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*An Interview with Judge David Hamilton*, By Laura McNally

*Reflections on the Importance of Legal Aid in Recognition of the 50th Anniversary of LAF*,  
By Robert M. Dow, Jr. and Elizabeth Hoskins Dow

*How to Succeed in Federal Court Without Really Trying or the Attorney's Guide to Fame and Fortune in  
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*Every Picture Tells a Story: A Visual Guide to Evaluating Opinion Evidence in Social Security Appeals*,  
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*Search Warrant Help Desk: Emergency Measures for Lawyer First-Responders*, By Daniel Hartnett

*An Annotated Guide to the Standards for Professional Conduct within the Seventh Federal Judicial Circuit*,  
By Alexandra L. Newman

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*Friend or Foe: The New Patent-Challenge Procedures at the Patent Trial and Appeal Board*, By Adam Kelly

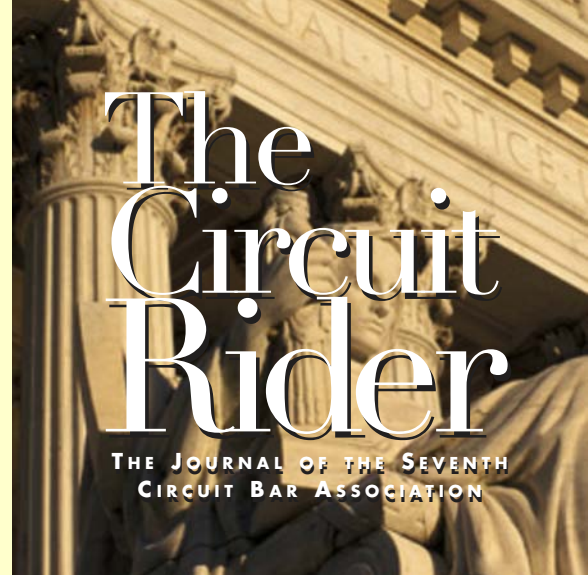
*A Modest Proposal to Measure and Manage Bad Behavior by Lawyers*, By Thomas E. Patterson

*The Post Wal-Mart Evolution of the Class Action*, By Shankar Ramamurthy, Prof. Randall D. Schmidt

*Seventh Circuit Bar Association Report on the Seventh Circuit*, By Collins T. Fitzpatrick

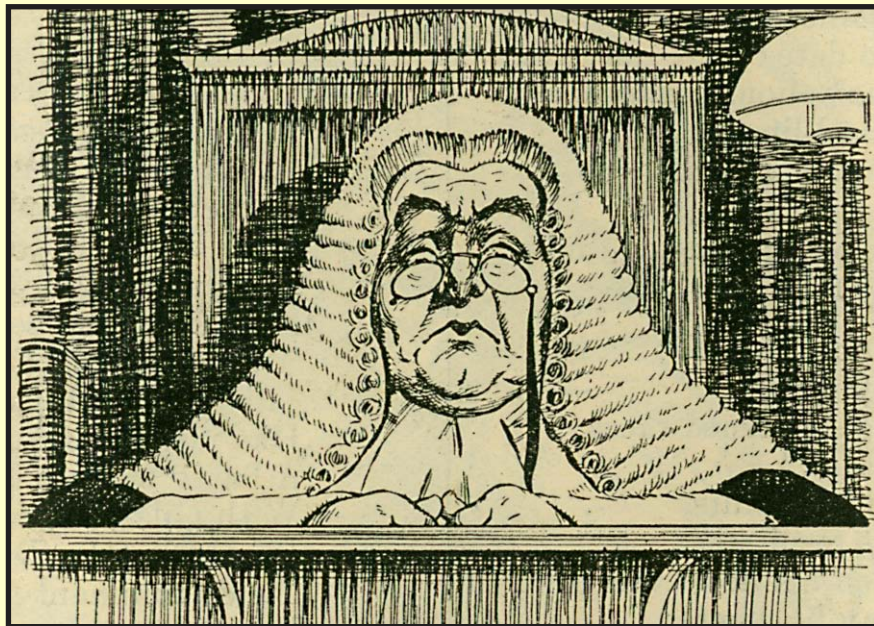
*Magistrate Judge Matthew P. Brookman*, By Rozlyn Fulgoni-Britton

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# Views from the Bench

(AND OTHER EQUALLY IMPORTANT NONJUDICIAL MUSINGS)





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# An *Annotated* Guide to the STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT

By Alexandra L. Newman\*

Are you familiar with the *Standards for Professional Conduct within the Seventh Federal Judicial Circuit*?<sup>1</sup> All attorneys seeking admission to practice within the Seventh Circuit — which includes the federal district courts and the bankruptcy courts in Illinois, Indiana, and Wisconsin, and the Seventh Circuit Court of Appeals — must certify under penalty of perjury on their applications for admission that they have read the Standards and that they agree to conduct themselves in accordance with them.<sup>2</sup> The Standards apply not only to licensed attorneys who are admitted to practice within the Seventh Circuit, but also to attorneys admitted *pro hac vice*<sup>3</sup> and *pro se* litigants.<sup>4</sup>

The Standards, which the Seventh Circuit adopted nearly 25 years ago, are divided into five sections: (1) Preamble; (2) Lawyers’ Duties to Other Counsel (thirty duties); (3) Lawyers’ Duties to the Court (eight duties); (4) Courts’ Duties to Lawyers (twelve duties); and (5) Judges’ Duties to Each Other (three duties).

Practitioners within the Seventh Circuit should review the Standards regularly. The Preamble instructs that the Standards “should be reviewed and followed by all judges and lawyers participating in any proceeding, in this Circuit,”<sup>5</sup> and “[v]oluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.”<sup>6</sup> Although the Preamble instructs that the Standards are not to be used as “a basis for litigation or for sanctions or penalties,”<sup>7</sup> courts within the Seventh Circuit have publicly admonished attorneys who failed to comply.<sup>8</sup> Courts have also stricken briefs that did not adhere to the Standards’ expectations of civility.<sup>9</sup> In addition, each jurisdiction has rules of professional conduct for attorneys and codes of judicial conduct that

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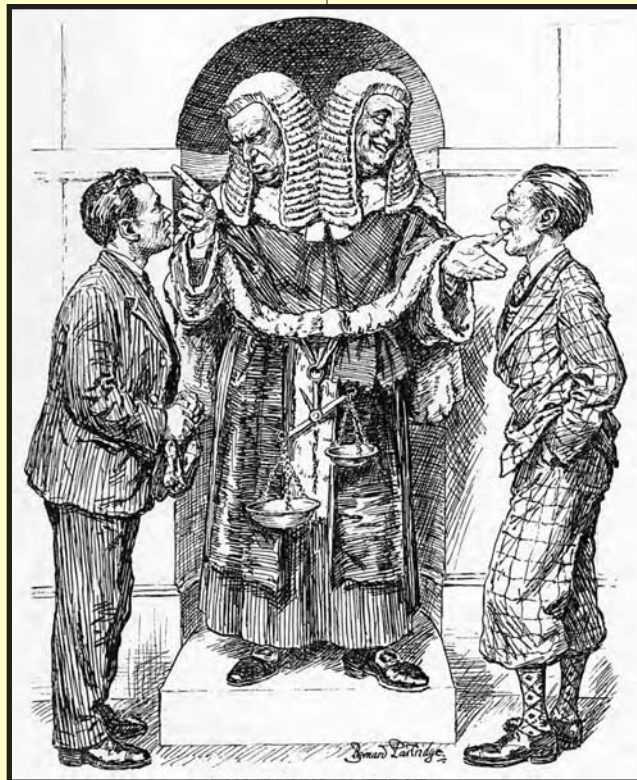
regulate the same types of conduct that are covered by the Standards.<sup>10</sup> Although these professional and judicial rules do not form the bases for independent causes of action, violations of these rules may lead to investigations and possible disciplinary actions by the appropriate disciplinary authorities. This article offers a brief history of the Seventh Circuit’s adoption of the Standards along with an annotated guide discussing case law, where available, that illustrates the meaning and application of the Standards. In doing so, this article seeks to promote the Standards’ purpose: to encourage lawyers and judges to “be mindful of [their] 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.”<sup>11</sup>

### I. A Brief History of the Standards

In 1971, then-Chief Justice Warren E. Burger of the U.S. Supreme Court identified a modern civility crisis in the legal profession, lamenting that “overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters.”<sup>12</sup> By 1989, then-Chief Judge William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit called Judge Marvin E. Aspen of the U.S. District Court for the Northern District of Illinois into his chambers and, as recalled by Judge Aspen, “solemnly advised me that the word was about that there were civility problems in the courtroom.”<sup>13</sup>

