

ARTICLE

A RESPONSE TO THE CIVILITY NAYSAYERS

Hon. Marvin E. Aspen*

Civility is the current hot topic of the legal lecture circuit. A majority of the current Supreme Court Justices have spoken on the subject in speeches or in interviews,¹ and an ever-increasing number of jurisdictions and bar associations have adopted civility codes.² The civility movement has attracted the attention of commentators as well,³ and it has become the focus of a contentious, if polite, de-

* © 1998, Marvin E. Aspen. All rights reserved. On July 24, 1979, Judge Aspen was appointed by President Carter to the United States Court for the Northern District of Illinois. On July 1, 1995, he was elevated to Chief Judge. Judge Aspen served as chair of the Committee on Civility of the Seventh Federal Judicial Circuit. This committee promulgated civility standards that were subsequently adopted by the Seventh Circuit, and by Courts and Bar Associations nationwide.

I appreciate the invaluable research assistance of Scott Glauber in preparing this Article.

1. See Marvin E. Aspen, *Let Us Be "Officers of the Court,"* A.B.A. J., July 1997, at 94, 95-96 (quoting Justice Stevens' comments to the American Bar Association's 1996 annual meeting); Alan Goforth, *Civility Is Declining, Clarence Thomas Says*, ST. LOUIS POST-DISPATCH, Dec. 22, 1996, at 10D; Nat Henloff, *Ginsburg's No Thurgood Marshall*, ROCKY MTN. NEWS, July 8, 1993, at 37A; Carlos Santos, *Rehnquist Chides Legal Profession*, RICHMOND TIMES-DISPATCH, Nov. 9, 1997, at C3; Dale Singer, *Lawyers Should Do Good, O'Connor Urges*, ST. LOUIS POST-DISPATCH, Sept. 27, 1997, at 11; M.A. Stapleton, *Kennedy Warns ABA of Crisis Facing Rule of Law*, CHI. DAILY L. BULL., Aug. 4, 1997, at 3.

2. See, e.g., Judge Marvin E. Aspen, Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441 (1992); Southern Pac. Transp. Co. v. Builders Transp., Inc., Civ. A. No. 90-3177, 1991 WL 160398, at *2 (E.D. La. Aug. 6, 1991); Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988) (en banc); Monroe Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995, at 54 (referencing "100 courtesy codes and civility guidelines throughout the country").

3. For a sampling, see Freedman, *supra* note 2; Lynne Eckert Gasey, *Intellectual Property Litigators Have No Patent on Manners*, CHICAGO LAW., Apr. 1998, at 6; Robert

bate. In this Article, I provide some background for the recent civility surge, describe one jurisdiction's civility code, recount some of the more common criticisms of civility codes, and offer my own assessment of those criticisms.

I. BACKGROUND

The “modern” civility movement dates back at least to 1971, when then-Chief Justice Warren Burger remarked 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.”⁴ My focus, however, is on even more recent concerns with civility in the practice of law. In 1989, then-Chief Judge William Bauer appointed me the chair of a nine-member Committee on Civility of the Seventh Federal Judicial Circuit (the Committee). He asked that the Committee investigate whether civility problems existed in the Seventh Circuit and, if so, what should be done.

The Committee's Interim Report, published in 1991, described our findings.⁵ Of the nearly 1300 attorneys who responded to our survey, approximately 42% perceived a civility problem; the number was substantially higher in the metropolitan Northern District of Illinois (61%).⁶ Seventy-nine percent of those perceiving a problem indicated that most civility problems occurred between lawyers, and an overwhelming 94% felt that discovery was the primary setting for uncivil conduct.⁷ Fifty-three percent thought that routine sched

C. Josefsberg, *The Topic Is Civility — You Got a Problem with That?*, FLA. B.J., Jan. 1997, at 6.

4. Chief Justice Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971) (remarks to the American Law Institute). Efforts toward civility in law, of course, date back much further. *See id.* (discussing one nineteenth-century barrister's thoughts on the subject); Aspen, *supra* note 1, at 95–96 (quoting Dean Roscoe Pound's 1906 address to the American Bar Association).

