Arkansas Appellate Advocacy Institute, 2015

Advanced Appellate Ethics

Hypotheticals

Hypothetical No. 0.

My comments appear a few pages down. My comments aren't necessarily the answers. They are just my thoughts.

I am going to request some audience participation during this ethics hour. Is it unethical for you to peek? Is it unethical for you to participate if you do?

Remember, I'm probably wrong about at least a couple of my comments.

Hypothetical No. 1.

You are looking for some law on a particularly narrow point. After much searching, you find what you are looking for. It is a great quote. It is brilliantly worded, exquisitely reasoned, and damn near poetic. The problem: It's from an unpublished case from 2003.

Can you cite it?

Now for the harder question. Can you plagiarize it? Can you paraphrase it? How much do you have to change?

Hypothetical No. 2.

You advertise your willingness to do appellate work for those lawyers who would prefer to do something else with their time. You can either enter an appearance on behalf of the lawyer's client, or you can ghostwrite the lawyer's material for him.

Is there anything wrong with ghostwriting for another lawyer? What obligations does it impose on the other lawyer?

Hypothetical No. 3.

You get a call from a Texas lawyer. He needs a brief in Federal Court in Texas. You do not have a Texas license, but you're familiar with Federal Civil Procedure, and you can research Fifth Circuit law just as well as you could Eighth Circuit law. He will gladly sign the brief and take responsibility for it. Can you take the assignment?

Assume you do take the assignment. You do a great job. You win! The Texas lawyer is entitled to petition the Court for fees. Does he have to tell the Court then, or can he just take your timesheets, edit them to provide for his Texas-sized hourly rate instead of your modest Arkansas-sized hourly rate, and submit the motion for fees to the judge?

Hypothetical No. 4.

A layperson needs a brief for his unemployment appeal. You don't want to undertake to represent him. Can you agree to just write a brief for him to sign?

Hypothetical No. 5.

A lawyer asks you if you'll take over his client's case on appeal. You would enter an appearance, do the work, and bill the client. On reviewing the record, you review the Order Extending Time to File Record on Appeal, which reads in its entirety as follows:

Appellant's Motion for an Extention [sic] of time to lodge the record on appeal is extended until April 1, 2015.

N. Decisive

February 10, 2015

Prepared by:

[Your Friend who Refers You a Lot of Cases]

Hypothetical No. 6.

In the same case above, you decide that you still have time to get a *nunc pro tunc* order, assuming that all the required findings can be met.

> (A) The appellant has filed a motion explaining the reasons for the requested extension and served the motion on all counsel of record;
> (B) The time to file the record on appeal has not yet expired;
> (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;
> (D) The appellant, in compliance with Rule 6(b), has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation; and
> (E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal or for the circuit clerk to compile the record.

Your friend tells you that shouldn't be a problem, although he doesn't remember if he actually served opposing counsel with the motion for extension. Opposing counsel is a good guy, and won't object. He'll even sign off on the order.

Assume instead that the opposing counsel isn't a good guy, but he did file a cross-appeal that will also be dismissed if the record isn't filed on time.

Hypothetical No. 7.

Your friend, above, comes to you with a Supreme Court case on which he is the appellee and he has been granted his last extension. The brief is due in six days. You're hungry, you haven't done any real work since . . . well . . . since you ghostwrote the appellant's brief in the same case.

Hypothetical No. 8.

Maybe that one was too easy. You haven't done any real work since . . . well . . . last week when you ghostwrote a brief taking the diametrically opposite position.

Hypothetical No. 9.

The General Assembly passed yet another unconstitutional statute. A lawyer wrote a magnificent brief challenging the constitutionality of the statute and filed it with the Circuit Court of Washington County. The lawyer posts his brief on his Facebook page. You read it and like it.

Can you cut and paste it and use it in your case in Pulaski County?

Can you do it with the author's permission?

Do you need to give attribution for the other lawyer's work?

Hypothetical No. 10.

You are somewhat respected as a legal scholar, but you don't know everything, and there are some things about which you aren't even particularly curious. For instance, you don't have any strong opinions whatsoever on the Second Amendment. A friend of yours, president of the local chapter of the National Bazooka Association, gives you what appears to be a well-written article about how the Second Amendment protects your right to own a bazooka. Your friend asks if you'd mind signing the article and submitting it to the Arkansas Lawyer as your own work. You check the cites and they all look legitimate. The benefit to you is one more scholarly publication on your c.v. and perhaps an all-expense-paid trip to the National Bazooka Convention in sunny Honolulu. Heck, if you'll promise to read the article, they may even get

you a quick shot on one of those news programs where you get to shout at each other and talk over each other. Is there a problem?

