PROFESSIONALISM: LITIGATION BY THE MASTERS

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(2.0 Ethics/Professionalism CLEs) These distinguished and nationally known lawyers will explore professionalism based upon their years of practice in court.

Speakers: Fred H. Bartlit Jr., Henry A. (Hank) Meyer III, Randi McGinn, Stephen D. Susman

Pillars of Professionalism

Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.

Admission to practice law in Kansas carries with it not only the ethical requirements found in the *Kansas Rules of Professional Conduct,* but also a duty of professionalism. Law students who aspire to be members of the Kansas bar should also heed these guidelines. Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration. Acting in such a manner helps lawyers preserve the public trust that lawyers guard and protect the role of justice in our society. Lawyers frequently interact with clients, courts, opposing counsel and parties, and the public at large. A lawyer's actions also reflect on the entire legal profession. With those interactions in mind, the following Pillars of Professionalism have been prepared. These Pillars should guide lawyers in striving for professionalism.

With respect to clients:

1. Respect your clients' goals and counsel them about their duties and responsibilities as participants in the legal process. Treat clients with courtesy, respect, and consideration.

2. Be candid with clients about the reasonable expectations of their matter's results and costs.

3. Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.

4. Counsel clients about the risks and benefits of alternatives before making significant decisions. Act promptly to resolve the matter once the relevant facts have been obtained and a course of action determined.

5. Communicate regularly with clients about developments. Keep them informed about developments, both positive and negative.

With respect to courts:

1. Treat judges and court personnel with courtesy, respect, and consideration.

2. Act with candor, honesty, and fairness toward the court.

3. Counsel clients to behave courteously, respectfully, and with consideration toward judges and court personnel.

4. Accept all rulings, favorable or unfavorable, in a manner that demonstrates respect for the court, even if expressing respectful disagreement with a ruling is necessary to preserve a client's rights.

With respect to opposing parties and counsel:

1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.

2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.

3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client's interests.

4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.

5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

With respect to the legal process:

1. Focus on the disputed issues to avoid the assertion of extraneous claims and defenses.

2. Frame discovery requests carefully to elicit only the information pertinent to the issues, and frame discovery responses carefully to provide that which is properly requested.

3. Work with your client, opposing counsel, nonparties, and the court to determine whether the need for requested information is proportional to the cost and difficulty of providing it.

4. Maintain proficiency, not only in the subject matter of the representation, but also in the professional responsibility rules that govern lawyers.

5. Be prepared on substantive, procedural, and ethical issues involved in the representation.

With respect to the profession and the public:

1. Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice.

2. Be mindful that, as members of the legal profession, lawyers have an obligation to the rule of law and to ensure that the benefits and the burdens of the law are applied equally to all persons.

3. Participate in continuing legal education and legal publications to share best practices for dealing ethically and professionally with all participants in the judicial system.

4. Take opportunities to improve the legal system and profession.

5. Give back to the community through pro bono, civic or charitable involvement, mentoring, or other public service.

6. Defend the profession and the judiciary against unfounded and unreasonable attacks and educate others so that such attacks are minimized or eliminated.

7. Be mindful of how technology could result in unanticipated consequences. A lawyer's comments and actions can be broadcast to a large and potentially unanticipated audience.

8. In all your activities, act in a manner which, if publicized, would reflect well on the legal profession.

BRAVE LAWYERS' WORK:
THE PILLARS OF PROFESSIONALISM

by

J. Nick Badgerow

What makes a nation's pillars high
And its foundations strong?
What makes it mighty to defy
The foes that round it throng?
. . .
Brave men who work while others sleep,
Who dare while others fly. . .
They build a nation's pillars deep
And lift them to the sky.

"A Nation's Strength," Ralph Waldo Emerson (1904)

I. INTRODUCTION.

In order to address an alarming decline in the public's *perception* of lawyers and, more importantly, to address the *actual* decline in civility and professionalism among some members of the Bar, the late Kansas Chief Justice Robert E. Davis appointed a Commission on Professionalism in the Bar ("Commission") in 2009.

Over the next two and one-half years, the Commission met recurrently, studied the issues, and conferred through committees and long-distance communication to address Chief Justice Davis' concerns. The Commission found that no regulatory rules or prosecutorial schemes can enforce civility and professionalism. Rather, it concluded that professionalism is an element of the Law as a Profession, a higher calling, and that tenets of professionalism are fundamental principles inherent in the practice of that Profession.

The result of the Commission's two-year effort is the Pillars of Professionalism, which are set forth in the Appendix to this article. While many of the elements of each Pillar resonate with similar provisions in the Kansas Rules of Professional Conduct,[1] they are different: the Pillars are not minimum "Rules" (the violation of which will lead to administrative action placing the lawyer's license in jeopardy). Instead, the Pillars represent higher aspirational goals to which "professionals" should hold themselves – at the risk of public and professional disapprobation, and not necessarily the loss of one's license.

As Justice Sandra Day O'Connor noted (in her dissent in the famous *Shapero* lawyer advertising case), membership in the legal profession

> entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.[2]

Thus, something beyond minimum "ethical" standards – something higher than the "floor" -- is needed. The purpose of this article is to review each of the Pillars of Professionalism, and the foundation for each, with the hope of encouraging knowledge – and self-enforcement by all members of the bar. While some readers may consider the principles set forth in the Pillars to be self-evident, not needing recitation, those readers are not the problem.

II. THE PROBLEM.

The problem is found in the increasing number of lawyers to whom "professionalism" is apparently not self-evident and the alarming decline in civility among those practicing the profession. This is not a new problem

For many years (perhaps, centuries), lawyers and members of the public have decried the decline in professionalism in the bar.[3] More than 150 years ago, no less an observer of the times than Charles Dickens expounded:

> The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.[4]

In 1953, Dean Roscoe Pound observed that lawyers, as professionals, should hold themselves above mere commercialization.[5] In 1995, retired United States Supreme Court Chief Justice Warren Burger noted that, "the organized Bar's failure to maintain high standards of ethics and professionalism certainly warrants criticism."[6] Indeed, there are literally dozens of articles on the topic, written by lawyers and judges.[7] Forty percent of non-lawyer respondents to an ABA survey concluded in 1993 that lawyers are not "honest and ethical."[8]

Legal commentators are not the only critics. Judges cannot help but see the problem, and some cannot restrain themselves from commenting on it in their judicial decisions. When a fellow lawyer (who happens to be serving as a judge), sees conduct which "reflects a serious lack of professionalism and good judgment," one may expect the judge to comment upon it.[9]

> Law is a profession of egos. "Scorpions in a bottle" was a phrase used to describe nine men with a traditional judicial temperament working in a great think tank in Washington -- how much more does the phrase apply to trial lawyers who are accustomed to the mortal engines of trial procedure, the rude throats of opposing counsel, and the pride, pomp and circumstance of glorious litigation.[10]

Further, when observing unprofessionalism, many judges not only comment upon it – they take action.

