

FINAL REPORT
OF THE
COMMITTEE ON CIVILITY
OF THE
SEVENTH JUDICIAL CIRCUIT

Hon. Marvin E. Aspen, U.S. District Judge, Northern District of Illinois
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Secretary

David E. Beckwith, Foley & Lardner, Milwaukee, Wisconsin

George N. Leighton, Earl L. Neal & Associates, Chicago, Illinois

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Nancy Schaefer, Schaefer, Rosenwein & Fleming, Chicago, Illinois

Hon. John C. Shabaz, U.S. District Judge, Western District of Wisconsin

Stephen W. Terry, Jr., Baker & Daniels, Indianapolis, Indiana

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Chicago, Illinois
Reporter

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June 9, 1992

Honorable William J. Bauer
Chief Judge
United States Court of Appeals
219 South Dearborn Street
Room 2754
Chicago, Illinois 60604

Dear Chief Judge Bauer,

I am pleased to submit the Final Report of the Committee on Civility of the Seventh Judicial Circuit. Your mandate to the Committee was to determine whether there is a civility problem in litigation in the Seventh Circuit and, if so, what should be done about it. This Final Report and the Committee's April 22, 1991 Interim Report are in response to this mandate.

In our Interim Report, we stated that a majority of lawyers and judges responding to our survey reported that civility in litigation has eroded in our circuit. Our Interim Report proposed several ways to address this problem and requested comments from the bench and the bar.

Our Final Report reviews a substantial number of comments from within and without the Seventh Circuit and, based on them, revises the tentative recommendations included in our Interim Report.

On behalf of the Committee, I wish to express our appreciation for your support and encouragement. We are grateful for your direction to us to determine the scope of our project without any prejudgment as to what the results ought to be. I am also appreciative of the hard-working lawyers and judges whom you have appointed to this Committee. In addition to the participation of the United States District Court Judges John C. Shabaz and Larry J. McKinney, and lawyer members David E. Beckwith, George N. Leighton, William A. Montgomery, Bernard J. Nussbaum, Nancy Schaefer, and Stephen W. Terry, Jr. during the past three years, the stellar contributions of our talented Reporter, Cornelia Honchar Tuite, were vital to the completion of our Final Report.

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Although the Committee's mandate has now been accomplished, the efforts required of the leaders of our profession are just beginning. Our Committee hopes this Report will be a catalyst for the judiciary, the bar, and our law schools to work together to stem the erosion of civility. This task will remain as one of the most important challenges in the 1990s for the courts and the legal profession.

Sincerely,

Marvin E. Aspen

MEA:ss Enclosure

FINAL REPORT

I. INTRODUCTION

In April 1991, the Committee on Civility of the Seventh Federal Judicial Circuit released its 68-page Interim Report, outlining the results of more than eighteen months of study and investigation into litigation practices and the attending relationships among lawyers, among judges, and between lawyers and judges in the federal courts in Indiana, Illinois, and Wisconsin. Every federal judge in the United States received the Interim Report, as did bar associations and law school deans in all three states as well as scores of lawyers, judges, and legal scholars across the nation.

Both the legal and general circulation print media discussed and debated the Interim Report's findings. See, e.g., Marvin E. Aspen, *From the Bench: Doing Something About Civility in Litigation*, 18 Litig. 3 (1992). Requests for copies came from every corner of America, and from abroad.

The Interim Report was discussed in national professional and bar association seminars throughout the nation, as well as within the Seventh Circuit and at workshops in some of the other federal circuits. It has been cited in court opinions, see, e.g., Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776 (7th Cir. 1991), and in reports of other professional groups examining these issues. See, e.g., Professionalism and the Legal Profession (Boston Bar Association) (April 1992). Law firms in the Seventh Circuit invited Committee members to discuss the Report and distributed it to new associates and summer interns.