Upon their meeting, Chief Judge Bauer appointed Judge Aspen to chair a new nine-member Civility Committee — comprised of

judges and lawyers — that would examine problems of civility in litigation in the Seventh Circuit.<sup>14</sup> Upon convening, the Committee settled on a definition of “civility”: “professional conduct in litigation proceedings of judicial personnel and attorneys.”<sup>15</sup> As Judge Aspen recalled, “[t]he Committee did not limit the term to good manners or social grace. It examined judicial as well as lawyer incivility.”<sup>16</sup> Over the next year, the Committee reviewed legal literature and the law in other jurisdictions; conducted informal surveys of judges and lawyers from within the Seventh Circuit; and received candid feedback that reflected both “the nature of the adversary system” and the “natural tension inherent in the different roles that judges and lawyers assume in the litigation process.”<sup>17</sup>



After evaluating survey results from more than 1,500 respondents, the Committee learned that a “widespread dissatisfaction exist[ed] among judges and lawyers with the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations.”<sup>18</sup> In particular, respondents identified discovery abuses and Rule 11 sanctions as “incivility flash points.”<sup>19</sup> The Committee determined that the decline of civility was due to several factors, including a “bottom-line mentality aimed at winning at all costs”; increased economic pressures and client demands; the decreasing frequency of repeated interactions between counsel and the same opponent or the same judge; the influence of the media’s “dramatic, abrasive” portrayal of the legal

industry; and a declining training relationship between the older and younger members of the bar, among other factors.<sup>20</sup>

The Committee published its Interim Report in April of 1991.<sup>21</sup> It proposed ways that “the organized bar, the courts, our law schools, lawyers, and law firms should tackle the civility problem” and included proposed Standards for Professional Conduct for both judges and lawyers.<sup>22</sup> Notably, the Preamble to these proposed Standards stated expressly that violation of the Standards would not be sanctionable and that the Standards could not be used in an attorney disciplinary proceeding, contempt of court, or as a basis for civil litigation.<sup>23</sup> Judge Aspen explained that “[t]he Standards

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were aspirational, that is, a reaffirmation by judges and lawyers as to what constitutes professional conduct for our working environment. The Committee was careful to avoid making the Standards fodder for satellite litigation of any sort.”<sup>24</sup>

After receiving comments on the Interim Report, the Committee fine-tuned its recommendations and published its Final Report in December of 1992.<sup>25</sup> The Final Report recommended (1) adopting the proposed Standards; (2) providing a copy of the Standards to each lawyer admitted to practice in any court within the Seventh Circuit and requiring each lawyer to certify that he or she has read and will abide by them; (3) implementing civility training at law firms and judicial workshops; (4) forming mentor relationships; and (5) encouraging law schools to incorporate the Standards into their curricula.<sup>26</sup> The Final Report explained that the Standards set forth a voluntary, aspirational, and educational code of civility.<sup>27</sup>

Following their adoption, Judge Aspen offered his view of why the Standards are so important: “They represent the first time that judges and members of the Bar have come to a common understanding regarding how they should behave and the behavior that they may expect from their fellow officers of the court.”<sup>28</sup> “Equally important,” he maintained, “the principles embodied in them will be passed from one generation of attorneys to the next, as every new attorney who is sworn in to practice in the Seventh Circuit must sign a statement certifying that he or she has read the Standards and promises to abide by them.”<sup>29</sup>

Six years after the Standards’ adoption, Judge Aspen acknowledged two common objections that opponents of civility codes typically leveled against the Standards: first, that the Standards “conflict with, or at least encroach on, the territory of another value, the ‘traditional ethic of zealous representation’”; and second, that “civility codes could result in a great deal of ‘satellite litigation’ or could be used ‘as professional standards in malpractice claims.’”<sup>30</sup> Responding to these objections, Judge Aspen asserted that case law supported his view that “the duty of zealous advocacy cannot trump the duty of professionalism.”<sup>31</sup> He also determined that judges in fact do not treat the Standards as a basis for additional litigation.<sup>32</sup>

## II. An Annotated Guide to the Standards

The Standards are set forth below in italic text, along with commentary about case law that illustrates their meaning and applicability. Courts within the Seventh Circuit frequently invoke the Standards’ Preamble, Lawyers’ Duties to Other Counsel, and Lawyers’ Duties to the Court to remind attorneys of these duties. Notably, there are no published opinions or orders discussing Courts’ Duties to Lawyers. Only one opinion discusses Judges’ Duties to Each Other.

A review of this case law demonstrates that, consistent with Judge Aspen’s first conclusion, courts within the Seventh Circuit have invoked the Standards to stress that the duty of zealous advocacy cannot trump the duty of professionalism: the Seventh Circuit Court of Appeals has asserted that “[t]here is a difference between zealously advocating for one’s clients and unnecessarily disparaging opposing counsel,” and the court has advised counsel to review the Standards when counsel employed an inappropriate tone or leveled “unfounded accusations” against opposing counsel.<sup>33</sup> Parties to a lawsuit are entitled to “zealous representation of counsel,” wrote one district court, but “sometimes zealous representation crosses the line into unacceptable conduct” that can approach the “danger zone” with respect to compliance with the Standards.<sup>34</sup> Regarding Judge Aspen’s second conclusion, it appears correct that courts do not sanction lawyers solely under the Standards, although some ambiguity has arisen because some courts have formally incorporated the Standards into their local rules.<sup>35</sup>

### Preamble

*[¶ 1] 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 district court invoked ¶ 1 of the Preamble to admonish counsel whose briefing in the case was “unnecessarily scathing” and warned counsel that “the tone of both briefs undermines not only professional civility but also effective advocacy.”<sup>36</sup>

*[¶ 2] 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.*

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*¶ 3] 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.*

Courts have invoked ¶ 3 of the Preamble to warn counsel and pro se litigants against taking “jabs” at opposing counsel<sup>37</sup>; engaging in “various rants which stray from the legal issues at hand”<sup>38</sup>; participating in “ad hominem attacks and other vitriolic exchanges”<sup>39</sup>; using “unnecessary vituperative language”<sup>40</sup>; and using sarcasm or other distracting attacks in their briefs.<sup>41</sup> Indeed, courts have relied upon ¶ 3 of the Preamble to strike such attacks in briefs.<sup>42</sup>

Courts have also invoked ¶ 3 of the Preamble to warn attorneys against using a “disrespectful and harsh” tone or a confrontational manner of asking questions during a deposition, especially when questioning a pro se litigant.<sup>43</sup> A “confrontational style, particularly with a pro se litigant,” lacks civility and is “ill advised.”<sup>44</sup> Thus, pointing to ¶ 3 of the Preamble, one district court denied a motion to compel discovery responses because it determined that the deponent’s refusal to answer certain questions may have been attributable to the “highly confrontational” tone that counsel used when questioning him.<sup>45</sup>

*¶ 4] 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.*

*¶ 5] 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.*

*¶ 6] 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.*

Paragraph 6 of the Preamble explicitly states that the Standards do not serve as an independent basis for litigation, sanctions, or penalties. The Standards are merely “aspirational,” and they do not “trump” the Federal Rules of Civil Procedure or other applicable court rules.<sup>46</sup>

Where there is already an independent statutory basis for sanctions, courts will sometimes point to the Standards to further justify the sanctions. Thus, in *Matter of Maurice*, the Seventh Circuit Court of Appeals affirmed an award of sanctions in a bankruptcy proceeding in which the attorney representing the debtor was sanctioned “pursuant to Federal Rule of Bankruptcy Procedure 9011” for, among other reasons, violating several of the Standards.<sup>47</sup>

Even when they do not impose sanctions, courts within the Seventh Circuit often invoke the Standards to publicly admonish attorneys who do not conduct themselves in a civil and courteous manner. For example, in *In re Horsfall*, a bankruptcy court declared that it had “never had a more unpleasant day in court than the day this trial was held” due to “the truculent conduct” of trial counsel.<sup>48</sup> Nonetheless, the court concluded that trial counsel’s behavior did not give rise to sanctions under Federal Rule of Bankruptcy Procedure 9011(b), 28 U.S.C. § 1927, or 11 U.S.C. § 105.<sup>49</sup> Still, the court admonished the attorneys to observe the Standards and follow the Preamble’s instructions that conduct “should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.”<sup>50</sup> Indeed, courts within the Seventh Circuit expect “judges and lawyers to make a mutual and firm commitment to these standards, which encourage us 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.”<sup>51</sup>

Even though uncivilized behavior may not result in sanctions, attorneys practicing within the Seventh Circuit should be aware that the Standards have been incorporated into the local rules of some courts within the circuit to “govern the conduct of those practicing in the court.”<sup>52</sup> In fact, at least one district judge has adopted the Standards into his own court rules in order to “call additional attention to them even though they apply to anyone practicing within the confines of the Seventh Circuit.”<sup>53</sup> It is therefore possible that a court could impose sanctions upon counsel for failing to comply with the Standards, even though the Standards themselves do not contemplate this.