> The most troublesome aspect of this lawsuit is the lack of professionalism and civility displayed by the lawyers. . . . This case serves as an example of the unfortunate lack of civility in the practice of law which is receiving considerable attention at this time. . . . The adversary process in the judicial arena does not

> require attorneys to be clothed in a suit of armor and fight to the bitter end. The parties, the profession, and the public all lose when the attorneys fail to treat each other with common courtesy.[11]

Moreover, lack of professionalism by one lawyer hurts all lawyers, by bringing the very profession into disrepute.[12] Lawyers should be mindful that unprofessional conduct "will not be tolerated" by the courts, and that sanctions are available to prevent lawyer misconduct "from bringing [the Bar's] image into disrepute."[13]

There should be little need for further commentary to support the proposition that professionalism in the Bar has eroded, and continues to erode.

III. THE DEFINITION.

What is a Profession? A profession – more than mere "employment" – carries with it a sense of "calling,"[14] involving higher education, standards for admission, standards of conduct, and self-regulation.[15] A "profession" is defined by its characteristics, which are:

> the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.[16]

"The practice of law is a profession and its uniqueness distinguishes it from all other endeavors."[17] The Law is not just a business; indeed, its best practices are contrary to those found in "business."

> [T]he rules of professional ethics that attorneys are duty-bound to "observe most scrupu[l]ously are diametrically opposed to the code by which businessmen must live if they are to survive." *State Bar of Arizona v. Arizona Land Title & Trust Co*., 90 Ariz. 76, 366 P.2d 1, 9 (1961). The Rules of Professional Conduct ensure that "[t]he practice of law is not simply an occupation; it is a profession," *Daigle v. City of Portsmouth*, 137 N.H. 572, 576, 630 A.2d 776, 778 (1993), whose members seek "to avoid even the appearance of impropriety and, thus, strive[ ] to live by a higher standard of conduct than a layperson," *Wehringer's Case*, 130 N.H. 707, 719, 547 A.2d 252, 259 (1988) (quotations omitted).[18]

Moreover, lawyers are not interchangeable technicians who apply unbending principles to unassailable facts. Rather, lawyers hold a unique and important historic place in the preservation of law and justice in society.

> Since the time of Edward I (King of England 1272-1307) and continuing for centuries to follow, the legal profession has occupied a unique role in society, in part, by virtue of the important responsibilities entrusted to it. Justice Frankfurter eloquently pronounced the legal profession's responsibilities when writing that

> "[o]ne does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty, and property' are in the professional keeping of lawyers." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247, 77 S.Ct. 752, 760, 1 L.Ed.2d 796 (1957) (Frankfurter, J., concurring). A lawyer's responsibility is preeminently to stand " 'as a shield' [] in defense of right and ward off wrong." *Id.*[19]

What is Professionalism? Within this context, then, the Pillars of Professionalism appropriately begin with their own definition.

> Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.[20]

The *attitude*, the intent, the life-plan to be professional exhibits itself in *actions*. By committing to a professional *attitude*, a professional lawyer commits himself to *act* with civility, respect, fairness, learning, and integrity. The Pillars remind us:

> Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration.[21]

The Pillars' introductory paragraph then explains that each Pillar pertains to a lawyer's relationship with five different constituencies – the lawyer's relationship to Clients,[22] to Courts,[23] to Opposing Parties and Opposing Counsel,[24] to the Legal Process,[25] and to the Legal Profession and the Public.[26] Each of these will be discussed in the remaining sections of this article.

IV. THE LAWYER'S RELATION TO CLIENTS.

The Pillars begin where a lawyer's duties should begin: with his relationship to his clients. Obviously, there is no "practice of law" without clients. Thus, preserving the relationship with clients should be a high priority for every lawyer.

1. Respect your clients' goals and counsel them about their duties and responsibilities as participants in the legal process. Treat clients with courtesy, respect, and consideration.

This resonates with the lawyer's duty under the KRPC to "abide by a client's decisions concerning the lawful objectives of representation."[27]

Additionally, all clients should be treated – and should expect to be treated – with courtesy, respect, and consideration.

> As we stated in *Broderick's Case*, 106 N.H. 562, 215 A.2d 705 (1965), the purpose of disciplinary action is to assure the public and the bar that "the practice of law is a profession which demands that its members adhere to fiduciary

> standards of conduct and that the failure to do so will result in expeditious disciplinary action." *Id*. at 563, 215 A.2d at 705 (quoting *Broderick's Case*, 104 N.H. 175, 179, 181 A.2d 647, 650 (1962)).[28]

2. Be candid with clients about the reasonable expectations of their matter's results and costs.

Clients have a reasonable expectation that their lawyers communicate with them about the representation. Clients do not hand a matter over to a lawyer and thereby abandon it.

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.[29]

This does not mean communicating for the sake of satisfying some esoteric rule; it means really communicating, so that clients can make meaningful decisions about their matters. Many times, the obligation is to provide even more detailed information and analysis. Under the KRPC, "informed consent" is defined as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[30]

As defined, the KRPC cites "informed consent" no less than 20 times.

Further, clients should not be oversold about the value of their case – for example, to encourage the client to engage the lawyer or to prolong a lucrative litigation – nor should they be undersold about the value of their case – e.g., to encourage a quick settlement.

3. Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.

Even where the lawyers are getting along with each other, they should counsel their clients to get along with opposing parties as well. This may mean addressing, and dealing with, the stresses which come from a busy law practice.

> The practice of law is a profession which can be attended by significant stress, and a lawyer's inability to manage such stress can harm the interests of a client. *See, e.g., State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002) (lawyer's failure to take necessary actions on behalf of clients related to untreated depression). Substance abuse is often a factor in attorney discipline cases. *See, State ex rel. Counsel for Dis. v. Hughes*, 268 Neb. 668, 686 N.W.2d 588 (2004); *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).[31]

Thus, not only should lawyers agree to extensions of time where they are reasonable (see Section VI, *infra*), but they should encourage clients to make such concessions and explain the reason.

Further, no one benefits from frivolous claims[32] or delaying tactics,[33] which are also prohibited by the KRPC.

4. Counsel clients about the risks and benefits of alternatives before making significant decisions. Act promptly to resolve the matter once the relevant facts have been obtained and a course of action determined.

As noted in the Comment to Rule 1.4 of the KRPC:

> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[34]

Thus, the lawyer should obtain and provide sufficient information for a client to understand the various alternatives available to him.

