

HOWARD W. BRILL
VINCENT FOSTER PROFESSOR OF
LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY
UNIVERSITY OF ARKANSAS

ROBERT A. LEFLAR LAW CENTER
FAYETTEVILLE, ARKANSAS 72701

TELEPHONE (479) 575-5358
FACSIMILE (479) 575-3320

May 9, 2014

Chadd Mason
Cabana Asset Management Program
208 N. College Ave.
Fayetteville, AR 72701

Dear Mr. Mason:

You have asked for my evaluation of the Cabana Asset Management Program, and in particular, the Attorney Affiliate Program. My general understanding of the program is that participating attorneys will also be FINRA Series 65 qualified investment advisors. These attorneys will be able to suggest to clients that they might find it advisable to invest their funds with Cabana Asset Management. The participating attorneys will receive a quarterly fee from Cabana Asset Management based on the program management fee generated by the client's invested portfolio.

You have asked for a preliminary opinion on attorneys participating in the Attorney Affiliate Program in light the Model Rules of Professional Conduct (as adopted by the American Bar Association).

Discussion: The legal profession has long recognized that attorneys may be involved in other professions that are tangential to the legal profession, and further that clients may best be served when an attorney has the capability to provide non-legal services to clients. An attorney has a fiduciary duty to a client, and accordingly must subordinate his personal interests to the best interests of the client. Model Rule of Professional Conduct 5.7 balances those policies. Further, Model Rule 1.8 which governs business transactions between an attorney and a client is also applicable.

Rule 5.7 permits an attorney to engage in law-related services. The comments refer to services, including those of title insurance, financial planning, accounting, economic analysis, and tax preparation. A lawyer may engage in those services, individually or through an entity. Those services may be provided to the client in two ways: (A) as a part of the legal services; and (B) distinct from the legal services. The attorney who participates in the Attorney Affiliate Program may function in either, or both, configurations.

(A): The attorney/investment adviser: In this scenario the attorney is wearing two hats: providing legal services for the client and also providing investment services for the client. It may be that the attorney has settled a matter for the client, and the client needs investment advice in regard to the settlement proceeds. In this instance, because the law related services (that is, the Cabana Asset Management financial services) and the legal services are effectively merged (as with the Attorney Affiliate Program), special safeguards for the client must be assured:

- 1) The Rules of Professional Conduct still apply to the conduct of the attorney even while wearing the hat of an investment adviser. Those obligations include maintaining confidentiality of client matters, avoidance of conflicts, a prohibition against false statements, and a prohibition against fraud or dishonesty in any form.
- 2) The duty to inform the client mandates that the client be told that the lawyer/investment adviser has a specific interest in Cabana Asset Management and will benefit financially and directly from client funds that are placed with Cabana Asset Management. Full disclosure of this conflict is essential.
- 3) The client must be informed that it has no obligation to invest with Cabana Asset Management; it must be free to invest elsewhere. The attorney should in no way put any pressure on the client to invest with Cabana Asset Management.
- 4) The client should be advised in writing of the desirability of seeking and has a reasonable opportunity to seek the advice of independent legal counsel before entering into an agreement that will benefit the attorney.
- 5) The business transaction (the investment with Cabana Asset Management) must be fair and reasonable to the client, and understandable to the client.
- 6) The attorney is to give candid advice and exercise independent professional judgment; and may as appropriate refer to economic or financial issues. Rule 2.1. For instance, it may be that for some clients investments with Cabana are not in the client's best interests.
- 7) The attorney must properly train and monitor the services of non-attorney support staff to assure compliance with the governing standards. Rule 5.3.

B): The attorney serving only as an investment adviser: In this instance a client is referred to the attorney but only for investment advice. The attorney is not providing legal services; the attorney is functioning only as an investment adviser. Because this entity is controlled in part by the attorney, Rule 5.7 requires that the services should be offered in a manner that is distinct from legal services; that the client be informed that the attorney is not providing legal services, and that the protections of the client-lawyer relationship do not exist.

These services may be provided from the same physical location as the law firm. But the lawyer must take "reasonable measures to assure [the] person obtaining the law-related services that the services are not legal services and that the protections of the client-lawyer relationship do not

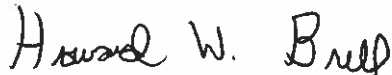
exist.” Rule 5.7(a) (2). This communication should be made before entering into an agreement for law-related services. The communication should be in writing, and should be appropriate under the circumstances, such as the sophistication of the client. See Comments 6 & 7.