5. Judge Marvin E. Aspen, *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371 (1991).

6. *See id.* at 380 app. III, tbl.2.

7. *See id.* at 380, 383, 386–88 app. III, tbl.4; *see also* Federal Bar Council Committee on Second Circuit Courts, *A Report on the Conduct of Depositions*, 131 F.R.D. 613, 613–15 (1990). As an example, the following exchange was recorded during a deposition in 1994:

Mr. V: Please don't throw it at me.

Mr. A: Take it.

Mr. V: Don't throw it at me.

uling changes and the like provided the context for civility problems, and 41% thought that the courtroom provided a setting.⁸ Slightly over half felt both that senior lawyers had become less effective in transmitting a tradition of civility and that young, inexperienced attorneys were prime civility offenders.⁹ In short, “[w]e learned there is widespread dissatisfaction among judges and lawyers at the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations.”¹⁰

No one solution commanded a clear majority of the respondents. Training programs at law schools and law firms garnered 55% and 53% of the vote, respectively, while 51% approved of a publicity campaign.¹¹ Half advocated a court-adopted civility code (while 40% advocated a bar-sponsored code), and slightly fewer favored increased court sanctions.¹² Between 22% and 38% opposed each proposal, and approximately one-quarter of respondents were undecided.¹³

II. CIVILITY CODES

Mr. A: Don't be a child, [Mr. V]. You look like a slob the way you're dressed, but you don't have to act like a slob.

Mr. V: Stop yelling at me. Let's get on with it.

Mr. A: Have you not? You deny I have given you a copy of every document?

Mr. V: You just refused to give it to me.

Mr. A: Do you deny it?

Mr. V: Eventually you threw it at me.

Mr. A: Oh, [Mr. V], you're about as childish as you can get. You look like a slob, you act like a slob.

Mr. V: Keep it up.

Mr. A: Your mind belongs in the gutter.

Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 513-14 (1994). For a far more outrageous example, see *Carroll v. Jacques*, 926 F. Supp. 1282, 1285-86 (E.D. Tex. 1996), and *Corsini v. U-Haul International, Inc.*, 630 N.Y.S.2d 45, 46 (N.Y. App. Div. 1995) (“It is difficult to find one among the 217 pages of the deposition which does not contain willful evasion, gratuitous insult, argumentative response, or patent rudeness . . .”).

8. See Aspen, *supra* note 5, at 380 app. III, tbl.5.

9. See *id.* at 380, 397-400 app. III, tbs.11 & 12.

10. *Id.* at 375.

11. See *id.* at 380 app. III, tbl.13.

12. See *id.*

13. See *id.*

The Committee's Final Report contained a number of recommendations: (1) adopting the (proposed) Standards for Professional Conduct within the Seventh Federal Judicial Circuit (the Standards);¹⁴ (2) providing a copy of the Standards to each lawyer admitted to practice in any court within the 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.¹⁵ The Standards themselves attracted the most attention and prompted the most discussion.¹⁶

Before I turn to defending the Standards against the most common criticisms of civility codes, I should first point out exactly 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. Equally important, 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. It is impossible to know for certain, but my clear impression is that they are working, and I believe that most of my colleagues share this feeling.¹⁷ Perhaps, then, it should not be any surprise that the Standards have attracted national attention. At its 1998 annual meeting, the American Bar Association adopted a slightly modified version of the standards, recaptioned Guidelines for Litigation Con-

14. Space considerations prevent me from setting out the Standards here in full. They may be found at Aspen, *supra* note 2, at 448 app. A.

15. *See id.* at 447.

16. Chief Justice Rehnquist, for one, stated: The Standards have been well-received not only in the Seventh Circuit but nationally. . . . The Standards enumerate a number of duties, including those of lawyers to other counsel, lawyers to the court, courts' duties to lawyers, and judges' duties to each other. The Standards recognize the duty to treat other counsel in a civil and courteous manner not only in court, but in all written and oral communications. . . . These are all steps in the right direction and, according to some judges in the Seventh Circuit, they are having a beneficial impact on the practice there.