*¶ 7] These standards should be reviewed and followed by all judges and lawyers participating in any proceeding, in this Circuit.*

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*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.*

Courts have invoked Duty 1 to admonish counsel that has behaved uncooperatively, disrespectfully, abusively, or violently towards opposing counsel.<sup>54</sup> For example, in *In re Silverman*, defense counsel informed the bankruptcy court that he and debtor's counsel were "unable to cooperate"; that debtor's counsel "telephoned his office between twenty and thirty times in one day" as a form of harassment; and that debtor's counsel had repeatedly "threatened physical violence" against him.<sup>55</sup> The court declined to strike the debtor's motion for summary judgment on the basis of these allegations.<sup>56</sup> Nonetheless, the court stated that "the mere fact that these allegations were even made demonstrates the lack of civility that has too often permeated the legal profession over the years."<sup>57</sup> Thus, the court advised all counsel to read and follow the Standards and asserted that "[b]oth parties' attorneys are expressly required by the Standards for Professional Conduct to act in a professional and civil manner when dealing with one another."<sup>58</sup> More recently, a district court has noted that an attorney is "required to proffer more than conclusory allegations of misconduct before the Court can find that an attorney has engaged in behavior that could well violate the Seventh Circuit's Standards for Professional Conduct."

*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.*

In *Shepherd v. Creighton Bros. LLC*, a lawsuit was filed asking the court to refer an attorney's conduct in the case to counsel for investigation and prosecution in a formal disciplinary proceeding.<sup>60</sup> The lawsuit alleged that the attorney had, on the one hand, supported his client in pleading guilty to the charge of pointing a firearm at another person, while on the other hand, the attorney had then filed an affidavit with the district court in which his client stated the opposite.<sup>61</sup> The district court remarked that if those allegations were true, the attorney would be in violation of, among other applicable rules, Duty 3 of Lawyers' Duties to Other Counsel and Duty 5 of Lawyers' Duties to the Court under the Standards.<sup>62</sup>

Under Duty 2 and Duty 4, it is improper for an attorney to accuse another attorney of being a "liar." Invoking these duties, one magistrate judge warned an attorney who had called opposing counsel a liar during a deposition that "[a]ccusations and characterizing opposing counsel as 'liars' has no place in a judicial proceeding."<sup>63</sup> Although these duties did not form an independent basis for sanctions, the magistrate judge cautioned that "parties' counsel should be forewarned that any witness coaching, speaking objections, uncivil behavior, interruptions of witness, or efforts to delay either deposition will result in sanctions."<sup>64</sup>

Courts have also admonished counsel under Duty 4 that it is improper to accuse opposing counsel of "distorting," "misquoting," or "misconstruing" the facts and the law of a case.<sup>65</sup> Such attacks are not only unnecessary and distracting, but they "do not assist the court in resolving the matter and give the impression, whether accurate or not," that the party resorting to such attacks is itself taking a position that is "unsupported by the law or facts because it has resorted to such distractions."<sup>66</sup> Arguments by counsel accusing opposing counsel of misconstruing the facts or law are "rude" and "ill serve their clients and adversely affect counsels' credibility."<sup>67</sup> At least one court has opted not to make a discretionary fee award to a party whose conduct offended the standards set forth in Duty 4.<sup>68</sup>

It is also improper under Duty 4 for an attorney to use "innuendo" or "speculation" to suggest, without any factual support in the record, that opposing counsel has engaged in improper communications or relationships with third parties.<sup>69</sup>



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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.

In one case interpreting Duty 5, *Borom v. Town of Merrillville*, the district court denied defendants' motion for sanctions against plaintiffs' counsel for her violation of procedural rules relating to service of subpoenas.<sup>70</sup> The defendants' motion had acknowledged that plaintiffs' counsel had in fact "conceded her error and promised to correct the problem [with the subpoenas] when the parties had conferred."<sup>71</sup> Citing to Duty 5 and denying the motion, the court remarked: "This is how the system is supposed to work: when a conflict arises, the parties' counsel work together to solve it." Because no conflict existed as acknowledged in the defendants' own motion, sanctions were not warranted against plaintiffs' counsel.<sup>72</sup>

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.

In *Salmeron v. Enterprise Recovery Systems, Inc.*, the Seventh Circuit Court of Appeals pointed to Duty 6 to emphasize that "a lawyer is permitted to rely on opposing counsel's promises and agreements."<sup>73</sup> Thus, where an attorney agreed to keep the opposing party's documents confidential for "attorneys' eyes only" and to get back to opposing counsel about his proposed changes to their draft protective order, the opposing counsel was entitled to take that attorney "at his word."<sup>74</sup> Indeed, the appellate court in *Salmeron* affirmed the district court's dismissal of the plaintiff's entire case as a sanction for plaintiff's counsel's violation of the "attorneys' eyes only" agreement, noting that counsel should be held to their word.<sup>75</sup>

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.

A magistrate judge suggested, in *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, that Duty 10 protects parties from the improper public disclosure of documents that are produced during discovery, even when the documents do not have any confidentiality designations.<sup>76</sup>

In that case, the defendant had voiced concern that the plaintiff or her counsel would make certain documents a matter of "public record," thereby "implying that the documents might be made public (perhaps on the internet) for some improper purpose."<sup>77</sup> The magistrate judge determined that the disputed documents were not "entitled to protection," but nonetheless reminded the parties that under Duty 10, "discovery may not be used for an improper purpose."<sup>78</sup>

11. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.

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Under several duties of Lawyers’ Duties to Other Counsel, including Duty 11, it is improper for counsel to engage in gamesmanship to adversely impact the efficiency, timeliness, and truth-seeking function of the discovery process.<sup>79</sup> Courts have required counsel to formally certify<sup>80</sup> or declare<sup>81</sup> that they have reviewed the Standards when they observe counsel engaging in such gamesmanship.

For example, in *Boehm v. Scheels All Sports, Inc.*, the district court sternly invoked Duty 11 in responding to a defendant’s discovery motion accusing the plaintiffs of discovery abuse.<sup>82</sup> Before addressing the merits, the court scolded that “the motions before me fall short of the standards of professionalism and courtesy that I expect.”<sup>83</sup> In particular, the court recited Duty 11 and remarked that defense counsel’s “obligation to try to resolve discovery disputes by agreement” under Duty 11 was “not satisfied by an email demand that discovery requests be withdrawn or that additional disclosures be made, which draws only a point-blank refusal.”<sup>84</sup> The court instructed that “counsel must confer by live, voice-to-voice communication in a sincere and diligent effort to resolve their disputes before filing any discovery motion, and any motion must so certify. Good faith does not require that negotiations drag on; court assistance should be sought promptly when sincere efforts fail.”<sup>85</sup> Finally, in its order, the court required certain counsel to formally certify that they reviewed the Standards and that they would “scrupulously follow them going forward.”<sup>86</sup>

Not all courts require a formal certification or declaration of compliance with the Standards in order to achieve a more civil tone in discovery. For example, in *Vukadinovich v. Hanover Community School Corp.*, the district court denied the plaintiff’s motion to admonish defendants’ counsel to comply with the Standards; instead, the court ordered the parties to confer about discovery by “back-and-forth email or other written communication.”<sup>87</sup> In its order, however, the court criticized the parties for resorting to “calling each other names and including snarky comments in their filings,” and so the court nonetheless urged the parties and their attorneys to “adopt a more civil tone.”<sup>88</sup>

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 obtain a tactical advantage.*

