

INDIANAPOLIS LAW CLUB

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IN THE NEWS: The Voicemail Message that Has General Counsel Talking

From the National Law Journal:

“There are dumb mistakes, and then there are really dumb mistakes. Four years ago Matthew Gloss, the general counsel of Marvell Semiconductor, Inc., and two of his colleagues phoned the legal chief of a rival company, Jasmine Networks, Inc. The call went straight to voicemail, so Gloss left a message and hung up. At least he thought he did. Though the Marvell officials didn’t know it, the Jasmine lawyer’s voicemail was still taping as they continued to talk on speakerphone – allegedly about how they were stealing their rival’s trade secrets.

Gloss’ little boo-boo has turned into a major headache, not just for Marvell but potentially for in-house lawyers everywhere. That’s because when Jasmine filed its inevitable lawsuit against Marvell, it tried to enter the voicemail as evidence. Marvell moved to exclude the tape, arguing that it was protected by attorney-client privilege, since two company lawyers took part in the conversation.”

The California appellate court found the tape admissible under the crime-fraud exception to privilege and also held that this inadvertent disclosure waived the attorney-client privilege. The latter holding is contrary to traditional doctrine which requires intentional disclosure for waiver. The case is now pending before the California Supreme Court.

1. Mandatory mediation; sanctions for failure to mediate—Office Environments v. Lake States Insurance Co., 833 N.E.2d 489 (Ind. Ct. App. 8/29/05)(Vaidik)

Office Environments brought a suit for bad faith and breach of contract against two insurers. The trial court ordered mediation which was scheduled and postponed several times over two years for varying reasons. When new counsel appeared for Office Environments, he notified mediator John Trimble that his law firm would not be responsible for paying mediation expenses. Trimble requested a \$600 retainer from each party. Office Environments refused to pay. Trimble cancelled the mediation. Lake States moved to dismiss the case with prejudice for failure to mediate. The trial court granted the motion.

On appeal, Office Environments argued that ADR Rule 2.10 controls. This rule authorizes sanctions for failure to comply with the ADR rules but appears to limit the available sanctions “to assessment of mediation costs and/or attorney fees relevant to the process.”

The Court of Appeals concluded that notwithstanding Rule 2.10, a judge could dismiss a case for failure to comply with an order to mediate. The failure to comply was recognized, not as a violation of the ADR rules, but as a violation of the court’s mediation order. Trial Rule 41(E) provides for dismissal for failure to comply with the trial rules. This has been interpreted to allow dismissal for violations of orders of the court issued pursuant to the trial rules. The order of mediation was issued pursuant to Trial Rule 81 which authorizes courts to make local rules. Marion County Local Rule 16.3(C) provides for mandatory mediation of all civil cases in which a jury trial is demanded.

Judge May dissented, believing that only the ADR Rules should apply to ADR proceedings. She also opined that requiring mediation in all civil cases is not a good practice. She believes that it is not appropriate in cases where the parties recognize the mediation would be futile and may also not be appropriate when a party is “financially challenged.” The majority

agreed that “not every case is appropriate for mediation” and noted the rules provide a channel for objecting but no objection had been made (*See* ADR Rule 2.2).

Lessons:

1. A plaintiff who refuses to mediate faces dismissal pursuant to Rule 41(E).
2. A party who does not want to mediate should object and cite this opinion—“not every case is appropriate for mediation.”
3. A lawyer who doesn’t want to be responsible for mediation expenses should say so in writing.

2. Peremptory challenges; religious affiliation—Highler v. State (Ind. Ct. App. 9/15/05)(Bailey)

Highler was charged with rape in Allen County. The jury panel of 47 included only one African-American who was struck by the prosecutor. Striking the only African-American on a panel “establishes a prima facie case” of discrimination and shifts the burden to the prosecutor to present a non-discriminatory explanation for the strike. The prospective juror who was struck was the pastor of a church and the prosecutor explained that he struck the man because “I never take any Pastors, Ministers, Reverends, [or] Priests on my jury panels just because they’re more apt for forgiveness.” The court found this to be race-neutral explanation.

