



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2013

The Co-Author Prenup

David A. Schlueter

St. Mary's University School of Law, dschlueter@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

Recommended Citation

David A. Schlueter, *The Co-Author Prenup*, 44 *St. Mary's L.J.* 451 (2012-2013).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

ESSAY

THE CO-AUTHOR PRENUP

DAVID A. SCHLUETER*

“We probably need a ‘marriage ref.’”¹

I. Introduction.	453
II. My First Time: Valuable Lessons Learned	454
III. Do You Really Want To Be a Co-Author?	457
A. Not so Fast.	457
B. Working Alone—Benefits and Costs.	457
C. Working with Co-Authors—Benefits and Costs	458
IV. How Many Co-Authors?	459
A. Working with One Co-Author.	459
B. Working with Two Co-Authors	460
C. Working with More Than Two Co-Authors	460
V. I Am a Co-Author—What Am I Supposed to Do?	462
A. An “Editor”	461
B. A “Fixer”	462
C. A “Cheerleader”	462
D. A “Worker Bee”	465
E. A “Free Rider”	463

* Hardy Professor of Law and Director of Advocacy Programs, St. Mary’s University School of Law. I am grateful for the helpful comments and suggestions I received from my colleagues, especially Michael Ariens, Colin Marks, and Bonita Roberts.

1. E-mail from David A. Schlueter to co-author (Mar. 4, 2010, 04:14 CDT) (on file with the *St. Mary’s Law Journal*).

F.	A "Manager"	464
G.	A "Point of Contact"	464
H.	A "Lead Author"	465
I.	A "Name"	465
J.	A "Collaborator"	465
VI.	What Does a Co-Author "Marriage" Look Like?	466
A.	Two Co-Authors	468
1.	Two Co-Authors—Version One	468
2.	Two Co-Authors—Version Two	467
B.	Three Co-Authors	467
1.	Three Co-Authors—Version One	467
2.	Three Co-Authors—Version Two	469
C.	Four Co-Authors	468
1.	Four Co-Authors—Version One	468
2.	Four Co-Authors—Version Two	468
3.	Four Co-Authors—Version Three	470
D.	Five or More Co-Authors	469
VII.	Threats to the Co-Authorship "Marriage"	469
A.	Who Gets the Top Billing?	470
B.	Are You Willing to Be an "Et Al.?"	470
C.	Lack of a Shared Level of Commitment—Why Am I Doing All of the Heavy Lifting?	471
D.	Losing Interest in the Project	472
E.	Keeping It in the Co-Author Family	473
F.	What Word-Processing Program Are You Using?	475
G.	Talking to Each Other Through E-Mails	474
H.	Who Owns the Copyright?	475
I.	Mind the Time—"So What Is Your Excuse for Being Late This Time?"	475
J.	Clash of the Egos—The Pride of Authorship	478
K.	"We Can't Say That"	479
L.	Constructive Criticism	480
M.	"Hey, That Is My Section"	479
N.	"I Am in This Only for the Money"	479
VIII.	Moving On	480
IX.	Saying Thanks	482

X. The Prenup	482
A. In General.	482
1. A Shared Vision	482
2. Roles of the Co-Authors	483
3. Whose Name Goes First?	483
4. Primary Point of Contact	483
5. Style and Format.	484
6. Who Will Have the Final Say?	484
7. Planning for the End	484
B. A Sample Prenup	485
XI. Conclusion.	486

I. INTRODUCTION

The e-mails heated up between a co-author and me. We were at an impasse on how to best write a section of a book. I thought we resolved the issue in a prior edition of the book, but he insisted I was wrong. We were starting to sound like an old married couple. In exasperation, I wrote something in one of my e-mails suggesting that we needed a “marriage ref”—thinking of a television show where married couples air their pet peeves in front of a panel of judges.² It seemed apropos for what we were going through. He was not amused.

As I reflected on our situation, it occurred to me that even after many years of working together, the two of us never discussed who would have the final say on the content, style, and format of our work. I found myself thinking I should probably tell him what I thought our respective roles should be, but it was too late for that. For almost two decades, we always managed to submit timely annual supplements and new editions to the publisher; now the tension was palpable and our friendship was in jeopardy. In hindsight, we should have discussed the structure of our partnership when we first started working on our book.

