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Ethics of Oral Argument

The Honorable Edward C. Prado

Edward C. Prado
Joshua A. Douglas
755 E. Mulberry, Suite 350
San Antonio, TX 78212
(210) 472-4060

I. Introduction

Oral advocacy is one of the cornerstones of our judicial system. Oral argument presents the opportunity for a lawyer to convince the judges to rule in a particular way, craft a rule, or expound upon a doctrine. Cases are sometimes won just at oral argument; more often, a lawyer can lose a case at oral argument even if the court initially was inclined to rule for that lawyer's client based on the briefs. Therefore, it is important to understand the potential pitfalls lawyers fall into when representing their clients at oral argument.

Most rules of ethics, as they apply to appellate oral advocacy, revolve around the same theme: lawyers should be respectful to the court and use their common sense. Zealous advocacy does not require unprofessionalism. Indeed, effective oral advocacy and ethical behavior co-exist. Judges remember when a lawyer acts unethically, and it can hurt your long-term credibility with the court. This paper will discuss ethical rules relevant to oral advocacy, provide practical tips for presenting an effective oral argument, and describe some examples of unethical behavior during oral argument.

II. Standards Governing a Lawyer's Conduct During Oral Argument

There are few explicit rules governing a lawyer's conduct at oral argument. Instead, the general standards of professionalism apply to all facets of an attorney's representation. This section will discuss those rules and highlight specific oral advocacy components.

A. Model Rules of Professional Conduct

There are no federal rules of professional responsibility governing attorneys who practice before federal courts like there are state rules of professional responsibility. Many federal courts, however, incorporate standards of professional conduct into their local rules. For example, the First, Fourth, Sixth, Tenth, Eleventh, and D.C. Circuits all have local rules that incorporate either the ABA's Model Rules of Professional Conduct or the relevant state rules of professional conduct. Similarly, all of the district courts within the Fifth Circuit have local rules adopting the rules of professional conduct of the state in which the district court is located.

The Fifth Circuit itself has not adopted or incorporated any rules of professional conduct; however, that does not mean that the ABA's Rules are not persuasive authority. In the context of disqualification of an attorney, the Fifth Circuit has referenced the ABA's rules on ethics, calling them the court's "source for the standards of the profession . . . ." *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992); *see also Resolution Trust Co. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993). Instead of looking at state standards to analyze a motion to disqualify, the court in *Dresser* relied upon national standards, including the ABA's rules. *In re Dresser*, 972 F.2d at 543-44 (finding the ABA's standards to be "useful guides"). Therefore, although the Fifth Circuit has not specifically incorporated the ABA's Model Rules, they are still an excellent starting point for gauging an attorney's conduct before the Fifth Circuit.

The following are some of the ABA's Model Rules that attorneys must be aware of on appeal. Failure to abide by them may subject an attorney to sanctions.

Rule 1.1 – Competence

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

Although not frequently denominated as such, many of the sanctions courts of appeals hand down are for conduct that might be considered incompetent, such as failing to follow court procedures and briefing rules, as well as failing to understand the underlying substantive law. *See, e.g.*, *Hamblen v. County of L.A.*, 803 F.2d 462, 464-65 (9th Cir. 1986) (per curiam) (sanctioning attorney for violating multiple briefing rules and failing to address clear precedent); *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985) (sanctioning attorney for "rambling briefs" containing irrelevant evidence and argument). Before arguing an appeal, an attorney must be familiar not only with the substantive law but also with the Federal Rules of Appellate Procedure and the local rules and internal operating procedures of the circuit court.

Rule 3.3 – Candor Toward the Tribunal

> *(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;*
>
> *(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; or*
>
> *(3) offer evidence that the lawyer knows to be false.*

Judges on the courts of appeals check the evidence in their cases and conduct independent legal research. If an attorney has made a false statement of law or fact or omitted significant legal authority, the court will discover it. It is better for an attorney to confront the facts and law adverse to his or her position head on rather than appear like the lawyer is trying to mislead or hide something from the court. Attorneys must double check their facts and constantly update their legal research throughout the duration of the appeal. *See* FED. R. APP. P. 28(j) (requiring lawyers to update the court with "pertinent and significant authorities").

Rule 8.2 – Judicial and Legal Officials

> *(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity*

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