Chief Justice William Rehnquist, Speech at the University of Virginia (Nov. 8, 1997) (copy on file with author).

17. *See id.*

duct, without a single dissent.

Opponents of civility codes typically offer two objections to them. First, they conflict with, or at least encroach on, the territory of another value, the “traditional ethic of zealous representation.”¹⁸ Dean Monroe Freedman, one outspoken proponent of this view, argues that other professional codes — from the ABA's 1908 *Canons of Professional Ethics* through the 1983 *Model Rules of Professional Conduct* — recognize the lawyer's paramount duty to advocate zealously his or her client's cause.¹⁹ He believes that civility is as vague as Justice Stewart's obscenity — you know it when you see it.²⁰

As to this argument, I have previously responded that the duty of zealous advocacy cannot trump the duty of professionalism and set forth the supporting case law.²¹ Rather than restate my response in detail, I intend to conduct a small experiment. In a 1995 article, Dean Freedman examined “how judges are interpreting and applying the civility codes” by reviewing state court decisions in Missouri and Georgia and a federal district court decision in Texas.²² He concluded that those decisions demonstrated that civility codes “are increasingly being given the force of law by judges who value courtesy to ‘brother lawyers’ above ‘entire devotion to the interests of the client [and] warm zeal in the maintenance and defense of his rights.’”²³ In Part III of this Article, I will review judicial use of the

18. Freedman, *supra* note 2, at 54.

19. *See id.*

20. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This is my characterization of Freedman's position; he states that “[o]bviously, ‘civility’ means radically different things to different people.” Freedman, *supra* note 2, at 54.

21. *See Aspen*, *supra* note 1, at 95, 96 (arguing that the contrary position is “indefensible as a matter of law” and that uncivil tactics lead to the ruin of one's professional reputation); *see also* Roger Parloff, *What Was Microsoft Thinking?*, AM. LAW., Mar. 1998, at 5 (discussing Microsoft's “testosterone-drenched” litigation tactics and stating that Microsoft's “filings obviously sought to mock and humiliate both the Justice Department and Judge Jackson, each of whom Microsoft is apt to be dealing with for some time to come”).

22. Freedman, *supra* note 2, at 54–55 (citing, in order, *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc); *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883 (Mo. 1987), *appeal after remand*, 775 S.W.2d 97 (Mo. 1989) (en banc); *Evanoff v. Evanoff*, 418 S.E.2d 62 (Ga. 1992); *Green v. Green*, 437 S.E.2d 457 (Ga. 1993); *Allen v. Lefkoff, Duncan, Grimes & Dermer*, 453 S.E.2d 719 (Ga. 1995)).

23. *Id.* at 54.

Committee's work, for "empiricism is the crucible" of this criticism.²⁴

I will respond in like fashion to those who offer the second criticism, which is that civility codes could result in a great deal of "satellite litigation" or could be used "as professional standards in malpractice claims."²⁵ These things "could," of course, happen, but in Part III we shall determine whether they have, in fact, happened.

III. JUDICIAL OPINIONS

Given that much criticism of the Standards and other civility codes focuses on the possible or likely judicial uses of such guidelines, a review of judicial decisions employing the Committee's work should be enlightening. I begin by testing the first critique, that judges will use the Standards to squelch zealous advocacy.

My review of the case law does not indicate a single instance in which a judge used the Standards or either of the civility reports to criticize or attempt to inhibit arguably defensible zealous advocacy. For example, let us review the Supreme Court of Wisconsin's decision in *Chevron Chemical Co. v. Deloitte & Touche*.²⁶ Chevron Chemical sued Deloitte & Touche and alleged that Deloitte's accounting audit of Chevron business was negligent and involved misrepresentations.²⁷ Discovery was full of problems and the trial court sanctioned Deloitte on four separate occasions for Deloitte's failure to produce its audit manuals and for other abuses.²⁸

The trial also involved uncivil, unfair, and unproductive win-at-all-costs tactics. Deloitte's counsel informed Chevron's counsel and the court that a key witness, the Deloitte partner responsible for

24. *Recent Legislation*, 109 HARV. L. REV. 1168, 1173 (1996).