Rules of Professional Conduct

Ethical questions always start with the Rules of Professional Conduct. What are the Rules of Professional Conduct but another set of "Rules"? How are the Rules of Professional Conduct different from the Rules of Evidence, the Rules of Civil Procedure, or the Rule against Perpetuities?

We call our Rules of Professional Conduct rules of "ethics." I'm talking about these rules today because we have a mandatory one-hour "ethics" requirement in our continuing legal education obligation: "Every member of the Bar of Arkansas, except as may be otherwise provided by these rules and, excepting those attorneys granted voluntary inactive status by the Arkansas Supreme Court Committee on Professional Conduct, shall complete 12 hours of approved continuing legal education during each reporting period as defined by Rule 5(A) below. Of those 12 hours, at least one hour shall be ethics, which may include professionalism as defined by Regulation 3.02." *Ark. R. Minimum Con't Legal Educ. Rule 3* (2009)

So what is this ethics hour supposed to be all about, anyway? Here it is:

Rule 3.02. Ethics

> Ethics presentations shall be distinct segments no less than one hour in length, shall be specifically designated separately on the program application and shall be accompanied by appropriate documentation. Likewise, claims for ethics credit shall be designated separately on certificates of attendance submitted to the Secretary.
>
> Ethics shall be defined as follows: "Legal ethics includes, but is not necessarily limited to, instruction on the Model Rules of Professional Conduct and the Code of Judicial Conduct."
>
> Ethics may include professionalism courses addressing the principles of competency, dedication to the service of clients, civility, improvement of justice, advancement of the rule of law, and service to the community.

> Professionalism courses may include a lawyer's responsibility as an officer of the Court; responsibility to treat fellow lawyers, members of the bench, and clients with respect and dignity; responsibility to protect the image of the profession; responsibility generally to the public service; the duty to be informed about methods of dispute resolution and to counsel clients accordingly; and misuse and abuse of discovery and litigation.

Ark. Continuing Legal Educ. Bd. R. 1.02 (2015).

The ethics hour ought to also have something to do with the program.

The rule tells us that the Rules of Professional Conduct and a few relate issues are entitled to an hour out of our twelve hour annual continuing legal education requirement. As substantive law, these rules are not all that complex. They are, to be sure, vague, but I'm not sure that they are conspicuously vaguer than some of the other broad rules of general applicability. They are difficult to apply, and frequently there is precious little authority to go on. We could look to the cases in which people get in trouble, but for the most part, with a few exceptions here and there, those seem to be fairly obvious cases. The only thing that bothers me about them sometimes is that I think the committee is too willing to take action on cases that in my opinion, if I were on the committee, I think I'd leave to the legal malpractice bar. If someone lets a statute of limitations run, sure, it's probably a legitimate violation of the rules about competence, but there's always circuit court for those cases. That's just me. I'm not likely to be on the committee any time soon.

Back to the question: What is it about this relatively short set of rules that requires that it dominate one twelfth of our annual continuing legal education requirement? It could be worse. I'm licensed in Texas. There I have to do fifteen hours of CLE a year, three of which are in ethics or professionalism.

To understand this requirement, I believe we have to look beyond the letter of the law and seek out its spirit. Unfortunately, that is often an invitation to impose our own values and prejudices on a set of rules, reading things into them rather than taking guidance from them. We cannot read the Rules of Professional Responsibility as a moral code. It is a body of substantive law. We are obliged to comply with the strictures of that substantive law, even if our personal

moral code might counsel us to act differently than the rules require. In many areas a cogent, strong, and principled ethical argument can be made for behavior that would violate the code. But if we are to practice law, we must set our personal moral beliefs to one side and live up to our oath to follow the Code of Professional Conduct. Still, I think the aspiration of the ethics hour is more than that we engage in a dispassionate analysis of the substantive requirements of the Model Rules of Professional Conduct, and that we spend this hour discussing our "ethical" obligations above and beyond the mere obligations imposed by the Model Rules. Which brings us to the question, *are there any moral or ethical obligations above, beyond, or different from those imposed by the rules?*

The drafters of the Preamble to the Model Rules seemed to think so. "The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." Preamble, Arkansas Model Rules of Professional Conduct. Scope. But what is the content of the additional moral and ethical considerations that should inform a lawyer? Reasonable minds can differ, and the minds of lawyers are seldom limited to the ideas that inhabit the hypothetical "reasonable mind."

