



CIVILITY IN THE PROFESSION

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Discussions surrounding civility—or more accurately a lack thereof—in the profession have been a hot topic recently. We have also seen an increased number of cases nationally and before our own Court regarding ethics violations relating to what would be classified as uncivil behavior. In disciplinary cases involving incivility, common violations can include:

- 3.1- Frivolous Claims and Contentions
- 3.3 - Candor Toward the Tribunal
- 3.4 - Fairness to Opposing Party and Counsel
- 4.1 - Truthfulness in Statements to Others
- 8.4 - Maintaining the Integrity of the Profession: Misconduct

Take for instance the case of *In Re Blume*, 309 Kan. 131, 443 P.3d 305 (2019). In this disciplinary case, the Respondent represented G.O. in a lawsuit filed against First National Bank of Omaha (FNBO) regarding the seizure of a portion of a money market account. G.O. and L.O. were married. L.O. was the co-owner of Superior Acquisition Group, Inc. In 2011, FNBO issued Superior a \$300,000 line of credit and two \$800,000 term loans. The loans were cross collateralized and secured by various properties, including a certificate of deposit owned by L.O. and G.O. Both L.O. and G.O. signed an agreement pledging the certificate of deposit as security for the three loans. A month later, L.O. and G.O. transferred the balance of the pledged certificate of deposit to a money market account. FNBO required G.O. and L.O. to execute

another agreement, pledging the money market account as security. In May of 2012, Superior defaulted on the line of credit and the loans. Pursuant to the money market pledge agreement, the FNBO seized \$186,000 from the money market account.

The Respondent filed a petition on behalf of G.O. alleging J.S., a bank representative, emailed L.O. in March 2012, indicating it needed L.O.'s and G.O.'s signatures on the agreement pledging the money market account, which FNBO had either misplaced, or it had fallen through the cracks. L.O. apparently told J.S. that G.O. was not available to sign the agreement, but J.S. instructed L.O. to sign G.O.'s name. FNBO then faxed only the signature page, which L.O. signed for both and returned.

In May 2015, FNBO served its first request for production of documents on G.O. It requested G.O. "produce each and every document evidencing, concerning, or memorializing any and all communications between J.S. and L.O." In June 2015, the Respondent filed G.O.'s response to FNBO's first request for production of documents and identified one email from J.S. to L.O. that would be produced at Respondent's law office.

A few weeks later, FNBO's counsel emailed the Respondent confirming the parties' agreement that FNBO would inspect and copy responsive documents at the Respondent's office. The day before the inspection, however, the Respondent sent an email to FNBO's counsel attaching the documents G.O. had in their possession. The email also mentioned that L.O. was filing for bankruptcy and wanted to hire new counsel, and that many of the documents requested of G.O. related to L.O.'s documents. The Respondent sent over 80 pages of documents but did not include the March 2012 email. FNBO's counsel responded that if the documents included everything in G.O.'s possession, then they would not be appearing to review and copy the documents at Respondent's office.

The March 2012 email was not produced by the Respondent until a deposition of J.S. in August 2015. After FNBO's counsel completed his direct examination of J.S., the Respondent offered the email.

FNBO's counsel objected to the introduction of the email, because it had not been previously produced in response to FNBO's request for production of documents. The Respondent indicated he had not produced the document, because it was L.O.'s document to produce and his responses were not due yet due to the filing of the bankruptcy.

In September 2015, FNBO filed a motion for sanctions based upon the Respondent's failure to timely produce the email. That same day, a status conference was held. The Respondent told the court he did not produce the email, because it was an impeachment document. At the hearing on the matter, the Respondent referred to the email as both an impeachment document and then a document that was L.O.'s and not G.O.'s. The court determined that based upon language in the Petition, which included language directly from the email, Respondent had the document in his possession prior to the deposition. Therefore, the Respondent should have produced it. The court determined the only appropriate sanction was

to dismiss G.O.'s claims. The litigation, however, remained pending because FBNO had previously filed counter and cross claims. The Kansas Supreme Court determined the Respondent's conduct violated KRPC 3.4(d) when he failed to make a reasonably diligent effort to comply with a legally proper discovery request, and the Court found a violation of KRPC 3.3 when the Respondent made a false statement of material fact that he did not have the email until one week prior to a deposition.

In the same matter, during a March 2016 deposition of G.O., the Respondent referred to the videographer at the deposition as a Nazi. From a previous encounter the Respondent knew the videographer had German ancestry. In this same deposition, the Respondent intentionally gestured using his middle finger toward J.S., and an FNBO representative. The court found this conduct to have violated KRPC 4.4. Additionally, the Court determined that the Respondent had also made frivolous filings during the litigation. The Court imposed an indefinite suspension.

The above case can serve as an example of the many ways in which incivility can occur. Often, civility can be described as treating others with dignity, courtesy, respect, politeness, and consideration. Incivility, however, can manifest itself in many ways including rude behavior, harassment, inequitable treatment, and even discrimination.

