ON A HANDSHAKE

Over dinner the other night I said to my wife, "Hey - I've got this case with Dave Ordell...you know, I like David Ordell. He's smart and he's got great integrity. Although he's a hell of an advocate, at the same time, I trust him and I can always take him at his word."

What a pleasure to talk about an opposing lawyer like that. What a pleasure to practice against an opposing lawyer like that.

I recall back in L.A., we were involved in the DES Litigation and the regional counsel for Eli Lilly was out of Oakland, the Crosby Heafey firm. We would go into court and try to beat each other's brains out on the merits. It was a very high level practice and some of the best time I've ever had as a lawyer. Another reason for the enjoyment was that these folks were entirely trustworthy. They took no cheap shots.

I recently brought a CR 60 motion on behalf of a fellow who had been defaulted in a divorce case last year. The merits of the motion were good and the wife's counsel would not agree to voluntarily vacate, so the motion was filed. When the response papers were due, I, instead, got a call requesting a continuance. I always afford this courtesy - someone gets jammed, they have a conflict, it almost doesn't matter their reason - I figure, let's decide it on the merits. I told the lawyer that my only concern was that we were coming up against the one year limitation period for CR 60(b)(1) and if I gave him a continuance, I didn't want to see some procedural defense he could have raised earlier but which would now force me to re-note for after the 1 year period. "Sure I'll give you the courtesy. Just don't use it to sandbag me."

When I got back from a week away from the office, I found his response had raised precisely that kind of procedural defense - which, it turned out, wasn't even meritorious based on authorities he didn't cite to the Court. I'd never dealt with this fellow before and I just looked at his papers and thought to myself, "Who is this guy?"

Not too long ago, I went through a trial against a lawyer who continually submitted misleading paperwork to the Court - including a perjured declaration by the opposing party - and my client wasted thousands of dollars dealing with the games. I recall telling lawyer friends about some of these shenanigans and they were amazed at the audacity. While that person's client lost on the merits, there was no down-side to the lawyer - no sanction - nothing.

The same colleagues who had to listen to my "bellyaching" about this, usually responded with their own stories about lawyers who deceive or run up fees or just take an obnoxious belligerent tone. With very few exceptions, the story is the same - these lawyers don't receive any sanction - not a slap on the writs (not to mention a punch in the nose) - that might put a stop to this kind of behavior. While care must be taken not to use CR 11 to dampen aggressive advocacy, I don't know that I have ever heard tell of a lawyer actually being sanctioned under Rule 11 for some of the outrageous behavior we have all heard about.

Two weeks ago at the State Bar Family Law Midyear, one speaker commented that judicial officers should not let these out-of-control "advocates" get away with various abuses and a spontaneous round of applause rippled throughout the ballroom.
"Zealous advocacy" is usually the justification for such conduct. Yet, those who fall back on this rationale need recall that this language no longer appears in the ABA rules or the Washington RPC's. Too much is made of this zealous advocacy mantra. It is used to defend what in most other contexts would be considered indefensible conduct. Also, it is this type of behavior which contributes to the dissatisfaction of lawyers across a broad spectrum of practice.

Chief Justice of the Indiana Supreme Court, Randall T. Shepard, made this observation in a recent address:

"In the Fire Insurance Exchange Case , a prominent law firm pursued a motion to dismiss and interlocutory appeals through two appellate courts trying to establish that other lawyers had no right to rely on their word. The atmosphere created by such experiences leads many lawyers simply to say that "it's not fun." Put another way, there is not enough "personal satisfaction" in the work they do each day.

The causes of this are plain enough. They include a bar that has expanded to the point that people do not know each other and do not share the same sense of loyalty to the joint enterprise that they did when the bar was smaller. It includes the economic competition that affords little time for senior partner training of young associates. It includes that great innovation of the twentieth century, pre-trial discovery, which has nearly given trial by ambush a good name. It includes clients who have unreasonable expectations driven by lawyer advertising and television fools like Judge Judy. And it includes the rise of the managerial judge, who sometimes does not appreciate the pressures that lawyers face."

"Civility" has been a big topic over the past few years - and for good reason. Yet, one very interesting response to the invocation of this value is an almost sneering dismissal of its import by the cynical, aggressive advocates among us. This leads to an important question - if courts are hesitant to sanction misleading "uncivil" conduct by counsel and if significant portions of the bar dismisses the concern as just so much hand-wringing, how, exactly, are we going to deal with the diminishment of the practice? Do we just accept as inevitable the descent of many of our cases into some kind of cesspool of games and deceit and "gotcha?"

What kind of lawyer are you? Do you relish the opportunity to work with (and against) a trustworthy adversary or do you see that attorney's preference for trust as a weakness to be exploited?

What about clients? Do you have any responsibility to educate your clients about the "bounds of advocacy?" Can you tell a client that a certain tactic, while perhaps allowable, is not the right thing to do...or do you take the position that you have no duty (or even right) to discuss moral or ethical principles with clients. Do you say "no" to a client or have you developed the well honed lawyer's skill of rationalization to sidestep otherwise difficult questions? Finally, how do we ultimately deal with those among us who deceive and who unnecessarily exacerbate the ill will and cost of legal conflict?

Are these naive musings or serious questions demanding a thoughtful response? I suggest that that's a question each of us has to answer for ourselves and then weigh the consequences of our answer.

1 Fire Ins. Exch. v. Bell, 643 N.E. 2d 310 (Ind. 1994)

2 Shepard, R., The Personal and Professional Meaning of Lawyer Satisfaction, 37 Valparaiso U. L.Rev. 1612 (2002)

3 The Bounds of Advocacy is a remarkable document. It is the unique set of ethical guidelines promulgated by the elite group family lawyers, the American Academy of Matrimonial Lawyers. It's fascinating reading and can be found on the AAML web site.