



Ten Commandments of Civility

I. *THOU SHALT* Know your obligations

You've probably never heard of a New York attorney named Thomas Decea. But if you Googled his name, you'd learn that he became infamous for "objectionable conduct" toward his female opposing counsel who, he said, had a "cute little thing going on" in a deposition. That conduct was bad, but Decea compounded his error when he told the trial court that, while he "aspires to be civil" to the other counsel, he is "not aware of any rule or law which requires civility between counsel."

The supreme court enlightened him by its order, requiring a special referee to oversee future depositions, and giving Decea loads of bad publicity in the process. *Laddcap Value Partners, LP v. Lowenstein Sandler, PC* (N.Y. sup. ct. 2007)

Please don't let this happen to you. Kansas has recommendations to encourage, and rules to require civility, or at least to impose sanctions when it's clearly lacking. Let's start with the KBA's Hallmarks of Professionalism. A Kansas attorney:

1. Shows respect for the legal system through appearance, manner, and conduct at all times;
2. Does not discuss client's affairs socially;
3. Does not blame others for the outcome of a case;
4. Recognizes one's income is secondary to serving the best interest of the client;
5. Communicates with clients, other lawyers, and the judiciary in a timely and complete manner and is prompt for all appointments;
6. Does not engage in ex parte communication with the court;
7. Expedites the resolution of disputes through research, articulation of claims, and clarifying the issues;
8. Abides by commitments regardless of whether they can be enforced in a courtroom;
9. Who as a member of the judiciary should avoid speech and gestures that indicate opinions not germane to the case, require lawyers to be comprehensible in the courtroom, and discuss pending cases only when all parties are present;
10. Is always mindful of the responsibility to foster respect for the role of the lawyer in society; and
11. Demonstrates respect for all persons, regardless of gender, race, or creed.

The ethical rules make these more meaningful:

From the Preamble of the Kansas Rules of Professional Conduct:

A lawyer's responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. *A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.*"

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

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*These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, **while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.***

RULE 4.4 Respect for Rights of Third Persons

a) In representing a client, a lawyer ***shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person***, or use methods of obtaining evidence that violate the legal rights of such a person.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(d) Engage in conduct that is prejudicial to the administration of justice;

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(d) engage in undignified or discourteous conduct degrading to a tribunal.

There are three instructive Kansas cases:

In *State v. Turner*, 217 Kan. 574, 538 P.2d 966 (1975), Lee Turner's actions, arising out of a civil lawsuit tried in Barton County, resulted in a public censure. The underlying suit, *Smith v. Blakey*, 213 Kan. 91, 515 P.2d 1062 resulted in a "large judgment" in favor of Turner's client. On appeal, the supreme court reversed, in part, for "misconduct on the part of plaintiff's counsel, Mr. Turner." An ethics complaint followed, which recommended censure, and the supreme court concurred, finding:

The record in that appeal is replete with language used by Mr. Turner which the Board deemed was improper and abusive of opposing counsel, Mr. James Mize. Many of the offensive utterances were in connection with objections interposed during Mize's examination of witnesses and they culminated in respondent's final summation to the jury.

Excerpts of the final summation were attached as an appendix to the opinion, and it is a sad commentary on the hazards of zealous representation taken too far.

In *re Pyle III*, 289 Kan. 230, 91 P.3d 1222 (2004), the attorney was censured for conduct arising out a premises liability case. Among other things, Pyle wrote a letter to defendant's counsel, John Conderman, advising Conderman that he had two available choices: "He could either settle the lawsuit or have a motion for sanctions and a disciplinary action filed against him. Pyle asserted that by filing an answer to the lawsuit, Conderman was in violation of KRPC 3.1 (2003 Kan. Ct. R. Annot. 418), 3.2 (2003 Kan. Ct. R. Annot. 420), 3.3 (2003 Kan. Ct. R. Annot. 424), and 3.4 (2003 Kan. Ct. R. Annot. 429). Pyle later admitted that this letter was unprofessional and should never have been sent. This admission is tantamount to acknowledging that the letter was used as a tool to gain a better bargaining position in the lawsuit. In our view, there was clear and convincing evidence that Pyle sent a letter that had no substantial purpose other than to embarrass, delay, or burden Conderman. KRPC 4.4. His conduct was obviously prejudicial to the administration of justice."

In the third case, *In re Comfort*, 284 Kan. 183, 159 P.3d 1011 (2007), the court also publicly censured counsel for publishing "to various members of the community an indignant letter he wrote to another attorney" [Swenson] in which the attorney Comfort alleged a conflict of interest. Among those copied on the letter were the Concordia City Manager, City attorney, City Clerk, and five city commissioners. The court found that: "Given all of the above, we adopt the hearing panel's conclusion that, by *publishing* the February 18 letter, Respondent served no substantial purpose other than to embarrass Swenson. This conclusion is supported by the clear weight of the evidence in the record."