> The fact that counsel was in a "pro bono" matter is not an excuse for his failure to make a sufficient investigation of the facts and law to establish probable cause prior to filing any suit. The practice of law is a profession and the fact that an attorney accepts a case without the expectation of receiving a fee does not excuse his conduct.[35]

Then, armed with the client's decision, the lawyer needs to act promptly and diligently.[36] The Comment to Rule 1.3 sharply observes:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.[37]

Kansas lawyers in numerous cases have been disciplined for failing to represent clients diligently and with reasonable promptness.[38]

> Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's right to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.[39]

5. Communicate regularly with clients about developments. Keep them informed about developments, both positive and negative.

Clearly, a lawyer should counsel with his client about the facts, the legal issues, and other considerations affecting the matter entrusted to him.

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.[40]

Clients need to be aware of the risks involved in various avenues for action, as well as alternatives available.

In sum, the lawyer's primary duty is to clients, who should be treated with respect and civility, and who should receive the level and quality of communications which one expects from a professional.

V. THE LAWYER'S RELATION TO COURTS.

Next, the Pillars of Professionalism address professionalism in a lawyer's relationship to courts. Because the legal profession is regulated by the judicial branch, unlike any other profession, its members have a special relationship to the courts before which they practice.

> "'The practice of law is . . . a profession the main purpose of which is to aid in the doing of justice. . . .'" *In re Application of Griffiths*, 162 Conn. 249, 254-55, 294 A.2d 281 (1972), rev'd and remanded, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), quoting *Rosenthal v. State Bar Examining Committee*, 116 Conn. 409, 414, 165 A. 211 (1933). An attorney "as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him." *In re Peck*, 88 Conn. 447, 450, 91 A. 274 (1914). This "unique position as officers and commissioners of the court . . . casts attorneys in a special relationship with the judiciary and subjects them to its discipline." (Citations omitted.) *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 524, 461 A.2d 938 (1983).[41]

Because of the unique relationship between lawyers and the courts which admit them to practice and before which they must practice, it is important for lawyers as professionals to treat those courts with respect.

> To be sure, at the foundation of the rule of law is respect for the law, the courts and judges who administer it. And the attorneys who practice law and appear in the courts are officers of the court.[42]

> As officers of the court, lawyers owe to the court an obligation of respect.

> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.[43]

1. Treat judges and court personnel with courtesy, respect, and consideration.

The KRPC prohibits disrespect to a court. Rule 3.5(d), KRPC provides that, "A lawyer shall not: (d) engage in undignified or discourteous conduct degrading to a tribunal."[44] But dignified, courteous, and civil conduct towards the tribunal from which the lawyer's client hopes for a good result is more than ethical or even professional, it is just common sense. Indeed, "Acts of common courtesy should be encouraged, not discouraged."[45]

> Civility is imperative in the courtroom: it is an essential element of the fair administration of justice. If we as a profession tolerate such an attitude among some of our practitioners, we cannot expect greater respect from the public. Lawyers, as officers of the court, should be problem-solvers, harmonizers, and peacemakers-the healers, not the promoters, of conflict. In the words of Abraham Lincoln: "As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough."'[46] Here we see the necessity for civility.[47]

2. Act with candor, honesty, and fairness toward the court.

Rule 3.3, KPRC, prohibits false statements of fact or law to a court, failure to disclose controlling legal authority, and offering false evidence.[48] Again, the violation of these provisions has resulted in lawyer discipline in a number of cases.[49] And again, to couch the rule in positive terms, lawyers should be candid, honest and fair towards the courts before which they practice.

> Law is a profession which demands trust. Lawyers must be able to rely on each other's word. Courts must take what lawyers say at face value. Clients must be able to rely on the truthfulness of what their lawyers tell them. Otherwise, our system of justice cannot operate. Jarrett's misconduct in lying to Ms. Smith has ramifications well beyond the injury to Ms. Smith's belief in the legal profession. His misconduct further erodes public confidence in the members of the bar and our system of justice.[50]

3. Counsel clients to behave courteously, respectfully, and with consideration toward judges and court personnel.

Because lawyers cannot undertake actions through others that they cannot undertake themselves,[51] lawyers should encourage clients to act with courtesy and respect.[52]

4. Accept all rulings, favorable or unfavorable, in a manner that demonstrates respect for the court, even if expressing respectful disagreement with a ruling is necessary to preserve a client's rights.

Although one may express respectful disagreement with a court's decision – in order to preserve and protect a client's rights – that disagreement should be expressed with the respect which is due to a tribunal.[53] Thus, it is unprofessional for a lawyer openly to express disrespect for a court, including its personnel.

> But "[o]ur legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law." (*People v. Chong* (1999) 76 Cal.App.4th 232, 243 [90 Cal.Rptr.2d 198].) "[I]t is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standard of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney must be an example of lawfulness, not lawlessness." (Ibid.)[54]

In a Kansas ethics case, where the respondent lawyer "shouted profanities at the clerks" of a municipal court and "at the court security officers and the United States Deputy Marshals," and the lawyer "was rude and disruptive" in two courts, the lawyer was disbarred.[55]

> The practice of law is a profession. Lawyers, as officers of the Court, and Judges have a mutual obligation each to the other to be considerate of their respective professional positions.[56]

VI. THE LAWYER'S RELATION TO OPPOSING PARTIES AND OPPOSING COUNSEL.

While even emotional and unrestrained lawyers hesitate to misbehave before a court, more lawyers appear willing to act in an unprofessional manner towards opposing counsel, perhaps being unwilling or unable to restrain themselves, or perhaps suffering from the misguided belief that it makes the lawyer appear strong.

1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.

The practice of law is an honorable profession, a high calling. Thus, it does and should require a high standard of conduct from its members, including standards of competence, civility, and public service. Disrespectful, discourteous, and impolite conduct should be discouraged, and should not be part of any honorable profession.

> "[A]ttorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the legal process." *In re Vincenti*, 114 N.J. 275, 282, 554 A.2d 470 (1989). "Vilification, intimidation, abuse and threats have no place in the legal arsenal." *In re Mezzacca*, 67 N.J. 387, 389-90, 340 A.2d 658 (1975). "An attorney who exhibits the lack of civility, good manners and common courtesy . . . tarnishes the entire image of what the bar stands for." *In re McAlevy*, 69 N.J. 349, 352, 354 A.2d 289 (1976).[57]

In the Kansas case from which this statement was taken, the respondent had sent a letter characterized as "vicious, offensive, and extremely unprofessional," employing "a number of vile and unprintable epithets referring to opposing counsel."[58] The lawyer was suspended indefinitely.[59]

Civility, above all, should be exemplified and encouraged by all thinking professionals. Justice Robert Benham, of the Georgia Supreme Court, took the opportunity to comment on the role and importance of civility in litigation in a criminal case where a defendant claimed his trial

counsel had been "ineffective because he showed respect for and friendship with opposing counsel."[60] Naturally, the court rejected this contention, and Chief Justice Benham – in concurring – took some effort to explain.

