



# APPELLATE ETHICS

Bar Association of the Fifth Federal Circuit

Texas A&M Law School, Fort Worth, Texas

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# GENERAL OBSERVATIONS

- Nobody expects to be unethical (well mostly no one).
- Nobody thinks they are unethical (well mostly).
- Become familiar with and follow the rules of the FRAP, the Fifth Circuit, the ABA Model Rules, and the Texas Rules of Professional Conduct and Responsibility.
- Be a zealous but professional advocate.



# ETHICS AND THE COURT

- Duty of Candor
- Duty of Accurate Citation
- Duty of Adequate Briefing
- Duty of Timely Argument
- Duty to Maintain Professional Decorum
- Duty of Thorough Research
- Duty to Monitor Docket
- Special Considerations in Civil Appeals
- Special Consideration in Criminal Appeals
- Ineffective Assistance of Counsel



# THE PARTY PRESENTATION PRINCIPLE

- ***United States v. Sineneng-Smith***, 590 U.S. 371, 375-376 (2020): “In both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”
- Our system “is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.” *Id.*
- ***Elmen Holdings, L.L.C. v. Martin Marietta Materials, Inc.***, 86 F.4th 667, 674-675 (5th Cir. 2023) (same).



# DUTY OF CANDOR

- **ABA Model Rule 3.3(a)(1):** “A lawyer shall not knowingly ... 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.”
- ***United States v. Robinson***, 318 F. App’x 280, 284 n.3 (5th Cir. 2009): Duty of candor is ongoing.



# DUTY OF CANDOR

- ***Trade-Winds Environ. Restoration, Inc. v. Stewart Dev., Ltd.***, 409 F. App'x 805, 808 n.3 (5th Cir. 2011): Appellant's failure to cite recent Fifth Circuit opinion (that involved same appellant) in opening brief "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."
- ***United States v. Quintanilla***, 114 F.4th 453, 461 n.1 (5th Cir. 2024): "There is some discrepancy among parts of the record, and the government's brief that presents it as cohesive is misleading."



# DUTY OF ACCURATE CITATION

- **Fed. R. App. P. 28(a)(8)(A):** Argument must contain “citations to the authorities and parts of the record...”
- **5th Cir. R. 28.2.2:** Every assertion in a brief regarding matter in the record must be supported by a reference to the page number of the original record where the matter is found.
- **5th Cir. R. 46.3:** Attorneys must cite to “all pending related cases and any cases on the docket of the Supreme Court, or this or any other U.S. Court of Appeals, which involve a similar issue or issues” in their entry of appearance form. *See In re Perez*, No. 24-40671, 2024 WL 4784386 at \*1 (5th Cir. Oc. 23, 2024) (failure to follow rule may result in sanctions or disciplinary action).



# DUTY OF ACCURATE CITATION

- **ABA Model Rule 3.3(a)(2):** “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.”
- **Fed. R. App. P. 10(b) & 5th Cir. R. 10.1:** Appellant retains the duty to order the transcript.





# DUTY OF ACCURATE CITATION

- ***Khan v. Midwestern University***, 879 F.3d 838, 840 (7th Cir. 2018): “We emphasize here how important it is for the court (and the parties) to have accurate citations to the record lest the court guess incorrectly to what the party is referring.”
- ***United States v. Quintanilla***, 114 F.4th 453, 476 (5th Cir. 2024): Appellant’s failure “to include a transcript of all relevant evidence” – here, a transcript of the sentencing hearing – constituted forfeiture of the issue challenging the sentence.
- ***In re Favre***, 342 F. App’x 5, 8 n.1 (5th Cir. 2009): Failure to provide any citation to the record or case law may result in issue being waived on appeal.



# DUTY OF ACCURATE CITATION

- ***Campbell v. Coppell Indep. Sch. Dist.***, No. 24-10318 (5th Cir. Feb. 4, 2025): Cursory briefing and failure to provide legal authority can constitute abandonment of issue.
- ***Coury v. Moss***, 529 F.3d 579, 587 (5th Cir. 2008): Defendants abandoned position on appeal by citing state cases but failing to explain how they provided authority for their position.
- ***United States v. White***, No. 23-10194, 2024 WL 4987350 (5th Cir. Dec. 5, 2024): Citing cases that may contain a useful argument is inadequate to preserve argument on appeal.



