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FOUR THINGS: SOCRATES AND THE INDIANA JUDICIARY

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*Four things belong to a judge:
To hear courteously,
To answer wisely,
To consider soberly,
And to decide impartially.
—Socrates¹*

This quotation was taped to the bench of the Honorable James R. Detamore, a Boone County Superior Court Judge from 1991 to 2005. It was placed on the center of his bench where only he could see it. He was one of my mentors. I noticed it the first time I ever sat in his courtroom as a Special Judge, sometime in 1995. I never asked him about it or the story behind it. I speculate that it gave him some reassurance that it was not his charge to judge people but instead to make the best decisions that he could possibly make. Judge Detamore retired in 2006 after decades of public service. Thinking about his Socrates quotation reminded me that we ask a lot of judges.

Placed before them are all the conflicts of a modern society, like passionate and emotional intra-family disputes, high-stakes business dealings and failings, and criminal violations ranging from the inane to the inhumane—just to name a few. As human beings, we would certainly understand that judges might grow annoyed with some individuals brought before them; they might commit error in deciding cases; they might become impassioned about issues and judge with their hearts; or they might choose a side or play favorites. But as Socrates said, we nevertheless forbid all those things. Instead it falls to our judiciary to rise above those very understandable—very human—reactions; they must “hear courteously, answer wisely, consider soberly, and decide impartially.”

It is with no small measure of subjective pride that I believe the judges in Indiana—at all levels—accomplish this feat with remarkable discipline, dedication, and compassion. To assist them, over the years the Indiana Supreme

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1. The original source of this quotation is unknown, but it is widely used in judicial readings.

Court, with the assistance of judges and lawyers from across the state, has enacted a number of frameworks designed to facilitate the resolution of disputes while maintaining the high degree of professional decorum expected from members of both the bench and Bar.² But even with these foundational structures in place, it still falls on the shoulders of our judicial officers to live those values and ensure they are reflected in our courts.

TO HEAR COURTEOUSLY

Everyone who steps into a courtroom expects his or her voice to be fairly heard, his or her arguments taken seriously, and his or her disputes aired without scorn or slight. But to “hear courteously” is more than just being a good listener. It requires a judge to listen to every side of an argument—to understand that every side has a position—and address them all fairly and open-mindedly. And it requires a judge to interact with the litigants and parties in front of him in an equally courteous manner.

Accordingly, our Judicial Canons prohibit judges from demonstrating “manifest bias or prejudice,” whether by words or actions, and also compel judges to prohibit such behavior by the litigants and attorneys in their courtrooms.³ “A judge shall require order and decorum in proceedings before the court” and “shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.”⁴

In addition to the preventing the manifestation of bias, I broadly would describe this obligation as one of civility—a topic I often now present and write about as an Indiana Supreme Court Justice. And when I was a trial judge in Boone County, I had a sign posted outside my courtroom doors as a reminder to myself, my staff, and those lawyers and citizens who entered to be civil with one another, listen to each other, and respect the significance of the room in which they were entering. It read:

CIVILITY: ci-vil-I-ty (noun)

*polite acts or expressions

*courteous behavior; politeness

Related words:

Respectful; polite; courteous; well-behaved; mannerly; considerate

2. See, e.g., IND. ADMISSION & DISCIPLINE R. 22 (2013) (including in the oath of attorneys the affirmation that “I will maintain the respect due to courts of justice and judicial officers;” and “I will abstain from offensive personality”); IND. CODE OF JUDICIAL CONDUCT pmb1. ¶ 3 (1993) (“The Code is intended . . . to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct”); IND. RULES OF PROF’L CONDUCT pmb1. ¶ 5 (2013) (“A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”). Likewise, a lawyer’s obligations include “maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.” *Id.* ¶ 9.

3. IND. CODE OF JUDICIAL CONDUCT R. 2.3(B)-(C) (1993).

4. *Id.* R. 2.8(A)-(B).

My staff and I pledge to treat you with respect and civility. We will be considerate and polite. Within the bounds of my ethical restrictions, I will also endeavor to do my best to keep you informed and to answer your questions. Please listen carefully when addressed by the court.

We will listen carefully to what you have to say.