Rudeness can occur through interruptions, sarcasms or condescension, inappropriate written language, verbal abuse, or belittling language. On the other hand, strategic incivility can include indiscriminate or frivolous use of drafts, pleadings or motions, playing hardball, inflammatory writings, and misrepresenting or stretching the facts or negotiating in bad faith. We also see acts of prejudice occurring within the profession with the use of disparaging comments or microaggressions targeting age, experience, gender, sexual, orientation, race, etc. In fact, in a recent study conducted in 2021 by the Illinois Commission on Professionalism, 54% of lawyers in Illinois reported experiencing incivility within the last six months. Of those who reported experiencing incivility, some experienced inappropriate comments about age, sexist comments, and racially or culturally insensitive comments.

Incivility within the profession can have many negative consequences including affecting the public perception of the lawyers and the justice system. It can lead to not effectively serving our clients if we are too wrapped up in the incivility. It can contribute to a lack of diversity within the profession, especially since lawyers from underrepresented groups often report being on the receiving end of incivility more than their counterparts. Incivility can also contribute to decreased well-being and it most certainly undermines the justice system.

Preamble [5] of our Rules of Professional Conduct points out that, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Additionally, Preamble [9] reminds us that "... issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. 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.” Comment [2] to KRPC 1.2 goes further by telling us that, “a lawyer is not bound, however, to press for every advantage that might be realized for a client...The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”

In 2012, the Kansas Supreme Court formally recognized, through Supreme Administrative Order 2012 SC 82, the Kansas Pillars of Professionalism. The Court recognized that these pillars represent inspirational and aspirational goals which Kansas attorneys should strive to reach. If you remember from your law school ethics class, our Rules of Professional Responsibility are often described as the minimum behavior a lawyer should act in accordance with. The Pillars of Professionalism serve as an excellent reminder of what we should also strive for in our behavior, since we are not only representatives of our clients, but also serve as representatives of the legal system.

The Pillars point out that lawyers, “have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, consideration.” They further highlight that, “acting in such manner helps lawyers preserve the public trust that lawyers guard and protect the role of justice in our society.” Building trust in the profession starts with us as individuals, and trust is ultimately of function of two things: credibility and behavior.

In his book *The Speed of Trust*, author and speaker Stephen M.R. Covey explains that credibility within the trust process comes down to our character and competence. Our competence is displayed through our results and our capabilities, but just as connected is our intent and integrity which we display through our character. Our behavior plays a key role in how we display our character, and that behavior has the potential to trump our competence when we are working to build trust with others if we behave in a negative manner.

When discussing experiences of incivility in the profession, a significant amount of reported incivility comes in the form of communication. In this profession, we are often faced with having what would be classified as crucial conversations. In the book *Crucial Conversations*, these are conversations where the stakes are high, opinions differ, emotions run strong, and there is a risk of negative consequences if the conversation is not handled with care. Sound familiar? My guess is that many of you have crucial conversations daily.

When having difficult or crucial conversations, it is important we take a moment to pause to respond in a thoughtful manner that is courteous and respectful. In his book, *Thinking Fast and Slow*, author Daniel Kahneman points out that in situations where we perceive a threat—even a symbolic threat—we are often responding with our system 1, rather than our system 2, portion of our brains. System 1 is meant for snap judgements and things we don’t have to think about. Our system 2, on the other hand, is slower and more deliberate. When we are faced with a perceived threat, like feeling attacked when having a difficult conversation at work, our system

1 is the automatic response system. Essentially, our fight or flight reactions kick in as the result of the perceived threat. Therefore, it is easier to respond with an insult or snide remark than a thoughtful response. The simple act of pausing and taking a breath, however, can help the system 2 portion of our brain resist the system 1, making it easier to respond in a civil manner, rather than with incivility. So, in intense situations or times of conflict, taking a step back can truly be helpful in regulating your own behavior.

Lawyers who behave with civility have often report higher personal and professional rewards. In addition to the obvious benefits civility has on the profession, there are many tangible benefits that can occur individually from practicing with civility. Increased well-being and career satisfaction are just two of those that have been commonly reported. Additionally, research shows that clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer. Ultimately, your professional reputation is not only impacted by your civility and professionalism within the profession and your colleagues, but also with the public including your current and future clients. Whether you chose to act with civility, can potentially impact your bottom line, your reputation, and your well-being.

Additional Resources and Recommended Readings:

- The Kansas Pillars can be found at <https://ksbar.org/?pg=pillars>.
- [Civility as the Core of the Professionalism](#) by Jayne Reardon from the Essential Qualities of the Professional Lawyer published by the American Bar Association
- [The Speed of Trust](#) by Stephen M.R. Covey
- [Crucial Conversations: Tools for Talking When Stakes are High](#) by Joseph Grenny, Kerry Patterson, Ron McMillian, Al Switzler, and Emily Gregory
- [Thinking Fast and Slow](#) by Daniel Kahneman