Ethics in Appeals and Legal Writing

Hypothetical Problem No. 1

You are a solo practitioner focusing on appointed criminal appellate work. You recently filed a brief in the North Carolina Court of Appeals on behalf of an indigent criminal defendant. The North Carolina Rules of Appellate Procedure limit your brief to 8,750 words.

You struggled to comply with the word limit in this complex case and came in just under 8,750 words. When you provided an early draft to your client, the client insisted that the facts section be expanded to include additional facts portraying the client in a favorable light. These additional facts were, in your view, not needed to address the legal issues raised, but they added a sense of "atmospheric" sympathy for your client, so you included them.

Your brief also included two arguments. The first argument took the majority of the brief to address, and you considered it a likely "winner" in the sense that it had greater than a 50% chance of success. The brief also included a second argument that you considered a "loser" in the sense that it had less than a 10% chance of success.

After you filed the brief, but before the opposing brief is filed, you discover that you forgot to check the "include footnotes" box in the word count and that, when you check the box, the brief is over the word limit by a few hundred words.

You begin preparing a revised brief to submit to the Court. While doing so, you discover a newly decided case that could negatively impact both your arguments. You review the case carefully and come up with a very weak argument to distinguish it, although you think it is quite possible the court will consider this case to be controlling authority. You also learn that some of the favorable facts discussed in the original brief have changed—those favorable facts were true at the time your wrote your brief, and were supported by evidence in the record on appeal, but since the appeal began things changed and those facts are not true anymore.

Finally, you realize that you can change some formatting and spacing in the citations and save yourself several hundred words.

What ethical considerations arise when deciding what to remove, and what to add, in your efforts to comply with the word limit?

Hypothetical Problem No. 2

You are a senior associate at a small firm who just became a North Carolina Board Certified Specialist in Appellate Practice. You recognize that in order to make partner, you need to start generating your own clients and legal work.

You are contacted by a wealthy retiree who lives alone on her large farm raising horses. A nearby landowner recently opened a new type of paper mill on his property. The new plant recycles old paper and the process produces foul odors. The retiree notices that her horses have been acting strange since the paper mill opened, included loss of appetite and energy. Several have required veterinary treatment and all are generally in failing health.

The wealthy retiree had her long-time estate lawyer sue her neighbor to stop the odors coming from the plant. The case was dismissed for failure to state a claim on which relief could be granted.

The retiree wants to hire you to appeal. She tells you she has fired her former attorney and plans to sue him for malpractice. She wants the full resources of your firm devoted to her appeal and will pay full firm rates. She also tells you that she heard her neighbor had spent tens of thousands of dollars getting her case dismissed and he cannot afford to continue paying his lawyers. She tells you that her neighbor might not be able to fight the case on appeal and may be forced to settle if an appeal is filed.

During your initial review of her case, you conclude that an appeal has only a tiny chance at success. The complaint was poorly pleaded and the trial attorney failed to make several arguments that might have avoided dismissal.

Can you and should you take the case? What advice should you offer this potential client both before and (if you take the case) after representation begins?

Hypothetical Problem No. 3

You are an insurance defense lawyer in heated litigation on behalf of an important client. You have a hearing scheduled in a few weeks on your motion to compel production of documents requested during discovery. The discovery phase of this case has turned nasty, with both parties believing the other side is making unreasonable requests. Your client told you recently that "you should not agree to anything those people want without asking me first."

The opposing side's lawyer left you a message. She has a long-planned vacation the week of the hearing and asked for consent to a motion to reschedule the hearing the following week.

You are free the following week, so it would not be a problem to reschedule the hearing to accommodate the request. But you also recognize that, because of the way the local court calendars work, if you put off the hearing for a few more weeks, it will likely mean the trial in this case will get pushed back until the next term, which could mean a delay of nearly a year. Your client is financially sound, and the opposing client is desperate to move the case forward because it is counting on the judgment to stay solvent through the end of the year.

You inform your client, and the client tells you not to agree to reschedule the hearing next week and, instead, to request that the hearing be rescheduled in a few weeks to push the trial into next year.

What, if any, ethical issues arise in your decision of whether to consent to reschedule the hearing and whether to seek to push the hearing out several weeks as your client requests?

Hypothetical Problem No. 4

You are an experienced business law attorney at a large firm with lawyers in offices all over the world. One of your largest clients signed a contract to purchase parts for their latest smart phone from a new, high-tech supplier that designed a better, cheaper way to make the parts.

Your client signs an exclusive output contract with the supplier, which states that your client will buy as many of the parts as the supplier can produce for a fixed price.

It turns out, this new supplier's technology was better than anyone anticipated. It produces hundreds of millions of the parts for far less cost than other suppliers. So many parts, in fact, that your client will be forced to buy millions of parts that will go unused. The client is panicked. This contract could ruin its business.

You come up with a novel legal argument that because of technological change— and the resulting mass-production that far exceeds what your client believed was possible—the contract is void for lack of a meeting of the minds. You file suit and lose at the trial level but, on appeal, get a very favorable panel of judges. You think you might actually win this case!

After reading about the suit in a blog post, one of your colleagues points out that many other firm clients in the industry have similar output contracts with their suppliers on very favorable terms, and a precedential ruling from the appellate court could mean all of those contracts are void as well. In fact, several of your partners are currently representing a client in lengthy negotiations with a supplier over a similar contract.

What, if any, ethical issues arise and how should you address them?

Hypothetical Problem No. 5

You are a partner at a law firm. You're getting pressure from your firm to do some *pro bono* work this year.

From some friends in the community, you hear a story about a student at a nearby community college. The student is in charge of the campus hunting & fishing club and runs a blog that often criticizes professors who express support for gun control views in the classroom.

Apparently, in a recent blog post, the student commented about a particularly vocal anti-gun professor by stating "I've been around guns my whole life. If I ever see Professor James, I will teach him a thing or two about the dangers of guns." College administrators interpreted the blog post as a threat of violence, expelled the student, and barred her from campus.

After meeting with the student and viewing her blog posts, you conclude her First Amendment rights were violated. You also are confident that there is little chance of a monetary recovery in this case, although you likely can get the student reinstated. You agree to represent her in a pro bono lawsuit and you file the lawsuit. At the hearing on the State's motion to dismiss, the trial court openly misstates the appropriate constitutional standard and grants the motion to dismiss on grounds you are convinced are erroneous and unlawful. You begin drafting a notice of appeal.

The next day, you pick up the local paper and see the headline "Local attorney files suit on behalf of Alt-Right activist." It turns out, your client is active on social media and often expresses far-right political views that many find offensive, including many criticisms of the LGBTQ+ community.

When you return to the firm, you are called to an emergency partner meeting. The firm has fielded calls all day from key firm clients expressing outrage at your representation of the student and demanding you withdraw from the case. If you continue to represent the student, enough clients may move their work elsewhere that the firm could go out of business.

Can you fire the client? Should you? If you do so, do you have any further obligations to the client with respect to the case?