Ethics and Professionalism in Appellate Practice

Hundreds of articles have been written on ethics and professionalism in the practice of law. Countless hours have been logged by lawyers sitting in CLE programs devoted to the subject. Dozens of courts, bar associations, and committees have invested their time and energy in creating rules and guidelines that address ethics and professionalism. Judges, academics, and bar leaders have added their voices to the call for greater ethics and professionalism in the practice of law.

To what end? Has our behavior improved? Are we any more ethical and professional today than we were ten years ago? Twenty years ago? If not, why not? Why can't we get our ethics act together?

I wish that I could tell you that this paper provides definitive answers to these questions. I cannot. Instead, this paper raises these questions as a reminder—if we need to be reminded—that, all our efforts and rhetoric notwithstanding, the legal profession continues to have a very real problem where ethics and professionalism are concerned. Certainly it bears considering why that is and what else we might do to encourage the type of behavior that we all profess to desire. At the very least, our recognition of the problem should encourage us all to examine our own behavior to ensure that we are (1) exhibiting professionalism in all our dealings with clients, courts, and other lawyers and (2) giving proper weight to the ethics issues that define our practice as appellate lawyers. What follows are thoughts on the most significant of those ethics issues.

I. Determine Whether the Appeal is One You are Competent to Take.

ABA Model Rule of Professional Conduct 1.1 requires a lawyer to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model R. Prof. Conduct 1.1 (2014). The Comment on Rule 1.1 fleshes out what that means.

Legal Knowledge and Skill

What factors should a lawyer consider in analyzing whether he or she possesses the legal knowledge and skill necessary to undertake representation of a client in a particular matter? Comment 1 to Rule 1.1 specifies that relevant factors include the following:

> [T]he relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

ABA Model R. Prof. Conduct 1.1 cmt. 1 (2014).

Must a lawyer have an expertise in a particular field of law in order to be considered competent? In general, no. *Id*. (noting that, while "[e]xpertise in a particular field of law may be required in some circumstances," "[i]n many instances, the required proficiency is that of a general practitioner"). But what if the situation requires the lawyer to handle a legal problem of a type with which the lawyer is unfamiliar? Can a lawyer ever be competent to take on a legal problem that he or she never has seen? In a word, yes.

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

ABA Model R. Prof. Conduct 1.1 cmt. 2 (2014).

Thoroughness and Preparation

The key, then, appears to lie in the lawyer's preparation. *See* ABA Model R. Prof. Conduct 1.1 cmt. 4 (2014) (providing that "[a] lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation"). In addition to analyzing "the factual and legal elements of the problem" and using "methods and procedures meeting the standards of competent practitioners," a lawyer also must prepare adequately. ABA Model R. Prof. Conduct 1.1 cmt. 5 (2014). Comment 5 to Rule 1.1 explains further:

> The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.

Id.

The importance of adequate preparation cannot be overstated. In expressing their views on the quality of appellate advocacy, judges have noted "the increase in the number of briefs and oral arguments that appear to be lacking in adequate preparation on the law and on the facts." Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 Pace Law Rev. 323, 332 (Spring 1999). Indeed, the lack of adequate preparation and, thus, the lack of competence in appellate practice is what motivated one judge to call competent representation the very first rule of professional responsibility. *See* Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence – A View from the Jaundiced Eye of One Appellate Judge*, 11 Cap. U. L. Rev. 445 (1982).

Retaining or Contracting With Other Lawyers

As Comment 1 to Rule 1.1 notes, one way that competent representation can be provided to the client is "through the association of a lawyer of established competence in the field in question." ABA Model R. Prof. Conduct 1.1 cmt. 2 (2014). To the extent that a lawyer wishes to associate with a lawyer outside his or her own firm, however, the lawyer should consider Comment 6 to Rule 1.l:

> Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical

> environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

ABA Model R. Prof. Conduct 1.1 cmt. 6 (2014).

Importantly, even lawyers who do not have primary responsibility for the representation of a client still may have ethical obligations to that client. For example, when a lawyer has direct supervisory authority over another lawyer who is performing tasks in furtherance of a client's representation, the supervising lawyer is subject to discipline for the subordinate lawyer's violation of the rules of professional conduct. ABA Model Rule 5.1(a) provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the professional conduct rules. ABA Model Rule 5.1(b) then provides that a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the professional conduct rules and exhibits competency.