Financial records and funds of the client must be maintained in a fashion that is clearly distinct from those of the law firm. Other practical steps may be appropriate to further emphasize to the client that the services provided are not legal services.

Protections for the client may be provided by the standards of the investment industry, but those are not identical to the standards of the legal profession. The conduct of a lawyer in this situation is still subject to the Rules that apply generally to lawyer conduct. Rule 8.4 (a).

Conclusion: The Model Rules of Professional Conduct permit attorneys to participate in the Attorney Affiliate Program as set up by Cabana Asset Management. An attorney may fill either, or both, of the roles described above. In either instance, appropriate disclosure must be made; appropriate forms must be drafted; and proper written consent from the client or the investor must be obtained. Those methods of implementation go beyond this preliminary opinion. It will be appropriate to include them in a handbook or policy manual for attorney affiliates.

Sincerely,

A handwritten signature in cursive script that reads "Howard W. Brill".

Howard W. Brill

Email: hbrill@uark.edu

HOWARD W. BRILL

Vincent Foster University Professor of Legal Ethics and Professional Responsibility University of Arkansas School of Law

EDUCATION: A.B., Duke University (1965)
J.D., University of Florida (1970); Order of the Coif; Editor-in-Chief,
University of Florida Law Review
LL.M., University of Illinois (1979)

TEACHING

EXPERIENCE:

University of Arkansas
Assistant Professor, 1975-77
Associate Professor, 1977-82
Professor, 1982-
Vincent Foster Professor of Legal Ethics and
Professional Responsibility, 1998-
University Professor, 2005-
Interim Dean, 2005-06
St. Petersburg, Russia, Summer 2003; Summer 2005, Summer 2008,
Summer 2011 (Comparative Legal Ethics)
Program Director, 2008-2011
Vytautas Magnus University, Kaunas, Lithuania
Comparative Legal Ethics (March 2012)
Comparative Constitutional Law (June 2013)
Downing College, Cambridge University, England
Comparative Equity (Summer 2001)
University of Tennessee
Visiting Professor, Fall 1988
University of South Carolina
Visiting Professor, Fall 1983
University of North Carolina
Visiting Associate Professor, Summer 1980
University of Illinois
Visiting Associate Professor, 1978-79
Teaching Fellow, 1972-73
University of Florida
Interim Instructor (Legal Writing Coordinator), 1971-72
Blackhawk College, Moline, Illinois, 1974
(Real Estate Practice)
Suwanee High School, Live Oak, Florida, 1969
(World Geography)
Government Secondary School, Sokoto, Nigeria, 1965-67 (Peace Corps
Volunteer; English language, African literature and African history)

Law School subjects taught:
Civil Procedure
Professional Responsibility
Remedies (Damages, Equity, Restitution)
Arkansas Constitution
The Law and Baseball
Family Law
State and Local Government
Legal Writing & Appellate Advocacy

OTHER

EXPERIENCE: Associate, Spector, Taber & Tappa, Rock Island, Illinois, 1973-75
Law Clerk, Judge Robert T. Mann, District Court of Appeal, Florida, 1970-71

PUBLICATIONS:

I. Books: The Law of Damages in Arkansas (5th Edition, 2004, West Publishing Company) (2013 supplement).
Arkansas Professional and Judicial Ethics (8th Edition, 2010, Arkansas Press)

II. Monographs: The Law and Ethics of Lawyering (Arkansas), released as part of The American Legal Ethics Library, Cornell Law School Legal Information Institute (1998) (CD Rom and www.law.cornell.edu/ethics).

