Work Hard & Be Nice to People. How the Appellate Lawyer can Navigate an Appeal in the United States Court of Appeals for the Fifth Circuit Ethically and while Maintaining Professionalism.

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Ethics and professionalism in the law are topics often discussed as amorphous ideologies that are noble in theory but difficult in practice. While the field of legal ethics is certainly not free from its challenging hypotheticals, this presentation seeks to establish that it is rather simple to engage in an ethical appeal. How can the appellate lawyer navigate an appeal in the United States Court of Appeals for the Fifth Circuit ethically and while maintaining professionalism? In the words of my favorite inspirational quote, practitioners must simply *Work Hard & Be Nice to People*.

Understandably, the phrase *Work Hard & Be Nice to People* may seem like a blatant oversimplification, or perhaps an overgeneralization, of legal ethics. However, unethical conduct is not often purposeful or done out of spite; it is simply a product of idle behavior. Similarly, what has come to be labeled as unprofessional conduct is often simply cured by treating oneself, one's colleague, and the court with the most elementary of common courtesies. Many ethical mistakes can be circumvented by simply doing due diligence in the following respects.

1. Work Hard to Understand the Ethics Standards that Regulate Your Behavior on Appeal.

Given the lack of uniformity across federal courts, practitioners often fail to consult the local rules to confirm the ethical standards governing their practice in the federal court. It is important to clarify which ethical standards apply to Fifth Circuit advocates. In the section entitled "DISCIPLINARY RULES" of the *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit* ("*Practitioner's Guide*"), the court provides the following:

> All attorneys admitted to the court are subject to disciplinary rules including suspension from practice for misconduct or failure to comply with the FED. R. APP. P. and 5TH CIR. R. 46.
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> . . . .
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> Standards of Conduct. All members of the bar must comply with the state standards of professional conduct and ethical behavior in the states in which they are admitted to practice. The court imposes disciplinary sanctions for deviations from these standards.
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> Basis for Disciplinary Action. The court usually takes disciplinary action when: 1) notified that another court has suspended or disbarred an attorney, or 2) an attorney's conduct in this court falls below that required of a member of the bar. Possible sanctions include reprimand, monetary penalties, forfeiture of payments to appointed counsel, prohibition from receiving Criminal Justice Act (CJA)

> appointments, suspension from practicing in the court, and removal from the roll of attorneys permitted to practice before this court. We refer all disciplinary matters initially to the chief judge. When another court has taken disciplinary action against an attorney, the court orders the attorney to show cause why this court should not impose the same punishment. Another court's decision to impose sanctions is prima facie evidence that the behavior occurred, and relitigation of the alleged acts is not permitted. The only issue is whether the proceedings in the other court comported with due process. When the court learns an attorney has failed to meet the standards expected of a member of this court's bar, the chief judge may order the attorney to show cause why disciplinary action should not be taken. The order sets out the circumstances giving rise to the court's concern, and specifies the sanctions that can be imposed.[1]

Because the Fifth Circuit incorporates and applies the standards of professional conduct and ethical behavior in the states in which the attorney is admitted to practice, it is imperative that the Fifth Circuit practitioner review and understand the intricacies of his or her state standards. For the purposes of this note, the Model Rules of Professional Conduct will be cited.

2. Be Nice to Yourself in Determining Whether to Pursue the Appeal.[2]

After you recognize the applicable ethical standards on appeal, you must decide whether you are the proper party to pursue the appeal. Model Rule of Professional Conduct 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[3]

Traditionally, the competency requirement is satisfied if the attorney is *capable*, through thorough preparation, of developing the legal knowledge and skill necessary for the representation.[4] Additionally, the lawyer can consider "the association of a lawyer of established competence in the field in question."[5]

Particularly relevant to this paper is the fact that attorneys often fail to consider their own well-being in determining whether they are competent to pursue an appeal in a particular case. In other words, an attorney may be considered an expert in the legal field relevant to the appeal but external

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[1] Clerk's Office United States Court of Appeals for the Fifth Circuit John Minor Wisdom United States Courthouse, *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit*, June 2017, at 8-10, *available at* http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks office/documents/practitionersguide.pdf (hereinafter *Practitioner's Guide*). Additional Louisiana Resources: https://lalegalethics.org/legal-ethics-resources/ Additional Mississippi Resources: https://courts.ms.gov/Newsite2/research/rules/rules.php / Additional Texas Resources: https://www.legalethicstexas.com/Ethics-Resources.aspx

[2] For the 2016 Appellate Advocacy Seminar, Marianne Auld with Kelly Hart put together an exceptional outline of the most common ethical issues that arise in appellate practice. With her permission, certain general topics and sources are also addressed herein. *See* Marianne Auld, *Ethics and Professionalism in Appellate Practice*, October 2016, *available at* http://www.baffc.org/content/2016_ethics.pdf.