25. Kathleen P. Browne, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 780 (1994); see also Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 13.

26. 501 N.W.2d 15 (Wis. 1993). Wisconsin state courts are not bound by the Standards, which are concerned with attorney behavior in federal courts within the Seventh Federal Judicial Circuit. This jurisdictional detail has not, however, deterred both state and federal courts from all over the country from utilizing the guidelines in judicial opinions. See, e.g., *Applied Telematics, Inc. v. Sprint Corp.*, No. Civ. A. 94-CV-4603, 1995 WL 79237 (E.D. Pa. Feb. 22, 1995); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146 (D.P.R. 1993); *Vlotho v. Hardin County*, 509 N.W.2d 350 (Iowa 1993); *Kotil v. Hydra-Sports, Inc.*, No. 01-A-01-9305-CV00200, 1994 WL 535542 (Tenn. Ct. App. Oct. 5, 1994).

27. See *Chevron Chem.*, 501 N.W.2d at 16.

28. See *id.* at 16-17; see also Aspen, *supra* note 2, at 450 (Standards, Lawyers' Duties to Other Counsel ¶ 24).

Deloitte's handling of the error in the financial statements, would be entering "the hospital for at least six weeks[, and w]e couldn't use him even if we wanted to."²⁹ During the trial, Chevron's counsel designated those parts of the partner's deposition that it intended to read into the record, after which Deloitte's counsel informed the court that the partner would, after all, be able to testify.³⁰ The partner subsequently testified to events that he claimed he could not remember during his deposition.³¹ In response to questions from the court, the partner indicated that his hospital stay was scheduled to last for only two days and that he had talked to another witness about the events in question, thus violating a sequestration order.³² The court was not amused:

And I don't think it's funny. . . . I don't think it's funny at all. I think this is very serious. . . . You have a sequestration order. . . . There should be no discussions whatsoever. . . . And to say, "He just reminded me of what I didn't remember," how do you separate that from what [the other witness] recalls that he testified to on the stand? I don't know how. That's why I say, this has been an extraordinary day. . . . I couldn't believe that I heard him say that he's even discussing all those notes and going over them with [the other witness]. That's not appropriate. . . . You just go ahead and ignore the order of this Court.³³

Nor was that all. At another point, Deloitte's counsel referenced an exhibit and claimed that it was an article from the *Wall Street Journal*; no such article appeared to exist.³⁴ Deloitte's counsel questioned a witness before the jury regarding a section of a document that had been redacted to remove material protected by attorney-client privilege.³⁵ And Deloitte's counsel twice intimated to the jury that Chevron had hidden documents without an adequate basis to

29. *Chevron Chem.*, 501 N.W.2d at 17.

30. *See id.*

31. *See id.*

32. *See id.*

33. *Id.* at 17–18; *see also* Aspen, *supra* note 2, at 451 (Standards, Lawyers' Duties to the Court ¶¶ 4, 5).

34. *See Chevron Chem.*, 501 N.W.2d at 18; *see also* Aspen, *supra* note 2, at 451 (Standards, Lawyers' Duties to the Court ¶ 5).

35. *See Chevron Chem.*, 501 N.W.2d at 18. The court explained the redaction to the jury. *See id.*

make such an accusation.³⁶

In sum, Deloitte's counsel obstructed ordinary discovery, violated the court's sequestration order, misinformed opposing counsel about the availability of a witness, referred to imaginary evidence and privileged information, and leveled unfounded accusations at opposing counsel. I think it is beyond dispute that such behavior is not within the realm of legitimate advocacy, however zealous. The Wisconsin Supreme Court agreed. With a citation to the Committee's Interim Report, it stated: "There is a perception both inside and outside the legal community that civility, candor, and professionalism are on the decline in the legal profession and that unethical, win-at-all-costs, scorched-earth tactics are on the rise."³⁷ The court concluded that the trial court's "entry of judgment as a sanction for Deloitte's unprofessional, aggravated, persistent, and contemptuous disregard of the orders of the [trial court] is appropriate."³⁸