For my part, I thought I had a good idea of how a good co-author partnership should work. I had experience working with fifteen other co-authors on a number of books, so I was tempted to tell my partner he should simply follow my lead. Fortunately, I thought more about that point and never sent the e-mail.

In talking with colleagues about my situation, I discovered other authors

2. *The Marriage Ref* (NBC television broadcast 2010).

experienced similar issues, and I thought there might be some benefit to collecting and sharing my thoughts about common problems that occur between co-authors.

This Essay is an attempt to set out a list of potential issues one might wish to consider before deciding to co-author a book or article. It is a collection of thoughts and suggestions based on my nearly three decades of working with a host of co-authors—some of them good friends and some of whom I never met in person.³

As I shared some of these thoughts with my colleagues, it struck me that many of us shared the same problems and issues. For a variety of reasons, we generally kept the drama that often develops between co-authors to ourselves. Much like complaining about a spouse or significant other, it is unbecoming to spend the lunch hour complaining to colleagues about the latest woes of co-authorship.

This is not a tell-all piece. I do not use the actual names of my co-authors, nor do I refer to the titles of my works. The purpose of this Essay is to share with the reader some insights that may be helpful in deciding: first, whether to take on a co-authorship for either a book or an article; and second, the issues to address with the other co-authors regarding the partnership structure. This Essay focuses primarily on co-authoring books because they have a longer shelf life and co-authors will often work together on them for longer periods—as in my experience, decades.

II. MY FIRST TIME: VALUABLE LESSONS LEARNED

When I started working with co-authors almost thirty years ago, I did not spend any time thinking about whether a co-authorship was the best way to proceed in publishing. I heard of others working with co-authors, and it seemed to be a natural progression from working alone on a project. I learned a number of valuable lessons about co-authorship during my first experiences in working with other authors.

On my first project, a teaching colleague and I discussed the idea of co-authoring a book and, at the last minute, asked a third colleague if he was interested in joining us. Subsequently, I was tasked with approaching a

3. Over the course of thirty years, I worked with fifteen co-authors on eleven different books, for a total of thirty-eight editions and over seventy-five annual supplements or releases. In the process, I worked with over twenty editors at four publishing houses. These numbers are not meant to be self-congratulatory; rather, they are intended to indicate the diverse group of co-authors, editors, and publishers I had the pleasure of working with and lend reliability to the advice in this Essay.

potential fourth co-author (I will refer to him here as the Lead Author). When I presented the idea to the Lead Author, he immediately showed interest in the project, but hesitated at the idea of working with three other authors. “That is probably too many,” he said. He added that if the three of us wanted to write the book we should feel free to do so; we should just let him know what we decided to do. After talking with my two colleagues, we reached a mutual decision. The third colleague, who was added at the last moment, graciously told us he would withdraw from the project,⁴ resulting in three authors total.

The two of us later met with the Lead Author, and he suggested some basic operating rules. First, he would use his contacts to get the contract for the book. Although we originally had another publisher in mind, we went with his selection.

Second, my colleague and I would divide the workload, prepare initial drafts, and the Lead Author would edit our work and prepare a final version of the manuscript to send to the publisher.

Third, the two of us would produce a sample for his review that he would return to us with his suggested changes. That way, we could incorporate his style of writing and editing into future drafts to create a more efficient process.⁵

Fourth, we would all work toward presenting the cleanest possible draft to the publisher in a timely fashion.

Fifth, the names of the authors would be alphabetical. He said this arrangement would avoid other problems.⁶

4. The colleague who graciously backed away from the project developed a strong national reputation as an author and co-author of a number of treatises. We are forever grateful to him.

5. We developed a well-oiled system: The two of us prepared typewritten drafts (I prevailed upon my wife to type my handwritten drafts each night after the kids were in bed); we took our drafts to the Lead Author on a regular basis—daily or weekly; the Lead Author edited our drafts and had his secretary type a clean copy; we would receive both the handwritten edits on our drafts and his clean draft for our review, allowing us to see what changes he made and offer any corrections or comments. At the end of the process, we collected the manuscript sections, placed them in proper order, numbered each page with a rotating rubber stamp, put rubber bands around the whole thing, and gave it to the publisher. As we moved into annual supplements and new editions, we continued to refine the system of submitting and reviewing manuscripts. While cleaning out my office some years ago, I ran across my original handwritten drafts on yellow legal paper. I kept them for a few months and finally threw them away. They reflected fond memories of those pre-word processing days. *See generally* Section VII(F) (describing the problems between co-authors who use different word processing programs).