Thus, in a given appeal, assisting a less experienced lawyer (or a lawyer less experienced in the appellate arena) in preparing for oral argument may not only be advisable but also may be ethically required. An appellate lawyer who is a partner or who possesses comparable managerial authority may want to examine whether his or her firm has established mechanisms by which less experienced lawyers can learn best appellate practices and obtain assistance from more experienced lawyers at the firm when needed.

On the flip side, what is the ethical obligation of a subordinate lawyer who is working with a senior lawyer on an appeal? ABA Model Rule 5.2 makes clear that a subordinate lawyer is bound by the Rules of Professional Conduct even when acting at the direction of another person. That said, a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Maintaining Competence

A lawyer must not believe that once competent, always competent. Comment 8 to Rule 1.1 emphasizes that the opposite is true:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits

> and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA Model R. Prof. Conduct 1.1 cmt. 8 (2014).

II. Determine Whether the Issue to Be Appealed Has Arguable Merit.

"It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals." *Polk Cnty. v. Dodson*, 454 U.S. 312, 323 (1981). Indeed, frivolous appeals are sanctionable under Federal Rule of Appellate Procedure 38:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Fed. R. App. P. 38.

The ABA Model Rules of Professional Conduct recognize this important limitation upon a lawyer's duty to advocate zealously on behalf of a client:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

ABA Model R. Prof. Conduct 3.1 (2014).

The Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit speaks directly to the issue of frivolous appeals. On page 1, the Practitioner's Guide includes the following heading: The Decision to Appeal. Under it, the question is asked, "Should I Appeal?" In providing an answer, the Practitioner's Guide does not mince words:

> You should not read further in this guide until you objectively review your case and decide that an appeal is worthwhile. Of course you should consider the cost of further proceedings, and the delay in getting a decision from the court, but most importantly, you need to consider whether the error you see in the district court or agency decision will cause this court to reverse.

See Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit at 1 (June 2016), available at http://www.ca5.uscourts.gov.

The Practitioner's Guide then addresses standards of review, chances for success on appeal, and the time it takes (generally) to get a decision before asking the question that is most important for the purposes of this paper: "What If I File A Meritless Appeal?" Again, the answer is direct and to the point:

> A frivolous appeal is one when the result is obvious and the arguments of error are wholly without merit. If the court finds you filed a frivolous appeal, it may award damages and single or double costs, pursuant to FED. R. APP. P. 38. Costs may be awarded against a counsel if the lawyer is at fault. Pro se litigants who file frivolous appeals may be barred from further filings unless they get prior written approval from a judge. 5TH CIR. R. 35.1 discusses the power of the court to impose sanctions on its own initiative under Rule 38 and 28 U.S.C. § 1927 if you file a groundless petition for rehearing en banc.

Id. at 2.

What does all this mean? It means that a lawyer has to know how to do legal research and then do it. Even if the law is unsettled and the lawyer will not find a clear answer, the lawyer still must do the research. Only after that work has been done can the lawyer intelligently advise his or her client. *See* Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527, 529 (2002); *U.S. v. Beltran-Moreno*, 556 F.3d 913, 918 (9th Cir. 2009) ("We remind counsel that the professional norms that establish the constitutional baseline for [criminal lawyers'] effective performance indisputably include the duty to research the record and the relevant case law and to advise a client properly on the consequences of an appeal.").

Given the unanimity of the rules prohibiting frivolous appeals, what might make a lawyer go forward with an appeal that he or she cannot win? There are several possible explanations, not one of which reflects well on the professionalism of the lawyer who makes this choice. For example, perhaps the lawyer is not competent to handle the appeal and is not aware of the frivolity of the appeal. Or perhaps the lawyer pursues the frivolous appeal based on (1) the desire to grant the client's wish and demonstrate that the lawyer is willing to fight to the end, (2) the fear that another lawyer may take the case on appeal and that the client thereby will be lost, (3) the belief that pursuing the appeal is necessary in order to avoid a malpractice claim, or (4) the interest in collecting payment for the work. *See* Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*,

19 Pace Law Rev. at 326. The ethical lawyer knows that none of these justifications relieves him or her of the obligation to advance only issues with arguable merit.