Defendant argued, that even if race-neutral, the challenge was improperly based on religious affiliation. The U.S. Supreme Court extended *Batson* to gender discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), but has not yet ruled on its applicability to religious affiliation. After finding “an emerging consensus” to extend the equal protection analysis of *Batson* and *J.E.B.* to religion, the Court of Appeals concludes that “the Equal Protection clause of the Fourteenth Amendment prohibits the exercise of a peremptory challenge to excuse a venire person because of his or her religious affiliation.”

The court found, however, based on analysis of a further voir dire exchange, that the prosecutor’s principal concern with the pastor was not his religious affiliation but the pastor’s lack of confidence in the criminal justice system and his belief that it operated differently for black versus white and rich versus poor. The court did not reverse but admonished that the practice of exercising peremptory challenges against leaders of religious organizations is improper and an unconstitutional proxy for juror competence and impartiality.

Lessons:

1. You cannot exercise a peremptory challenge based on religious affiliation.
2. Inquiry into a juror’s religious affiliation and beliefs is improper.
3. Striking the only African-American or woman on a panel is prima facie evidence of discrimination.

3. Pharmacist duty to warn—Allberry v. Parkmor Drug (Ind. Ct. App. 9/16/05)(Bailey)

Albert Allberry purchased a prescription drug from Parkmor. The drug, Caverject, is used to treat impotence. Parkmor provided no warning of any adverse side effects of the drug and failed to provide the patient information leaflet which advised that a patient should seek

immediate medical attention if an erection lasts more than 4 hours. After suffering severe side effects from use of the drug, Allberry sued the pharmacy, arguing that the pharmacist had a duty to warn of these side effects.

The Court of Appeals noted that there are differences among the states on this issue but the majority view is that the duty to warn about side effects of a prescribed drug rests solely with the physician: the pharmacist has no duty to warn and no duty to provide the manufacturer's product information. The Court of Appeals agreed with the majority view and affirmed summary judgment for Parkmor.

This conclusion was supported (1) by concern that if the pharmacist provided warnings, it could interfere with the physician-patient relationship, (2) by the learned intermediary doctrine which is premised on the physician's duty to warn the ultimate consumer about prescription products, (3) by the omission of such warnings from the statutory list of things that pharmacist's are authorized to do, and (4) by *Ingram v. Hook's Drugs, Inc.*, 476 N.E.2d 881 (Ind. Ct. App. 1985), which also held a pharmacist has no duty to warn about side effects.

Lesson: In the absence of extraordinary circumstances, your legal remedies for failing to warn about side effects of a prescribed drug are limited to (1) a medical malpractice claim against the prescribing physician or (2) a product liability claim against the manufacturer if the manufacturer has not warned the physician.

P.S. Allberry has a pending malpractice claim against his physician.

4. Legislator affidavit; statutory construction—Utility Center, Inc. v. City of Fort Wayne (Ind. Ct. App. 9/15/05)(Bailey)

Utility Center owned sewer and water facilities in Allen County that the City of Fort Wayne sought to condemn. Utility Center brought a declaratory judgment action alleging that the City had failed to follow the proper condemnation statute when it initiated condemnation proceedings. In support of its motion, Utility Center submitted an affidavit from State Senator David Long, the author of legislation as to the intent of language now found at I.C. 8-1-30-6. The trial court struck the affidavit, denied the Utility Center's motion for summary judgment, and granted a cross motion for summary judgment filed by the City.

On appeal, the court considered whether the Senator's affidavit had been properly stricken. In *O'Laughlin v. Barton*, 582 N.E.2d 817 (Ind. 1991), the Supreme Court held that the motives of individual sponsors of legislation cannot be imputed to the legislature. Although finding the Long affidavit was based on personal knowledge, the Court of Appeals, following *O'Laughlin*, held that Long's personal intent was irrelevant and the affidavit was properly excluded.

The court also considered the opinion of the Indiana Utility Regulatory Commission on the issue of statutory interpretation. While acknowledging that the interpretation by the Commission was entitled to "great weight" under these circumstances, the court rejected that interpretation as being unreasonable and contrary to the plain and unambiguous language of the statute.

In its decision, the court also looked to the principle of statutory construction that "when two conflicting statutory provisions appear controlling, the statute dealing with a subject in a

specific manner controls over the statute dealing with the same subject in general terms.” Here the more specific statute was found to be controlling. Summary judgment reversed.

Lessons:

1. Do not try to get an affidavit from a legislator to support your construction of a statute; it won't help.
2. There's still hope for a favorable statutory construction even if the relevant state agency has ruled otherwise.
3. A specific statutory provision takes precedence over a conflicting general provision.