6. I have long since realized there was great wisdom in that decision. It was a quick and painless resolution to a problem that often plagues other co-authors. I also learned, from years of talking to other authors, that the decision about the order of the names on the project can make or break a relationship. I cover this issue in a later section. *Infra* Section VII(A).

Finally, the contract with the publisher included a provision for what would happen if one of us decided to leave the project.⁷

This model worked for us; that book is now in its seventh edition and regularly cited. I used that same model several times when others approached me about being the lead author on a writing project.

I was very fortunate to have such a positive initial experience with co-authors. That first experience provided several valuable lessons that I continue to apply to co-authorship projects:

First, think carefully about how many authors make an ideal number for the project. There are varying pros and cons to working with one co-author, two co-authors, three co-authors, and more.

Second, it is important to decide certain issues upfront, such as order of the authors, the role of each author, and who, if anyone, will have the final say on content and style.

Third, consider what arrangements should be made when one or more of the authors decides not to continue with the project. Few people go into a marriage planning to divorce; however, some people do enter a marriage with a prenuptial agreement that confronts the possibility of the end of a marriage.⁸

This Essay addresses the foregoing issues in more detail, along with others one may wish to consider before deciding to become a co-author. In short, this early experience and other subsequent encounters helped me frame the questions I would ask today if someone invited me to be a co-author or if I invited someone else to join a co-authorship.

7. The contract provided that if one of us decided to leave the project, our name would remain on the book for the next edition and we would share in the royalties for that book. In my experience, this provision is uncommon, but is an important issue to consider when drafting a contract with a publisher.

8. It can be difficult talking about this topic, especially when the co-authors are excited and energized to produce a book. There is a risk that raising the issue may send a wrong signal to your co-authors that you lack total commitment to the project. For an analogous situation in the business world, see Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 911-16 (2005) (noting reasons why close corporation investors may not engage in advance planning, e.g., mutual trust, lack of knowledge, and a desire to avoid creating any hard feelings that might result from attempts to bargain).

III. DO YOU REALLY WANT TO BE A CO-AUTHOR?

A. *Not so Fast*

In the preceding section, I described my first experience as a co-author. At about the same time, I received an offer to join a book project—as one of four authors—that I eventually turned down.

When I received the offer to be a co-author, I had already signed a contract to do an eight-chapter book on the same subject with the same publisher.⁹ I had completed four chapters of the text when one of three authors on the competing book contacted me.¹⁰ He explained that they could take my work and blend it into their project because their book was in its very early stages. After thinking about it, I respectfully declined their offer to join them on their book. While the other authors were well-respected with strong reputations, I recall thinking it might take years before my contribution saw the light of day. I was also concerned the other authors would heavily edit my work.

I completed my book. Although from time to time I wonder what it would have been like to of had a co-author on that text—especially when the time came for producing annual supplements and new editions—I still appreciate the “bachelorhood” of being the sole author.

B. *Working Alone—Benefits and Costs*

One of the first questions to address before starting a writing project is whether to work alone or with one or more co-authors on a writing project. Knowing what I know now, I would not rush into an agreement to co-author a project without first considering the following benefits and costs.

On the benefits side of the ledger, it is clear working alone has its advantages. First, there are no long and involved discussions with a co-author about what to write in a book or law review article. If I decide to add chapters, cut a section, add or delete appendices, or completely reorganize the project, I can do so without anyone’s comment or approval.

Second, when I work alone, I do not run into any of the problems associated with co-authors—e.g., not meeting deadlines or dealing with material that I am not convinced should be included in the project.

9. I learned that two individuals in the same publishing company executed contracts for two books on the same subject. Needless to say, they were embarrassed by the mix-up.

10. The publisher suggested one of the authors on the competing book call me about possibly collaborating to produce only one book.

Third, when the publisher calls with a question, I can quickly answer it without having to consult with co-authors.