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

Local Rule 30-1(d) for the Southern District of Indiana explicitly incorporates Duty 14, stating that under Duty 14 “attorneys will make a good faith effort to schedule depositions in a manner that avoids scheduling conflicts.”<sup>89</sup> A magistrate judge for the Southern District of Indiana, in *Slabaugh v. LG Electronics USA, Inc.*, interpreted what constitutes a “good faith effort” under Local Rule 30-1.<sup>90</sup> The magistrate judge explained that “to discuss what constitutes a ‘good faith effort’ under Local Rule 30-1, the Court looks to Local Rule 37-1, which also addresses the measure of good faith necessary to resolve deposition disputes. Specifically, Local Rule 37-1 requires that “[p]rior to involving the court in any discovery dispute, including disputes involving depositions, counsel must confer in a good faith attempt to resolve the dispute.”<sup>91</sup> In determining that the plaintiffs “did not fail to make a good faith effort” in scheduling depositions, the magistrate judge observed that plaintiffs’ counsel had “instructed defense counsel to ‘please let me know’ if defense counsel ‘would like to discuss alternative locations, date, times, or means of taking the depositions.’”<sup>92</sup> “This instruction alone,” the magistrate judge reasoned, “given the fact that the close of discovery was just over two weeks away at the time that notice was served, fully complies with the Rule 30-1 requirement that attorneys make a good faith effort to avoid scheduling conflicts when scheduling depositions.”<sup>93</sup>

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.*

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In *Harrington v. City of Chicago*, the Seventh Circuit Court of Appeals strongly admonished a plaintiffs’ attorney who failed to comply with Duty 16.<sup>94</sup> The plaintiffs’ attorney had filed a suit on behalf of his clients, but his “repeated inattention” to the case caused the district court to dismiss it for want of prosecution.<sup>95</sup> The appellate court affirmed the district court’s denial of the attorney’s motion to vacate the dismissal.<sup>96</sup> In doing so, the appellate court noted that the plaintiffs’ attorney had failed to appear before the district court at a status conference.<sup>97</sup> The plaintiffs’ attorney attempted to excuse this absence with the fact that, on the date of the conference, he was in trial on another matter.<sup>98</sup> He also pointed to his status as a sole practitioner as an excuse for his absence.<sup>99</sup> Citing Duty 16, the appellate court determined that the plaintiffs’ attorney’s “failure to notify the district court and opposing counsel about his conflicting trial date before the status conference [was] inexcusable.”<sup>100</sup> “Sole practitioner or not,” the court admonished, the plaintiffs’ attorney, “as a member of the bar, had duties to his clients, to opposing counsel, and to the district court — not the least of which was respect.”<sup>101</sup>

- 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.*

A district court interpreted Duty 18 in *Sullivan v. General Plumbing, Inc.*<sup>102</sup> In that case, the defendant moved to vacate a default judgment under Federal Rule of Civil Procedure 60(b)(1). The district court denied the motion, determining that the defendant’s conduct did not constitute “excusable neglect” under Rule 60(b)(1).<sup>103</sup> The court rejected the defendant’s argument that the plaintiffs’ attorney was “well aware that [the defendant] was represented by counsel yet did not contact counsel to inform him that Plaintiffs were seeking entry of a default judgment.”<sup>104</sup> The court acknowledged that although there are “civility standards that address this situation” — namely, Duty 18 — “there is no legal duty to serve opposing counsel with the request for

default.”<sup>105</sup> “[B]ecause there was no legal requirement to notify counsel,” the court declined to grant the defendant’s motion to vacate on that basis.<sup>106</sup>

Interestingly, the district court’s interpretation of Duty 18 in *Sullivan* conflicts with a decision issued nearly 10 years earlier in *Grun v. Pneumo Abex Corp.*, in which the Seventh Circuit Court of Appeals determined that the “spirit” of Duty 18 “required” a lawyer to alert opposing counsel of a dismissal notice even though there was not an “explicit rule” requiring the lawyer to do so.<sup>107</sup> The court criticized defense counsel’s decision “to remain silent when he admittedly knew that Grun [the plaintiff] was unaware of the dismissal order, and that neither party had received notice of the trial date.”<sup>108</sup> The court noted with dismay that defense counsel admitted that he had researched whether he had a duty to inform the plaintiff’s lawyer of the dismissal notice and, when he found no such affirmative duty in the rules, “he chose to remain silent.”<sup>109</sup> Citing to Duty 18, the court recognized that defense counsel “did not affirmatively ‘cause’ the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play.”<sup>110</sup> Defense counsel had no affirmative duty to alert the plaintiff’s lawyer of the dismissal; nonetheless, “the spirit of the rules required such a result.”<sup>111</sup> Commentators have written that *Grun* illustrates that the Seventh Circuit Court of Appeals “seriously takes a lawyer’s duty to improve civility among the members of the bar and, by criticizing uncivil conduct by lawyers who appear before it, is willing to guide lawyers toward the aspirational goals of civility and professionalism.”<sup>112</sup>

- 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.*

Duty 20 and Duty 21 were both invoked in *Alford v. Aaron Rents, Inc.*, in which the magistrate judge recommended that the district court impose monetary sanctions upon certain counsel for particularly uncivilized behavior during depositions.<sup>113</sup>

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The attorneys “failed to heed warnings of uncivil conduct” by the district judge who supervised the depositions and the attorneys “spoke over one another and the Judge.”<sup>114</sup> Indeed, the attorneys’ contentious behavior was so extreme that it required the district judge “to take time out of his schedule,” including during jury trial recesses, “to resolve the repetitious, ongoing arguments of the parties,” and one deposition became so “combative” that the judge “personally observed the deposition for approximately an hour in an effort to get the parties to conduct themselves professionally.”<sup>115</sup> Recommending that monetary sanctions be imposed on the attorneys under Federal Rule of Civil Procedure 37, the magistrate judge also invoked several rules of the Illinois Rules of Professional Conduct, Duty 20, and Duty 21 to justify the sanctions. In doing so, the magistrate judge emphasized that “[c]ivility is simply an integral component of the contentious legal process,”<sup>116</sup> and admonished that the attorneys’ “complete lack of civility is disgraceful.”<sup>117</sup>



- 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 expense or 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.*

Duty 26, Duty 27, and Duty 29 — which concern attorney conduct during

discovery — were all invoked in *Thompson v. Fajerstein*, in which the district court awarded attorneys’ fees and costs to the plaintiff relating to discovery disputes.<sup>118</sup> The plaintiff had asked the court to impose such sanctions because the defendants had improperly refused to respond to discovery requests.<sup>119</sup> Defense counsel resisted the sanctions, responding that they did not violate any court orders or advise their client to violate any court orders.<sup>120</sup> In awarding attorneys’ fees and costs to the plaintiff under Federal Rule of Civil Procedure 37, the district court acknowledged that defense counsel technically did not violate court orders in failing to respond to discovery.<sup>121</sup> Citing to the Preamble, Duty 26, Duty 27, and Duty 29, the court emphasized, however, that “even if Defendants requested that their attorneys not fully respond to discovery, attorneys have an obligation to the Court and other attorneys.”<sup>122</sup> In other words, defense counsel’s duty to comply with



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discovery pursuant to counsel’s professional responsibilities trumped any desire by defense counsel’s clients to not fully respond to the discovery requests.

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

Notwithstanding the directive of this duty, courts have held that it is not a violation of Duty 30 to attach counsels’ correspondence as an exhibit to a complaint<sup>123</sup> or a motion.<sup>124</sup>

### Lawyers’ Duties to the Court

The Seventh Circuit Court of Appeals has stated that under this section of the Standards, all attorneys and pro se litigants “have a professional duty” to conduct themselves “courteously before all courts.”<sup>125</sup> Accordingly, if anyone appearing before a court within the Seventh Circuit “thinks that he is entitled to meet a judge’s use of intemperate language” with “mud-slinging of his own,” he is “mistaken” and should pursue “other remedies for alleged judicial misconduct” to the extent it has occurred.<sup>126</sup> In addition, the duties in this section apply to attorney and party conduct before judges during settlement conferences.<sup>127</sup>

1. *We will speak and write civilly and respectfully in all communications with the court.*

An accusation that a court within the Seventh Circuit “either recklessly ignored or willfully refused to apply Circuit precedent” is a violation of Duty 1.<sup>128</sup> Courts may well publicly admonish lawyers and strike briefs that do not comply with the expectations of civility set forth in this duty.<sup>129</sup>