P.S. Judge Robb dissented on the statutory construction issue, believing that I.C. 8-1-30-6 does not apply. Looks like a case for possible transfer to the Indiana Supreme Court.

5. Lawyer affidavit; legal malpractice. Price v. Freeland, 832 N.E.2d 1036 (Ind. Ct. App. 8/17/05)(Najam)

Consolidated Industries hired lawyer Gary Price to bring a declaratory judgment action against its insurers to establish coverage as to class action claims allegedly arising from defective furnaces manufactured by Consolidated. While the dec action was pending, Consolidated filed for bankruptcy and the bankruptcy court assumed jurisdiction over the dec action. During the bankruptcy proceeding, at the insistence of the bankruptcy judge, Price entered into a stipulation with the insurers as to what constitutes an “occurrence” under the policy.

Daniel Freeland, as bankruptcy trustee of the Estate of Consolidated, subsequently sued Price and his firm alleging that in stipulating as to the meaning of “occurrence” Price had committed malpractice. Price moved for summary judgment. Freeland filed an affidavit in opposition and the trial court denied the motion. Price appealed.

Price argued on appeal that the trial court should have stricken the Freeland affidavit. The Court of Appeals held that portions of the affidavit were improper in that Freeland failed to attach to the affidavit supporting documentation that was referred to, including judgments entered by the bankruptcy court on summary judgment motions and billings for attorney's fees incurred by Freeland. Trial Rule 56(E) mandates: “Sworn or certified copies not previously self-authenticated of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

The court also held the affidavit to be improper with respect to Freeland's assertion that the stipulation “is not an accurate statement of the law.” Statements by lawyers concerning legal issues, even in a legal malpractice case are inadmissible.

Freeland also stated in the affidavit that there may be future attempts by the insurance carriers to use the stipulation to attempt to restrict or deny coverage. The court concluded that this statement was “mere speculation” and should have been stricken.

The court also concluded that the trial court should have granted the summary judgment motion. The court found that the stipulation as to the meaning of occurrence under the policy was a nullity because “questions of law are beyond the power of agreement by the attorneys or parties.” As a nullity, it could not be the proximate cause of any harm to Freeland.

The court also found there was no evidence of damage to Freeland. A settlement was reached in the declaratory judgment action whereby Consolidated would not have to pay anything to individual claimants.

Lessons:

1. Be sure to attach any documents referred to in an affidavit that are not already properly before the court on a motion for summary judgment—not just a good practice, it is mandated by Rule 56(E).
2. A stipulation between parties as to the law is a nullity, including a stipulation as to the meaning of a contract term.

6. Gift; condition precedent—Fowler v. Perry, 830 N.E.2d 97 (Ind. Ct. App. 7/6/05)(Bailey)

Robert Fowler gave Sue Perry an engagement ring on October 21, 1999. They subsequently broke up and the ring was stolen from Perry who received \$5,000 in insurance proceeds for the ring. Fowler argued that he was entitled to the money. The trial court said no and Fowler appealed.

The Court of Appeals found that an engagement ring is a conditional gift given in contemplation of marriage. The gift does not become absolute (that is, ownership does not vest in the donee) until the marriage occurs. In the absence of marriage, the person who purchased the ring is entitled to return of the ring and if that is not possible, to the monetary amount contributed toward purchase of the ring.

Most jurisdictions follow a fault-based approach to this issue wherein the donor is entitled to the ring only if the engagement was broken by mutual agreement or unjustifiably by the donee. The concern underlying the fault-based approach is that the donor should not benefit by his breach of a promise of marriage.

A minority of jurisdictions have adopted a “no-fault” approach requiring return of the ring without regard to fault. Consistent with Indiana’s no-fault system of divorce, the Court of Appeals adopts the no-fault approach in order to avoid litigating the potentially contentious question of fault in the termination of an engagement.

Lesson: After a break-up, the donor owns the engagement ring.

7. Contract; condition precedent—AquaSource, Inc. v. Wind Dance Farm, 833 N.E.2d 535 (Ind. Ct. App. 9/6/05)(Riley)

AquaSource entered into a contract to provide sewage disposal and treatment services to Wind Dance (a real estate developer). The contract was subject to approval by AquaSource’s board of directors which was never given. Wind Dance sued AquaSource for breach of the contract. AquaSource defended, asserting the failure of a condition precedent in that board approval had not been secured.