Fourth, if the project pays royalties, I am not required to share the proceeds with another co-author.¹¹

However, there are some downsides to working alone. First, there is no one else to turn to if I need an extra hand to work on the project. Second, I have no one to consult with on a regular basis to make sure my writing makes sense.¹² Third, if the writing project is a book, there can be a problem with backups and continuity. If I become unable to work on a project without selecting or choosing a successor, the publisher may do what it wants with the manuscript if it owns the copyright.¹³

C. *Working with Co-Authors—Benefits and Costs*

Working alone is not always the best way to produce a writing project; there are definite benefits to working with others on a project.

First, as the old adage says, two heads are better than one.¹⁴ I cannot count the times that having someone else to consult with on a project resulted in a better work product. Every writer experiences writer's block, and I can recount a number of instances when the words flowed again after exchanging a few e-mails among co-authors.

Second, many hands can make light work.¹⁵ The most daunting writing project seems manageable when divided between two or more colleagues. Spreading the work among co-authors permits very busy people, who might not otherwise find the time to tackle a project alone, to join in a cooperative effort to produce a product.

Third, having others on the project provides backup and continuity for a book project. If there are more than two authors, however, there should be some agreement as to a line of succession. I discuss this in more detail under the topic of planning for the future.¹⁶

11. I discuss the issue of royalties as a motivation for writing a book in a later section. *Infra* Section VII(N).

12. See Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 964–70 (2007) (highlighting the importance for solo authors to research and consult librarians about the writing process).

13. When I raised this point with some of my editors at a book-publishing company, they pointed out that they could hire contract writers, who would probably be former editors already familiar with the book.

14. See E.D. HIRSCH, JR. ET AL. *THE NEW DICTIONARY OF CULTURAL LITERACY* 57 (3d ed. 2002) (“Some problems may be solved more easily by two people working together than by one working alone.”).

15. See *id.* at 54 (“Large tasks become small when divided among several people.”).

16. See *infra* Section X(A)(7) (listing possible issues that can arise when writing projects end).

Fourth, putting together a team of reputable co-authors can lend weight to the project. Readers gravitate toward articles and books bearing names of authors with whose work they are familiar. As I note in another section, that principle may also inform the decision about whose name appears first on the book or article.¹⁷

Balanced against these benefits are several downsides potential co-authors should consider. First, while two heads may be better than one, if the heads do not agree, there can be trouble and even stalemates. This can be especially true if you intend to work on the project over the long haul with multiple editions. Working with a co-author almost always involves a give and take.¹⁸

Second, while many hands can make light work, one pair of hands often does all of the heavy lifting. In the projects I worked on, I can say that rarely have all of the hands worked with equal diligence or energy *all* the time.

And third, having co-authors almost always requires more cooperativeness, greater patience, and willingness to pick up the slack. If any of the co-authors lack these characteristics, it can lead to late manuscript submissions and tension among the co-authors.

IV. HOW MANY CO-AUTHORS?

Once you decide to co-author a piece, how many authors will be on board? One? Two? Three? More? At the outset I should note that more is not always better. For example, years ago I used a text by ten authors for one of my courses. The text was a behemoth; it was too large and the writing style and format were inconsistent throughout the book. It was really just a collection of materials, not so much a book as an anthology.

I have worked with one, two, and three co-authors. Each combination presents its own challenges and benefits. It is worth noting that some of the following discussion ties in with the preceding section that addressed the costs and benefits of being a co-author.¹⁹

A. *Working with One Co-Author*

I have worked on several projects with only one co-author. While it

17. See *infra* Section VII(A) (suggesting different ways to rationalize the order of authors' names on a work).

18. Sometimes it is not necessary for the authors to talk to each other; they just send in their respective work to an editor or publisher who then tries to make sense of it all. One of the co-authors can also take on this role. *Infra* Section V(A).

19. See *supra* Section III(C).

would seem that working with one other person is easier than working with multiple co-authors that is not always the case. This is particularly true where the two authors do not share the same writing style or vision for the project. True, there is less coordination involved when working with only one co-author, but there is no tiebreaker if the two authors reach an impasse.

Based on my experience, I recommend that if there are only two authors, they should reach an agreement on the division of labor, not just in the writing department, but also with regard to who will have the final say on the style and format of the project.

B. *Working with Two Co-Authors*

While there are some benefits to working with only one other person, there are some good reasons for working with at least two others.

First, having three authors presents the possibility of a tiebreaker. Over the years, I worked on projects where the third person could serve as an editor on the project, take up the slack if one of the other two needed a break, and finally, offer constructive compromises on style, format, or vision.