In January 1992, the Chicago Bar Association instituted a Pathways Mentoring Program matching volunteer lawyers with students from Chicago's law schools. Mentors and students will attend a year of seminars, the first of which centered around a discussion of

the Committee's Report. Additionally, the Program is designed to offer second and third year law students an opportunity to attend contested motions, trials, and depositions with their mentors to learn lawyering skills based on principles of civility and to have a resource in forming professional career plans. The widespread interest in the Interim Report strongly indicates that the decline of civility standards in litigation practice is among the most important and universally discussed issues facing the legal community today.

One of the Committee's primary goals in issuing the Interim Report was to stimulate thoughtful discussion of litigation behavior throughout the bench and bar. In this respect, the Interim Report has clearly achieved one of its major purposes as a catalyst for change.

The Committee would like to express its thanks for the thoughtful comments on the Interim Report submitted to it by judges, lawyers, and bar associations. Not only did the many and passionate voices we heard from help the Committee reach its final conclusions, but, most importantly, they reconfirmed the legal community's dedication to the development and enhancement of high professional standards.

II. COMMENTS ABOUT THE INTERIM REPORT

On the whole, the comments enthusiastically supported the Interim Report's timely appearance and provision of a framework to stimulate discussion and analysis.

None of the comments questioned the Informal Survey's findings showing a decline in civility in larger jurisdictions, such as the Northern District of Illinois located in Chicago, but fewer problems in smaller Districts in downstate Illinois, Wisconsin, and Indiana, nor that discovery, billing demands, and the increased size of the bar are among the fuels igniting uncivil litigation practices.

Incivility as a Societal Problem

One judge observed that the Interim Report did not refer to the decline of civility in society generally and wrote:

Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings none should be surprised that the courtroom is less tranquil. Cardozo reminds us that "judges are never free from the feelings of the times"

While the Interim Report did not discuss the complex causes or manifestations of incivility in society at large, the Committee believes these observations are apt and are no doubt contributing factors to the civility problems plaguing our profession.

Costs to the Client

A lack of civility can escalate clients' litigation costs while failing to advance their interests or bring them closer to their ultimate goal of ending disputes. Time expended in "Rambo"-style discovery can hinder or prevent litigation parties from getting to the heart of the important contested issues. Furthermore, with today's overcrowded dockets, judicial time is wasted resolving needless (often petty) disputes, which, in turn, deprives those litigants who are ready for trial of the opportunity for a more expeditious hearing. Everyone is harmed.

As one large firm litigation lawyer observed:

When a lawyer behaves uncivilly, contentiously opposing everything his opponent proposes, both litigants suffer because they must pay even higher attorneys' fees and the disposition of the case is delayed. It is no secret that a lawyer's contentiousness causes more work for the lawyers on both sides and slows down the progress of the litigation. And I have not seen a shred of evidence that such conduct advances the client's interests one iota.

Since discovery is the area in which uncivil conduct is most likely to arise, the Committee notes recent proposed changes in the Federal Rules of Civil Procedure, particularly the proposed amendments to Rule 26. The changes are aimed, in part, at minimizing the adversarial character of the discovery process. The most controversial provision would require voluntary disclosure of core information. The Committee expresses no opinion on the proposed discovery rules, other than to observe that a need for systemic change is suggested by its findings.

Greater Judicial Leadership

Several commentators turned a critical eye to the bench, urging the judiciary to assume a leadership role and serve as the principal example of courtesy, dignified courtroom conduct, restraint, and tolerance --attributes most would agree are important in fostering civility.

Judicial leadership, like civility itself, cannot be legislated or mandated. If change is to come, it must stem from the individual effort of each participant in the litigation process as part of a personal obligation assumed equally by lawyers and judges.

Standards For Professional Conduct

The Proposed Standards for Professional Conduct, of all the Committee's recommendations, generated the most comments.

The greatest concern centered on the possibility that, when adopted, the Standards could create the potential for satellite litigation similar to that surrounding Federal Rule of Civil Procedure 11. Others suggested that no Standards be adopted at all, recommending, instead, stronger enforcement of existing statutory sanctions.

First, as the Preamble clearly states, the Standards "shall not be used as a basis for litigation or for sanctions or penalties." With this Preamble, the risk that the Standards will generate additional litigation is nonexistent.

