported by citations to the Record on Appeal or Appendix (see Appellate Rule 46(A)(6)(a) and (A)(8)(a)) and other statements that were deemed to be impertinent or immaterial (see Appellate Rule 42).

10. Insurance—cooperation clause: *Morris v. Economy Fire and Casualty Co.*, WL2086006 (Ind. Ct. App. 9/20/04) (Riley)

Several items were stolen from a mini-storage unit rented by Dirk and Lisa Morris. They estimated the loss at \$15,000 in reporting the theft to the police. Then later, filed a claim for \$38,000 with their insurance carrier, Economy. Economy took recorded statements from the Morrises and requested numerous financial records, including tax returns, documentation of all debts and bank accounts. The Morrises produced some of the requested records but objected to others. Economy asked the Morrises to submit to examinations under oath. The Morrises agreed to do so but only after counsel received their prior recorded statements. Economy insisted on the examinations without production of the prior statements.

The Morrises brought suit against Economy for failure to deal in good faith. Economy moved for summary judgment based on the cooperation clause of the policy. The trial court granted the motion and the Morrises appealed.

The Court of Appeals held that Economy was not entitled to summary judgment. It does not necessarily violate the cooperation clause to refuse requests for documents where the requests may be unfair, burdensome and oppressive and may invade the Morrises’ privacy. Nor does the refusal to submit to examinations with production of the prior statements violate the cooperation clause. Indeed, the Court found that it was unreasonable and unfair for Economy to have the benefit of the transcripts and tapes of the Morrises’ prior statements, while refusing the same documents to the Morrises’ counsel.

Lessons:

1. The cooperation clause does not give an insurance company carte blanche to require any personal documents of a claimant when investigating a claim. There are limits, even when the circumstances look suspicious.
2. The insurance company can be required to produce prior statements before an insured will be compelled to submit to an examination under oath.

11. Contract—Reasonably definite: *Berkel & Co. Contractors v. Palm & Associates*, 814 N.E.2d 649 (Ind. Ct. App. 9/08/04)(Sharpnack)

Berkel, a subcontractor on the construction of a generating plant, issued a purchase order to Palm for surveying work on the project. Sometime after issuing the purchase order, Berkel informed Palm that it would have to use union labor for the work. Palm responded that it would talk to the local unions and that the price in the purchase order would need to be adjusted. Four days later Palm had not yet worked out an agreement with the union and Berkel hired another surveyor to complete the work. Palm sued Berkel for breach of contract based on the purchase order.

Berkel argued that the purchase order was not sufficiently definite to constitute an enforceable contract. The Court of Appeals disagreed. It found that the purchase order was sufficiently definite as to the job to be performed (to stake approximately 800 pilings with a two-man field crew) and to pay \$110 per hour for this work. It was not necessary that the contract specify the number of hours to be worked, the date for completion, or any guaranteed minimum payment to Palm.

Judge Mathias dissented.

12. Arbitration: *Sanford v. Castleton Health Care*, 813 N.E.2d 411 (Ind. Ct. App. 8/13/04)(Bailey)

Upon placing her mother in the Castleton Health Care Center (a nursing home), Cheryl Sanford signed an agreement that (on page 10) required any dispute to be submitted first to mediation and then, if not resolved, to binding arbitration. After her mother died, Sanford, as personal representative for the estate, brought survival and wrongful death claims in Marion Superior Court. The Castleton Center moved to compel mediation and arbitration and the trial court granted the motion. The estate appealed.

The estate argued that the nursing home admission agreement was an unconscionable contract of adhesion. In rejecting the argument, the Court of Appeals indicated that the standard for being unconscionable is a high one. It may be met if a weaker party is required to sign a contract without being aware of its terms. Here, however, the contract required a signature by Sanford immediately under the Arbitration clause, making it hard to argue that she was not aware of this term.

A contract is also unconscionable when “no sensible man not under delusion, duress or in distress would make [it], and no honest and fair man would accept.” An arbitration clause only affects the forums wherein issues may be raised. It does not prevent the estate from seeking to recover for negligent acts. Accordingly, the Court of Appeals did not find the contract unconscionable.

Lesson: It will be very tough to avoid arbitration clauses on grounds of unconscionability.

13. Governmental immunity—law enforcement: *St. Joseph Cty. P.D. v. Shumaker*, 812 N.E.2d 1143 (Ind. Ct. App. 8/10/04)(Sullivan)

The St. Joseph County Police Department mistakenly released Philip Stroud from custody without posting the required bond (he posted \$3,000 when \$8,000 had been imposed). During his release, Stroud murdered three people. Representatives of the decedents' estates sued the police department for wrongful death. The Department moved for summary judgment based on governmental immunity as provided in Section 3(8) of the Indiana Tort Claims Act. The trial court denied the motion and the Department appealed.