The Model Rules are a starting point. The Model Rules are the ethical rules that are actually enforced—the violation of which will subject us to sanctions.

Most real ethical quandaries arise out of conflicting ethical obligations. The most common situation in which this occurs is when a conflict of interest arises. We may owe conflicting duties of loyalty to our clients and the legal system. We may owe conflicting legal duties to different people.

Hypotheticals with Comments

Hypothetical No. 1.

You are looking for some law on a particularly narrow point. After much searching, you find what you are looking for. It is a great quote. It is brilliantly worded, exquisitely reasoned, and damn near poetic. The problem: It's from an unpublished case from 2003.

Can you cite it?

Now for the harder question. Can you plagiarize it? Can you paraphrase it? How much do you have to change?

Comment:

I don't think you can cite it:

> (c) Precedential Value. Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding. Opinions of the Supreme Court and Court of Appeals issued before July 1, 2009, and not designated for publication shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case).

Rule 5-2, Rules of the Arkansas Supreme Court and Court of Appeals.

Plagiarism is somewhat of a different issue in the context of legal writing. We usually think of plagiarism in the context of academics or scholarship. The writer derives a benefit from pretending that certain work is his or her own when in fact the work was done by someone else. In legal writing, however, the benefit of pretending that you wrote something is far outweighed by the fact that the persuasive value of anything you write is far greater if you can attribute it to someone, particularly a court or a scholar prominent in the field.

This hypothetical is one of the few situations in which you cannot benefit from attributing the work to its true author. There are others. There are some well-known incidents in which lawyers took long passages from scholarly works without attribution, and then billed a number of hours consistent with the time it would have taken to research and write the materials. See, *Iowa Supreme Court Board of Professional Ethics and Conduct v. Lane*, 642 N.W.2d 296 (Iowa, 2002) (plagiarism, charging for 80 hours of work to prepare a brief that was largely copied from an uncredited source, and attempt to conceal it once caught, warranted a six month suspension); *See also, Iowa Supreme Court Attorney Disciplinary Board v. Cannon*, 798 N.W.2d 765 (Iowa, 2010) (plagiarism, but no attempt to charge for it, and no attempt to cover it up, warranted public reprimand); Millar, Jr., Richard W. "Copying Another's Work and Charging for it: Taking Plagiarism to New Heights," 44 Orange County Law. 4 (July 2002).

Here we have a different reason for pretending you wrote something you didn't write. What is the solution here?

There is a certain discomfort with trying to change language "just enough" to avoid charges of plagiarism. In The Little Book of Plagiarism by Richard A. Posner (yes, *that* Richard A. Posner), he discusses a young author, Kaavya Viswanathan, who had received a $500,000 advance against royalties and movie rights for a book she had written. Shortly thereafter, it was discovered that the book reproduced many passages from an established author, Megan McCafferty. Later, other examples appeared. The first example is enough:

Kaavya Viswanathan

> Priscilla was my age and lived two blocks away. For the first fifteen years of my life, those were the only qualifications I needed in a best friend. We had first bonded over our mutual fascination with the abacus in a playgroup for gifted kids. But that was before freshman year, when Priscilla's glasses came off, and the first in a long string of boyfriends got on.

Megan McCafferty

> Bridget is my age and lives across the street. For the first twelve years of my life, these qualifications were all I needed in a best friend. But that was before Bridget's braces came off and her boyfriend Burke got on, before Hope and I met in our seventh-grade honors classes.

Posner, supra, p. 4.

There are some differences, but the similarities are undeniable. There are also some similarities between my summary of the circumstances, above, and Judge Posner's summary of the identical circumstances.

But in this incident alone, did Viswanathan plagiarize from McCafferty? Did I plagiarize from Judge Posner?

One obvious difference was that I mentioned my source where Viswanathan did not. Another obvious difference is that Viswanathan and McCafferty are writing fiction, where I'm at least trying to convey facts. And, of course, I'm not getting quite as much as Viswanathan was offered.

But my point is that sometimes it's not easy to avoid plagiarism simply by rearranging a few words, particularly when your message is the same.

Hypothetical No. 2.

You advertise your willingness to do appellate work for those lawyers who would prefer to do something else with their time. You can either enter an appearance on behalf of the lawyer's client, or you can ghostwrite the lawyer's material for him.

Is there anything wrong with ghostwriting for another lawyer? What obligations does it impose on the other lawyer?