The Committee concluded that the Standards should be adopted to clarify and to articulate important values held by many members of the bench and the bar. These values should be voluntarily assumed and implemented by judges and lawyers alike as a commitment to improving the administration of justice throughout the Seventh Circuit.

Furthermore, written and adopted Standards serve as a valuable teaching and discussion guide, gathering in one text a set of principles designed to improve litigation practice.

The Committee's review of similarly adopted standards and codes in other jurisdictions shows they have not generated satellite litigation, but have stimulated discussion and new proposals for litigation practice, all of which result in subtle, gradual improvement.

Consequently, the Committee affirmed its decision to recommend adoption of the Standards. However, incorporating comments submitted in response to the Interim Report, the Committee has revised certain of the Standards.

Mediation

Several commentators suggested the use of professional mediators, other than judges or magistrate judges, to resolve discovery disputes, a practice that is gaining some currency in other federal circuits and seems to relieve some of the acrimony that otherwise is noted in discovery disputes. The Committee made no recommendations regarding private discovery mediation.

Expanded Bar Activities

Finally, some commentators recommended that the Committee *revise* its recommendation that lawyers and judges participate in the American Inns of Court, noting that membership in the Inns is limited to a relatively small number of practitioners, judges, and students, and then by invitation only.

They suggested, as alternatives, greater participation in bar association activities, open to all members of the legal community, and the creation of mentoring programs through bar associations to expand discussion of civility questions and increase collegiality, goals similar to those of the American Inns of Court.

The Committee concurred in these observations and accordingly expanded its recommendations in this area.

III. FINAL RECOMMENDATIONS

After consideration of all the comments and suggestions submitted following the release of the Interim Report, the Committee adopts the following Final Recommendations:

1. The Proposed Standards for Professional Conduct within the Seventh Federal Judicial Circuit, as amended and set forth in Appendix A, should be adopted.
2. Each lawyer admitted to practice (or appearing pro hac vice) in any court in the Seventh Federal Judicial Circuit should receive a copy of the Standards for Professional Conduct. Each court within the Circuit should consider adoption of a local rule requiring each lawyer admitted to practice (or appearing pro hac vice) to certify, as a precondition to admission and to filing an appearance in any court within the Seventh

Federal Judicial Circuit, that he or she has read and will abide by the Standards.

3. Civility training, including education regarding the Standards for Professional Conduct, should be implemented by public law offices, private law firms, and corporations with in-house counsel. This training should also be available at federal judicial workshops.

4. All lawyers and judges within the Seventh Federal Judicial Circuit should consider participation in civility, professionalism, or mentoring programs in professional legal associations and bar associations as well as participation in one of the American Inns of Court.

5. If a professional legal organization or bar association does not have a civility, professionalism, or mentoring program, or an American Inn of Court does not exist in a particular area, lawyers and judges should consider establishing such a program or an Inn of Court.

6. Law schools should encourage discussion of the Standards of Professional Conduct in the classroom and, especially, in clinical training programs, and should encourage discussion among faculty members.

APPENDIX A
PROPOSED STANDARDS FOR PROFESSIONAL CONDUCT
WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.

These standards should be reviewed and followed by all judges and lawyers participating in any proceeding in this Circuit. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards.

Lawyers' Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.
2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.
3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.
4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.
5. We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.
6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.
7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.
8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.
9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.
10. We will not use any form of discovery or discovery scheduling as a means of harassment.
11. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.
12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.
13. We will not request an extension of time solely for the purpose of unjustified delay or to

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.

16. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

24. We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

30. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

Lawyers' Duties to the Court

1. We will speak and write civilly and respectfully in all communications with the court.
2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.
3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.
4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.
5. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.
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7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.
8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.
2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.
3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.
4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.
5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.
6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.
7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.
8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.
9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.
10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.
11. We will not adopt procedures that needlessly increase litigation expense.
12. We will bring to lawyers' attention uncivil conduct which we observe.

Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

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