III. Correctly Represent the Record.

ABA Model Rule of Professional Conduct Rule 3.3 addresses a lawyer's duty of candor to the court:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [. . .] or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

ABA Model R. Prof. Conduct 3.3 (2014).

ABA Model Rule of Professional Conduct Rule 4.1 provides that the same duty of candor applies to a lawyer's conversations with third persons—i.e., persons other than the lawyer's client:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model R. Prof. Conduct 4.1 (2014); *see In re: Deepwater Horizon*, 824 F.3d 571, 582-83 (5th Cir. 2016) (affirming sanction order based upon knowingly false statements of material fact made by a lawyer during a special master's

investigation into improper fee payments); *Schlafly v. Schlafly*, 33 S.W.3d 863, 873-74 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (writing at length regarding counsel's inexcusable and "blatant misrepresentation and mischaracterization of the facts in his briefing" and finding "good cause for ordering him to pay all costs" of the appeal); *see also* ABA Model R. Prof. Conduct 8.4(c) (2014) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA Model R. Prof. Conduct 8.4(d) (2014) (prohibiting "conduct that is prejudicial to the administration of justice").

Bottom line: do not lie. Be honest about the facts. Be honest about *all* the facts. If you find out that you have inadvertently misrepresented a fact, correct your misrepresentation. Certainly the disciplinary rules require that. Equally important, your role as an advocate for your client requires that. *See* Schiess, *Ethical Legal Writing*, 21 Rev. Litig. at 530. Should you fail to fulfill this obligation, you may find that the harm to your client goes far beyond the court's concerns regarding your representation of the facts:

> [D]on't let your role as an advocate tempt you to leave out damaging facts or color them in a misleading way. It should go without saying that your opponent will seize upon any such facts in his or her brief and highlight them. If you fail to deal with them up front, the judge will wonder whether you have misled him or her in other ways.

Michael G. Walsh, *Points to Ponder Before Writing Your Next Appellate Brief* 15, 19-20, Prac. Law. (June 1998). Or, as my mentor (who, in my opinion, is one of the greatest judges ever to sit on the United States Court of Appeals for the Fifth Circuit) once told me, when an advocate in the court of appeals misrepresents the record, he or she forfeits the right to participate in the decisional process.

IV. Correctly Represent the Law.

Model Rule 3.3(a)(1) also provides that "[a] lawyer shall not knowingly . . . make a false statement of . . . law to a tribunal or fail to correct a false statement of . . . law previously made to the tribunal by the lawyer." ABA Model R. Prof. Conduct 3.3(a)(1) (2014). Rule 3.3(a)(2) goes on to say that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA Model R. Prof. Conduct 3.3(a)(2) (2014).

In other words, a lawyer may not either misrepresent what the law is or misrepresent that there is no controlling authority. Why is this the rule? Because,

as much as a lawyer is the advocate for his or her client's position, the lawyer is first and foremost an officer of the court who has the responsibility to educate the court regarding the applicable law. The Comment on Rule 3.3 makes this clear:

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in the adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model R. Prof. Conduct 3.3 cmt. 2 (2014).

In technical terms, the circumstances under which a lawyer is required to disclose adverse authority are rather narrow. Specifically, the adverse authority must be (1) known to the lawyer, (2) in the controlling jurisdiction, (3) known by the lawyer to be directly adverse to his or her client's position, and (4) not disclosed by opposing counsel. A lawyer should be aware, however, that some judges are of the view that "candor to the tribunal" requires more than this:

> My own view is that candor to the tribunal should require even more than the Rule requires. I think that a lawyer should cite pertinent authority from other jurisdictions to help the court in its labors, even if the adversary fails to do so. I also think that there is no reason to say this it is wrong only for the lawyer to omit the citation of contrary authority known to him or her. With modern computer research techniques, precedent cases are easily knowable to all lawyers. Beyond all this, it may very well be counterproductive to one's case to omit the citation of authority, whatever its source. . . . "[I]t is tactically desirable for the lawyer to cite and refute uncited authorities that are arguably adverse." Obviously, a lawyer cannot argue to distinguish, modify or overrule an adverse precedent not mentioned in the brief but discovered by the court on its own.

Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 Pace Law Rev. at 331 (citation omitted).