> While serving as advocates for their clients, lawyers are not required to abandon notions of civility. Quite the contrary, civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.
>
> Civility is more than good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.[61]

It is important to remain civil even in the face of incivility. A professional should "take the high road" when treated uncivilly, and remain above the fray.

2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.

As discussed above, the prompt resolution of clients' matters is a valuable goal of the professional practitioner. It is also consistent with the proper administration of justice. Thus, failure to respond to communications and inquiries is inimical to that proper administration of justice. In a Kansas disciplinary case, the respondent lawyer caused

> . . . substantial delay in two federal cases by repeatedly failing to respond to motions, by repeatedly failing to comply with court orders, [and] by repeatedly failing to properly communicate with opposing counsel.[62]

As a result of this, and other, conduct, the lawyer was disbarred.[63]

3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client's interests.

Making agreements for extensions of time or other concessions that would likely be granted anyway and/or where no real harm can result to the client's matter, is common courtesy – and an element of the Golden Rule. One certainly cannot foresee and foretell when an agreement for an extension may be required from the opposing counsel.

> When engaged in even the most contentious litigation, attorneys should be ever mindful that the practice of law is a profession and that attorneys are expected to extend professional courtesy to opposing counsel when health problems or other unforeseen events prevent attendance at scheduled proceedings. Moreover,

> parties are expected to contact the opposing party and attempt to resolve discovery disputes amicably prior to seeking sanctions from the court. See Rule 2-431. Once Glassman knew Post was in the hospital, he made no attempt to reschedule the deposition or otherwise informally resolve the matter. Such conduct does not reflect well on the practice of law, and most assuredly should not be rewarded by the grant of a default judgment.[64]

Short and non-repetitive extensions of time to accommodate counsel should be routine, again within the context of protecting the client's substantive rights.

4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.

Clients often feel strongly in their animosity to opposing parties, particularly in litigation. But, as the spokesperson for his client, the lawyer need not take on the mask of that animosity. Indeed, the professional lawyer remains courteous and civil even when confronted with animosity.

> A good attorney is detached from the emotions of the parties. They serve as an objective voice of reason; an independent source of wise counsel. A good attorney understands the conflict, but is never part of the hostilities. A good attorney is above the fray. He or she is careful to never inflame the passions of their client. A good attorney is a peacemaker who resolves disputes, not encourages them.[65]

This also does not mean the lawyer should act in a passive-aggressive manner, for example acting aloof from the dispute, while counseling or encouraging the client's boorish behavior.

> It is no defense that the individual participant's conduct, when isolated from that of the group as a whole, would not violate the court's order. The foregoing applies with equal weight to those who direct, control, plan and supervise activity in defiance of the court order. The true instigators may not be absolved by maintaining the appearance of remaining above the fray. One who conspires to induce contemptuous conduct by others which does in fact occur, may be equally guilty with those who actually engage in that conduct.[66]

Lawyers should remain professional, and prevent client animosity from infecting attorney relations.

> And do as adversaries do in law,
> Strive mightily, but eat and drink as friends.[67]

5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

"Dilatory practices bring the administration of justice into disrepute."[68] As professionals, lawyers should work to resolve their clients' matters promptly, and try to work out disputes without having to file motions.[69]

VII. THE LAWYER'S RELATION TO THE LEGAL PROCESS.

1. Focus on the disputed issues to avoid the assertion of extraneous claims and defenses.

Lawyers should avoid the assertion of frivolous or extraneous claims or defenses, and should assert only those claims or defenses which are meritorious.[70] Again, this is not only professional, it is ethical. For example, where a Kansas lawyer "in six federal court cases and two state court cases," filed "frivolous lawsuits, disobey[ed] court orders, fail[ed] to comply with court orders, and fail[ed] to dismiss nonmeritorious cases," the lawyer was placed on probation for two years.[71]

2. Frame discovery requests carefully to elicit only the information pertinent to the issues, and frame discovery responses carefully to provide that which is properly requested.

Where discovery seeks information beyond what is relevant, and ventures into the purely personal and private, such discovery "could encourage abusive inquiries designed to harass, embarrass, and discourage plaintiffs from pursuing their claims."[72] Again, the KRPC speaks to this issue, by prohibiting "a frivolous discovery request."[73]

3. Work with your client, opposing counsel, nonparties, and the court to determine whether the need for requested information is proportional to the cost and difficulty of providing it.

It is no secret that the cost of discovery has escalated exponentially.[74] Counsel should attempt to balance the perceived benefit to be derived from discovery requests against the relative cost of responding to those requests.[75] This principle is consistent with the civil discovery rules. For example, the Federal Rules and the Kansas state court rules require the court to limit discovery if it finds that

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[76]

4. *Maintain proficiency, not only in the subject matter of the representation, but also in the professional responsibility rules that govern lawyers.*

It is only common sense that a true professional only practices in the subject areas where he is competent to practice and keeps up with changes in the law in those areas, as well as in the rules of professional conduct.

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[77]

This requires continuing study and education.[78]

5. ***Be prepared on substantive, procedural, and ethical issues involved in the representation.***

Of course, legal knowledge is not enough: one must know the issues and be prepared to present the client's matter or otherwise handle the representation appropriately. First, the issues have to be identified.

> Perhaps the most fundamental legal skill consists of determining what kind of legal problems the situation may involve, a skill that necessarily transcends any particular specialized knowledge.[79]

Then, the matter must be prepared: the lawyer must do the work necessary to accomplish the client's ends and goals.

> Competent handling of a matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.[80]

VIII. THE LAWYER'S RELATION TO THE PROFESSION AND TO THE PUBLIC.

1. Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice.

First, the bar is a self-regulating profession: one whose members take on the responsibility and obligation to report ethical violations by themselves and other members,[81] and to assist in enforcing the ethical rules.[82]

> Self-regulation also helps maintain the legal profession's independence from government dominion. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.
>
> The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the

> Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.[83]

Second, recognizing the profession to be self-regulating and self-policing, lawyers should conduct themselves in a manner that does not reflect adversely upon their fitness to practice, nor bring disrepute to the profession as a whole.[84]

> 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 professional affairs.[85]

2. Be mindful that, as members of the legal profession, lawyers have an obligation to the rule of law and to ensure that the benefits and the burdens of the law are applied equally to all persons.

Lawyers have accepted the high calling to practice this profession. It is up to those most familiar with the rule of law to uphold the rule of law. Further, the law plays no favorites. Justice is blind to color, creed, religion or gender.[86]

> While it is the lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.[87]

Lawyers should also participate actively and willingly in *pro bono* legal service. Rule 6.1, KRPC, provides:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups and organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[88]

And the Comments to Rule 6.1 observe that, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged."[89]

3. Participate in continuing legal education and legal publications to share best practices for dealing ethically and professionally with all participants in the judicial system.