In *Hamlin v. Steward*, 622 N.E. 2d 535 (Ind. Ct. App. 1993), the court held that a party may not rely on the failure of a condition precedent to excuse performance where that party’s own action or inaction caused the failure. When a party retains control over whether a condition will be fulfilled, it has an implied obligation to make a reasonable and good faith effort to satisfy the condition. Accordingly, AquaSource was required to make a reasonable and good faith effort to seek approval of the contract by its board. A good faith effort here “would entail at least

presenting the Contract to the Board for its consideration.” Having failed to do so, AquaSource cannot rely on the condition precedent to avoid its obligations under the contract.

Lessons:

1. Do not assume that by making a deal subject to later approval by someone your client controls that you have given yourself a loophole to get out of the contract.
2. If you do include such a provision, be sure to submit the contract for the approval even if you think it will be denied.

8. Personal jurisdiction; forum selection clause—Dexter Axle Co. v. Baan USA, Inc., 833 N.E.2d 43 (Ind. Ct. App. 8/22/05) (Baker)

Dexter Axle Co. entered into two contracts with Baan USA: a software agreement to license the use of Baan’s ERP software and a consulting agreement to provide consulting services to implement the ERP software in Dexter’s operations. The ERP system didn’t work and Dexter sued Baan for breach of both contracts and assorted other claims. The suit was filed in Indiana but the consulting agreement had a forum selection clause providing for exclusive jurisdiction and venue in Santa Clara County, California. Based on this clause, the trial court dismissed the case in Indiana for lack of jurisdiction and Dexter appealed.

In deciding whether to enforce the forum selection clause, the Court of Appeals considered first whether the clause was unreasonable or unjust or invalid for fraud or overreaching. Dexter argued that California would be inconvenient since none of the witnesses or companies were located in California. The court, however, court found such inconvenience did not satisfy the required standard of unreasonableness.

The court next found no evidence that the forum selection provision had not been freely negotiated or that the provision was unconscionable. It noted that the parties were both sophisticated businesses that entered into the contract after arms-length negotiations. It also observed that California courts have acquired significant expertise in disputes involving complex technological issues. So, there was some rationale for selecting California. Accordingly, the court held that the forum selection clause was valid and enforceable.

Unlike the consulting agreement, the software agreement contained no forum selection clause. Dexter argued that Indiana had jurisdiction as to those claims and to the assorted related claims for fraud, unjust enrichment, etc. Rejecting the argument, the Court of Appeals found that both contracts were part of a single business relationship and the forum selection clause in the consulting contract would be applied to all contract and other claims.

Lessons

1. A forum selection clause between sophisticated parties is likely to be enforced.
2. It is likely to apply to related claims, not just to claims under the contract containing the clause. Efforts to plead your way around the clause by asserting other legal theories will be unavailing.
3. Pay attention to forum selection clauses in any contract. You may rue the day if you don’t.

Note: The court observed that when a defendant attacks jurisdiction of the person, the defendant bears the burden of proof on the issue unless the lack of jurisdiction is apparent from the face of the complaint.

9. Excited utterance—D.G.B. v. State, 833 N.E.2d 519 (Ind. 6/28/05)(Crone)

In this juvenile case, a six-year-old was taken to the hospital following a child molest incident that occurred in the afternoon. She required surgery and spent the night in the hospital. The next morning, the girl made out-of-court statements to her mother, relating details about the incident. These statements were subsequently admitted at trial.

The Court of Appeals upheld the statements as admissible under the excited utterance hearsay exception. The court concluded that the stress of excitement caused by the traumatic molestation continued until the girl awoke after surgery and gave her account the next morning to her mother.

The court recognized that the interval here between the incident and the utterance is longer than what has been considered allowable for the excited utterance exception. The court justified this expansion on the “abhorrent molestation” of a young child that would cause stress to extend much longer than usual and emphasized that the decision was based on “the unique facts of this case and should not be interpreted as a modification or extension of the excited utterance rule.”

Lesson: The excited utterance exception continues to be liberally construed. An excited utterance can occur even after a night’s sleep.