Section 3(8) immunizes a governmental entity from liability if a loss results from the enforcement of or failure to enforce a law. There is an explicit exception for false arrest or false imprisonment. In this decision, the Court of Appeals provides a detailed analysis of the case law that has addressed this provision since its enactment in 1974.

The Court observed that this immunity is not as broad as it was once viewed, nor as narrow as it was later viewed. It finds that "enforcement" in Section 3(8a) means "compelling or attempting to compel the obedience of another to laws, rules, or regulations, and the sanctioning or attempt to sanction a violation thereof. It would also, by the plain meaning of the statute, include the failure to do such. However, it does not include compliance with or following of laws, rules or regulations by a governmental unit or its employees. Moreover, a governmental entity will be immune only for adopting or enforcing, or failure to adopt or enforce, a law, rule, or regulation within the scope of the entity's purpose or operational power."

Here the Department had failed to enforce the law (the trial court's bond order) and is entitled to immunity.

Advocacy Tips of the Month: Comments from a "fish"

From an online interview with Seventh Circuit Judge Frank H. Easterbrook

(The full interview can be found at [legallaaffairs.org/howappealing/20q/.](http://legallaaffairs.org/howappealing/20q/))

Good appellate arguments are like conversations. It may be hard for lawyers to think this way, but it is vital: Counsel offer knowledge about the case and the corner of the law in which it must be resolved, while generalist judges can place the controversy within the web of similar or related principles. Gains from the trade are to be had. Sometimes the back-and-forth, like exchanges among friends, can be pointed, but that's necessary to strip away irrelevancies and get to the core in the short time available. The best way to prepare is to follow John W. Davis's Rule #1 of appellate advocacy: change places mentally with the court and imagine what a generalist judge would find troubling about your position. Friends who have had nothing to do with the case (other than to read the briefs) can help you by supplying the outsider's perspective.

I care principally about two rules and call attorneys to task to reduce the number of violations in the future. One of the two rules on my short list is Fed. R. App. P. 28(a)(4), and its parallel Circuit Rule 28(a). These demand vital details about subject-matter jurisdiction and appellate jurisdiction. Determining whether jurisdiction exists should be the first order of business for every federal judge. Last year my clerks gave me a sketch, done by a cartoonist, that captures my attitude: a lawyer is disappearing through a trap door, which I opened by pushing a button on the bench. On his way down (*way, way* down; the Seventh Circuit's courtroom is on the 27th floor of the Dirksen Courthouse) the lawyer exclaims: "BBUT, YOUR HONOR, JURISDICTION WASN'T RAISED BELOOOOOWWW...!" No, indeed; but lawyers who follow national and local Rules 28(a) will cover the subject on appeal.

Inviolable Rule #2 is Circuit Rule 30(a) and (b), which requires counsel to supply copies of the decision under review (and, in collateral attacks, any written rulings supporting the original judgment being challenged). It is impossible to evaluate an appeal without knowing what the court or agency did, and why.

Of our 11 active judges, only 6 have principal chambers in Chicago. (Two of four senior judges who continue to hear cases also are located away from the headquarters.) Moreover, even the judges with principal chambers in Chicago often prepare elsewhere--at home, in Michigan, in Paris, or in my case in Alaska, where I escape to relax and work.

Civility is overrated. There is no place for mean or petty conduct (in the courtroom or in depositions, where the problem is worse), but if maintaining a genteel atmosphere means pussy-footing around problems, then the trade is a poor one. Pointed questions, and insistence that they be answered, serve vital ends--especially when time is limited, as it must be for the court to hear oral argument in all counseled appeals. A judge's job is to protect the litigants' rights, not to shelter the feelings of advocates (who are paid for their services).

Lawyers tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers. Judges and other lawyers should spend more time with books and magazines, where exposition is at a higher level. If all lawyers would read Strunk & White and Garner even once, the world would be a better place. A turn through Ambrose Bierce's *Devil's Dictionary* wouldn't hurt, either.

An effective brief is simple, to the point, easy to read (no passive subjunctive constructions, please), addressed to a generalist (no jargon; no unusual acronyms; don't assume that the reader knows your corner of the law), and honest to a fault. Lawyers who face up to factual or legal weaknesses win respect and win cases; lawyers who dodge or substitute bluster lose respect; lawyers who dissemble get the trap door.