Another illustrative decision is that of the Iowa Supreme Court in *Vlotho v. Hardin County*.³⁹ Hardin County fired Vlotho, its engineer, after he ordered his crews to tear down a historic bridge that he and the county had promised to preserve as a condition to receiving state and federal funds for another bridge.⁴⁰ Vlotho sued for wrongful termination and defamation, and the county counterclaimed for damages resulting from the bridge's destruction.⁴¹ Vlotho's response to the counterclaim was due on December 27, 1990, but for reasons not disclosed by the decision, Vlotho did not respond until January 4, 1991, and "[i]n the meantime, the county had the clerk [of court] enter a default on the counterclaim."⁴²

The court held that under Iowa's *Rules of Civil Procedure*, the court clerk clearly had no power to enter a counterclaim default, but it also noted that the default had no effect on the outcome of the suit since the trial judge did allow Vlotho to proceed without admitting

36. See *Chevron Chem.*, 501 N.W.2d at 18; see also Aspen, *supra* note 2, at 449 (Standards, Lawyers' Duties to Other Counsel ¶ 4). The court "admonished" Deloitte's counsel each time. See *Chevron Chem.*, 501 N.W.2d at 18.

37. *Chevron Chem.*, 501 N.W.2d at 19-20 (citing Aspen, *supra* note 5).

38. *Id.* at 22.

39. 509 N.W.2d 350 (Iowa 1993).

40. See *id.* at 351.

41. See *id.* at 351-52.

42. *Id.* at 352.

the allegations of the counterclaim.⁴³ “However, [the court felt] compelled to address the issue because even at this late date the county is still insisting that the default was good.”⁴⁴ It continued:

We would be remiss in our duty to the public, bench, and bar if we were to ignore the manner in which this default was taken. Standards of civility exist in the practice, not as a matter of convenience to the profession, but as a matter of fairness and simple justice. These standards condemn unfair tactics, such as “blind siding” counsel of record with an *ex parte* application for default. Departure from the standards of civility are obvious examples of ineffective and counterproductive advocacy. Such departures are condemned because they severely distract from the quality of justice Iowa citizens have a right to expect when they come to court.⁴⁵

The court then referred to the Standards, which state in relevant part: “We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.”⁴⁶

I do not, of course, suggest that the county should have ignored Vlotho's violation of the counterclaim deadline.⁴⁷ Nor do I understand the Iowa Supreme Court as so suggesting; its opinion states quite clearly that Vlotho's response was late.⁴⁸ But the county handled the situation in an underhanded way; it contacted the court clerk *ex parte* and had the clerk enter an unlawful order.⁴⁹ If the

43. *See id.*

44. *Id.*

45. *Vlotho*, 509 N.W.2d at 352–53.

46. *Id.* at 353 (quoting Marvin E. Aspen, *The Judiciary — New Issues and New Visions*, 40 FED. B. NEWS & J. 496, 499 (1993) (describing the Standards)); *see also* Aspen, *supra* note 2, at 449, 450 (Standards, Lawyers' Duties to Other Counsel ¶¶ 12, 18).

47. *See supra* note 20; *see also* *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996).

We live in a world of deadlines. If we're late for the start of the game or movie, or late for the departure of the plane or train, things go forward without us. The practice of law is no exception. A good judge sets deadlines, and the judge has a right to assume that deadlines will be honored. The flow of cases through a busy . . . court is aided, not hindered, by adherence to deadlines.

Id.

48. *See Vlotho*, 509 N.W.2d at 352.

49. Interestingly, one of the county's attorneys refused to have anything to do with these tactics.

[W]e need to mention that attorney John P. Whitesell . . . came into the case after the default had been entered and after the district court had refused to

county had proceeded properly, it would have asked the judge to enter the default pursuant to an adversarial proceeding. Vlotho would have had the opportunity to be heard (and perhaps to file a motion for extension of time or for leave to file *instanter* with an explanation for the delay), and a great deal of needless appellate litigation could have been avoided. All parties, and the courts, would have benefitted had the county acted with common courtesy.