I, in turn, expect you to treat my staff and everyone else in this courtroom, with respect. I expect you to be polite, well-mannered and patient. A courtroom is a special place where you have a right to be heard, consistent with the rules of procedure and within the bounds prescribed by the rules of law. Many men and women have sacrificed their lives for you to enjoy the rights that you have, access to the courts and due process, to name just a few. Do not engage in any behavior that would disrespect them or diminish their contributions.

Thank you for your consideration,
Judge Steve David

“Few Americans can even recall that our society once sincerely trusted and respected its lawyers.”⁵ A large part of this diminished reputation, I believe, is due to a diminished level of civility and respect that we as lawyers pay to each other. We can reverse this trend, but it remains firmly incumbent upon our judicial officers to lead the way.

TO ANSWER WISELY

No litigant wants to think that he or she expended all the time, effort, and expense to take a dispute to court and then lost because the judge just “got it wrong.” There is an expectation from litigants, quite obviously, that at the conclusion of whatever process they have undergone the trial judge will reach “the truth”—and do so in a way that is both fair and efficient. Our Judicial Canons hold judges to the same expectation, requiring them to “perform judicial and administrative duties competently, diligently, and promptly.”⁶

To be sure, that is not an easy expectation to live up to. For one thing, trial court dockets are incredibly crowded. Between July 1, 2011 and June 30, 2012, over 230,000 civil cases were filed in Indiana courts.⁷ Add to these more than 250,000 small claims filings, over 70,000 juvenile filings, almost 1.7 million family law cases, and nearly 1.1 million criminal matters, and you have a very heavy

5. SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 226 (2003). This quotation from Justice O’Connor is one that I use frequently in my presentations on civility, ethics, and professionalism. It is a sad statement, but true.

6. IND. CODE OF JUDICIAL CONDUCT R. 2.5(A) (1993).

7. 1 INDIANA JUDICIAL SERVICE REPORT 2011: JUDICIAL YEAR IN REVIEW 94 (2011), available at <http://www.in.gov/judiciary/admin/files/rpts-ijs-2011-review.pdf>. The precise number is 230,712. *Id.*

caseload borne by our State's circuit, superior, probate, small claims, city, and town judges and magistrates.⁸ And each of these more than 3 million matters deserves a judge's competent, diligent, and prompt attention.

For another thing, the law is complex.⁹ Not all matters that reach the courtroom are, despite the respective parties' beliefs, so clear as to be black-and-white. Even assuming the law itself is clear on a matter (by no means a foregone conclusion), very rarely are the facts entirely undisputed. If cases were that clear we could do away with the judiciary entirely and replace us all with punch-card computers. But that is not the way of the world.

Instead the stakes are high—with liberties, families, and finances all at stake. The law is not black-and-white, but varying shades of grey. The facts are convoluted, hotly contested, and deeply personal. And ultimately a trial judge must stand (alone) before the court and declare to one side "You win," and to the other, "You lose."¹⁰

Despite all these challenges, I believe Indiana's judiciary answers Socrates's call to "answer wisely." The answer may not always be perfect; it may not be ideal. Some may feel like "justice" was not done or "the truth" not found. But, nevertheless, judges make the best decisions we can for each case we face, and we do it with the fullest competence, diligence, and promptness.¹¹ As Abraham Lincoln put it, "I do the very best I know how – the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything."¹²

8. *Id.* There were 253,255 small claims filings, 70,813 juvenile filings, 1,680,412 family court filings, and 1,099,668 criminal filings. To serve these needs were 315 circuit, superior, and probate court judges, 83 small claims, town, and city judges, ninety-one magistrates and juvenile magistrates, 69 other judicial officers including commissioners and small claims referees, and 105 senior judges. INDIANA JUDICIAL SERVICE REPORT 2011: INDIANA COURTS IN BRIEF 10 (2011). This roughly presents a ratio of over 5000 filings for every one judicial officer—in one year alone.

9. See Randall T. Shepard, *Elements of Modern Court Reform*, 45 IND. L. REV. 897, 901–04 (2012) (highlighting expanding the nature of legal authority and regulation, and noting limited opportunities to strike "blows for simplicity").

