

Civility as a Strategy for Effective Advocacy
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For 27 years, the Texas Lawyer’s Creed has been encouraging Texas attorneys to practice law with civility and professionalism. Yet some lawyers continue to express concern that being polite and agreeable is inconsistent with the duty to zealously advocate for their client.

Who’s right? You may be surprised, but there is good reason to believe that a lawyer who behaves with civility is a more effective advocate.

Zealous advocacy does not require unprofessional behavior.

Nothing in the Texas Disciplinary Rules of Professional Conduct (TDRPC) contemplates that “zealous” means discourteous or disrespectful. The word “zealously” appears twice in the TDRPC Preamble: Paragraph 2 says, “a lawyer zealously asserts the client's position *under the rules of the adversary system*,” and Paragraph 3 says, “a lawyer should zealously pursue clients’ interests *within the bounds of the law*.” (emphasis added) Paragraph 4 adds that lawyers should “use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.”

So, rather than suggest uncivil behavior, “zealous” in the TDRPC merely envisions “zeal,” or a passionate and enthusiastic manner designed to achieve a favorable **outcome** for the client. Thus, zealousness should not be judged by its stridency, but by the result.

Successful outcomes can depend upon initial impressions

Favorable outcomes depend on a favorable response by the decision-maker. Accordingly, the focus should not be whether an advocacy technique or attitude gratifies your ego, or appeals to your client’s bloodlust, or rattles opposing counsel. It should be on what behaviors and attitudes are likely to favorably influence the decision-making process.

Daniel Kahneman's 2011 book, *Thinking Fast and Slow*, synthesizes two decades of academic research on the decision-making process. It has some insights about human nature that can illuminate our understanding of advocacy.

According to the research, decision-making happens in two ways, labeled System 1 and System 2. System 1 ("thinking fast") is intuitive, emotional, and unconscious. System 2 ("thinking slow") is rational, rule-based, and deliberative. Neither system is inherently good or bad, and we all go back and forth between the systems. Different types of decision-making are appropriate for different types of decisions.

These studies also demonstrate that the human brain is inherently lazy, and because System 1 decision-making is easier, the brain constantly pushes us toward System 1. Perhaps more alarming, even when we consciously strive to be in System 2 — which most decision-makers in the legal process do — the brain subverts that process by intruding with System 1 influences.

Research shows that the data that we use to make System 2 decisions already has been screened and shaped by System 1 judgments. As Kahneman observes, "System 2 is more of an apologist for the emotions of System 1 than a critic of those emotions — an endorser rather than an enforcer. Its search for information and arguments is mostly constrained to information that is consistent with existing beliefs, not with an intention to examine them."

In other words, despite the rules and deliberative processes built into the legal system, legal decision-makers — like all humans — are genetically predisposed to form an early instinctive impression, then sub-consciously seek out and retain information that supports that gut reaction, while simultaneously blocking contrary information. Because this process occurs outside our awareness, we are all subject to its influence.

Therefore, a prudent attorney should not undermine substantive arguments by allowing uncivil behavior to create a negative initial impression. A positive initial impression provides the subconscious brain with a subliminal incentive to reach an outcome consistent with that favorable first impression. This is not to suggest that lawyers and judges do not make rational decisions; instead it is a recognition that

our decision-making process is subject to the same scientifically-documented shortcomings of the brain that afflict all decision-makers.

Decision-makers are more likely to respond favorably to professional conduct

While the strength of the evidence and supporting arguments is critical, the demeanor of the advocate when presenting them has a significant impact on how they are perceived. For a variety of reasons, decision-makers are more likely to be favorably impressed by an advocate who is courteous and respectful to the decision-maker, opposing counsel, the litigants, and the legal process.

First, most decision-makers see themselves as participants in a dignified process of resolving disputes in a civilized way. They do not want to be reduced to refereeing fights between childish and churlish lawyers. It demeans the role of the decision-maker.

Second, decision-makers feel like they are over-worked and under-compensated, and they often are. Time is a precious commodity. When they have to spend more time reading insults and personal attacks than they do reading about the merits of the case, it squanders their most precious resource.

Third, unprofessional conduct damages credibility. When an advocate behaves in a way that causes the decision-maker to believe the advocate will say or do anything to win, the advocate no longer has any credibility.

Finally, it is unpleasant. When lawyers are nasty to each other it makes everyone in the room uncomfortable and embarrassed for them. Creating this kind of discomfort in the decision-maker is not conducive to a favorable outcome.

Guidelines for behaving professionally

Behaving professionally means more than just following minimum rules of conduct codified in the TDRPC. It means following standards of behavior and attitude, the violation of which may not result in court-ordered penalties and sanctions, ***but which nonetheless have adverse consequences.***

Two helpful sets of guidelines are available: the Texas Lawyer's Creed and the Standards for Appellate Conduct, promulgated in 1989 and 1999, respectively. Both acknowledge that lawyers have duties to the legal system, their clients, other lawyers, and the court. Both contemplate that these duties may conflict, but one should not be elevated to the exclusion of all others. There must be a balance.

The Preamble to Texas Lawyer's Creed says: "I must abide by the Texas Disciplinary Rules of Professional Conduct, ***but I know that professionalism requires more than merely avoiding the violation of laws and rules.***" Likewise, the Standards for Appellate Conduct Preamble notes that "problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others."

Behaving Professionally: An Attitude of Respect

Using civility to improve advocacy begins by embracing the attitude that underlies all of these rules: respect for the justice system and the people who play a role in it.

Respect for the justice system. It is a system for fairly resolving disputes in an equitable manner. Aggressively manipulating the system for personal gain, or even over-reaching for your client, does not show respect for a system that is supposed to work for everyone.

Respect for judges. Judges are human beings who almost invariably try to be fair. While they have their own worldview and life experience, they rarely consciously pursue ideological agendas or predetermined outcomes when deciding cases. They do not appreciate being insulted or told what they have to do. A reasoned and rational approach that respects their intelligence and judgment will serve you better.

Respect for opposing counsel and parties. Opposing counsel are ***not*** your enemy; they are simply other lawyer trying to do their job of representing their clients. You should always treat them as worthy adversaries who deserve your respect and who raise the level of your game.

Opposing parties, in most cases, are good faith participants in the justice system, exercising their legal rights. The fact that they view the facts differently does not mean that they are untruthful. Their subjective view of what happened may be as valid as yours or your client's. If you accept and embrace that concept, your ability to respect opposing parties will increase dramatically.

Respect for your client. A desire to win does not excuse over-reaching and unprofessional conduct. Respecting your client means believing that they have a right to a fair result – and nothing more. It also means that they have a right to be represented by a lawyer who behaves with class and dignity.

Respect for yourself. You should conduct yourself in a way that makes you feel good about yourself; that makes decision-makers want to find reasons to decide in your favor; that makes opposing counsel look forward to dealing with you; and that makes clients want to hire you again and tell friends about you.

When you unfailingly show respect for yourself and others, those others will, in turn, respect you. And a respected attorney is a successful attorney.

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