As stated in the Preamble to the KRPC, lawyers should "work to strengthen legal education."[90] The quality of legal education programs and legal publications can only improve if more lawyers offer their time and knowledge to teach and write. Diversity of point of view, experience, and expertise in CLE programs and legal articles will help to expand the legal knowledge and ability of those who participate in those programs and read those articles.

4. Take opportunities to improve the legal system and profession.

Certainly, the practice of law is a profession which, in the public interest, must be jealously guarded.[91]

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of services rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.[92]

If lawyers do not take responsibility, and take the lead in improving the rule of law, no one else will take that responsibility. Further, if the legal profession does not police itself properly, someone else will try to take on that task.

5. Be mindful of how technology could result in unanticipated consequences. A lawyer's comments and actions can be broadcast to a large and potentially unanticipated audience.

Numerous are the stories of confidential e-mails which have been misdirected or inadvertently sent to the wrong addressee. This includes a reply to "all," when a response was intended for one recipient; a message sent to a group, when delivery was intended to one member of that group; delivery to the wrong addressee, where address completion software inserted the recipient's address, when a different recipient was intended; or just sending an impolite or emotional e-mail that would better have been deleted before delivery.

In one highly-publicized incident, a young lawyer inadvertently sent a sexually explicit e-mail to thirty members of his firm, resulting in his suspension from employment.[93] In another instance, a summer associate inadvertently sent an e-mail to forty lawyers in his group, bragging about doing no work.[94] And in a third case, a press secretary inadvertently attached a confidential salary schedule to an e-mailed press-release.[95]

Care should be taken to try not to make mistakes of this nature.[96]

6. In all your activities, act in a manner which, if publicized, would reflect well on the legal profession.

It is important for lawyers to set the example, not only for other lawyers, but so the public can recognize the practice of law for the profession – the high calling – that it is.

> Those who hold themselves out as lawyers should realize that they help shape and mold public opinion as to the role of the law and their role as lawyers. The law sets standards for society and lawyers serve as problem solvers when conflicts arise. To fulfil their responsibility as problem-solvers, lawyers must exhibit a high degree of respect for each other, for the court system, and for the public. By doing so, lawyers help to enhance respect for and trust in our legal system. These

> notions of respect and trust are critical to the proper functioning of the legal process.[97]

IX. CONCLUSION.

As members of a profession, lawyers should aspire to the promise of Justice Oliver Wendell Holmes, speaking proudly of the legal profession, that, "Of all secular professions this has the highest standards."[98] Along with the KRPC, the Pillars of Professionalism provide a structure for professional attitudes – and action.

> 'Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned art as a common calling in the spirit of public service-no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life men must bear this in mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided.' 5 Pound, Jurisprudence 676-677 (1959). The legal profession exists primarily for the advancement of justice. 'The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law.' Pound, The Lawyer From Antiquity to Modern Times 10 (1953).[99]

The privilege of practicing law carries with it obligations and duties, not only to think professionally, but also to exemplify professionalism in every act and deed.

> To be a member of the Bar and an officer of the court is a high calling which bestows unique opportunities on one so endowed. However, there is an obligation which corresponds to the privilege of being a member of the Bar and it is best expressed in a passage from the book of our most fundamental laws: ". . . For unto whomsoever is much given, of him shall be much required: and to whom men have committed much, of him they will ask the more."[100]

If lawyers commit to *thinking* professionally and *acting* professionally, the practice of law will be improved, thus improving the profession. With that improvement in the Bar and the practice of law, the perception of the Bar and its practitioners from those outside the Bar will naturally improve.

Built on the Law, foundation strong,
The Pillars of Profession stand.
The Law protects against the Wrong,
And every storm it can withstand.

Lawyers answer Law's high calling,
Their oath and pledge do they renew.
Strong support keeps Law from falling,
These Pillars stand up straight and true.[101]

J. Nick Badgerow is the partner-in-charge of the Overland Park, Kansas office of Spencer Fane Britt & Browne LLP. He is a trial lawyer specializing in the areas of construction, employment and professional responsibility. Nick is a member of the Kansas State Board of Discipline for Attorneys; member, Kansas Judicial Council; chairman, Judicial Council Civil Code Committee; co-chair, Judicial Council Antitrust Committee; chairman, Kansas Ethics Advisory Committee; and chairman, Johnson County (Kansas) Ethics & Grievance Committee. Nick is also a member of the Kansas Commission on Professionalism, which wrote the Pillars of Professionalism. He is co-author and co-editor of the KBA Ethics Handbook, and a co-author of the KBA Employment Law Handbook.