10. Though the trial judge makes this announcement alone, we are fortunate in Indiana to have a terrific support network for our judiciary. The Indiana Judicial Center, established pursuant to Indiana Code § 33-38-9-4, is the staff agency for the Judicial Conference of Indiana. It assists the Judicial Conference in carrying out its tasks of educating judges and court staff, assisting the trial judiciary, and overseeing many of the alternative resolution programs throughout the state. See *Indiana Judicial Center: About*, COURTS.IN.GOV, <http://www.in.gov/judiciary/center/2450.htm> (last visited Sept. 16, 2013).

11. It is no scientific benchmark of trial court "success," but in the same statistical year a comparatively few 4315 appeals were filed with the Court of Appeals. 1 INDIANA JUDICIAL SERVICE REPORT 2011, *supra* note 7, at 72. And of those, only 468—less than 20% of the total appellate filings—resulted in reversals. *Id.* at 73.

12. F. B. CARPENTER, *THE INNER LIFE OF ABRAHAM LINCOLN: SIX MONTHS AT THE WHITE HOUSE* 258–59 (1872).

TO CONSIDER SOBERLY

A judge cannot become impassioned, despite the passions of the arguing parties in court. A judge's demeanor must be marked by restraint and solemnity, with full respect for the gravity of the issues that find their way into court. Certainly this is a challenge, particularly when faced with opposing lawyers whose aims are to argue in a way that persuades the judge to their position. That may happen, but, in adopting the position of the litigant, the judge may not also adopt the litigant's passion.

But in this day and age, it is more than the persuasion of the lawyers in court that beats against a trial judge's obligation to consider soberly: the Judicial Canons also warn judges not to be swayed by the hue and cry of popular opinion.¹³ This is a task that is especially difficult in a media-saturated world—where the race for ratings trumps reporting, hyperbole dominates headlines, and bombastic opinion rules the airwaves. And the dramatic expansion of social media, legal-based blogs, and internet-accessible information has likewise changed the landscape—in many ways for the better, but it has also increased the amount of “arm-chair quarterbacks” who are quick to predict, second-guess, and/or critique courtroom decisions.

Ultimately it is neither the reporter, nor the talk-show host, nor the blogger who carries Socrates's weighty responsibility of sober consideration: in this context, it is the trial judge who is Roosevelt's “Man [or Woman] in the Arena.”¹⁴ And so we require them to enter their courtrooms with a deaf ear to whatever clamor exists outside and with a fresh mind for the facts and law of each case they see before them. A judgment in the court of public opinion cannot preordain a judgment in a court of law.

TO DECIDE IMPARTIALLY

Closely related to the obligation to consider soberly, a judge cannot take sides or be influenced by anything other than the arguments made and evidence

13. See IND. CODE OF JUDICIAL CONDUCT R. 2.4(A) (1993) (“A judge shall not be swayed by public clamor or fear of criticism.”).

14. President Theodore Roosevelt, Speech at the Sorbonne in Paris, France: Citizenship in a Republic (Apr. 23, 1910), available at <http://www.theodore-roosevelt.com/images/research/speeches/maninthearena.pdf>. And as Roosevelt said,

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasm, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

Id.

presented. “A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.”¹⁵ Nor may the judge “convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”¹⁶ Of Socrates’s four things, this may be the most significant because “[a]n independent, fair and impartial judiciary is indispensable to our system of justice.”¹⁷ Our judicial system—both civil and criminal—rests on the public’s perception of impartiality at all levels; it is the foundation of our entire branch of government, and when the people’s confidence in that foundation is shaken or torn, the entire system risks tumbling down.¹⁸ Indiana’s judiciary is not immune to misstep,¹⁹ but I firmly believe (and the numbers support) that our judicial officers are well-respected for the fairness and impartiality that they bring to each and every case that comes before them.

CONCLUSION

I’m not sure what Socrates would make of our modern courts. The dockets,

15. IND. CODE OF JUDICIAL CONDUCT R. 2.4(B) (1993).

16. *Id.* R. 2.4(C).

17. *Id.* pmb. ¶ 1.