Comment: In general, there's nothing wrong with lawyers subcontracting legal work. It does impose some obligations on the lawyers you hire. In the June 26, 2014 amendments to the Rules of Professional Conduct, the Court added Comment 6 to Rule 1.1:

> 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.
>
> When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Another obligation the lawyer undertakes is to check your work and make sure it lives up to the standards it should. The other lawyer may also need to make sure you haven't inadvertently misstated any facts.

Hypothetical No. 3.

You get a call from a Texas lawyer. He needs a brief in Federal Court in Texas. You do not have a Texas license, but you're familiar with Federal Civil Procedure, and you can research

Fifth Circuit law just as well as you could Eighth Circuit law. He will gladly sign the brief and take responsibility for it. Can you take the assignment?

Assume you do take the assignment. You do a great job. You win! The Texas lawyer is entitled to petition the Court for fees. Does he have to tell the Court then, or can he just take your timesheets, edit them to provide for his Texas-sized hourly rate instead of your modest Arkansas-sized hourly rate, and submit the motion for fees to the judge?

Comment: The Arkansas rule is that a lawyer admitted in another jurisdiction (and not suspended or disbarred) may provide legal services on a temporary basis in association with a lawyer admitted in Arkansas who actively participates in the matter.

> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> > (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> >
> > (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
> >
> > (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
> >
> > (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
>
> (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

> (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Ark. R. Prof. Conduct. 5.5 (c) and (d).

The rule in Texas is less detailed:

> A lawyer shall not:
>
> > (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
> >
> > (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Texas Disciplinary Rules of Professional Conduct, Rule 5.05.

This is one aspect of "ghostwriting." Ghostwriting for lawyers doesn't pose as many problems as ghostwriting for pro se litigants, as we'll see in the next hypothetical.

Last year, the Orange County (California) Bar Association issued Formal Opinion 2014-1 regarding Ghostwriting by contract lawyers and out-of-state lawyers. The conclusion was that there was "nothing inherently unethical with a client or lawyer hiring another lawyer . . .to ghostwrite a document to be submitted to a court, without identifying the contract lawyer or discussing his involvement." There were a couple of caveats. If the in-state lawyer requests court awarded attorney's fees, he must disclose the arrangement. The in-state lawyer must also disclose the involvement of the ghostwriter to the client. See. Isabelle Smith, "I Ain't Afraid of no Ghost!: A Review of OCBA Formal Opinion 2014-1 on Ghostwriting by Contract Lawyers and Out-of-State Lawyers, 56 Orange County Law. 44 (December 2014).

Hypothetical No. 4.

A layperson needs a brief for his unemployment appeal. You don't want to undertake to represent him. Can you agree to just write a brief for him to sign?

Comment: The issue is "ghostwriting" again, but here we are concerned with a different kind of ghostwriting. This kind of ghostwriting occurs when a lawyer drafts documents for an unrepresented person to file. It is one kind of "unbundled" legal services. "Unbundled" legal services mean services that a lawyer provides to a client under an agreement that the lawyer will not engage in full-service representation of the client, but will only perform particular tasks for the client. Salman Bhojani, *Attorney Ghostwriting for Pro Se Litigants-A Practical and Bright-Line Solution to Resolve the Split of Authority Among Federal Circuits and State Bar Associations*, 65 SMU L. Rev. 653, 655 (2012). For more information see, http://www.unbundledlaw.org/faq.html

The American Bar Association issued Formal Opinion 07-446 on May 5, 2007. The end result was that, "A lawyer may provide legal assistance to litigants appearing before tribunals "pro se" and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." That conclusion was far from uncontroversial, both before and after. In that opinion, the attitudes various courts have had toward the practice are set out, and it's clear that many courts found the practice of undisclosed ghostwriting fraudulent, dishonest, and that it conferred an unfair advantage on the unrepresented person.

This practice has given law professors and scholars a lot to write about. See, e.g., Lindsay E. Hogan, *The Ethics of Ghostwriting: The American Bar Association's Formal Opinion 07-446 and its Effect on Ghostwriting Practices in the American Legal Community*, 21 Geo. J. Legal Ethics 765 (2008); Jona Goldschmidt, *In Defense of Ghostwriting*, 29 Fordham Urb. L.J. 1145 (2002); John C. Rothermich, *Ethical And Procedural Implications of "Ghostwriting" For Pro Se Litigants: Toward Increased Access To Civil Justice*, 67 Fordham L. Rev. 2687 (April 1999).

Hypothetical No. 5.