III. Articles: "Take Me Out to the Hearing: Major League Baseball Players Before Congress," 5 Albany Gov. L. Rev. 90 (2012) (co-authored with Christian H. Brill).
"Campaign Contributions, Campaign Involvement, and Judicial Recusal," 64 Ark. L. Rev. 103 (2011).
"The Arkansas Code of Judicial Conduct of 2009" Ark. L. Notes 1
"For Such a Time as This": Bible Verses for Law School Deans, 2006 Ark. L. Notes 125.
"Arkansas Law of Damages," 2004 Ark. L. Notes 9.
"The Christian Lawyer: Seven Distinguishing Marks, 2001 Ark. L. Notes 137.
"Equity and the Criminal Law," 2000 Ark. L. Notes 1.
"Equitable Remedies for Common Law Torts", 1999 Ark. L. Notes 1.
"Reformation in Arkansas", 1998 Ark. L. Notes 1.
"Specific Performance in Arkansas", 1995 Ark. L. Notes 17.
"Business Transactions with Clients: Ethical or Ill-Advised", Arkansas Lawyer (Winter 1995), page 28.
"The Name of the Departed Team: Who can use it?", 15 Whittier L. Rev. 1004 (1994).
"Equity: Real Property and the Problem of the Troublesome Neighbor", 1994 Ark. L. Notes 1.
"Sex and the Client: Ten Reasons to Say 'No!'", 33 Santa Clara L. Rev. 651 (1993).
"The Maxims of Equity", 1993 Ark. L. Notes 29.
"Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, Subrogation", 1992 Ark. L. Notes 1.
"Baseball and the Legal Profession", 1990 Ark. L. Notes 81.
"Punitive Damages in Arkansas - Expanded? Restricted?", 1990 Ark. L. Notes 25.
"A Primer on Judgment and Pre-judgment Interest in Arkansas," 1989 Ark. L. Notes 1.
"Law and Equity in Arkansas: Will Liles v. Liles Lead Us Out of the Morass?", 1987 Ark. L. Notes 1-10.
"A More-or-Less Accurate Rendition of a Faculty Dialogue on Commercial Paper, Garnishment, Interpleader, Intervention, Creditor's Bills and, If You Can Believe It, Bills of Peace", 1986 Ark. L. Notes 61 (with Laurence, Matthews & Watkins).
"Unjust Enrichment: An Arkansas Outline", 1985 Ark. L. Notes 1-7.
"A Proposed Arkansas Contempt Statute", 1984 Ark. L. Notes 29-38.
"The Election of Remedies Doctrine in Arkansas", 37 Ark. L. Rev. 385-417 (1984).
"The Citizen's Relief Against Inactive Federal Officials: Case Studies in Mandamus, Actions 'In the Nature of Mandamus,' and Mandatory Injunctions", 16 Akron L. Rev. 339-396 (1983).
"The Arkansas Code of Judicial Conduct", 35 Ark. L. Rev. 247-272 (1982).
"Faculty Note: Harvey v. Eastman Kodak Company", 34 Ark. L. Rev. 722-728

(1981).
"The Arkansas Supreme Court Committee on Professional Conduct", 1969-1979, 33 Ark. L. Rev. 571-604 (1980).
"Federal Rule of Civil Procedure 14 and Ancillary Jurisdiction", 59 Neb. L. Rev. 631-678 (1980).
"Protection for the Hard of Hearing: State and Federal Regulation of Hearing Aid Dealers", 27 DePaul L. Rev. 45-87 (1977).
Book Review, Verdicts on Lawyers, 30 Ark. L. Rev. 382-392 (1976).
Book Review, Space Adrift: Landmark Preservation and the Marketplace, 41 Tenn. L. Rev. 975-979 (1974).
Student Note, "Death with Dignity, A Recommendation for Statutory Change", 22 U. Fla. L. Rev. 368-383 (1970).

AWARDS:

Lewis E. Epley, Jr. Award for Excellence in Teaching, (selected by Class of 2010)
Lewis E. Epley, Jr. Award for Excellence in Teaching, (selected by Class of 2007)
Professor of the Year (selected by class of 2001)
Lewis E. Epley, Jr., Faculty Award for Excellence in Teaching (selected by students), May 1997
Burlington-Northern Award for Outstanding Teacher at the University of Arkansas, May 1993
Professor of the Year (for Upperclassmen, selected by Student Bar Association), April 1992
Law Faculty Nominee for Outstanding Teaching Award at the University of Arkansas, April 1992
Professor of the Year (selected by Student Bar Association), April 1991
Commencement Speaker, School of Law (selected by graduating class), May 1990
Professor of the Year (selected by Student Bar Association), March 1987
Law Faculty Candidate for Burlington-Northern Outstanding Teacher Award, March 1987
Professor of the Year (selected by Student Bar Association), April 1980
Commencement Speaker, School of Law (selected by graduating class), May 1978
Outstanding Teacher Award (Arkansas Law Review), November 1977

PROFESSIONAL SERVICE:

Bar Admissions - Florida, Illinois, Arkansas (state and federal)
Arkansas Bar Association:
(i) Civil Procedure Committee 1978-79, 1980-87; Vice-Chairman, 1987-88
(ii) Professional Ethics & Grievances Committee, 1980-86, 1991-2013; Chairman, 1993-95, 1997-99
(iii) Special Committee for the Study of the Model Rules of Professional Conduct, 1983-91
(iv) Reporter, Arkansas Bar Association Advisory Opinions, 1992-2013
(v) Chairman, Joint Committee for the Study of the Model Code of Judicial Conduct, 1990-92; Member, 1992-94
(vi) Special Task Force on Lawyer Discipline and Admission, 1998-2000
(vii) Multi-Disciplinary Practice, Study Committee, 1999-2000
(viii) Chair, Task Force on the Code of Judicial Conduct, 2007- 2009
Member, Arkansas Judicial Ethics Advisory Committee, 1991-2013; Chairman, 1992-95
Member, Governor's Ethics Task Force, 1993-95
Member, Governor's Code of Ethics Commission, 1987-88
Reporter, Arkansas Supreme Court Committee on Judicial Discipline, 1986-88
Member, Arkansas Improvement District Commission of the General Assembly of Arkansas, 1986-87

**LITIGATION
INVOLVEMENT:**

Special Justice, Arkansas Supreme Court:
Davenport v. Lee, 348 Ark. 148, 72 S.W.3d 85 (2002)
Villines v. Harris, 340 Ark. 319, 11 S.W.2d 516 (2000).
Clark v. State, 308 Ark. 84, 824 S.W.2d 345 (1992).

Expert Witness:

Murphy v. Wood, (Pulaski County, 2003)
Ver Weire v. Zimmerman, 72 Ark. App. 11, 26 S.W.3d 132 (2000).
Sexton v. Milligan, 329 Ark. 285, 948 S.W.2d 388 (1997).
United States v. Maglothin (93-50048-01, W.D. Ark. 1994)
Shaffer v. Kreutz (Civ. 93-5052, W.D. Ark. 1994)
Pratt v. Pickens, (Jackson County Circuit Court 1988), CIV-86-259
Robertson v. White, 635 F.Supp. 851 (W.D. Ark. 1986).

Attorney of Record:

Firestone v. Little, 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980) (co-counsel
with Solicitor General Erwin Griswold and Professor Ron Rotunda).
Butt v. Evans Law Firm, 351 Ark. 566, 98 S.W.3d 1 (2003) (challenge to award of
attorney fees in class action litigation).

ATHLETICS:

Faculty Athletics Representative to SEC/NCAA, July 1, 1995- June 30, 2010
Secretary, Southeastern Conference, 2007-2010.
Member, Special Committee to Review Gender Equity, Spring 1994
Member, Faculty Athletics Committee, 1991-94, 1995-2010
Chair, NCAA Certification Self Study, 1995-98
Vice-Chair, NCAA Certification Self Study, 2003-05
Search Committee, Head Football Coach, December 1997
Search Committee, Head Basketball Coach, March 2002
Chair, SEC Faculty Athletic Representatives, 1999-2000

**OTHER
ACTIVITIES:**

Christian Legal Society, Member and Adviser to Student Chapter
Lecturer, CLE programs on Ethics, Damages and Civil Procedure, 1980-
Lecturer, BAR/BRI of Arkansas, 1981-
Speaker, Annual Red Mass Luncheon, Little Rock, May 2001
Speaker, "The Name of the Departed Team: Who can use it?", Symposium on Baseball
and the American Culture, Cooperstown, New York, June 1994
President, Central States Law School Association, 1988-1989
Use of Litigation Simulations in First Year Civil Procedure classes, noted
in 32 J. Legal Educ. 429 (1982)
"Current Developments in Legal Ethics", 7 Ark. Lawyer 140, 172 (1983).
Master, W.P. Putnam Inn of Court, 1992-1995
Lecturer, CLEO Institute, Washburn School of Law, July 1982; Legal Writing
Instructor, CLEO Institute, University of Arkansas, Summer 1984; High
School Law Camp, June 1988, 1990, 1991

**COMMUNITY
SERVICE:**

Member, Rotary Club of Fayetteville, 1975; President, 2007-2008
Fayetteville Schools, Committees & Guest Speaker on Africa
Coach, Youth Soccer and Youth Basketball
Civil Service Commission, City of Fayetteville, 1981-1988; Chairman,
1985-1986
Candidate, Fayetteville School Board, 1986
Communicant Member, St. John's Lutheran Church;
Watchcare Member and Sunday School Teacher, University Baptist Church

PERSONAL:

Wife: Katherine

Children: Christian: Columbus, Ohio

Elizabeth: Durham, N.C.

Andrew: Fayetteville, AR.

Activities: State high points, presidential graves, camping trips,
running, baseball stadiums

May 1, 2014