18. *See id.* pmb. ¶ 2 (“Judges . . . should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”); *Id.* R. 1.2 (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”); *see also* Brian Dickerson, Op-Ed., *The Case of Money v. Justice in Supreme Court*, DETROIT FREE PRESS, May 6, 2012, <http://www.freep.com/article/20120506/COL04/205060475/Brian-Dickerson-The-case-of-money-v-justice-in-Supreme-Court> (Michigan Judicial Selection Task Force revealed “almost 9 out of 10 cases that came before Michigan’s [supreme] court involved parties who had donated money to the [supreme court election] campaigns[.]” which encouraged “the perception that the judiciary is for sale”).

19. The Indiana Commission on Judicial Qualifications, established pursuant to Article 7, Section 9 of the Indiana Constitution and operating according to Indiana Code section 33-38-13, is charged to investigate complaints of judicial misconduct and, when necessary, pursue disciplinary charges. *About the Commissions*, COURTS.IN.GOV, <http://www.in.gov/judiciary/jud-qual/2380.htm> (last visited Sept. 15, 2013). In fiscal year 2011-2012, the Commission received 389 complaints of judicial misconduct. ADRIENNE MEIRING, INDIANA JUDICIAL NOMINATING COMMISSION, INDIANA COMMISSION ON JUDICIAL QUALIFICATIONS: FISCAL YEAR 2011-2012, at 2 (2012), available at <http://www.in.gov/judiciary/jud-qual/files/jud-qual-2011-2012qcfisyearreport.pdf>. All but thirty-four of those complaints were dismissed for failing to raise valid questions of judicial misconduct, *id.*, and of those remaining, four were dismissed after investigations found no misconduct, *id.* at 3, one was dismissed without prejudice, two dismissed after remedial action, and one administratively closed. *Id.* Seventeen judges received private advisory letters, one accepted a public admonition in lieu of disciplinary charges, and one concluded with a disciplinary decision from the Indiana Supreme Court. *Id.* Seven cases remain pending. *Id.*

as I highlighted, are over-crowded. Technology makes the inside of the courtroom—and the results of an action or decision—instantaneously accessible to anyone in the world.²⁰ And an ever-increasing array of alternative approaches to case resolution forces our judiciary to see each defendant, each plaintiff, and each trial in a unique light; the realm of “typical” cases is shrinking, replaced with more time-consuming and deliberate (but better, I think) methodologies.²¹ Certainly our judges face challenges beyond what he might have envisioned, but I am confident that Socrates would see in our judges those four things still, and he would be pleased.

Another of my great personal mentors, the Honorable O.A. Kincaid—like Jim Detamore, a Boone County Superior Court Judge—had a prayer taped to the

20. Appellate arguments at the Indiana Court of Appeals and Indiana Supreme Court have long been available to the public via webcast. See *Oral Arguments Online*, COURTS.IN.GOV, <http://mycourts.in.gov/arguments/> (last visited Sept. 16, 2013). Now three Lake County judges—Judge George Paras of the Lake Circuit Court and Judges Calvin Hawkins and John Pera of the Lake Superior Court, assisted by the *Northwest Indiana Times*—have nearly completed an eighteen-month pilot program making their trial proceedings available via webcast. See Dan Carden, *Technology Enables the Times to Webcast Lake County Courts*, NWI.COM (Jan. 27, 2012, 7:15 PM), http://www.nwitimes.com/news/local/lake/technology-enables-the-times-to-webcast-lake-county-courts/article_c0b0ea43-c068-5c53-9306-e7b11acc7249.html. Similarly, a different program is testing the efficacy of using audio-visual recordings of trials in the appellate briefing process, rather than the text transcript. James F. Maguire, *Indiana Court Reporting Pilot Project Underway*, IND. CT. TIMES, Dec. 20, 2012, <http://www.indianacourts.us/times/2012/12/indiana-court-reporting-pilot-project-underway>.