[1] Kansas Rules of Professional Conduct ("KRPC"), Rule 226, Rules of the Kansas Supreme Court.
[2] *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 488-89 (1988) (O'ConnorJ., dissenting).
[3] See, e.g., Warren E. Burger, The Decline of Professionalism, 63 Fordham L. Rev. 949 (1995), available on-line at http://ir.lawnet.fordham.edu/flr/vol63/iss4/2 ("Burger")(last checked August 20, 2012).
[4] Charles Dickens, Bleak House (Penguin Books 1971), at 603-04 (1853).
[5] Roscoe Pound, The Lawyer from Antiquity to Modern Times 12, n. 3 (1953).
[6] Burger, at p. 950.
[7] See, e.g. Diacoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 American University Law Review 1337 (1997), at 1344. At footnotes 15 - 17, Professor Diacoff cites no fewer than 19 articles and commentaries decrying the erosion of professionalism in the Bar.
[8] Gary A. Hengstler, *Vox Populi*, A.B.A. J. Sept. 1993, at 62.
[9] *Weissman v. Quail Lodge, Inc*., 179 F.3d 1194, 1196 (9th Cir. 1999).
[10] *Magana v. Charlies Foods, Inc*., G041153, 2010 WL 1390865, *5 (Cal. App. 2010).
[11] *Miller v. Bittner*, 985 F.2d 935, 941 (8th Cir.1993)(affirming award of Rule 11 sanctions).
[12] *Attorney Griev. Comm'n v. Rose*, 391 Md. 101, 111, 892 A.2d 469, 475 (2006) (" conduct which tends to bring the legal profession into disrepute, . . . is, . . . prejudicial to the administration of justice").
[13] *Attorney Grievance Comm'n v. Culver*, 371 Md. 265, 277, 808 A.2d 1251, 1258 (2002) (quoting *Attorney Grievance Comm'n v. Garfield*, 369 Md. 85, 98, 797 A.2d 757, 764 (2002)).
[14] *Master v. Chalko*, 794 N.E.2d 144, 148,124 Ohio Misc.2d 46 (Ohio Comm. 1999)("a high calling"); *Disciplinary Counsel v. Bein*, 822 N.E.2d 358, 105 Ohio St.3d 62 (Ohio 2004)(same).
[15] *In re Unification of the New Hampshire Bar*, 109 N.H. 260, 264, 248 A.2d 709, 711 (1968).
[16] *Lincoln Rochester Trust Co. v. Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480, 483 (1974).
[17] *Sifers v. Horen*, 385 Mich. 195, 188 N.W.2d 623, 628 (1971).
[18] *Averill v. Cox*, 145 N.H. 328, 333, 761 A.2d 1083 (2000).
[19] *Ippolito v. State of Florida*, 824 F.Supp. 1562, 1566 (M.D. Fla. 1993).
[20] Pillars of Professionalism ("Pillars"), preamble.
[21] *Id*.
[22] See Section IV, *infra*.
[23] See Section V, *infra*.
[24] See Section VI, *infra*.
[25] See Section VII, *infra*.
[26] See Section VIII, *infra*.
[27] Rule 1.2(a), KRPC.
[28] *In re Carroll*, 127 N.H. 390, 393, 503 A.2d 750 (1985).
[29] Rule 1.4(a), KRPC.
[30] Rule 1.0, KRPC, "Definitions."
[31] *In re Application of Hartmann*, 270 Neb. 628, 705 N.W.2d 443, 640 (2005).
[32] Rule 3.1, KRPC.
[33] Rule 3.2, KRPC ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").
[34] Rule 1.4(b), KRPC.
[35] *Prewitt v. Sexton*, 777 S.W.2d 891, 899 (Ky. 1989).
[36] See, Rule 1.3, KRPC. See also, Rule 3.2, KRPC.
[37] *Id*., Comment.
[38] See, e.g. *In re Johanning*, 279 Kan. 950, 111 P.3d 1061 (2005); *In re Rumsey*, 276 Kan. 65, 71 P.3d 1150 (2003); *In re Rathbun*, 280 Kan. 672, 124 P.3d 1 (2005).
[39] Rule 3.2, KRPC, Official Comment [1].
[40] Rule 1.4, KRPC, Official Comment.
[41] *Statewide Grievance Committee v. Rozbicki*, 211 Conn. 232, 558 A.2d 986 (1989).
[42] *Attorney Grievance Com'n of Maryland v. Link*, 380 Md. 405, 844 A.2d 1197, 1199 (2004), citing *In the Matter of McAlevy*, 69 N.J. 349, 354 A.2d 289, 290-91 (1976).
[43] KRPC, Preamble, ¶[5].

[44] Rule 3.5(d), KRPC.
[45] *State v. Richard*, 252 Kan. 872, 878, 850 P.2d 844 (1993)(no judicial misconduct where judge handed box of tissues to a crying witness).
[46] Citing, Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), in The Life and Writings of Abraham Lincoln 327-28 (Phillip Van Doren Stern ed., 1940).
[47] Burger, supra, at p. 953.
[48] Rule 3.3(a), (b), and (c).
[49] See, e.g. *In re Daugherty*, 285 Kan. 1143, 180 P.3d 536 (2008); *In re Franco*, 275 Kan. 571, 66 P.3d 805 (2003); *Matter of Brantley*, 260 Kan. 605, 920 P.2d 433 (1996).
[50] *Kentucky Bar Ass'n v. Jarrett*, 997 S.W.2d 456, 458 (Ky. 1999).
[51] Rule 8.4(a), KRPC.
[52] See Section IV.3., *supra*.
[53] Rule 3.5(d), KRPC.
[54] *People v. Pigage*, 112 Cal.App.4th 1359, 1374 (2003).
[55] *In re Romious*, 240 P.3d 942, 952 (Kan. 2010).
[56] *In re Thomson*, 666 So.2d 464, 476 (Miss. 1995).
[57] *In re Gershater*, 270 Kan. 620, 629 17 P.3d 929 (2001).
[58] *Id*., at 622.
[59] *Id*., at 632.
[60] *Butts v. State*, 273 Ga. 760, 546 S.E.2d 472 (2001).
[61] *Id*., at 485 (Benham, C.J., concurring).
[62] *In re Dennis*, 286 Kan. 708, 188 P.3d 1, 20 (2008).
[63] *Id.,* at 23.
[64] *Scully v. Tauber*, 138 Md.App. 423, 771 A.2d 550, 557-58 (2001).
[65] Ralph Losey, "Litigation, e-Discovery, e-Motions, and the Triune Brain," found on-line at http://e-discoveryteam.com/2012/05/27/litigation-e-discovery-e-motions-and-the-triune-brain/ (last checked August 20, 2012).
[66] *State ex rel. Girard v. Percich*, 557 S.W.2d 25, 37 (Mo. App. 1977).
[67] William Shakespeare, *The Taming of The Shrew*, Act 1, Scene 2, 276–277.
[68] Rule 3.2, KRPC, Official Comment [1].
[69] This is consistent with the "Golden Rule" required in most courts as a prerequisite to filing motions to compel discovery. See e.g., K.S.A. 60-237(a) and Rule 37(a)(1), Federal Rules of Civil Procedure.
[70] Rule 3.1, KRPC.
[71] *In re Boone*, 269 Kan. 484, 7 P.3d 270 (2000).
[72] *Williams v. District Court*, 866 P.2d 908, 915 (Colo. 1993), citing *Priest v. Rotary*, 98 F.R.D. 755, 758-59 (N.D. Cal. 1983).
[73] Rule 3.4(d), KRPC.
[74] See, e.g., Lawyers for Civil Justice, *et al*., *Litigation Cost Survey of Major Companies*, presented to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States (May 10-11, 2010), available on-line at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (last checked August 20, 2012).
[75] See, e.g. Douglas L. Rogers, A Search for Balance in the Discovery of ESI Since December 1, 2006, 14 Richmond Journal of Law & Technology 8, 81, available at http://jolt.richmond.edu/v.14i3/article8.pdf (last checked August 20, 2012).
[76] Rule 26(b)(2)(C)(iii), Federal Rules of Civil Procedure. See also, K.S.A. 60-226(b)(2)(A)(iii).
[77] Rule 1.1, KRPC.
[78] *Id*., Official Comment [6].
[79] Rule 1.1, KRPC, Official Comment [2].
[80] *Id*., Official Comment [5].
[81] Rule 8.3, KRPC and Rule 207(c), Rules of the Kansas Supreme Court.
[82] Rule 207(a), Rules of the Kansas Supreme Court.
[83] KRPC, Preamble: A Lawyer's Responsibilities.
[84] See, Rule 8.4(g), KRPC ("It is professional misconduct for a lawyer to: . . . (g) engage in any other conduct that reflects adversely on the lawyer's fitness to practice law.").