[3] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2016).

[4] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 4 (2016).

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2016).

factors, such as time constraints imposed by that attorney's accompanying caseload or stress and anxiety associated with that attorney's home or personal life, impede the attorney's ability to provide truly competent representation.

Indeed, the National Task Force on Lawyer Well-Being recently issued a recommendation for the American Bar Association to modify Rule 1.1 or its comments to more clearly include a lawyer's well-being in the definition of "competence."[6] The Task Force clarified that:

> The goal of the proposed amendment is not to threaten lawyers with discipline for poor health but to underscore the importance of wellbeing in client representations. It is intended to remind lawyers that their mental and physical health impacts clients and the administration of justice, to reduce stigma associated with mental health disorders, and to encourage preventive strategies and self-care.[7]

As noted in later sections, ethical appellate work takes significant amounts of time and effort. While attorneys certainly hate having to turn down work, it is good practice before taking any appeal to evaluate whether you are competent, both objectively and subjectively, to provide representation compliant with the standards of the profession and the court. If you need help, seek it. If you need to refer the appeal to another, do it. Your health and your license are not worth taking on an appeal for which you cannot adequately prepare and progress.

3. Work Hard to Determine Whether your Appeal is Meritorious.

If you feel you are capable to handle an appeal, you must next consider whether there is any genuine basis for reversal in the appellate court. Model Rule of Professional Conduct 3.1 states that "[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."[8]

An appeal should never be automatic, and the *Practitioner's Guide* provides explicit instruction in this regard:

> SHOULD I APPEAL? 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.[9]

Notably, the court continues and encourages the practitioner to focus on research as related to the standard of review:

> WHAT IS THE STANDARD OF REVIEW? First look at the applicable "standard of review" this court must employ in deciding your appeal. For example, one

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[6] National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change The Report of the National Task Force on Lawyer Well-Being,* August 14, 2017, at 26, *available at* https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf.
[7] *Id.*
[8] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2016).
[9] *Practitioner's Guide*, *supra* note 1, at 1.

> standard requires the court to ask whether the district court's factual determinations are "clearly erroneous?" If not, you will lose the appeal. If you are seeking review of an agency determination, is the agency determination supported by "substantial" evidence? If it is, you will lose the appeal. Look carefully at your case. Put yourself in the place of a judge, apply the proper standard of review, and determine the likelihood this court can overturn a decision under the law. To assist you in finding the correct standard of review, there are many books which discuss the law and give examples of the standards of review. Two are "Federal Standards of Review," by Steven Alan Childress and Martha S. Davis, and "Appeals to the Fifth Circuit" by George Rahdert and Larry Roth. You should also analyze whether the error or errors are "harmless," or if they are of such magnitude as to require reversal. Only after you determine that you can satisfy the correct standard of review and that the error requires reversal, should you consider other factors, such as cost and time.[10]

An acknowledgment of the standard of review, however, is only meaningful in the context of the substantive body of law in which it will be applied. Professional standards require even the most experienced practitioners to thoroughly research settled and unsettled substantive law so as to make sure there is a good faith argument for reversal of the district court decision on appeal.[11]

Failing to take the time to ensure that your appeal is not frivolous has consequences:

> WHAT IF I FILE A MERITLESS APPEAL? 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.[12]

4. Be Nice to the Court Staff and Clerks and Follow the Applicable Procedural and Local Court Rules.

After you have determined that you have a meritorious basis for appeal, and as you start writing your brief, familiarize yourself with all the requirements and restrictions of the procedural and local court rules. The Model Rules of Professional Conduct address civility towards third parties when they prohibit behavior undertaken for "no substantial purpose other than to embarrass, delay, or burden a third person" and misconduct that is "prejudicial to the administration of justice."[13]

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[10] *Id.*

[11] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (2016) ("The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.").

[12] *Practitioner's Guide*, *supra* note 1, at 2.