A lawyer asks you if you'll take over his client's case on appeal. You would enter an appearance, do the work, and bill the client. On reviewing the record, you review the Order Extending Time to File Record on Appeal, which reads in its entirety as follows:

Appellant's Motion for an Extention [sic] of time to lodge the record on appeal is extended until April 1, 2015.

N. Decisive

February 10, 2015

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[Your Friend who Refers You a Lot of Cases]

Comment: The conclusion I came to when something similar happened (facts greatly exaggerated to enhance the suspense) was that I needed to tell the lawyer about the problem, and tell the lawyer that if I were to undertake representation, I was going to disclose the problem to the potential client and tell him what I planned to do about it. What I planned to do about it was see if I could get a *nunc pro tunc* order entered before trying to lodge the record. The lawyer agreed with everything, including me telling his client that he had made a potentially fatal mistake. We discussed the fact that his client might turn around and hire a different lawyer to sue him for malpractice if things didn't work out. He still said for me to go forward with it, discuss it with the client, and tell him the truth, the whole truth, and nothing but the truth.

I can only hope, if I were faced with the same problem, I would reach the ethically right result as quickly and easily as this lawyer did.

Hypothetical No. 6.

In the same case above, you decide that you still have time to get a *nunc pro tunc* order, assuming that all the required findings can be met.

> (A) The appellant has filed a motion explaining the reasons for the requested extension and served the motion on all counsel of record;
> (B) The time to file the record on appeal has not yet expired;
> (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;
> (D) The appellant, in compliance with Rule 6(b), has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation; and
> (E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal or for the circuit clerk to compile the record.

Your friend tells you that shouldn't be a problem, although he doesn't remember if he actually served opposing counsel with the motion for extension. Opposing counsel is a good guy, and won't object. He'll even sign off on the order.

Assume instead that the opposing counsel isn't a good guy, but he did file a cross-appeal that will also be dismissed if the record isn't filed on time.

Comment: Okay, I made these details up for the hypothetical. Nothing like this has happened to me yet. But I think it would pose an interesting question. The real problem is that if it turns out that one of the essential elements isn't actually true, you can't make it true by stipulating to it.

Hypothetical No. 7.

Your friend, above, comes to you with a Supreme Court case on which he is the appellee and he has been granted his last extension. The brief is due in six days. You're hungry, you haven't done any real work since . . . well . . . since you ghostwrote the appellant's brief in the same case.

Comment: Rule 1.7 prohibits "concurrent conflicts of interest." If the representation of one client will be directly adverse to another client, or there's a significant risk that the representation of one or more clients will be materially limited by a lawyer's responsibilities to another client, a former client, or a third person by a personal interest of the lawyer, you ordinarily cannot represent either client. There is an exception under subsection (b), but one of the requirements is that the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

> [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable[2], meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability[3] must be resolved as to each client.

Ark.R. Prof'l. Conduct, Rule 1.7 Comment 14

Hypothetical No. 8.

Maybe that one was too easy. You haven't done any real work since . . . well . . . last week when you ghostwrote a brief taking the diametrically opposite position.

Comment: This is the positional conflict problem. Comment 24 to Rule 1.7 reads as follows:

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

Ark.R. Prof'l. Conduct, Rule 1.7 Comment 24.

There is a good law journal article about this problem, Noreen L. Slank, Positional Conflicts: Is it ethical to simultaneously represent clients with opposing legal positions?" Michigan Bar Journal, May 2002, p. 15. The author discusses Informal Ethics Opinion RI-108 released by the Michigan State Bar Standing Committee on Professional and Judicial Ethics. In that case, a lawyer represented two unrelated clients in two unrelated domestic-relations cases. The same issue arose. In both cases, the losing party appealed. The lawyer was afraid the Supreme Court would take both cases, and might even consolidate the two appeals. The Committee recommended that the lawyer withdraw from both cases.

Michigan, like most states, appears to permit positional conflicts in trial courts, as trial courts' decisions do not create precedent. The American Bar Association issued Formal Opinion 93-377 on the issue in 1993. The opinion says that the lawyer cannot represent both, but must either refuse to accept the second representation or withdraw from the first. ABA Journal, July 1994. p. 88.

Hypothetical No. 9.

The General Assembly passed yet another unconstitutional statute. A lawyer wrote a magnificent brief challenging the constitutionality of the statute and filed it with the Circuit Court of Washington County. The lawyer posts his brief on his Facebook page. You read it and like it.

Can you cut and paste it and use it in your case in Pulaski County?

Can you do it with the author's permission?