# DUTY OF ACCURATE CITATION

See **Fifth Circuit Form 1** for proper record citation form:

<https://www.ca5.uscourts.gov/docs/default-source/forms/fifth-circuit-court-of-appeals-form-1.pdf?sfvrsn=4>



# DUTY OF ADEQUATE BRIEFING

- **Fed. R. App. P. 28(a)(5) & (b)(2)**: Argument must contain “statement of issues presented for review.”
- ***Hoskins v. GE Aviation***, 803 F. App’x 740, 743 (5th Cir. 2020): Limiting review only to those issues “in line with adequate briefing” because “[i]t is not our duty to sift through the record in search of evidence to support” a party’s positions.
- **Fed. R. App. P. 28(a)(8)(B)**: Argument must contain “the applicable standard of review” for each issue.
- ***United States v. Scroggins***, 599 F.3d 433, 446-447 (5th Cir. 2010): A party must ordinarily identify the legal standards and any relevant Fifth Circuit cases.



# DUTY OF ADEQUATE BRIEFING

- ***Kretchmer v. Eveden, Inc.***, 374 F. App'x 493, 697 (5<sup>th</sup> Cir. 2010): When a party lists issue as one presented for review but does not make any argument on that issue in the body of the brief, the argument is waived.
- ***United States v. Quintanilla***, 114 F.4th 453, 464 (5th Cir. 2024): When a party fails to list an issue presented in the statement of the issues, that issue is forfeited even if raised in the body of the brief.



# DUTY OF ADEQUATE BRIEFING

- **Fed. R. App. P. 28(a)(8)(A)**: Argument must contain the “contentions and the reasons for them.”
- ***In re Repine***, 536 F.3d 512, 518 n.5 (5th Cir. 2008): Because of conclusory briefing, Court could not discern basis for or substance of argument; issue therefore waived due to inadequate briefing.
- ***Burgess v. Cleco Corp.***, 539 F. App'x 454, 455 (5th Cir. 2013): Appellant's failure “to support his arguments with accurate citations to material facts and legal authority,” results in waiver of several issues.



# DUTY OF TIMELY ARGUMENT

Generally, Court will not consider arguments raised for the first time:

- ***Conkling v. Turner***, 18 F.3d 1285, 1299 (5th Cir. 1994): In reply brief.
- ***United States v. Devaney***, 109 F.4th 322, 330 n.11 (5th Cir. 2017): Failure to respond in reply brief to opposing party's contentions can waive an issue.
- ***United States v. Guillen-Cruz***, 853 F.3d 768, 777 (5th Cir. 2017): In a 28(j) letter.
- ***Martinez v. Mukasey***, 519 F.3d 532, 545-46 (5th Cir. 2017): At oral argument.



# DUTY TO MAINTAIN PROFESSIONAL DECORUM

- ***United States v. Lanier***, 879 F.3d 141, 151 n.5 (5th Cir. 2018): Court laments willingness of counsel to distort record and challenge opposing counsel's integrity with accusations that could not have been made in good faith.
- ***Fleming v. United States***, 162 F. App'x 383 (5th Cir. 2006): Caution to attorney appearing *pro se* that continued use of "intemperate and abusive language" and "ad hominem attacks on federal judges" will "invite the imposition of sanctions available to this court."





# DUTY TO MAINTAIN PROFESSIONAL DECORUM

- ***Casas v. American Airlines, Inc.***, 304 F.3d 517, 526-527 (5th Cir. 2002): Casas asked Court to decide whether American should be sanctioned for making misstatements in its briefs.
- Court notes that American's misstatements were likely caused by its attorneys' inadequate research, and that plaintiff's briefs were "hardly exempt" from the same problems.
- Counsel should therefore "hesitate before accusing others of lying."



# DUTY TO MAINTAIN PROFESSIONAL DECORUM

- *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989)— “Rules of fair play apply to all counsel and are to be observed by the prosecution and defense alike. No counsel is to throw verbal rocks at opposing counsel. The court will not accept such conduct from any lawyer. If anything, the obligation of fair play by the lawyer representing the government is accentuated.”



# DUTY OF THOROUGH RESEARCH

- ***Gomez v. Quarterman***, 529 F.3d 322, 334 n.9 (5th Cir. 2008): “A reasonable lawyer prepares reasonably for cases. That means that he conducts reasonable research, drafts reasonable briefs, directs reasonable investigation, and reasonably allocates time to those avenues with the most likelihood of success.”
- **ABA Model Rule 3.3(a)(2)**: “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.”