[13] MODEL RULES OF PROF'L CONDUCT R. 4.4 and 8.4(d) (2016).

Practitioners often forget that there are formatting standards for filing appellate briefs for a reason. Indeed, one of the 50 most frequently asked questions in the Fifth Circuit is, "Why is the 5th Circuit so strict on its rules concerning briefs?" The answer is simple:

> The court charges us with enforcing the rules fairly and uniformly to all parties. We enforce the rules so that each litigant is ensured that the "playing field will be level" and that no party can obtain an advantage over another by failing to comply with the rules. Equally important, the court wants the form of briefs and other pleadings to be consistent and easily readable by the judges. Remember fewer than 30% of the fully briefed cases receive oral argument and our judges must read a tremendous volume of written materials. They want them to be easy to read and to understand. When you comply with the rules, the court receives a better product that aids in their decision.[14]

In different terms, the rules are established to assist the litigant! Consistency in form allows the court staff, clerks, and judges to process and review written submissions efficiently and with understanding. Additionally, the rules simply make the court's job easier, and compliance with the rules reflects common courtesy to the hardworking individuals at the court and the judicial system as a whole.

To the end of ensuring rule compliance, the ethical lawyer will take advantage of the court's resources.[15] The Fifth Circuit alone has published a *Practitioner's Guide*, a *Briefing Checklist*, a list of answers to the *50 Most Frequently Asked Questions*, a *Fifth Circuit Appeal Flow Chart*, a *Guide to Filing Emergency Motions/Petitions*, a set of *Sample Briefs*, etc.[16] Given these publically-available resources, a failure to comply with the binding procedural and local filing rules is unacceptable and could be considered a sign of incompetency. [17]

5. Work Hard to Correctly Represent the Record and the Law.

Next, you will turn to drafting the meat of your brief. It is in this stage of the appeal that a genuine work ethic is required. Model Rule of Professional Conduct 3.3 states that 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] (2) 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."[18] A similar duty is imposed with respect to third persons in Model Rule of Professional Conduct 4.1, which prohibits an attorney from knowingly making "a false statement of material fact or law to a third person."[19]

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[14] Clerk's Office United States Court of Appeals for the Fifth Circuit John Minor Wisdom United States Courthouse, *Clerk's Office Most Frequently Asked Questions*, June 2017, at 8, *available at* http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks office/faqs/faqs.pdf?sfvrsn=6.

[15] Sarah Lindemann Buthe, *Ethical Appeal*, FED. LAW., August 2012, at 4.

[16] *Practitioner's Guide*, *supra* note 1, at a-b.

[17] BUTHE, *supra* note 15, at 4.

[18] MODEL RULES OF PROF'L CONDUCT R. 3.3 (2016).

[19] MODEL RULES OF PROF'L CONDUCT R. 4.1 (2016). *See also* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) and (d) (2016).

The Fifth Circuit has long admonished lawyers for (1) blatant failures to accurately cite the record and the law and (2) being less than forthcoming with respect to binding opposing authority. For example, in *Dube v. Eagle Global Logistics,* the Fifth Circuit wrote: "We rejected [the appellant counsel's] briefs as noncompliant because, *inter alia*, they contained 'specious arguments' and had 'grossly distorted' the record through the use of ellipses to misrepresent the statements and orders of the district court."[20] Also, in *Trade-Winds Environmental Restoration, Inc. v. Stewart Development Liability Company*, the Fifth Circuit noted that the appellant's "failure to cite our *St. Tammany Park* opinion in its opening brief, filed several months after our opinion in that case was issued, falls well short of fulfilling counsel's duty of candor to the court. Counsel is reminded that practice before this court is a privilege, not a right."[21]

Yet, in speaking with lawyers who have previously clerked on the Fifth Circuit, the problem with candor expands beyond merely failing to correctly rearticulate a record fact or a case holding. According to one clerk in particular, practitioners tend to overgeneralize both the record and the case law, failing to disclose or adequately acknowledge ambiguity or a line of case law that, while not necessarily binding, is still unfavorable to their position. In his mind, this leads to an immediate loss of credibility that is generally without redemption.[22] Many judges agree.[23]

According to the Fifth Circuit, the solution to this problem is two-fold—proofread and put yourself in the judges' position. The *Practitioner's Guide* instructs that:

> Above all, accuracy is imperative in statements, references to the record, citations, and quotations. Counsel should carefully proofread briefs for errors in spelling, quotations, or citations. The neater the briefs appear, the better written, the more succinct, the more to the point they are, the better the impression the briefs make on the judges.
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> Finally, put yourselves in the judges' position - what will they see as critical? Write the briefs almost as your client would like to see the opinion written. The appellate courts have constraints under the law: for instance, they cannot substitute their opinion when there are credibility questions. Think about what the judges must do to affirm or reverse, and structure the briefs accordingly.[24]

For proofreading, it is advisable to treat brief writing as a team effort, always taking the time to

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[20] 314 F.3d 193, 194-95 (5th Cir. 2002) *vacated as moot* (5th Cir. Feb. 4, 2003). *See also* David L. Horan, *Legal Ethics and Malpractice Issues for Appellate Lawyers*, at 2 *available at* http://www.texasbarcle.com/Materials/Events/11377/144872_01.pdf (also citing *Dube* and providing additional guidance to Texas appellate attorneys).

[21] 409 F. App'x. 805, 808, n. 3 (5th Cir. 2011). *See also* HORAN, supra note 20, at 1 (also citing *Trade-Winds* and providing additional guidance to Texas appellate attorneys); Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991) *abrogated on other grounds by* Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc., 55 F.3d 181 (5th Cir. 1995) (noting that in the Fifth Circuit, "alternative holdings are binding precedent and not *obiter dictum*."); Perez v. Stephens, 784 F.3d 276, 281 (5th Cir. 2015) (citing *Pruitt* for the same proposition).

[22] Edward Duhe was a law clerk for the Honorable W. Eugene Davis, United States Court of Appeals for the Fifth Circuit, for the 2014-2015 academic year. The writer thanks him for his insight and input.

[23] *See* Honorable Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 330–31 (1999).

[24] *Practitioner's Guide*, *supra* note 1, at 50.

have an objective third party review the record, the brief, and all citations for accuracy.[25] This third party should also be able to comment on whether the brief provides a fair and inclusive representation of the facts and the law. To the Fifth Circuit's second suggestion, try to put yourself in the judges' position when determining what adverse authorities to disclose. Even if Rule 3.3 does not mandate disclosure, if you think your judge would want to know about a case or a theory or if you think a judge would ask you to distinguish that case or theory in oral argument, address it in the brief.

6. Be Nice to the Lower Court and Opposing Counsel.

While writing the brief, and during oral argument, you must also be mindful of your ethical obligation to demonstrate civility towards the lower court and opposing counsel.[26] As Judith Fischer wrote:

> Incivility in the practice of law harms clients, stresses lawyers, and reflects poorly on the profession and the legal system….While there is no way to know how often uncivil conduct goes unpunished, cases from the past twenty years show that numerous courts have imposed penalties for incivility in lawyers' written documents. Some lawyers have been disbarred for uncivil language, usually along with other offenses. Others have incurred official censure or reprimands, been sanctioned, had their writing stricken, or received embarrassing scoldings on the record.[27]

Like other courts, incivility is an issue that the Fifth Circuit takes rather seriously. For example, in *Sanches v. Carrollton-Farmers Branch Independent School District*, the Fifth Circuit wrote:

> Not content to raise this issue of law in a professional manner, Sanches and her attorneys launched an unjustified attack on Magistrate Judge Stickney. The main portion of the argument on this point, contained in Sanches's opening brief, reads *verbatim* as follows:
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> > The Magistrate's egregious errors in its [*sic*] failure to utilize or apply the law constitute extraordinary circumstances, justifying vacateur [*sic*] of the assignment to [*sic*] Magistrate. Specifically, the Magistrate applied improper legal standards in deciding the Title IX elements of loss of educational opportunities and deliberate indifference, ignoring precedent. Further, the Court failed to consider Sanches' Section 1983 claims and summarily dismissed them without analysis or review. Because a magistrate is not an Article III judge, his incompetence in applying general principals [*sic*] of law are [*sic*] extraordinary.

[25] *See* Wayne Schiess, *Ethical Legal Writing*, 21 REV. LITIG. 527, 548 (2002).
[26] MODEL RULES OF PROF'L CONDUCT R. 4.4 and 8.4 (2016).
[27] Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok,* 50 WASHBURN L.J. 365, 372-94 (2011) (collecting cases punishing incivility towards lawyers, the court, and others).

(Footnote omitted.)