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.*

Pursuant to Duty 5, “under no circumstances is twisting the evidence or misrepresenting the record considered advocacy.”<sup>130</sup> For example, in *Gross v. Town of Cicero, Ill.*, the Seventh Circuit Court of Appeals admonished an attorney under Duty 5 who, in his reply brief, sought to withdraw an argument that he had fully developed in his opening brief.<sup>131</sup> The attorney contended that a new court decision came down in between the time he filed his opening and reply briefs, but the appellate court noted that the new decision had actually been decided almost two months before the opening brief had been due.<sup>132</sup> Pointing to Duty 5, the appellate court determined that the attorney’s failure to withdraw the argument earlier and to cite “adverse controlling authority” made his argument “frivolous,” “imprudent and unprofessional.”<sup>133</sup>

Similarly, invoking Duty 5, a district court admonished an attorney who argued, in misrepresentation of the trial record, that her cross-examination of a witness was “unfairly denied or limited” when in fact “any limitation of her inquiry” of the witness “occurred on recross-examination, not an initial cross-examination.”<sup>134</sup>

6. *We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.*

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

There are no published opinions or orders discussing Courts’ Duties to Lawyers as set forth in the Standards. It appears that, by and large, the Seventh Circuit Court of Appeals strives to comply



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with the Standards. As summarized in lawyers’ comments about the Seventh Circuit in the Almanac of the Federal Judiciary, the Seventh Circuit Court of Appeals generally “treats attorneys well”; the judges “are well prepared and professional in oral argument”; the judges write opinions that are “practical, clear, and offer guidance to the attorneys”; and the court is usually “cordial and collegial.”<sup>135</sup> Joel N. Shapiro, who serves as the Chief Circuit Mediator for the Seventh Circuit, has noted that “[c]ollaboration and congeniality” are “the norm for bench/bar relations.”<sup>136</sup>

There have been some instances, however, in which practitioners before the Seventh Circuit Court of Appeals have questioned the court’s civility. For example, the court has been criticized on some popular internet blogs for issuing so-called “benchslaps” — statements in written opinions or during oral argument that may embarrass, humiliate, or otherwise criticize an attorney.<sup>137</sup> Some commentators find benchslaps to be funny, entertaining, or even well-deserved by the attorneys receiving them. As one commentator wrote, “[i]t may seem like the Seventh Circuit issues lots of benchslaps, but when you look at the kind of conduct they are admonishing” — such as lack of preparation,<sup>138</sup> lying to the court,<sup>139</sup> or acting like an “ostrich” by intentionally ignoring dispositive authority<sup>140</sup> — “it seems like they just call problems out when they see them.”<sup>141</sup>

Communication failures might be the root cause of incivility between judges and lawyers.<sup>142</sup> Nonetheless, in its Final Report, the Committee on Civility noted that reviewers of the Interim Report had “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.”<sup>143</sup> In response, the Committee urged: “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.”<sup>144</sup>

*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.*

Collins T. Fitzpatrick — who serves as the Circuit Executive for the Seventh Circuit — has proposed several informal approaches to address judicial incivility.<sup>145</sup> He has noted that “[j]udicial temperament — the way judges treat parties, witnesses, jurors, lawyers, and staff — colors how those people view justice.”<sup>146</sup> Informal solutions to judicial incivility that he has proposed include:

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(1) the use of anonymous surveys in which lawyers evaluate judges on their integrity and judicial temperament; (2) intervention by chief judges or other court personnel when necessary to address an issue of judicial conduct; and (3) formation by the organized bar of a committee that would be “willing to receive complaints from lawyers and others reluctant to file formal complaints about a judge.” These ideas deserve further discussion among stakeholders throughout the Seventh Circuit.

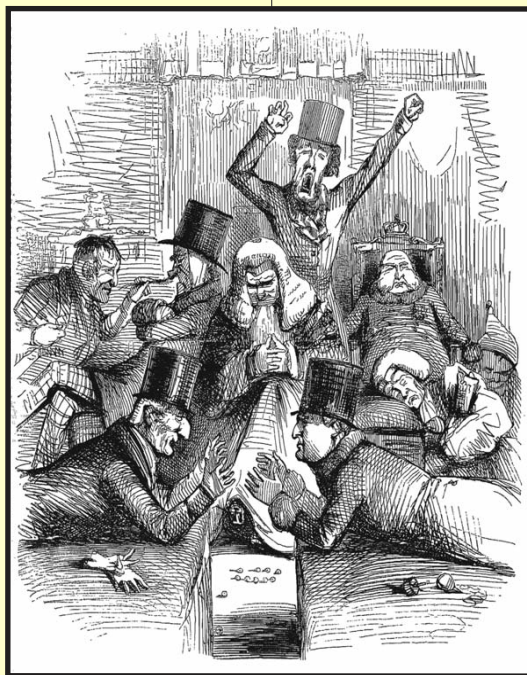
### Judges’ Duties to Each Other

It appears that judges within the Seventh Circuit widely comply with Judges’ Duties to Each Other as set forth in the Standards. Indeed, Judge Richard A. Posner has identified “a durable tradition in the Seventh Circuit” regarding the judges’ collegial conduct amongst themselves:

[D]isagreements are not personalized, and ideological and other clashes, even when they engage the deepest beliefs of the judges, do not produce anger, rancor, or incivility. This triumph of civility not only makes the lives of the judges more pleasant but also improves the quality of the court’s work. Time is not lost in nitpicking colleagues’ opinions or refusing to resolve differences by deliberation and compromise; there are still dissents but they are not multiplied by mutual suspicion and antagonism. Recall that in the Sunstein-Epstein database of published opinions, the dissent rate in the Seventh Circuit is substantially below the average for all the courts of appeals.<sup>148</sup>

Given this widespread culture of civility amongst the judges in the Seventh Circuit, it is not surprising that there is only one published opinion — written before the formal adoption of the Standards in 1992 — in which a court addressed Judges’ Duties to

Each Other. In that opinion, *United States v. Lopez*, the district judge acknowledged that the Seventh Circuit Court of Appeals had previously cautioned him in its earlier appellate opinion not to refer to criminal defendants by possibly offensive “slang” terms during sentencing hearings.<sup>149</sup> In response, the district judge stated that he would accept the appellate court’s admonition against the use of slang at sentencing.<sup>150</sup> However, the district judge, invoking Judges’ Duties to Each Other, scolded the appellate court that “the unduly harsh tone of that admonition was unnecessary. The opinion’s brutal style does not serve the interests of civility.”<sup>151</sup> Thus, the district judge in *Lopez* raised the question — which has reappeared in other courts outside of the Seventh Circuit — whether a judge can enforce civility by being uncivil.<sup>152</sup>



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.*

Since the Seventh Circuit adopted the Standards, it appears that the Seventh Circuit Court of Appeals reserves its harshly worded criticism of lower courts for particularly egregious errors of legal reasoning — for example, where the lower court “fails to mention highly pertinent evidence” or “fails to build a logical bridge between the facts of the case and the outcome” because of “contradictions or missing premises.”<sup>153</sup> Personal attacks are not the norm. The civility amongst judges on the Seventh Circuit Court of Appeals contrasts with widely publicized instances of incivility<sup>154</sup> — or even violence<sup>155</sup> — amongst judges on other state and federal courts.



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## III. Conclusion

Since the Seventh Circuit’s adoption of the Standards, many commentators have applauded the Standards and have encouraged their wide application.<sup>156</sup> Indeed, dozens of state and local bar associations and other courts have adopted similar civility codes.<sup>157</sup> Others, however, have questioned whether the Standards are truly voluntary and unenforceable as a basis for sanctions and whether the Standards are superfluous given the preexisting rules that are already supposed to guide attorney behavior.<sup>158</sup>

Still other commentators have explored the philosophical, economic, and political roots of the civility problem itself. These commentators have asked, for example, whether the quest for civility is at odds with the goal of zealous advocacy in the American litigation system<sup>159</sup>; whether “the focus of these discussions [about civility] should shift to the underlying foundational dilemmas that exist concerning the role of the attorney and the purpose of the trial” and the “underlying goals and purposes of the profession”<sup>160</sup>; whether the legal profession should “re-educate our lawyers on the actual goal — not to win the battle but to further the clients’ interests”<sup>161</sup>; and whether so-called incivility is actually detrimental to the profession.<sup>162</sup> These fascinating questions, among many others, about the Standards and the value of civility continue to be debated and are worthy of ongoing consideration.

### Notes:

<sup>1</sup> STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT (current as of Dec. 1, 2014), available at <https://www.ca7.uscourts.gov/Rules/rules.htm#standards>.