[85] KRPC, Preamble, ¶[5].
[86] *Gentry v. State*, 625 N.E.2d 1268, 1276 (Ind. App. 1993)("The State must steadfastly remember that justice is blind and equally available to all, without regard to race, color, or creed.").
[87] KRPC, Preamble, ¶[5].
[88] Rule 6.1, KRPC.
[89] *Id*., Official Comment [3].
[90] KRPC, Preamble, ¶[6].
[91] *Professional Adjusters, Inc. v. Tandon*, 433 N.E.2d 779, 786 (Ind. 1982).
[92] KRPC, Preamble, ¶[6].
[93] "Another Associate Accidentally Sends Sexually Explicit E-Mail," New York Lawyer, August 19, 2003 http://www.nylawyer.com/news/03/08/081903m.html, reported in Badgerow, *infra*, at footnote 1.
[94] "Elite Firm Summer Associate Sends E-Mail Boasting Of Laziness to Partners," New York Lawyer, June 20, 2003 http://www.nylawyer.com/news/03/06/062003b.html, reported in Badgerow, *infra*, at footnote 2.
[95] "Gov err-mail: Press Gets Salary Memo." July 22, 2003, New York Daily News, http://www.nydailynews.com/news/story/102824p-93073c.html, reported in Badgerow, *infra*, at footnote 3.
[96] See, Badgerow, "Ethics and E-Mail: Sender Beware," 73 Kansas Bar Journal 9 (January, 2004).
[97] *Butts v. State, supra*, at 485.
[98] Fred R. Shapiro, Battle of the Quotes, A.B.A. J., Dec. 1993, at 62, 62 (quoting Oliver Wendell Holmes, Jr., "The Law," Address at the Suffolk Bar Association Dinner (Feb. 5, 1885)).
[99] *Weiner v. Fulton County*, 113 Ga.App. 343, 148 S.E.2d 143, 147-48 (1966).
[100] *The Florida Bar v. McCain*, 361 So.2d 700 (Fla. 1978)(Sundberg, J., concurring), quoting Holy Bible, Luke 12:48 (King James Version).
[101] Vic Benelli, *Profession's Pillars* (with permission from the author).

TRIAL AGREEMENTS*

1. The parties will ask the court to dispense with the requirement of a final Pretrial Order and instead exchange witness and exhibit lists, deposition designations, and proposed jury instructions as agreed to below. The parties will also ask the Court to permit whatever they have agreed to herein.

2. Real live witness lists will be exchanged on _____. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial

3. The length of the trial (excluding openings and closings) will be ___ days and that time will be split equally. Each party will get ___ to open and ___ to close.

4. The list of witnesses to be called by deposition will be exchanged 48 hours before the trial commences. Actual deposition designations will be provided 48 hours before a party intends to read or play a deposition. The opposition then has 24 hours to object and counter-designate, and the originally designating party has 4 hours to object to any counter-designations. The deposition may be used as soon as the Court rules on the objections.

5. Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed.

6. We will agree on the in limine orders contained in Exh. A plus a briefing schedule for contested limine motions

7. We will exchange lists of exhibits (with each exhibit entitled simply Trial Exhibit and numbered sequentially as in the deposition transcripts) on ___ that will be limited to exhibits we in good faith intend to show to the jury during trial. The deadlines for exchanging exhibit objections and a time for lead counsel to meet and confer on them are as follows: _____

8. All un-objected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial

9. All exhibits produced by a party are presumed to be authentic. All exhibits produced by the following third-parties are also presumed to be authentic:

_____If

nevertheless an authenticity objection is made pursuant to para. 7 above, the party seeking to admit the exhibit is entitled to take expedited telephonic depositions to authenticate the exhibit before or during trial.

10. The parties will ask the court to administer a questionnaire to the venire and to provide the completed questionnaires to counsel as early as possible. The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the final pretrial conference

11. An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents

12. The jurors can take notes and can use their own notes during deliberations. When each witness takes the stand, the party calling that witness will provide each juror with a lined sheet of looseleaf paper with a photo and the name and title of the witness, suitable for taking notes on and placing in the juror notebook.

13. Jurors can direct, through the judge, questions to each witness before he or she leaves the stand. Attached as Exhibit B is a protocol of doing this.

14. The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The

parties shall further notify opposing parties 36 hours before any particular witness is called live

15. Demonstratives (i.e., charts, power point slides, models and the like, that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.

16. The parties will (a) exchange proposed preliminary and final jury instructions on _____ and ____, respectively; (b) ask the Court to give preliminary substantive instructions; and (c) try to reach agreement on preliminary instructions before the trial begins and on final instructions before the court sets a charge conference. If a pattern instruction is available, it will be used.

17. The parties will ask the court to instruct the jury before rather than after final arguments.

18. The parties will ask the Court to provide each juror with a copy of the instructions and verdict form.

19. The parties will jointly request real-time reporting

20. The parties will share any courtroom audio-visual equipment and will provide each other

electronic versions of whatever they display immediately after the display

21. Each side will be allowed ____ minutes of interim argument that can be used in increments no greater than ___ minutes when no witness is on the stand.

*These Trial Agreements have been suggested by Stephen D. Susman of Susman Godfrey and Paul C. Sanders of Cravath, Swaine & Moore

EXHIBIT A

AGREED MOTION IN LIMINE

1. Privileged communications.

The intent or understanding of any parties' counsel, and the content of any attorney-client privileged or confidential communications, or lack thereof. FED. R. EVID. 501; TEX. R. EVID. 503. (Oral or written communications between any third party and counsel for one of the parties, which are non-privileged and non-confidential, may be inquired into, subject to objection on relevancy or other ground.)

Counsel shall refrain from asking questions that may tend to require an attorney or witness to divulge a client confidential or privileged communication, or which may tend to require an attorney or witness to have to object to answering on such grounds. FED. R. EVID. 403.

2. Questions about trial preparation.

Questions about how counsel prepared witnesses who they represent for their trial testimony.

3. References to the filing of a motion in limine.

Reference to the filing of any Motion in Limine by any party because such references are inherently prejudicial in that they suggest or infer that a party sought to prohibit proof or that the Court has excluded proof of matters damaging to a party's case. FED. R. EVID. 401-403.

4. Exclusion of evidence.

Any reference in any manner by counsel or any witness that suggests, by argument or otherwise, that a party sought to exclude from evidence or proof any matters bearing on the issues in this cause or the rights of the parties to this suit. FED. R. EVID. 401-403.

5. Statement of any venire person.

After the close of voir dire, reference to the statement of any venire person. FED. R. EVID. 401-403.

6. Questioning attorneys.

Any question by a witness, in front of the jury, directed to the adverse party's counsel. FED. R. EVID. 401-403.

7. Probable testimony of unavailable witnesses who will not be called by deposition.

That the probable testimony of a witness, who is absent, unavailable or not called to testify in the cause would be of a certain nature. FED. R. EVID. 401-403.

8. Any reference to any exhibit not being offered by any party.

Any reference to any exhibit not being offered by any party. FED. R. EVID. 401-403.