21. In the civil and family law arenas, this is perhaps best seen in the growth of alternative dispute resolution rules and programs. See Shepard, *supra* note 9, at 903-04. In the juvenile law arena, this is reflected in the development of what is broadly referred to as the Juvenile Detention Alternatives Initiative, promoting policies aimed at reducing reliance on pure detention-based punishments in the juvenile justice system. See *Juvenile Detention Alternatives Initiative*, ANNIE E. CASEY FOUND., <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx> (last visited Sept. 15, 2013). Indiana currently has eight counties, representing 34% of the state’s at-risk youth population, participating in JDAI. *Juvenile Detention Alternatives Initiative*, IN.GOV, <http://www.in.gov/idoc/dys/2407.htm> (last visited Sept. 15, 2013).

And in the criminal arena, the expansion of so-called “problem-solving courts” has served to resolve the friction point “between society’s need to hold the guilty accountable and the need of the guilty for rehabilitative opportunities.” Shepard, *supra* note 9, at 912-16. Whether aimed at drug users or veterans returning from service in combat overseas, these courts have allowed judges to “[s]tep[] [o]utside the [b]ox” and use sentencing methods other than a hammer—and thus they let judges view defendants as more than just a bunch of nails. *Id.* at 911. See Elliot Blair Smith, *War Heroes Gone Bad Divided by Courts Favoring Prison or Healing*, BLOOMBERGBUSINESSWEEK (Nov. 2, 2012), <http://www.businessweek.com/news/2012-11-02/war-heroes-gone-bad-divided-by-courts-favoring-prison-or-healing#p3> (detailing difference in sentences—and results—between two veterans, one sentenced in “veteran’s court” and one—a Hoosier—sentenced traditionally); see also *First Person Graduates Floyd Co. Veterans’ Court*, WDRB.COM (Apr. 1, 2013, 5:42 PM), <http://www.wdrb.com/story/21848080/first-person-graduates-floyd-co-veterans-court>.

bench where he sat from 1986 to 2002. O.A. Kincaid was one of those great human beings who became a great lawyer and then a great judge. While not the words of Socrates precisely, looking back I recognize now that Judge Kincaid's prayer evoked the same concerns and goals as Socrates's four things—the same focus to administer justice courteously, wisely, soberly, and impartially. His prayer—again placed in the center of his bench in a place no-one else could see and still, I am told, there today, though the paper is well-yellowed and the tape now frayed—was this:

*Oh Lord, let me seek . . .
 Not so much to be heard . . . as to listen;
 Not so much to examine . . . as to trust;
 Not so much to require formality . . . as to show kindness;
 Not so much to condemn . . . as to be merciful;
 Not so much to be correct . . . as to do justice;
 Not so much to judge . . . as to understand.*

And I would close by saying that like Judges Detamore and Kincaid, I am also fond of creeds. I believe they give members of a profession or an organization an easy way to view their common purpose or mission with a sense of pride; they bond those members together by holding them accountable, in writing, to a certain level of conduct, behavior, or aspiration. It is a tradition I brought from my days as a military officer, and in talks or presentations I frequently reference my Lawyer's Creed²² or my CASA Volunteer's Creed²³ as a way to reinforce to the audience those ideals that I believe are most important to their continued success. I also have a creed for our State's justices, judges, magistrates, commissioners, and referees. I believe it reflects their obligations as judicial officers and lawyers. I think it would make Socrates—and hopefully Judges Detamore and Kincaid—proud:

*I am a Judicial Officer.
 I am a protector of the rule of law, due process, and fairness.
 I serve the people of the State of Indiana.
 I live the Code of Judicial Conduct.
 I will always place my obligations to judge fairly and judge impartially
 first and foremost.
 I am trained in the law. I am committed to the rule of law.
 I will never forget my oath of office nor my obligation to support and
 uphold the Constitution of the State of Indiana and the Constitution
 of the United States of America.*

22. See Steven H. David, *The Rule of Law Always*, 56 RES GESTAE, Oct. 2012, at 46, 46, available at http://www.inbar.org/Portals/0/SD-Fair-Comment_1.pdf.

23. CASAs are Court Appointed Special Advocates who stand before the courts solely to represent the best interests of the child in cases of abuse, neglect, or termination of parental rights. See *GAL/CASA: About*, IN.GOV, <http://www.in.gov/judiciary/galcasa/2387.htm> (last visited Sept. 16, 2013).

*I am a lawyer first. I am a professional.
I am a guardian of Freedom, the Rule of Law, and the American way of life.
I am a Judicial Officer!*