<sup>2</sup> See U.S. Ct. of Appeals for the Seventh Cir., Application for Admis. to Practice (Feb. 2016), available at <https://www.ca7.uscourts.gov/forms/applctn.pdf>, see generally the attorney applications for admission to the U.S. District Courts and U.S. Bankruptcy Courts for the N. Dist. of Ill., Cent. Dist. of Ill., S. Dist. of Ill., N. Dist. of Ind., S. Dist. of Ind., E. Dist. of Wis., and W. Dist. of Wis., which are available on the courts’ respective websites.

<sup>3</sup> See *Williams v. Rohm and Haas Pension Plan*, No. 4:04-CV-0078-SEB-WGH, 2009 WL 382628, at \*2 n.1 (S.D. Ind. Feb. 11, 2009) (not reported); *U.S. v. Payne*, No. 03 CR 398, 2004 WL 1879993, at \*3 (N.D. Ill. Aug. 12, 2004) (not reported); *Harding Univ. v. Consulting Servs. Grp., L.P.*, 48 F. Supp. 2d 765, 773 (N.D. Ill. 1999).

<sup>4</sup> *Vukadinovich v. Griffith Pub. Schools*, No. 2:02 cv 472, 2008 WL 5191451, at \*3 (N.D. Ind. Dec. 10, 2008) (not reported); *In re Troutt*, 460 F.3d 887, 895 (7th Cir. 2006).

<sup>5</sup> STANDARDS, *supra* note 1, at Preamble, ¶ 7.

<sup>6</sup> *Id.* at Preamble, ¶ 5.

<sup>7</sup> *Id.* at Preamble, ¶ 6.

<sup>8</sup> *E.g., Polson v. Cottrell, Inc.*, No. 04-0882-DRH, 2007 WL 518652, at \* 4 (S.D. Ill. Feb. 15, 2007) (not reported) (“The Court previously admonished the parties as to their litigation practices and now heeds the parties to act professionally and to follow the Standards \* \* \* while practicing in this Court.”); *E&B Real Estate Servs., Inc. v. First Advantage Realty, Inc.*, No. 3:04-CV-055-RLY-VSS, 2005 WL 1397397, at \*1 n.1 (S.D. Ind. June 3, 2005) (not reported) (“Counsel is admonished to be mindful of [the Standards] in its future briefing on this case.”).

<sup>9</sup> *E.g., Flomo v. Bridgestone Americas Holding, Inc.*, No. 1:06-cv-00627-WTL-JMS, 2010 WL 935553, at \*1 (S.D. Ind. Mar. 10, 2010) (not reported); *U.S. Neurosurgical, Inc. v. City of Chicago*, No. 02 C 4894, 2006 WL 752970, \*1 (N.D. Ill. Mar. 21, 2006) (not reported).

<sup>10</sup> See ILL. RULES OF PROF’L CONDUCT (eff. Jan. 1, 2010), <https://www.iardc.org/newrules2010.htm>; ILL. CODE OF JUDICIAL CONDUCT (eff. Jan. 1, 2016), [https://www.iardc.org/rules\\_governing\\_the\\_legal\\_profession.pdf](https://www.iardc.org/rules_governing_the_legal_profession.pdf); IND. RULES OF PROF’L CONDUCT (amended Apr. 30, 2015), [http://www.in.gov/judiciary/rules/prof\\_conduct/](http://www.in.gov/judiciary/rules/prof_conduct/); IND. CODE OF JUDICIAL CONDUCT (amended Jan. 1, 2011), [http://www.in.gov/judiciary/rules/jud\\_conduct/](http://www.in.gov/judiciary/rules/jud_conduct/); SCR Ch. 20, WIS. RULES OF PROF’L CONDUCT FOR ATTORNEYS (amended Jan. 1, 2015), <http://docs.legis.wisconsin.gov/misc/scr/20/>; SCR Ch. 60, WIS. CODE OF JUDICIAL CONDUCT (amended July 1, 2014), <http://docs.legis.wisconsin.gov/misc/scr/60/>.

<sup>11</sup> STANDARDS, *supra* note 1, at Preamble, ¶ 1; see *Thompson v. Fajerstein*, No. 08 CV 3240, 2010 WL 4628515, at \*5 (N.D. Ill. Nov. 8, 2010) (not reported).

<sup>12</sup> Hon. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 254 & n.4 (Fall 1998) (citing Chief Justice Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971) (remarks to the American Law Institute)).

<sup>13</sup> Hon. Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 514 (1994).

<sup>14</sup> *Id.* at 514.

<sup>15</sup> *Id.* at 514-15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Aspen, *The Search for Renewed Civility*, *supra* note 13, at 515.

<sup>19</sup> *Id.* at 516.

<sup>20</sup> *Id.* at 516-19.

<sup>21</sup> INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371 (April 1991). The Committee members were: Hon. Marvin E. Aspen, Chairman and U.S. District Judge, N. Dist. of Ill.; Hon. Larry J. McKinney, U.S. District Judge, S. Dist. of Ind.; and Hon. John C. Shabaz, U.S. District Judge, W. Dist. of Wis.; William A. Montgomery from Schiff Hardin & Waite (Chicago, IL); David E. Beckwith from Foley & Ladner (Milwaukee, WI); George N. Leighton from Earl L. Neal & Assoc. (Chicago, IL); Bernard J. Nussbaum from Sonnenschein Nath & Rosenthal (Chicago, IL); Nancy Schaefer from Schaefer Resenwein & Fleming (Chicago, IL); and Stephen W. Terry, Jr. from Baker & Daniels (Indianapolis, IN).

<sup>22</sup> Aspen, *The Search for Renewed Civility*, *supra* note 13, at 519-20.

<sup>23</sup> *Id.* at 520.

<sup>24</sup> *Id.*

<sup>25</sup> FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441 (December 1992).

<sup>26</sup> *Id.* at 447.

<sup>27</sup> *Id.* at 446. See generally Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365, 1366-71 (2000).

<sup>28</sup> Aspen, *A Response to the Civility Naysayers*, *supra* note 12, at 256.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 257.