# DUTY OF THOROUGH RESEARCH

- ***United States v. Lanier***, 879 F.3d 141, 150 (5th Cir. 2018): Issue abandoned on appeal when defendant copies and pastes argument from his district court motion but fails to address the district court's reasons for denying motion.
- ***United States v. Thompson***, No. 24-50045, 2024 WL 4904669 at \*3 (5th Cir. Nov. 27, 2024): Appellant cannot adopt by reference fact-specific challenges by incorporating similar challenges from another appellant's brief.



# DUTY TO MONITOR DOCKET

- ***Rollins v. Home Depot USA***, 8 F.4th 393, 396-397 (5th Cir. 2021): Counsel's duty to check the docket, read all orders received, ensure functioning email system, and inquire about the status of case.
- ***Trevino v. City of Fort Worth***, 944 F.3d 567, 570 (5th Cir. 2019): Counsel's failure to respond to defendant's motion to dismiss because email was incorrectly diverted to spam folder not sufficient to reverse district court's dismissal of suit.



# SANCTIONS

- Fed. R. App. 38 (allowing sanctions for “frivolous” or “vexatious” appeals). “[F]ederal courts have the inherent power to police the conduct of litigants and attorneys who appear before them. *In re Rudder*, 100 F.4th 582, 584 (5th Cir. 2024).
- ***United States v. Brown***, 72 F.3d 25, 28 (5th Cir. 1995): Review of district court-imposed sanctions is abuse of discretion.



# SANCTIONS

- ***Sun Coast Resources, Inc. v. Conrad***, 958 F.3d 396, 398 (5th Cir. 2020): Defendant-appellee’s FRAP 38 motion for sanctions denied after dismissal of appellant’s “frivolous” appeal because appellant was incompetent not malicious.
- ***Johnson v. Lumpkin***, 76 F.4th 1037, 1039 (5th Cir. 2023): Denying petition for rehearing *en banc* as sanction where counsel already tested “the limits of their duties of good faith and candor.” Expectation was exercise of “better judgment” to discern whether to file a petition”—especially one that badly misstates the opinion's conclusion”. Counsel strongly encouraged “to confine future arguments to the limits imposed by applicable ethical rules.”



## SPECIAL CONSIDERATIONS WITH CLIENT COMMUNICATIONS IN CIVIL CASES

- **ABA Model Rule 1.4(a)(1)&(3):** “A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent...is required,” and (3) keep the client reasonably informed about the status of the matter.”
- **Duty to disclose malpractice:** Appellate lawyer discovers malpractice of trial counsel or appellate lawyer's own malpractice.
- **ABA Formal Ethics Opinion 481 (2018):** Lawyer must inform a current client if s/he believes material errors in the client's representation have been made.





## SPECIAL CONSIDERATIONS WITH CLIENT COMMUNICATIONS IN CRIMINAL CASES

- ***United States v. Tighe***, 91 F.4th 771, 774-76 (5th Cir. 2024): Defense attorney has duty to consult with client about right to appeal.
- ***Roe v. Flores-Ortega***, 528 U.S. 470 (2000): “Consult” is advising defendant “about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover” his wishes. Judicial notice of right to appeal does not absolve counsel of duty to advise client.
- ***United States v. Tapp***, 491 F.3d 263, 264-66 (5th Cir. 2007): If defendant wants to appeal, defense attorney must file notice of appeal even if right to appeal was waived in plea agreement.



# INEFFECTIVE ASSISTANCE OF COUNSEL

- ***United States v. Reinhart***, 357 F.3d 521, 525-530 (5th Cir. 2004): Appellate counsel ineffective by failing to raise meritorious, preserved argument challenging application of sentencing guideline that increased defendant's sentence.
- ***Harris v. Day***, 226 F.3d 361, 366 (5th Cir. 2000): Appellate counsel ineffective by filing one-page motion to withdraw pursuant to *Anders*. Expectation brief will "at least" refer "to anything in the record that might arguably support the appeal."



# INEFFECTIVE ASSISTANCE OF COUNSEL

- 5th Cir. *Anders* Guidelines:

<https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/andersguidelines.pdf>

- 5th Cir. *Anders* Checklist:

[https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/anderschecklist.pdf?sfvrsn=afb6c62d\\_10](https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/anderschecklist.pdf?sfvrsn=afb6c62d_10)