> These sentences are so poorly written that it is difficult to decipher what the attorneys mean, but any plausible reading is troubling, and the quoted passage is an unjustified and most unprofessional and disrespectful attack on the judicial process in general and the magistrate judge assignment here in particular. This may be a suggestion that Magistrate Judge Stickney is incompetent. It might be an assertion that all federal magistrate judges are incompetent. It could be an allegation that only Article III judges are competent. Or it may only mean that Magistrate Judge Stickney's decisions in this case are incompetent, a proposition that is absurd in light of the correctness of his impressive rulings. Under any of these possible readings, the attorneys' attack on Magistrate Judge Stickney's decisionmaking is reprehensible.[28]

Similarly, in *Walker v. City of Bogalusa*, the Fifth Circuit addressed unprofessional attacks on opposing counsel and held: "We deny both parties' motions for sanctions, because both parties contributed to the 'disharmony in the proceedings,'…and 'utter[ly] disregard[ed] ... the time constraints every court faces,'…. Briefs in this Court were long on hyperbole and personal attacks and short on thoughtful analysis."[29]

While these cases may seem to reflect extreme situations, unprofessional conduct is not always overt or blatant. For example, Ross Guberman with the *Legal Writing Pro* Blog recently surveyed thousands of judges, ranging from state trial-court judges to U.S. Supreme Court justices, about what annoys them in brief writing. The majority agreed that lawyers should shy away from "tone talk" and avoid using the following terms:

1. disingenuous
2. clearly wrong
3. baseless
4. specious
5. without merit
6. frivolous
7. unfortunately for [the other side]
8. sanctionable.[30]

This study demonstrates that even small acts of unprofessionalism can result in a loss of credibility and reputation in the eyes of the bench.

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[28] 647 F.3d 156, 172 (5th Cir. 2011) (also admonishing the attorneys for their grammatical errors in note 13). *See also* HORAN, supra note 20, at 3 (also citing *Sanches* and providing additional guidance to Texas appellate attorneys).
[29] 168 F.3d 237, 241 (5th Cir. 1999) (internal citations omitted).
[30] Posting of Ross Guberman to Legal Writing Pro, https://www.legalwritingpro.com/blog/judges-speak-out/ (June 26, 2017).

7. Work Hard in Determining Whether there is a Genuine Basis to Petition for Rehearing.

After the appeal is done, you may have to determine whether to petition for rehearing. Equally important for consideration in conjunction with Model Rule of Professional Conduct 3.1 is determining whether you have a meritorious basis for petitioning for rehearing. The *Practitioner's Guide* speaks directly to this issue:

> REHEARINGS AND RECONSIDERATIONS. Initially, remember that filing a petition for panel or en banc rehearing is not a prerequisite to filing a petition for writ of certiorari in the Supreme Court. Also remember that you should only ask for rehearing when truly warranted. Second, petitions for panel or en banc rehearing should never assume an adversarial posture with the panel. Challenging the position of an opponent in an argumentative way is an effective adversarial tool, but is counter-productive when applied to the panel opinion. Even though the court has ruled against a particular party, the panel has not become an adversary, and counsel should not treat it as such in the petition for rehearing.[31]

In his blog dedicated to appellate practice, Jason Sneed summarized the issue with filing frivolous petitions for rehearing and petitions for rehearing en banc as follows:

> First, according to the court's most recent stats report (2014-2015), the court received 236 petitions for rehearing en banc (PFREBS), or a PFRE in 8% of all cases decided with an opinion. But the court granted rehearing en banc just 5 times—and once on the court's own motion—so just 4 times on a PFREB. That's only a 2% grant rate. In fact, including these 5 grants, the court took a poll for en banc rehearing only 19 times, or for only about 8% of the PFREBs. In other words, about 92% of PFREBs are denied without even a poll. It takes only one judge to request a poll—so 92% of the time the PFREB fails to get even one of the 15 judges interested enough to request a poll.
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> Unfortunately, it looks like the court doesn't keep numbers on regular PFRs (*i.e.*, petitions for rehearing before the panel, instead of en banc). But I'm guessing those numbers are even worse.
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> A key takeaway from this, in my estimation, is that way too many PFREBs are filed when they shouldn't be. I once heard one of the Fifth Circuit judges say, at a conference, that PFRs/PFREBs are one of the most abused tools in the attorney's toolbox. The numbers support this claim. And the broader problem (surely) is that this dilutes the potency of those PFRs/PFREBs that really do have merit. So, generally speaking, it's probably a good idea for practitioners to steer clients away from PFR/PFREB whenever possible—because it's most likely not worth the court's time, not worth the client's money, and not worth the hit to your credibility as an advocate.[32]