As a final example, we look to *Castillo v. St. Paul Fire & Marine Insurance Co.*⁵⁰ Dr. Castillo's attorney engaged in obstructive and unpleasant behavior during Dr. Castillo's deposition, including the use of untimely and meritless objections; Dr. Castillo, for his part, was "very adept at evading the questions, giving unresponsive answers and stonewalling."⁵¹ At an impasse during a second deposition, the defense counsel suggested that the attorneys call the trial judge, who had previously invited them to do so.⁵² When Dr. Castillo's attorney did not respond, the defense counsel indicated that he would place the call.⁵³ This led to the following exchange:

[Dr. Castillo's attorney]: I would caution you not to use any telephones in this office unless you are invited to do so, counsel.

[Defense counsel]: You're telling me I can't use your telephones?

[Dr. Castillo's attorney]: You can write your threatening letters to me. But, you step outside this room and touch the telephone, and I'll take care of that in the way one does who has possessory rights.⁵⁴

I hope that it is clear that this conduct falls decidedly outside the realm of legitimate zealous advocacy.

The three-judge district court panel found that these remarks

set it aside. Whitesell disavows any participation in securing the default and any participation in that part of the county's brief urging this court to uphold the default.

Id. Bravo, Mr. Whitesell.

50. 828 F. Supp. 594 (C.D. Ill. 1992). This opinion is a disciplinary decision against an attorney for his litigation misconduct. In this same case, the Seventh Circuit had previously sustained the trial judge's dismissal of the suit and imposition of sanctions. *See Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991).

51. *Castillo*, 828 F. Supp. at 596-97; *see also* Aspen, *supra* note 2, at 450 (Standards, Lawyers' Duties to Other Counsel ¶¶ 20-22).

52. *See Castillo*, 828 F. Supp. at 597.

53. *See id.*

54. *Id.* (quoting *Castillo*, 938 F.2d at 779).

“could reasonably be interpreted as threatening violence to opposing counsel.”⁵⁵ The panel later quoted the Committee's Interim Report: “Scores of comments zero in on what may be generally called strategic non-compliance in discovery, including obstructing access to documents, burdensome requests for documents, refusals to make reasonable scheduling agreements, one upmanship, gamesmanship, sarcasm as a weapon, a failure to cooperate, and winning by trick or at any cost.”⁵⁶ The opinion continued: “The underlying scenario orchestrated by [Dr. Castillo's attorney] falls on all fours as a classic example and case history of the uncivil conduct deplored by the Interim Report on civility.”⁵⁷

I turn now to see whether the second criticism — that civility codes such as the Standards will spawn satellite litigation and be used as malpractice standards — is borne out by the case law. At the outset I observe that the Standards themselves state that “[t]hese 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.”⁵⁸

Not surprisingly, I was unable to locate a single decision that described a litigant's attempt to use the Standards as the basis for any motion or suit or a judge's use of them to sanction or penalize a litigant or attorney.⁵⁹ Judges have, of course, cited the Standards or

55. *Id.* at 601.

56. *Id.* at 602 (quoting Aspen, *supra* note 5, at 386).

57. *Id.*

58. Aspen, *supra* note 2, at 448 (Standards, Preamble ¶ 6). One commentator fears these ill side effects of civility codes even after acknowledging the Standards' disclaimer and noting that “[s]o far, there have not been many problems with an increase in litigation resulting from these standards.” Browne, *supra* note 25, at 763, 779–80 & n.206.

59. One bankruptcy judge in the Northern District of Illinois wins the award for coming the closest. Noting that he was taking under advisement a motion for sanctions under 28 U.S.C. § 1927 (1994), the judge stated that the

uncivil treatment on both sides has distracted the parties from the issues and was not helpful to the Court. Repetition will be dealt with appropriately, at least by requiring the lawyers to read the District Court civility standards and then file and make public pleadings identifying those parts of it violated by each counsel.