A non Kansas illustration: In his 44-page opinion in *GMAC Bank v. HTFC Corp.*, No. CIV.A. 06-5291, 2007 WL 3197153 (E.D. Pa. Nov. 1, 2007), U.S. District Judge Eduardo Robreno found that Aaron Wider, HTFC's CEO, engaged in "hostile, uncivil, and vulgar conduct, which persisted throughout the nearly 12 hours of deposition testimony."

Robreno noted that Wider used the "F word" or variations of it 73 times during the deposition and that the video shows that his lawyer, Joseph Ziccardi of Chicago, at one point "snickered" at his client's conduct.

Ziccardi was also to blame, Robreno found, because he failed to stop his client's tirades and persuade him to answer questions. "The nature of Wider's misconduct was so severe and pervasive, and his violations of the Federal Rules of Civil Procedure so frequent and blatant, that any reasonable attorney representing Wider would have intervened in an effort to curb Wider's misconduct," Robreno wrote.

II. *THOU SHALT* Make Civility the Rule, Not the Exception

Almost 70 percent of lawyers surveyed for “The Pulse of the Legal Profession,” a comprehensive 2006 ABA study surveying the opinions of 800 lawyers, believe that “lawyers have become less civil to each other over time.” <http://www.abanet.org/media/October>, 2007.

So civility is diminishing, and happiness in the profession is sliding as well. *The New York Times* reported last November that lawyers, as well as doctors, find less satisfaction in their work, and quoting an ABA Survey stated “Forty-four percent of lawyers recently surveyed by the ABA said they would not recommend the profession to a young person.”

Every attorney must do his or her share to reverse these trend lines. One professionalism task force described the problem as a “tripartite crisis” – as professionalism declines, the public opinion of lawyers diminishes, which in turn, contributes adversely to lawyer dissatisfaction.

III. *THOU SHALT* Focus on the Little Things

Personal relationships are at the core of what lawyers do. The human connection is what we all share in common. But these days our interpersonal interactions with counsel are fleeting, thanks to e-mail and fax replacing the phone call. So on those rare occasions when we are together in hearings, on the phone or in trial, little things matter. This is true of your adversary, your co-counsel, your partners, and even your teenagers. So let’s be sensitive to habits that are impolite, rude and obnoxious.

Richard Carlson’s book, “Don’t Sweat the Small Stuff . . . and its all small stuff”, has a great illustration of something “small” that can be quite large. In chapter 7 is titled “Don’t Interrupt Others or Finish Their Sentences,” he wrote: “It wasn’t until a few years ago that I realized how often I interrupted others and/or finished their sentences. Shortly thereafter, I also realized how destructive this habit was, not only to the respect and love I received from others but also for the tremendous amount of energy it takes to try to be in two heads at once.

“Once you begin noticing yourself interrupting others, you’ll see that this insidious tendency is nothing more than an innocent habit that has become invisible to you. This is good news because it means that all you really have to do is to begin catching yourself when you forget. Remind yourself (before a conversation begins, if possible) to be patient and wait. Tell yourself to allow the other person to finish speaking before you take your turn. You’ll notice, right away, how much the interaction with the people in your life will improve as a direct result of this simple act.”

IV. *THOU SHALT* Remember the Big Things Too

Many states have “Creeds of Professionalism.” One prevailing theme of these documents is “keeping your word.” Attorneys who keep their promises are the textbook illustration of true professionals.

V. *THOU SHALT* Be Respectful of Others' Schedules

Robert Kraus, in a column titled "Toward Civility in Civil Practice" in *Business Law Today*, May/June 2007, offered this observation:

"Every lawyer handles multiple clients and matters (even in-house lawyers), and while many strive to make each client and matter be "number one" on the list, civility can be enhanced by recognizing that a counterparty's time may be taken up by other equally pressing matters. Asking for unreasonable return times for documents, or scheduling of conferences, only adds to the stress of the transaction. Of course, there is nothing wrong with attempting to expedite matters and 'keep the ball moving,' but such efforts should be framed as requests to, not demands of, the other side."

All of us have examples of this in our practice. What impresses me is when an attorney I don't know, and may never see again, shows courtesies, such as concluding the deposition so as to allow me to make my flight. Such actions separate the ordinary attorney from the extraordinary ones.