So what does a lawyer do if he or she is in a situation in which the lawyer has no clear duty under the Rules to disclose and yet disclosure of the adverse authority may assist the court in analyzing the issue before it? The safe and ethical bet is to disclose. Ethics experts Geoffrey Hazard and W. William Hodes offer this rough test in their treatise, The Law of Lawyering: "[T]he more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:206 (2d ed. 1990). Or, stated another way, the lawyer should consider this question: if the lawyer does not disclose the authority and the judge later finds out about it, will the judge think that he or she has been misled? If the answer is even arguably yes, disclose it. *See* Schiess, *Ethical Legal Writing*, 21 Rev. Litig. at 532.

For all the authority that a lawyer discloses, whether that authority is favorable or adverse, the lawyer must make sure that he or she tells the truth about it. Woe to the lawyer who oversells or undersells its significance. As the former Chief Judge of the United States Court of Appeals for the Federal Circuit has advised, "[m]isquotation, mischaracterization, omission, and exaggeration are obvious and will diminish your credibility and your client's prospects . . . . Confront applicable adverse authority expressly and early. The opponent probably will cite it, and our law clerks will surely find it." Paul R. Michel, *Effective Appellate Advocacy*, Litig. 19, 23 (Summer 1998).

While it is unfortunate that so many lawyers have had to be taken to task for omitting authorities that should have been disclosed, the cases reporting these situations provide a great learning opportunity for us all. *See, e.g.*, *Pannell v. McBride*, 306 F.3d 499, 502 n.1 (7th Cir. 2002) (criticizing the failure to disclose two cases from the same circuit court of appeals); *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990) (noting that the duty to disclose authority in the "controlling jurisdiction" extends even to trial court decisions); *Jorgenson v. Volusia Cnty.*, 846 F.2d 1350, 1352 (11th Cir. 1988) (stating that the "studied care" with which the appellants withheld controlling precedent was "not redeemed by the fact that opposing counsel *subsequently* cited" that precedent); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (8th Cir. 1986) (noting that an argument resting on a serious misrepresentation of existing law cannot be described as a reasoned request for a change in the law); *Batko v. Sayreville Democratic Org.*, 860 A.2d 967, 968 (N.J. Super. Ct. App. Div. 2004) (stating that "[t]here is no more important or dispositive source of legal authority [that must be brought to the court's attention] than decisions of the Supreme Court of the United States"); *Nw. Nat'l Ins. Co. v. Guthrie*, No. 90-C-04050, 1990 WL 205945, at *2 (N.D. Ill. Dec. 3, 1990) (expressing that the court was "deeply troubled" by the fact that, while counsel

faithfully recited the "line of cases explicating the general rule," counsel neglected "to discuss the exception to that general rule that is directly on point here—a failure that strikes us as something more than a mere oversight").

V. Correctly Cite the Law.

No one wants to believe that sloppy citations might actually have an effect on the outcome of the appeal. And yet no one can say that they do not. Off the record, a number of judges have lamented that sloppiness in citation form creates an impression of sloppiness overall. Do you really want your sloppy citations to send the message that your entire case is weak? Mark Rust, *Mistakes to Avoid on Appeal*, 74 A.B.A. J. 78, 80 (1988). Or to distract the court's attention from the merits of your arguments? Pamela Stanton Baron & Douglas W. Alexander, *Briefing to the Texas Courts of Appeals and the Texas Supreme Court—Avoiding Common Mistakes*, Fourth Annual Conference on Techniques for Handling Civil Appeals in State and Federal Court 15 (1994). No. Of course not.

There are differences of opinion regarding the citation errors that carry with them the most serious implications. I agree with Wayne Schiess that three of the worst mistakes a lawyer can make in citing the law are (1) failing to provide pinpoint cites that identify for the reader the exact page from which the relevant statement, information, or proposition was taken, (2) altering quoted language without indicating that the lawyer has done so, and (3) failing to follow faithfully the citation manual of the court's choosing. Schiess, *Ethical Legal Writing*, 21 Rev. Litig. at 529. When a lawyer makes these errors, he or she shifts the workload to the reader, thereby frustrating the very person the lawyer is attempting to persuade. Worse, if the lawyer's mistakes in citation form result in a situation in which the reader cannot locate the cited authority, the lawyer may lose credibility with the court or the court may discount the lawyer's position.