<sup>31</sup> *Id.*



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- <sup>32</sup> *Id.* at 257.
- <sup>33</sup> *Wiese v. Community Bank of Cent. Wis.*, 552 F.3d 584, 591 (7th Cir. 2009).
- <sup>34</sup> *Reed v. City of Chicago*, No. 01 C 7865, 2008 WL 4534084, at \*3 (N.D. Ill. Apr. 22, 2008) (not reported).
- <sup>35</sup> See discussion *infra* of ¶ 6 of the Preamble.
- <sup>36</sup> *Schwindt v. Hologic, Inc.*, No. 1:11-CV-00110-JMS, 2011 WL 3806511, at \*5 (S.D. Ind. Aug. 26, 2011) (not reported).
- <sup>37</sup> *Vukadinovich v. Griffith Pub. Schools*, No. 2:02 cv 472, 2008 WL 5191451, at \*3 (N.D. Ind. Dec. 10, 2008) (not reported).
- <sup>38</sup> *Id.*
- <sup>39</sup> *In re Spanjer Bros., Inc.*, 191 B.R. 738, 755 & n.1 (N.D. Ill. Bankr. 1996).
- <sup>40</sup> *In re GSB Liquidating Corp.*, No. 94 B 24672, 1995 WL 521528, at \*2 n.1 (N.D. Ill. Bankr. Aug. 21, 1995) (not reported).
- <sup>41</sup> *U.S. Neurosurgical, Inc. v. City of Chicago*, No. 02 C 4894, 2006 WL 752970, at \*1-3 (N.D. Ill. Mar. 21, 2006) (not reported).
- <sup>42</sup> *Id.* at \*1.
- <sup>43</sup> *Shabazz v. Arandell Corp.*, No. 11-315, 2012 WL 3201884, at \*3, \*7 (E.D. Wis. Aug. 3, 2012) (not reported).
- <sup>44</sup> *Id.* at \*7.
- <sup>45</sup> *Id.*
- <sup>46</sup> *Orthoarm, Inc. v. Am. Orthodontics Corp.*, No. 06-C-0532, 2007 WL 172612, at \*5 (E.D. Wis. Jan. 18, 2007) (not reported).
- <sup>47</sup> *Matter of Maurice*, 69 F.3d 830, 831-32 (7th Cir. 1995).
- <sup>48</sup> No. 10-12596, 2011 WL 5865454, at \*1-2, \*5 (W.D. Wis. Bankr. Nov. 17, 2011) (slip).
- <sup>49</sup> *Id.* at \*1-2, \*5.
- <sup>50</sup> *Id.* at \*9.
- <sup>51</sup> *Id.*
- <sup>52</sup> *E.g.*, S.D. Ind. L.R. 83-5(e); N.D. Ind. L.R. 83-5(e); *United States v. Carlisle*, No. 3:13-CR-012 JD, 2014 WL 958027, at \*2 (N.D. Ind. Mar. 12, 2014) (not reported); *Card v. CSC Credit Servs., Inc.*, No. 1:13-CV-01150-TWP, 2014 WL 590368, at \*1 (S.D. Ind. Feb. 13, 2014) (not reported).
- <sup>53</sup> *Cunningham Charter Corp. v. Learjet Inc.*, No. 07-233-DRH, 2012 WL 2884987, at \*2 (S.D. Ill. July 13, 2012) (not reported).
- <sup>54</sup> *E.g.*, *U.S. ex rel. Coots v. Reid Hosp. & Health Care Servs., Inc.*, No. 1:10-CV-0526-JMS-TAB, 2012 WL 1098930, at \*1 n.3 (S.D. Ind. Apr. 2, 2012) (not reported); *In re Horsfall*, No. 10-12596, 2011 WL 5865454, at \*9 (W.D. Wis. Bankr. Nov. 17, 2011) (slip); *Reed v. City of Chicago*, No. 01 C 7865, 2008 WL 4534084, at \*3 (N.D. Ill. Apr. 22, 2008) (not reported); *U.S. Neurosurgical, Inc. v. City of Chicago*, No. 02 C 4894, 2006 WL 752970, \*2 (N.D. Ill. Mar. 21, 2006) (not reported); *In re Famisaran*, 224 B.R. 886, 890 & n.1 (N.D. Ill. Bankr. 1998); *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998).
- <sup>55</sup> No. 98 B 37764, 1999 WL 326328, at \*5-6 (N.D. Ill. Bankr. May 18, 1999) (not reported).
- <sup>56</sup> *Id.* at \*6.
- <sup>57</sup> *Id.*
- <sup>58</sup> *Id.*; see also *Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, No. 1:14CV06 RLM-SLC, 2015 WL 6134466, at \*4 (N.D. Ind. Oct. 19, 2015) (not reported) (requiring counsel to certify that they have read the Standards).
- <sup>59</sup> *Cusic v. Glass Mountain Capital LLC*, No. 12 C 6200, 2013 WL 10209048, at \*3 (N.D. Ill. June 26, 2013) (not reported); see also *Rayter v. Crawford Ave. Anesthesia Provider Servs. LLC*, No. 2:12-CV-75-RLM-APR, 2012 WL 3288754, at \*4 (N.D. Ind. Aug. 7, 2012) (not reported) (instructing plaintiff's counsel to review the Standards before filing an amended complaint where the plaintiff had improperly accused opposing counsel of dishonesty and made other unacceptable remarks in her response briefs).
- <sup>60</sup> No. 3:00-CV-355RM, 2006 WL 508079, at \*2 (N.D. Ind. Mar. 1, 2006) (not reported).
- <sup>61</sup> *Id.*
- <sup>62</sup> *Id.*
- <sup>63</sup> *Alford v. Aaron Rents, Inc.*, No. 3:08-cv-683 MJR-DGW, 2010 WL 2765260, at \*13 (S.D. Ill. May 17, 2010) (not reported).
- <sup>64</sup> *Id.* at \*14.
- <sup>65</sup> *In re Raymond Prof'l Grp., Inc.*, 386 B.R. 678, 682 (N.D. Ill. Bankr. 2008); *In re GGSJ Liquidation, Inc.*, 389 B.R. 636, 638 (N.D. Ill. Bankr. 2008); *U.S. Neurosurgical, Inc. v. City of Chicago*, No. 02 C 4894, 2006 WL 752970, \*1-3 (N.D. Ill. Mar. 21, 2006) (not reported).
- <sup>66</sup> *U.S. Neurosurgical*, 2006 WL 752970, at \*1.
- <sup>67</sup> *In re Raymond*, 386 B.R. at 682; see also *In re GGSJ Liquidation*, 389 B.R. at 638.
- <sup>68</sup> *Signage Found. for Commc'n Excellence Inc. v. Am. Planning Ass'n*, No. 3:01-CV-649RM, 2006 WL 3833455, at \*4 (N.D. Ind. Dec. 11, 2006) (not reported).
- <sup>69</sup> *Medallion Prods. Inc. v. McAlister*; No. 06 C 2597, 2008 WL 4542997, at \*14 (N.D. Ill. Oct. 9, 2008) (not reported).
- <sup>70</sup> No. 2:07 CV 98, 2009 WL 1617085, at \*1 (N.D. Ind. June 8, 2009) (not reported).
- <sup>71</sup> *Id.* at \*2.
- <sup>72</sup> *Id.*
- <sup>73</sup> 579 F.3d 787, 796 (7th Cir. 2009).
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> 270 F.R.D. 312, 322 (N.D. Ill. 2010).
- <sup>77</sup> *Id.*
- <sup>78</sup> *Id.*
- <sup>79</sup> *YCB Intern., Inc. v. UCF Trading Co., Ltd.*, No. 09-CV-7221, 2012 WL 3069683, at \*3 (N.D. Ill. June 12, 2012) (not reported); *E.E.O.C. v. Supervalu, Inc.*, No. 09 CV 5637, 2010 WL 5071196, at \*10 (N.D. Ill. Dec. 7, 2010) (not reported); *Orlando Residence, Ltd. v. GP Credit Co., LLC*, No. 04-C-439, 2006 WL 2849866, at \*9 (E.D. Wis. Sept. 29, 2006) (not reported).
- <sup>80</sup> *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2015 WL 8516825, at \*4 (W.D. Wis. Dec. 11, 2015) (slip).
- <sup>81</sup> *YCB Intern.*, 2012 WL 3069683, at \*3.
- <sup>82</sup> *Boehm*, 2015 WL 8516825, at \*1.
- <sup>83</sup> *Id.*
- <sup>84</sup> *Id.*
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.* at \*4.
- <sup>87</sup> No. 2:13-cv-144-PPS-PRC, 2014 WL 667830, at \*3 (N.D. Ind. Feb. 20, 2014) (slip).
- <sup>88</sup> *Id.*
- <sup>89</sup> S.D. Ind. L.R. 30-1(d).
- <sup>90</sup> No. 1:12-cv-01020-RLY-MJD, 2015 WL 500849, at \*2-3 (S.D. Ind. Feb. 3, 2015) (slip).
- <sup>91</sup> *Id.* at \*3 (citing S.D. Ind. L.R. 37-1(a)).
- <sup>92</sup> *Id.*
- <sup>93</sup> *Id.*
- <sup>94</sup> 433 F.3d 542, 548-49 (7th Cir. 2006).
- <sup>95</sup> *Id.* at 544.
- <sup>96</sup> *Id.*
- <sup>97</sup> *Id.* at 548.
- <sup>98</sup> *Id.*
- <sup>99</sup> *Harrington v. City of Chicago*, 433 F.3d 542, 548 (7th Cir. 2006).
- <sup>100</sup> *Id.*





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<sup>99</sup> *Harrington v. City of Chicago*, 433 F.3d 542, 548 (7th Cir. 2006).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* 548-49.

<sup>102</sup> No. 06 C 2464, 2007 WL 1030236, at \*4-\*5 (N.D. Ill. Mar. 31, 2007) (not reported).

<sup>103</sup> *Id.* at \*5.

<sup>104</sup> *Id.* at \*4 n.2.

<sup>105</sup> *Id.*

<sup>106</sup> *Sullivan*, 2007 WL 1030236, at \*4 n.2.

<sup>107</sup> 163 F.3d 411, 422 & n.9 (7th Cir. 1998).

<sup>108</sup> *Id.* at 422 n.9.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Kidd & Anderson*, *supra* note 27, at 1371.

<sup>113</sup> No. 3:08-cv-683 MJR-DGW, 2010 WL 2765260, at \*7-\*9 (S.D. Ill. May 17, 2010) (not reported).

<sup>114</sup> *Id.* at \*8.

<sup>115</sup> *Id.* at \*3.

<sup>116</sup> *Id.* at \*8 (quoting Judge Bruce S. Meucher, *Civility: A Casualty of Modern Litigation*, THE WASHINGTON LAWYER, Sept.-Oct.1993, at 19).