Volpert v. Volpert (*In re Volpert*), Bankr. No. 93 B 13982, 1994 WL 605894, at *5 (Bankr. N.D. Ill. Oct. 26, 1994). It appears that this was a threat to deter future misconduct; however, no subsequent opinion reports that the judge actually required those filings. See Volpert v. Ellis (*In re Volpert*), 177 B.R. 81 (Bankr. N.D. Ill.) (imposing sanctions), *aff'd*, Volpert v. Volpert (*In re Volpert*), 186 B.R. 240 (N.D. Ill. 1995), *aff'd on*

one of the Committee's reports while imposing sanctions or penalties,⁶⁰ but in those decisions it did not appear that the judge's conclusion would have been any different had the Standards never been proposed (28 U.S.C. § 1927 and Federal Rules of Civil Procedure 11 and 37 are the real bases for those holdings, and reference to works on civility serve to underscore the systemic seriousness of the problems described in those opinions). Similarly, to the best of my knowledge, in no case has a judge used the Standards or either of the Committee's reports to assess an attorney's negligence in a malpractice action. Nor am I aware of any disciplinary commission using the Standards to punish an attorney.⁶¹

In fact, a review of the case law turns the second criticism on its head: it indicates that the Standards actually hold out the promise of *decreasing* the (uncivil) use of sanctions.⁶² In *Burks v. City of Philadelphia*,⁶³ for instance, the defendants moved for an award of fees for misconduct by the plaintiff's attorney during discovery and at trial.⁶⁴ The court observed:

In the overwhelming majority of instances when Plaintiffs' counsel engaged with the court on paper and in person, he pushed his self-perceived role of advocate to the near breaking point as respects civility, professionalism, and plain good manners. Despite the many instances when the court expressed its disappointment with Plaintiffs' counsel's performance, [however,] the court cannot conclude that he, in willful bad faith, multiplied the proceedings in this

other grounds, In re Volpert, 110 F.3d 494 (7th Cir. 1997).

60. See, e.g., *Klemka v. Bic Corp.*, Nos. CIV. A. 95-4548, 95-5538, 1996 WL 103830, at *7 (E.D. Pa. Mar. 11, 1996); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 152-53 (D.P.R. 1994); *Kramer v. Tribe*, 156 F.R.D. 96, 110 (D.N.J. 1994); *Van Pilsum v. Iowa State Univ. of Science & Tech.*, 152 F.R.D. 179, 180-81 (S.D. Iowa 1993).

61. To my knowledge, the only reference to the Standards made by a disciplinary commission was in *In re David Scott Grosky*, Ill. Disp. Op. 96 ch. 624 (1997) (also available at 1997 WL 745571 (Ill. Atty. Reg. Disp. Com. Aug. 15, 1997)), in which the commission stated that:

Respondent testified that he was a member of the Illinois State Bar Association's Committee on Professionalism and Civility. This proceeding might not have been necessary if Respondent had paid a little more attention at the committee meetings or paid heed to the Rules of Civility promulgated by Judge Marvin Aspen and the Seventh Circuit Court of Appeals.

1997 WL 745571, at *12.

62. See generally *Aspen*, *supra* note 5, at 409-10 (describing the view that "[s]eeking sanctions has become a trial strategy, much like any other strategy").

63. 974 F. Supp. 475 (E.D. Pa. 1997).

64. See *id.* at 490.

case.⁶⁵

Instead of imposing sanctions, the court “direct[ed] Plaintiffs' counsel's attention to the Final Report . . . on Civility of the Seventh Federal Judicial Circuit” and stated that “[t]he court believes it satisfied its obligation by respectfully and patiently encouraging Plaintiffs' counsel to take a more civil approach to the court and opposing counsel. Plaintiffs' counsel should ask himself whether he is satisfied with his effort in this respect.”⁶⁶ Here, then, is a court using the Committee's work to defuse a sanctions dispute while publicly (i.e., in a published opinion) reminding counsel that his behavior in prosecuting this case was subpar.⁶⁷