Do you need to give attribution for the other lawyer's work?

Comment: I think the better practice is to acknowledge the attorney's contribution somewhere, even if the language is used with the lawyer's permission. I think a footnote is sufficient.

I have also footnoted when I have filed a brief that borrowed extensively from a previous brief that I myself have written, particularly if I've submitted the same brief to the same trial judge, *mutatis mutandis*. I am concerned that the judge will remember having read the identical argument somewhere.

Hypothetical No. 10.

You are somewhat respected as a legal scholar, but you don't know everything, and there are some things about which you aren't even particularly curious. For instance, you don't have any strong opinions whatsoever on the Second Amendment. A friend of yours, president of the local chapter of the National Bazooka Association, gives you what appears to be a well-written article about how the Second Amendment protects your right to own a bazooka. Your friend asks if you'd mind signing the article and submitting it to the Arkansas Lawyer as your own work. You check the cites and they all look legitimate. The benefit to you is one more scholarly publication on your c.v. and perhaps an all-expense-paid trip to the National Bazooka Convention in sunny Honolulu. Heck, if you'll promise to read the article, they may even get you a quick shot on one of those news programs where you get to shout at each other and talk over each other. Is there a problem?

Comment: To me, this is very similar to the scientific and medical ghostwriting problem. A corporation would like to get some favorable ink in scientific journals, or even

influence the scientific consensus on a subject (such as whether its product will cause your hair to fall out). Or let's say that a drug company would like to promote use of its product, perhaps even off-label use of their products. Certainly scientists on their payroll could publish articles supporting their position, but somehow that might be less persuasive than they would like.

So what is the solution? Get someone else to sign the article. Pay them if necessary, even though it's often not necessary in the publish-or-perish atmosphere of academia. The corporation gets the advantage of manipulating scientific opinion or encouraging doctors to prescribe their products. The scientist lending his name to the paper gets another well-written, often very persuasive publication to put on his or her curriculum vitae. And the scientist just may be able to wrangle a free trip or some other benefits out of the deal.

As described in "Ghostwriting in Medical Literature," Minority Staff Report, 111th Congress, June 24, 2010:

> Medical ghostwriting is a practice where pharmaceutical or device companies hire medical education, marketing or communications companies to draft articles that are presented to prominent physicians and scientists to sign on as authors to increase the likelihood that the article will be published in important medical journals. Ghostwritten articles include articles that are drafted by pharmaceutical or device company employees who are not acknowledged in the final publication. The articles may be review articles, editorials or primary research papers, and they are typically presented to physicians and scientists affiliated with academic institutions. The physicians and scientists agree to sign on even if they may not be intimately familiar with the underlying data or relevant research or provided limited input on the article. Authors who make little to no contribution to a publication are also referred to as "guest" authors.

Id, p. 2.

What you are being asked to do here is pretty much the same as what the academics were being asked to do when they were presented medical articles for their signature.

I think this is in the category of deceptive and misleading practices prohibited by Rule 8.4 (c). We may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

I also think, however, it's arguable that nothing other than a vague prohibition on dishonesty, fraud, deceit, or misrepresentation prohibits you from doing this. I may well be begging the question by labeling this conduct fraudulent. Is it fraudulent? You read over the

article. It appeared to be well-written. You may never before have had an opinion on the Second Amendment, but now you may well be convinced.

And besides, you may get a bazooka out of it.

Gerry Schulze

About the Author

Gerry Schulze practices with Baker, Schulze & Murphy in Little Rock, Arkansas. He has been practicing law since 1983. He is licensed in Arkansas and Texas, although he hasn't actually practiced in Texas for around fifteen years. He practices in the area of plaintiff's personal injury litigation, social security disability, civil rights, civil and commercial litigation, and appellate practice. He is very active in continuing legal education programs, such as this one. He is a member of the Arkansas Bar Association, the American Bar Association, the State Bar of Texas, the Arkansas Trial Lawyers Association, the American Association of Justice and Scribes. Gerry attended the University of Puerto Rico in Mayagüez (where the primary language of instruction is Spanish). He earned a B.A. degree, magna cum laude, from Loyola University in 1980 and his J.D. degree with high honors, from the University of Arkansas at Little Rock. Gerry is fluent in Spanish, and still remembers some French, German, and Russian from college. Recently, he has begun the study of Turkish. He won the Silver Medal in Adult Turkish Language at the 2015 Turkish Olympiad in Houston, Texas. In his spare time he studies linguistics, foreign languages, and engages in the art of scambaiting.