



Ethical Issues on Appeal

Judge Richard Dietz

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 you 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 steps must you take upon discovering the error in the word count? Assuming you can file a corrected brief, what ethical considerations arise when deciding what to remove, and what to add, in your efforts to comply with the word limit?





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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, including 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. Several claims are 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 those claims 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 because her former lawyer made many mistakes in drafting the complaint. In addition, although there is a weak but plausible argument for a risk of inconsistent verdicts, the appeal has a good chance of being dismissed as interlocutory because the trial court ruled on some but not all claims, meaning the challenged order is not a final judgment. But the appeal will further add to the costs of the litigation and may force the opposing side to talk settlement.

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





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Hypothetical Problem No. 3

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?