As a final example, consider *Chapsky v. Baxter V. Mueller Division, Baxter Healthcare Corp.*⁶⁸ Chapsky sued her former employer for sex and disability discrimination, and during discovery the case degenerated into a battle of sanctions-related motions.⁶⁹ In ruling on those motions, Judge Castillo made civility the focus of his opinion. After quoting the Committee's Final Report, he recounted the unprofessional conduct of the attorneys and wrote:

The court will not condone either party's actions in this case by granting the pending motions. It is clear that the legal misconduct alleged is as much attributable to the parties' failure to get along

65. *Id.* (footnotes omitted).

66. *Id.* at 490 n.19. Judge Bechtle, the author of *Burks*, is not alone in using the shaming technique to redress, at least partially, counsel's uncivil behavior. In another case in the same district, for example, Judge Rendell noted that

[The defendant] is represented in this case by Marshall, Dennehey, Warner, Coleman & Goggin, specifically by Richard Kraemer, Esquire and Michele Tiger Heyman, Esquire. [The defendant's] counsel are very experienced in litigation and know their way around the Federal Rules and the courthouse. They also know that a court order is a directive upon them.

Klemka, 1996 WL 103830, at *3. Judge Rendell, however, also sanctioned the defendant's counsel for their conduct. *See id.* at *4.

67. *See also* *Trust & Inv. Advisors, Inc. v. Hogsett*, 830 F. Supp. 463, 468 & n.6 (S.D. Ind. 1993) (finding no Rule 11 violation and stating that “the court is more concerned, however, with counsels' failure to comply with basic standards of civility towards one another, given the tenor of the briefs filed by each side, and thus directs counsel to review the recently promulgated and adopted Standards of Civility”).

68. No. 93 C 6524, 1994 WL 327348 (N.D. Ill. July 6, 1994).

69. *See id.* at *1 (including a “motion to dismiss for discovery abuse,” “motion to sanction plaintiff's attorney,” “motion for protective order,” “motion for sanctions up to and including dismissal of the lawsuit,” and “motion to strike defendant's motion to dismiss and for sanctions”). This is tragically typical of modern litigation.

on a personal level as it is to a failure to comply with the law. Had the parties familiarized themselves with the law (as it is incumbent upon them to do), they would have known that relevance is rarely an appropriate grounds for instructing a deponent not to answer, private conferences during a deposition between a deponent and his or her attorney for any purpose other than to decide whether to assert a privilege are not permitted, [and] on-the-record witness-coaching through suggestive suggestions are prohibited. . . .⁷⁰

Judge Castillo further admonished the parties that “[t]he court will not consider similar motions in the future absent evidence that attorneys for both sides have conducted themselves professionally . . . [and] abide[d] by the common sense rules of civility in order to promote an orderly and efficient resolution of the pending lawsuit.”⁷¹

Once again, civility principles were used not to add to the crush of sanctions litigation taking over our courts today, but rather to bring a brief moment of calm to the litigation, to remind the parties that their rancorous conduct served no one's interests, and to set the case back on a proper course.⁷² In a civil and professional opinion, the judge acted as many commentators have requested, upholding the “judicial obligation to promote values of the legal profession that advance access to justice and improve its administration.”⁷³

IV. CONCLUSION

It should by now be obvious that the fears of the naysayers have not been borne out by our collective experience under one civility code. Courts have not used the Standards as an excuse to stifle legitimate adversarial behavior, and the Standards have not prompted satellite litigation. Instead, the aspirational Standards have “ma[d]e the bar more conscious of professional responsibility and provide[d] judicial ways to express disapproval of uncivil conduct.”⁷⁴ And while they are not a panacea, I think most practicing lawyers will find them quite worthwhile.

70. *Id.* (citations omitted).

71. *Id.* at *2.

72. *See generally* Aspen, *supra* note 5, at 408–09.

73. Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8 (a message from the President of the American Bar Association).

74. *Id.*; *see also* Aspen, *supra* note 2, at 446.