9. Pre-trial motions or matters.

Any pre-trial motions or matters, specifically including but not limited to summary judgment motions and the Court's rulings on such motions. FED. R. EVID. 401-403.

10. Attorney's objections.

In reading or playing videotaped depositions, any attorney's objections, comments, side bars, or responses to objections. FED. R. EVID. 401-403.

11. Settlements and settlement discussions.

Settlements entered into or discussed with any party, including a party to this lawsuit or to any other action and proceeding, as well as any and all statements made by any party in the settlement discussions during the course of those discussions. FED. R. EVID. 408.

12. Stipulating to any matter.

Any reference to the fact that counsel for any party may have declined or refused to stipulate to any matter. FED. R. EVID. 401-403.

13. References to any anyone sitting in the courtroom.

Any reference to any anyone sitting in this courtroom other than witnesses, counsel, the party's corporate representatives, or Court personnel. FED. R. EVID. 401-403.

14. Reference to other suits.

Any reference, comment, or statement by counsel, or by any witness called to testify, regarding any other suit, litigation, arbitration, or other legal or administrative proceeding. This would be irrelevant, confusing, misleading and unfairly prejudicial. FED. R. EVID. 402 & 403.

15. Alternative pleadings, theories, and requests for relief.

Any reference, comment, or statement by counsel, or any witness called to testify, regarding the fact that one party or the other may have had alternative pleadings, other theories of liability, or other requests for relief in this lawsuit than those contained in the latest pleading. Those matters are irrelevant and would be confusing, misleading and unfairly prejudicial.

16. Opinions not disclosed in expert report.

Eliciting any opinion from an expert that is not contained in that expert's written report. *See* FIRST AMENDED SCHEDULING ORDER ¶ 4 ("Any opinion or testimony not contained in the summary will not be permitted at trial.") [D.E. #43].

17. Location or size of any law firm.

Any suggestion as to where a particular lawyer or firm is from or how big it is.

18. The Wealth, Religious or Political Beliefs or Sexual Preferences of any party

Any reference to the wealth, religious or political beliefs or sexual preferences of any party.

EXHIBIT B

Questions by the Jurors During Trial

1. The court will read the attached instructions included to the jury after the jury is seated and may repeat any or all of these instructions to remind the jury of its role. These instructions explain the procedure that will be used to allow jurors to submit written questions.

2. After the parties have asked their own questions of each witness who appears and testifies, jurors will be given the opportunity to write any questions they may have for the witness on the attached juror question form.

3. To the extent possible, the court will take steps to maintain the anonymity of any juror who asks a question. The court will instruct jurors not to put their names on juror question forms. The court will provide each juror a juror question form in the jury box and ask each juror to pass the form to the bailiff at the end of the witness examination. The court will have every juror pass down his or her juror question form—even if the juror did not write a question on the form—in order to preserve anonymity.

4. Upon receipt of a written question from the jury, the court will allow the parties, outside the hearing of the jury, to make objections to the question on the record and obtain a ruling. On its own initiative or upon a party‘s request, the court may remove the witness from the courtroom before reviewing the question or allowing the parties to object to the question.

5. In its discretion, the court may reword the question or decide that the question should not be asked. If the court rewords the question, the court should read the reworded question and allow the parties to make objections to the reworded question on the record and obtain a ruling outside the jury‘s hearing.

6. If the court allows a verbatim or reworded juror question, the court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.

7. The court will include any completed juror question form in the record.

Attachments: 1) Instruction on Juror Questions
2) Juror Question Form

Attachment 1

INSTRUCTION ON JUROR QUESTIONS

After the parties have asked their own questions of each witness and before each witness is excused, you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You should not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally and do not assume it is important that your question is not asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give to particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person. That is because of my overall instruction that you must not discuss the case among yourselves or with anyone else until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.

Attachment 2

JUROR QUESTION FORM

You may submit one or more questions about the witness's testimony. Your questions should be short. You may not give an opinion about the case, criticize the case, or comment on the case in any way. You may not argue with the witness through a question. Your questions should be yours alone and not something you got from another juror.

Write your questions, if any, on this form. Do not put your name on the form. The judge will apply the same rules to your questions that the judge applies to the parties' questions. These rules are based on various rules of law and procedure. Some questions may be changed or rephrased, and others may not be asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give particular testimony. And you must not discuss this case with a fellow juror until the judge has told you to begin your deliberations.

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(Style of Case)

PRETRIAL AGREEMENTS WITH OPPOSING COUNSEL*

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged. Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

Item No.	Description	Agreed	Source of Agreement
1.	As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls. Each side will copy all of its emails to the email group distribution list provided by the other side		
2.	Before depositions begin, we will try to agree on how long the trial will last and ask the Court to give us a firm trial setting and to establish the length of the trial. Whatever time is allotted will be divided equally.		
3.	Depositions will be taken by agreement, with both sides alternating if possible and trying in advance to agree upon the dates for depositions, even before the deponents are identified. Each side gets a total of ___ hours to depose fact witnesses and only one of such depositions can last more than 3 hours. This does not include 30(b)6 depositions.		
4.	At depositions, all objections to relevance, lack of foundation, non-responsiveness, speculation or to the form of the question will, if requested by the deposition taker, be reserved until trial, so there will be no reason for the defending lawyer to say anything other than to advise the client to assert a privilege or to adjourn the deposition because the questioner is improperly harassing the witness. If counsel violate this agreement, the other side can play counsel's comments/objections to the jury		
5.	The parties will use the same court		

Item No.	Description	Agreed	Source of Agreement
	reporter/videographer, who they will urge to provide specified services at discounted prices for the right to transcribe all depositions.		
6.	All papers will be served on the opposing party by e-mail. For purposes of calculating the deadline to respond, email service will be treated the same as hand –delivery		
7.	Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.		
8.	If the case is in federal court, the parties will seek an order from the court, under FRE 502(d), providing: Each side must initially produce electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents that have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated. Whether in federal court or not, the parties will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side (at that side's expense, if any). The parties will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail–so it's stand-alone on a CD or DVD) as long as		

Item No.	Description	Agreed	Source of Agreement
	the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.		
9.	If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.		
10.	All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.		
11.	The parties will share the expense of imaging all deposition exhibits.		
12.	We will exchange expert witness reports that provide the disclosures required by the Federal Rules. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports. There will be no depositions of experts unless an expert's report is incomprehensible or incomplete, in which case the party seeking clarification is required to establish the same by motion filed with the Court		
13.	The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent.		
14.	Each side has the right to select 20 documents from the other's privilege list for submission to the court for in camera inspection.		
15.	We will agree to a briefing schedule and page limitations for all pretrial motions.		

*These Pretrial Agreements have been suggested by Stephen D. Susman of Susman Godfrey and Paul C. Sanders of Cravath, Swaine & Moore