<sup>117</sup> *Id.*; see also *United States ex rel. Baltazar v. Warden*, 302 F.R.D. 256, 259 n.1 (N.D. Ill. 2014) (granting in part plaintiff's motion for relief to remedy defense counsel's deposition misconduct where plaintiff relied in part on Duty 20).

<sup>118</sup> No. 08 CV 3240, 2010 WL 4628515, at \*8 (N.D. Ill. Nov. 8, 2010) (not reported).

<sup>119</sup> *Id.* at \*5.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Fair Hous. Ctr. of Cent. Ind., Inc. v. Brookfield Farms Homeowners' Ass'n*, No. 4:14-CV-58-PPS-JEM, 2015 WL 4077247, \*1 (N.D. Ind. July 6, 2015) (slip) (stating that the court "cannot conclude that attaching to the Complaint the communication that identifies the source of the disagreement between the parties is 'sending' copies of counsel correspondence within the meaning of Rule 30").

<sup>124</sup> *Loparex, LLC v. MPI Release Techs., LLC*, No. 1:09-CV-01411-JMS, 2012 WL 6094141, at \*9 (S.D. Ind. Dec. 7, 2012) (not reported) ("Defendants did not 'send' copies of the letters and email messages to the Court, but rather attached them as exhibits to a motion which related to their claim of [plaintiff]'s counsel's unprofessional conduct. The Court does not believe that the language or intent of Rule 30 prohibits the [ ] Defendants' submission of that correspondence in this context.").

<sup>125</sup> *In re Troutt*, 460 F.3d 887, 895 (7th Cir. 2006).

<sup>126</sup> *Id.*

<sup>127</sup> *Zdravkovic v. U.S.*, No. 01 C 5893, 2002 WL 31744668, at \*1 and \*4 (N.D. Ill. Dec. 5, 2002) (not reported).

<sup>128</sup> *Oakley v. Remy Intern., Inc.*, 2011 WL 5147546, at \*1 (S.D. Indiana 2011) (not reported).

<sup>129</sup> E.g., *Flomo v. Bridgestone Americas Holding, Inc.*, No. 1:06-cv-00627-WTL-JMS, 2010 WL 935553, at \*1 (S.D. Ind. Mar. 10, 2010) (not reported); *U.S. Neurosurgical, Inc. v. City of Chicago*, No. 02 C 4894, 2006 WL 752970, \*1 (N.D. Ill. Mar. 21, 2006) (not reported); *E&B Real Estate Servs., Inc. v. First Advantage Realty, Inc.*, No. 3:04-CV-055-RLY-VSS, 2005 WL 1397397, at \*1 n.1 (S.D. Ind. June 3, 2005) (not reported).

<sup>130</sup> *Pupo-Leyvas v. Bezy*, No. 2:08-CV-00207-JMS, 2010 WL 3528570, at \*1 (S.D. Ind. Sept. 3, 2010) (not reported).

<sup>131</sup> 619 F.3d 697, 703 (7th Cir. 2010).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *United States v. Betts-Gaston*, No. 11 CR 502-1, 2015 WL 6859165, at \*17 (N.D. Ill. Nov. 6, 2015) (not reported).

<sup>135</sup> *Lawyers' Comments about the Seventh Circuit*, ALMANAC OF THE FEDERAL JUDICIARY, VOL. 2 (2016), 2016 WL 15274.

<sup>136</sup> Joel N. Shapiro, *Mediation in the Seventh Circuit Court of Appeals*, 32 S. ILL. U. L.J. 569, 570 (2008).

<sup>137</sup> E.g., William Peacock, *2014 at the 7th Cir.: So Many Posner Benchslaps*, FINDLAW (Dec. 23, 2014), [http://blogs.findlaw.com/seventh\\_circuit/2014/12/2014-at-the-7th-cir-so-many-posner-benchslaps.html](http://blogs.findlaw.com/seventh_circuit/2014/12/2014-at-the-7th-cir-so-many-posner-benchslaps.html); David Lat, *Judge Posner's Blistering Benchslaps at the Same-Sex Marriage Arguments*, ABOVE THE LAW (Aug. 27, 2014), <http://abovethelaw.com/2014/08/judge-posners-blistering-benchslaps-at-the-same-sex-marriage-arguments/>; Gabriella Khorasanee, *5 Tips: How to Avoid Getting Benchslapped in the 7th Cir.*, FINDLAW (Mar. 26, 2014), [http://blogs.findlaw.com/seventh\\_circuit/2014/03/5-tips-how-to-avoid-getting-benchslapped-in-the-7th-cir.html](http://blogs.findlaw.com/seventh_circuit/2014/03/5-tips-how-to-avoid-getting-benchslapped-in-the-7th-cir.html); Gabriella Khorasanee, *The "Benchslappy" Seventh Circuit—A 2014 First Quarter Review*, FINDLAW (Mar. 17, 2014), [http://blogs.findlaw.com/seventh\\_circuit/2014/03/the-benchslappy-seventh-circuit---a-2014-first-quarter-review.html](http://blogs.findlaw.com/seventh_circuit/2014/03/the-benchslappy-seventh-circuit---a-2014-first-quarter-review.html); Josh Blackman, *The 8 Best Benchslaps of 2012*, JOSH BLACKMAN'S BLOG (Dec. 18, 2012), <http://joshblackman.com/blog/2012/12/18/the-8-best-benchslaps-of-2012/>; David Lat, *Benchslap of the Day: Judge Easterbrook*, ABOVE THE LAW (Feb. 8, 2012), <http://abovethelaw.com/2012/02/benchslap-of-the-day-judge-easterbrook-benchslaps-biglaw/>.

<sup>138</sup> *United States v. Clark*, 657 F.3d 578, 585 (7th Cir. 2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011).

<sup>141</sup> Khorasanee, *5 Tips*, *supra* note 137.

<sup>142</sup> Hon. Richard A. Posner, *What Young (and Old) Lawyers Need to Know About Judges*, COLO. LAW., March 2014, at 75.

<sup>143</sup> FINAL REPORT, *supra* note 25, at 446.

<sup>144</sup> *Id.*

<sup>145</sup> Collins T. Fitzpatrick, *Building A Better Bench Informally Addressing Instances of Judicial Misconduct*, JUDGES' J., Winter 2005, at 16.

<sup>146</sup> *Id.* at 18.

<sup>147</sup> *Id.* at 19-20.

<sup>148</sup> Hon. Richard A. Posner, *A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy*, 29 YALE J. ON REG. 355, 363 (2012).

<sup>149</sup> 799 F.Supp. 922, 923-24 (1992); see also *United States v. Lopez*, 974 F.2d 50 (7th Cir. 1992).

<sup>150</sup> *Lopez*, 799 F.Supp. at 924.

<sup>151</sup> *Id.*

<sup>152</sup> David Lat, *Judicial Diva Gone Wild? Chief Judge Jones Tells Judge Dennis to "Shut Up."* ABOVE THE LAW (Sept. 21, 2011), <http://abovethelaw.com/2011/09/benchslap-of-the-day-chief-judge-jones-tells-judge-dennis-to-shut-up/>.

<sup>153</sup> *Parker v. Astrue*, 597 F.3d 920, 921 (7th Cir. 2010), *as amended on reh'g in part* (May 12, 2010).

<sup>154</sup> E.g., Lat, *Judicial Diva*, *supra* note 152.

<sup>155</sup> Crocker Stephenson et al., *Justices' feud gets physical*, JSONLINE (June 25, 2011), <http://www.jsonline.com/news/statepolitics/124546064.html>.

<sup>156</sup> E.g., David C. Weiner, *Civility*, 21 NO. 1 LITIGATION 1 (Fall 1994).

<sup>157</sup> See generally Michael B. Keating, *Formal Reactions to Incivility*, 6 BUS. & COM. LITIG. FED. CTS. § 66:3 (3d ed.); Brenda Smith, *Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss their Mark*, 24 U. DAYTON L. REV. 151, 159 (Fall 1998).

<sup>158</sup> See generally Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 780 (Summer 1994); Smith, *Civility Codes*, *supra* note 157.

<sup>159</sup> E.g., John Wesley Hall, Jr., *Professionalism and Zealous Advocacy*, PROF. RESP. CRIM. DEF. PRAC. 3d § 34.6 (Oct. 2015) (collecting sources).

<sup>160</sup> Browe, *supra* note 158, at 782.

<sup>161</sup> Fern C. Bomchill, *Restoring Civility*, 58 DEC. FED. LAW. 3, at \*5 (Nov./Dec. 2011).

<sup>162</sup> Browe, *supra* note 158, at 773, 775-77.