VI. Know and Obey Limitations Imposed by the Governing Rules.

In these days of e-filing, the consequence of failing to follow governing rules typically is that the court will "file" the nonconforming document but then will instruct that the document must be resubmitted in a conforming format. *See*, e.g., 5th Cir. R. 32.5. While the court will give the offending lawyer more time to get his or her nonconforming document on file, that is not desirable. More time equates to more money spent by the client and more work for the court.

The Fifth Circuit uses a checklist—attached as Exhibit E to the Practitioner's Guide—to ensure that appellate briefs comply with the court's rules. Despite the fact that lawyers have access to the very checklist that the court will use to check

compliance, over 30% of the briefs that are filed have deficiencies. Practitioner's Guide at 56. If the lawyer who files the deficient brief is an ECF filer, the court will notify the lawyer through a "notice of docket activity," which will explain what action has to be taken to correct the problem(s) and the deadline for submitting a corrected brief to the court. *Id*. If the lawyer does not timely correct the identified errors, the brief can be sent to the court for review, possible striking, and, if the lawyer is representing the appellant, dismissing the appeal. *Id*.; *see also* 5th Cir. R. 32.5.

Not uncommonly, an appellate brief fails to conform with the rules because it exceeds the type-volume limits for briefs. Before a lawyer decides that the fix for this problem is to file a motion to exceed the applicable type-volume limits, he or she should be aware that any such motion must be filed at least ten days before the brief is due and that a draft copy of the proposed brief must be submitted with the motion. Additionally, the lawyer should be aware that the Fifth Circuit "looks . . . with great disfavor" on motions to exceed the type-volume limits. 5th Cir. R. 32.4.

The reality is that, even if you can get additional pages or words for your brief, you probably are better off without them. To be successful on appeal, your brief must be as clear and concise as possible. No judge wants to read a long and unwieldy brief.

VII. Avoid Personal Attacks.

There is no room for nastiness in appellate practice, and lawyers should take care not to criticize either courts or other lawyers. Simply put, nothing good will come of it. *McCaffity v. Hurst-Euless-Bedford Indep. Sch. Dist.*, 98 F.3d 1339 (5th Cir. 1996) ("We caution McCaffity that *ad hominem* attacks on district court judges will not be tolerated."); *Fleming v. U.S.*, 162 F. App'x 383, 386 (5th Cir. 2006) ("That [a licensed attorney] is proceeding pro se does not give him carte blanche to employ intemperate and abusive language or to engage in ad hominem attacks on federal judges."); *Mayes v. Kollman*, 560 F. App'x 389, 394-95 (5th Cir. 2014) ("[I]t is highly inappropriate for a lawyer to make personal attacks on opposing counsel during any stage of litigation."); *U.S. v. Young*, 470 U.S. 1, 9 (1985) (observing that "inflammatory attacks on the opposing advocate" have "no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach [of this rule] by either counsel"); *Ransmeier v. Mariani*, 718 F.3d 64, 68 (2d Cir. 2013) (describing "ad hominem attacks on opposing counsel" as "offensive" and as a potential basis for sanctions); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1308 (11th Cir.

2002) (per curiam) ("We conclude that an attorney who submits . . . *ad hominem* attacks directed at opposing counsel is subject to sanction under the court's inherent power to oversee attorneys practicing before it.").

VIII. Write and Present Oral Argument Persuasively.

The purpose of appellate advocacy—whether in brief writing or in oral argument—is to persuade. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 Pace Law Rev. at 334. To write persuasively, a lawyer must keep the following things in mind.

Write correctly. Know and follow the basic principles of grammar, punctuation, usage, and style. There are many great sources that can and will help lawyers improve their legal writing style.

> Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* (2013).
>
> Martha Faulk & Irving Mehler, *The Elements of Legal Writing* (1996).
>
> Bryan Garner, *Garner's Dictionary of Modern Legal Usage* (3d ed. 2011).
>
> Patricia O'Connor, *Woe is I: The Grammarphobe's Guide to Better English in Plain English* (3d ed. 2009).
>
> Wayne Schiess's blog, Legible: http://sites.utexas.edu/legalwriting/.