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[31] *Practitioner's Guide*, *supra* note 1, at 71. *See also* 5TH CIR. R. 35.1 and 40.2, and the Internal Operating Procedure accompanying 5TH CIR. R. 35 (emphasizing that a petition for rehearing en banc is an "extraordinary procedure").
[32] Forma Legalis, https://formalegalis.org/2016/05/27/rehearings-at-the-fifth-circuit/ (May 27, 2016).

8. Be Nice to the Profession and Do Your Part to Change our Culture.

As last-year's speaker, Marianne Auld, and many other legal professionals recognize, it is not enough to acknowledge that the legal profession faces significant challenges when it comes to ethics and professionalism. Instead, all members of the legal profession must take affirmative steps to contribute to change.

Many scholars have explored how different facets of the legal profession are already doing their part to police legal ethics. For example, in 2011, Judith Fischer explored how judges are taking it upon themselves to confront unethical and unprofessional in their opinions and rulings.[33] Meanwhile, in 2012, Christopher Whelan and Neta Ziv explored how professionalism is becoming "privatized" as corporate clients use their client guidelines to monitor the ethical conduct of their attorneys, noting that "[n]ot only can clients, especially in-house counsel, monitor lawyer conduct directly and indirectly, they have the leverage to direct and to manage particular behavior."[34] Addressing the law school setting, in 2014, Francis DeLaurentis explored manners in which law professors can better incorporate legal ethics into their legal writing curriculum.[35]

What can the practicing attorney do? In my opinion, the answer is three-fold:

1. Act ethically even when it requires extra effort. As discussed in this outline, the ethical choice, especially in appellate practice, is often the choice that requires extra effort. The ethical appellate attorney thoroughly researches the law. The ethical appellate attorney is meticulous and ensures that their written submissions conform to all national and local procedural rules. The ethical attorney engages in multiple rounds of brief editing to make sure that all representations of the record and the law are correct. The ethical attorney discloses and distinguishes adverse authority, even when he is inclined to believe that his opposing counsel will not do the same. The ethical attorney avoids personal attacks, even when the same courtesy is not offered by his opponent. The ethical attorney knows when to have a difficult conversation with his client and avoids filing frivolous petitions for rehearing.

2. Mentor the next generation. Most experienced attorneys expect young attorneys to have an inherent ethical conscience that can guide all of their decisions as a "baby lawyer." The truth, however, is that, like children, young attorneys usually follow the instruction of their elders. If a young attorney sees an experienced attorney treating opposing counsel with disrespect, he will likely follow suit. Be a role model at all times. In addition to acting as a role model, take the time to tell your younger attorneys when they are engaging in unprofessional behavior. For example, if you delete words like "meritless" or "baseless" from a draft, tell the younger attorney why you did so. Young attorneys can sometimes

[33] FISCHER, *supra* note 27, at 372-94.
[34] Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2604 (2012).
[35] Frances C. DeLaurentis, *When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal*, 7 DREXEL L. REV. 1, 35 (2014).

interpret edits of this kind as merely reflective of personal preference in word choice. Make sure they are aware that your edits are pointed to a larger effort to avoid unnecessary attack.

3. Incorporate civility into your work culture. I often question how we can expect the entire legal culture to change for the better when we don't even take the time to monitor the culture of civility in our smaller, individualized work communities. What comes to mind initially is unspoken firm "hierarchies of importance" and the accompanying tolerance of speaking down to members of the staff. To promote professionalism in the larger legal community, I encourage experienced attorneys to "audit" their smaller workplace culture. How do your employees of differing levels of education and responsibility treat and interact with each other? Do you turn a blind eye to unprofessional attacks that occur in the workplace? Do you reward attorneys or staff members that succeed, despite doing so in an unethical and unprofessional manner? If so, what does this demonstrate to the next generation of attorneys? Does your workplace culture promote ethical and professional behavior in the legal profession?

Overall, the legal profession will not change overnight. However, small measures of ethical and professional behavior can certainly stimulate drastic change overtime. Just remember to *Work Hard & Be Nice to People.*