10. Comparative negligence of a child—Hockema v. J.S., 832 N.E.2d 537 (Ind. Ct. App. 8/8/05)(Vaidik)

Eight-year-old Jacob Secrest darted into the road and was hit by a vehicle driven by 17-year-old Anne Hockema. A suit for Jacob’s injuries was brought on behalf of Jacob and his parents. Following a jury trial, Jacob was found 66.75% at fault, Anne was 33.25% at fault and zero dollars were awarded to plaintiffs by the jury. Upon motion by Jacob’s parents, the trial court granted an additur of \$12,780 which was 33.25% of the stipulated medical expenses. The parents have a separate claim arising from their common law and statutory duty to support their child, including providing medical care.

On appeal, the Court of Appeals overturned the additur award, finding that the parents’ right to recover medical expenses rests upon the child’s right to recover and is a derivative right. Since the child was precluded from recovery due to being assigned more than 50% of the fault, so also are the parents barred from recovery.

Lesson: The fault of the minor child will be imputed to the parents.

See also, Penn Harris Madison School Corp. v. Howard, 832 N.E.2d 1013 (Ind. Ct. App. 8/16/05)(Najam), finding error in a trial court instruction that had suggested a 17-year-old plaintiff was bound to exercise the reasonable care that “a person of like age, intelligence, and experience would ordinarily exercise” under similar circumstances. In Indiana, the standard of care for contributory negligence of a child is determined under a three-tiered standard: Children

under 7 are conclusively presumed to be incapable of being contributorily negligent; from 7 to 14 a rebuttable presumption exists that they may be guilty thereof, and over 14, absent special circumstances, they are chargeable with exercising the standard of care of an adult. (Citing *Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000)).

11. Attorney misconduct—In the Matter of Cynthia Winkler (Ind. 9/13/05)(per curiam)

Cynthia Winkler, the Prosecuting Attorney of Washington County, and her Chief Deputy, Blaine Goode, were at a deposition in a criminal case. The defendant was taking notes on a legal pad and prior to a break, he turned his pad face down on the table and left the room to confer with his counsel. While they were out, Goode tore the notes out of the legal pad and gave them to Winkler who concealed them in a stack of files on the table. Apparently, the plan was to use these notes as a handwriting exemplar to compare with other evidence in the case.

When the defendant and his counsel returned to the room, they began looking for the notes. Winkler pretended to join in the search by shuffling through her stack of files. When the defendant saw the edge of a yellow piece of paper protruding from Winkler's file, the jig was up and Winkler returned the notes to defendant.

The Supreme Court found that this conduct violated the defendant's rights to confidential attorney-client communications and violated Rules 4.4, 4.1(a) and 8.4(d) of the Rules of Professional Conduct. The Court stated: "Here, blinded by their zealous quest to prosecute the defendant, respondents lost sight of basic ethical considerations. It is important that all lawyers understand that it is unacceptable to tolerate litigation premised on 'the end justifies the means.'"

Winkler, who had insisted during the proceedings that she had done nothing wrong, was suspended for 120 days. Goode, who did not actively deceive opposing counsel and who did not insist his conduct was proper, was suspended for 60 days.

Lessons:

1. Keep your hands off your opponent's papers, no matter how tempting.
2. When you're caught red-handed, arguing your innocence with the Supreme Court will only make matters worse.

12. Laches—SMDFund, Inc. v. Fort Wayne-Allen county Airport Authority, 831 N.E.2d 725 (Ind. 8/2/05)(Boehm)

The Fort Wayne-Allen County Airport Authority announced in February 2003 that it planned to close Smith Field. To keep that from happening, plaintiffs sued for declaratory and injunctive relief. They argued that the Airport Authority has no legal control over Smith Field because it was never validly created. The authority was the product of special legislation passed in 1985 that established a joint city-county airport authority in any county having a population of more than 300,000 and less than 400,000. Only Allen County fell within the population parameter. Plaintiffs contended that this special legislation was in violation of Article IV, Section 23 of the Indiana Constitution.

The trial court dismissed the complaint on statute of limitations grounds. Plaintiffs appealed and obtained an immediate transfer to the Supreme Court, bypassing the Court of Appeals, pursuant to Appellate Rule 56(A). This rule requires showing a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.