VI. *THOU SHALT* Pay Compliments

Extend to your opponent a compliment that has nothing to do with his tie or choice of shoes. We teach our sons and daughters to be good sports, to exchange handshakes after games, and say "good game." Yet rare is the day when we tell our adversary after a big hearing, "you did a great job," or after a deposition of a key witness, "you did a nice job with him/her." Some, I suppose, think this is a sign of weakness or tipping your hand. Nonsense. Sometimes those adversaries down the road will end up working on your side of the case, or sometimes become judges and hear your cases. Consider this story from Topeka attorney Jerry Palmer.

"Many years ago I was involved in an argument of a motion opposed by a very fine lawyer quite my senior. His argument in that district court on a summary judgment matter was the best I had ever heard in any court. It was so fine that even before the ruling, I wrote him a letter. I said that every law student should be required to attend one of his district court level arguments to see the way that it should be done."

As history developed my side won that argument and the ruling was affirmed in the Kansas Supreme Court. But by the time it was appealed he was on the Court of Appeals and I understand Justice Fred Six still keeps that letter."

VII. *THOU SHALT* Find That Civility Will Get You Business

An article about the California State Bar Association's new civility guidelines, said: "Unfortunately, we live in a less civil society today. It is not surprising that incivility has spilled over into the legal profession, and that something needs to be done about it," quoting Jeffrey C. Morgan, Atlanta, Chair of the Trial and Appellate Rules Committee for the, American Bar Association's Intellectual Property Law Section. "Some lawyers approach the practice of law as taking a severe personality disorder and turning it into a pretty good living, says Morgan, only half kidding. More seriously, he notes that 'civility is not just a matter of good manners. It's also good business. Lawyers' and their clients' interests both benefit when lawyers are courteous.'" "Can Litigation Ever Be Civil?" <http://www.abanet.org/litigation/litigationnews/2008/january/0108>

VIII. *THOU SHALT* Not Make Litigation Personal

Opposing parties can loathe each other; attorneys don't have to, however. According to one commentator, "Litigation can become civil when lawyers recognize that they are advocates for their client's rights but not gladiators facing a den of lions seeking to devour them. I have had many cases proceed in a 'civil' manner and managed to stay friends with opposing counsel. When the lawyer personifies his client's claims he or she is likely to become more aggressive and combative in dealing with opposing counsel."

Sports gives us another illustration of this principle.

One would be hard pressed to find a rivalry more fierce than the Red Sox and Yankees. Every year, it seems, they are the two teams competing for a world title. And it would seem that such dislike would extend to the team managers. Yet, it might surprise some that Red Sox manager Terry Francona and former Yankee's manager Joe Torre have nothing remotely resembling their on-field rivalry.

Last fall, after Cleveland eliminated New York, and the Red Sox remained alive, someone asked Sox manager Terry Francona if he had spoken to Joe Torre. As reported by the *The New York Times*: "I have not spoken to him," Francona said. "I left a message for him, and understandably his phone was off. I don't blame him." The Red Sox manager continued, "We've talked quite a few times over the years ... It's not on the field because it's probably not the most popular thing for people to see us hanging out." The reporter asked Francona how Torre had handled the crushing 2004 league championship series defeat, after the Yankees blew a 3-0 lead, allowing the Red Sox to win their first World Series in 86 years. He nodded, approvingly. "After the series, he gave me a very nice phone call, very kind, very warm," Francona continued, "I'll just say that he was very classy and not in the easiest situation because of who we are, the intensity of the rivalry and of that series. It was the kind of gesture that creates a real connection."

Attorneys should be no different.

**IX. *THOU SHALT* Remember That Cases
Have a Beginning and an End**

One of the longest running lawsuits in Kansas involved Koch brothers Bill, Fred, Charles, and David. The newspapers described it as a multi-million-dollar feud involving a boardroom fight over dividends from the family business. In 1988, one of the cases went to trial in a Topeka federal court, with a verdict in favor of brothers Charles and David. Foulston, Siefken represented the prevailing brothers. The media coverage prompted Foulston partner Bob Howard to say, in response to a question as to whether the brotherly feud would end, "I don't have a good answer to that. Even World War II had to end at some point."

Koch's litigation did end, finally, after 20 years, in May 2001, with a formal settlement of all claims.

Cases end, and, when they do, the contentious parties go their way and may never cross paths with their adversary again. Attorneys, however, will see one another again and again.

**X. *THOU SHALT* Find That Civility Reduces Stress,
Improves Quality of Life and Helps You Live Longer**

Incivility adds stress to life. Professionalism decreases stress.

Bottom line Commandment Number Ten: be nice, have more clients, make more money, be happier, live longer. Any questions?

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