Write for the audience that you are trying to persuade—the court. Remember that the court would like for the lawyers handling the case to aid the court's understanding of the issues, not complicate matters. This really goes back to competence. If a lawyer cannot take even a complex issue and present it in such a way that the court can follow the analysis and be persuaded by it, the lawyer is not competent to present his or her case to the court.

An appellate judge in Texas has said this about legal writing:

> [T]he use of legalese or "six-bit" college words may help convince your client that you are worth the hourly fee being charged, but it does not help win his case. Indeed, it actually interferes in your communication with the court when the judge is constantly shifting attention from the brief to either a Webster's, Black's Law, or a Latin-to-English dictionary. I know you received a high dollar education.

> Instead of trying to impress me with some high-brow vocabulary, use your education to figure out how to simplify what you are saying with plain language. After all, the simpler you make it, the easier it is for me to understand.

Brian Quinn, *Dispelling Misconception*, 62 Tex. B.J. 890, 891 (1999).

Remember to proofread. No matter how pressed for time a lawyer is and no matter how many times a lawyer has reviewed drafts of the brief that he or she is preparing to file, the lawyer must make sure that he or she takes the time to proofread. While a misspelled word or an incorrectly placed punctuation mark is not likely to derail an appeal, even the smallest mistakes can adversely affect the client's interest. Consider the words of this former chief judge from the United States Court of Appeals for the D.C. Circuit: "[P]roofread with a passion. You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel." Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 22 (1999).

If the lawyer who is the primary author of a brief has a trusted colleague who can proofread the document, that is ideal. If the task is left to the author himself or herself, I recommend that the author read the document aloud. It never ceases to amaze me what I can catch by forcing myself to read the words out loud.

Prepare for and present oral argument thoughtfully. Competent appellate advocates know that they must consider three main things in preparing to deliver what, they hope, will be a persuasive oral argument. First, the lawyer must thoroughly review the record, the briefs on file, and the case law cited in the briefs. Second, the lawyer must research to locate any updated case law that may have issued between the briefing and argument. Third, the lawyer must formulate answers to potential questions from the bench. If you wonder whether you are prepared for argument, consider the words of former Deputy Solicitor General Lawrence Wallace: "If you can't answer the question, 'what are the strongest points to be made for the other side?' you're not really prepared to argue the case. *Taking It To The Top: Modern-day Court Record Set*, A.B.A. J. 14 (1998).

IX. Realistically Consider Whether to File Any Petition for Rehearing.

It is the lawyer's job to understand when—and when not—to file a petition for panel or en banc rehearing. Fifth Circuit Rule 40.2 emphasizes the limited nature of a petition for panel rehearing:

> A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is *not* used for reargument of the issue previously presented or to attach the court's well-settled summary calendar procedures.

5th Cir. R. 40.2.

Fifth Circuit Rule 35.1 counsels lawyers to think very carefully before filing a petition for rehearing en banc:

> Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a). As is noted in Fed. R. App. P. 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of Fed. R. App. P. 35(b)(1). The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under, *inter alia*, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.

5th Cir. R. 35.1.

If that were not clear enough, the Internal Operating Procedure (I.O.P.) accompanying Fifth Circuit Rule 35 expands upon that directive:

> **Extraordinary Nature of Petitions for Rehearing En Banc** – A petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit, or state law precedent, subject to the following: Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc.
>
> **The Most Abused Prerogative** – Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth

Circuit. Fewer than 1% of the cases decided by the court on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties.

X. Conclusion.

All the ethics rules and guidelines in the world will not change the nature of our law practice unless each one of us makes the individual choice to live a life and build a practice typified by professionalism (competence, civility, integrity). How can you know whether you live such a life? Start here:

1. Look inward and be completely honest with yourself; if you identify a characteristic or a behavior that needs to change, commit yourself to changing it.

2. Do what you say you will do.

3. Be honest in your communications with others.

4. Stand up for what is right.

5. Surround yourself with the proper influences.

See 5 Things People With Integrity Do Differently, Power of Positivity (July 7, 2016), available at http://www.powerofpositivity.com; Shari Yantes, *Five Things You Can Do To Build Your Integrity* (September 23, 2015). Most importantly, remember that exhibiting professionalism and civility is not a sign of weakness. It is a reflection of your character.