The Supreme Court applied the equitable doctrine of laches to affirm the dismissal of plaintiffs' case. The Court first determined that the suit was grounded in equity. A declaratory judgment action may be legal or equitable depending on the nature of the suit. Here the requested declaration—that the Airport Authority is invalid and has no authority over the airports in Fort Wayne—is the functional equivalent of an injunction. An injunction was also expressly requested to prevent the Authority from closing Smith Field. Since an injunction is an equitable remedy, the equitable doctrine of laches potentially applies.

Laches requires three elements: “(1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party.”

The Court found that plaintiffs should have known of their right seventeen years before they brought suit. The claim accrued with the creation of the Authority or at the latest when it began collecting taxes. Plaintiffs argued that their injury is only recent and therefore not barred by laches. The Court disagreed, finding that all residents of the County became directly affected when the Authority began operations, issued bonds and imposed taxes.

As to prejudice, the third element, that was established when the Authority in reliance on the statute issued bonds and took over operation of Smith Field.

The Court observed that the alleged constitutional defect here was procedural, not substantive. The Airport Authority could have been constitutionally created long ago by several forms of legislation or local action if the issue had been timely raised.

Lessons:

1. If you have a laches issue, this case provides the latest and best analysis of the doctrine.
2. You can bypass the Court of Appeals in civil cases if you have a substantial question and an emergency.
3. An unconstitutional statute may stand if parties wait too long to challenge it.

13. Expert testimony; Rule 702—Norfolk Southern Railway Co. v. Estate of Wagers, 833 N.E.2d 93 (Ind. Ct. App. 8/25/05)(Kirsch)

Plaintiff sued the Norfolk Southern Railway under the FELA after Robert Wagers, a long-time Norfolk employee, died of lung cancer. Wagers, a smoker, was exposed to diesel fumes and asbestos on the job. In opposition to Norfolk's motion for summary judgment, plaintiff relied on the testimony of Dr. David Parkinson. Norfolk moved to strike his testimony, arguing that it failed to meet the reliability requirements of Rule 702 for the admissibility of expert testimony in toxic exposure cases.

On appeal, the primary attack on Parkinson's testimony was that it was not based on specific information regarding Wager's level of exposure to, *i.e.*, the dose of, asbestos and diesel fumes. The Court of Appeals found that there was some evidence as to the quantity of Wagers' exposure, indicating that he “was exposed on a daily basis to diesel fumes and diesel exhaust approximately five hours per day over a period of 21 years.” Parkinson testified as to scientific evidence that absolutely demonstrates diesel fumes are carcinogenic. The court found this was sufficient to satisfy Rule 702 standards.

Lesson: In a toxic exposure case, quantitative data on the amount of exposure is not always necessary to support an expert's opinion on causation.

Additional notes:

1. This opinion presents a detailed analysis of current Indiana law on the admissibility of expert opinions on medical causation.
2. *See also, Fuesting v. Zimmer, Inc.* (7th Cir. 8/30/05), new Seventh Circuit decision overturning \$650,000 jury verdict based on error in allowing unreliable testimony by biomedical engineer on product defect and causation of alleged failure of prosthetic knee.
3. Resource on *Daubert* case law: website at <http://daubertontheweb.com/>.

14. Other decisions of interest:

Westray v. Wright (Ind. Ct. App. 9/14/05)(Baker)—Overturns \$15,000,000 punitive damages award because truck driver's inattention did not establish anything more than mere negligence.

Madden v. Indiana Dept. of Transportation, 832 N.E.2d 1122 (Ind. Ct. App. 8/19/05)(May)—Rejects INDOT's claim to discretionary function immunity as to traffic signals at a railroad crossing, overturning summary judgment in favor of INDOT.

Natare Corp. v. D.S.I. Duraplastec Systems, Inc. (Ind. Ct. App. 8/24/05)—Overturns arbitrator's decision denying attorney's fees to prevailing party as required by contract.

Litigation Tip of the Month:

A mistake to avoid, reported by Scott Meyers of Chicago in the ABA eJournal:

“When I was a midlevel associate at a large firm in Chicago, the partner in charge of a litigation matter asked a first-year associate to go to court for a routine status hearing. The first-year returned from court radiating with triumph and proudly explained to the partner that the other side had failed to show up, so she asked the judge to dismiss the case for want of prosecution, which he did. The partner stared at her in disbelief and then coldly informed her: ‘We were the plaintiffs.’”