Second, if one of the authors is not able to finish the project, the other two can continue the work and make adjustments to fill any gaps. This happened on one of my early writing projects when I contacted one of my former law professors about co-authoring a book. He agreed and said that he would like to bring one of his other former students along on the project. After about three months, however, it was clear his invitee would not be able to continue with her share of the work. After she dropped off, the two of us continued on the project for several editions until my former professor decided to retire and take on a reduced role. I found another colleague to join the project.

C. *Working with More Than Two Co-Authors*

Working with more than two co-authors means the team can be more productive, and may be able to produce a book in a shorter period. But it also comes with the challenges of working with a larger group of people. There is a greater chance of personality conflicts and greater odds that at least one of the authors will miss a deadline. On the other hand, if one or more of the authors leaves the project at some point, there will be a sufficient number to continue without significant interruption.

V. I AM A CO-AUTHOR—WHAT AM I SUPPOSED TO DO?

In deciding whether to co-author a project, it is important to know *going into the project* what your role will be. There is more to being a co-author than just writing a portion of the project; you are part of a team whose purpose is to produce a written product. In most contracts with legal publishing companies, your book will be referred to as “the work,” and work it is. If the product involves long-term commitments because the team expects to publish multiple editions of the work, it is important to give some serious thought to the respective tasks and roles each member of the team expects to assume or avoid.

Publishers care little about who does what task in producing a book or article. Put simply: They want to see the final product. Most book contracts require that the authors produce a clean and complete manuscript within a specified time. If the authors fail to do that, the publisher often reserves the right to hand off the project to someone else. It is generally left to the co-authors to define their respective roles and determine how they will work together as a team.

In my experience, co-authorship can involve one or more of the following roles:

A. An “Editor”

One of the most important roles for a co-author is to serve as the editor on the project. This is especially true if there are more than two co-authors. The risk of inconsistency in both substance and style increases exponentially with each additional co-author and each successive edition of the book.²⁰ The risk also increases if one of the authors is subsequently replaced. I was involved with several projects in which my co-authors made a concerted effort with each new edition to conform word usage, citation form, and even punctuation. One of us took on the role of going through the entire manuscript to scrub it for those lurking issues. It is best if only one of the authors takes on this role.²¹

20. For a number of years, I served as the Reporter for the Federal Rules of Criminal Procedure Advisory Committee. Towards the end of my tenure, the chair of the Committee on Rules of Practice and Procedure, Judge Robert Keeton, with the assistance of the late Professor Charles Alan Wright, convinced Chief Justice Rehnquist the Rules needed “restyling.” The motivating factor behind the restyling was that, after nearly fifty years of amending them, inconsistency in format and style had gradually crept into the Rules. In recognition of the need for a unified vision, a consultant on style and a style subcommittee assisted each of the Advisory Committees to ensure consistent style and format.

21. One of my co-authors recently recommended that we retain a “scrubber” to go through the manuscript to clean it up and make it consistent throughout. I have worked with co-authors who

B. *A "Fixer"*

In a recent project with other co-authors, we received an e-mail from one of the co-authors who wrote something like, "I sure hope that [name of co-author] can fix this." Someone needed to work out the right language, the right format, and the global changes in the manuscript. On other projects I worked on, other co-authors volunteered to do the heavy lifting—proofreading, for example—because one of their research assistants used to work in the publishing business. For that particular edition, being a fixer was extremely helpful.

This role ties in with my general view that when co-authors submit their manuscript to a law review or book publisher, it should be clean and complete.²²

C. *A "Cheerleader"*

It helps if one member of the team can fill the role of cheerleader for the project. When I am the lead author on a book, I try to send encouraging e-mails to my co-authors, even when the news is bad. Working long hours on a writing project can often be a thankless job. I suspect that every author at some point has wondered, "Is anyone going to read this?" The answer is always: Of course they will. Nonetheless, it is important to remind the team occasionally that the work they are doing will be a worthwhile investment and contribution to the legal system.

Some years ago, I was working with two co-authors on a first edition of a book. One of the co-authors contacted me and said he was depressed about the prospects for our book. He explained that he had just come from a bookstore where he saw a large bin filled with \$1.00 books. When he thought about all of the effort the authors put into those books, and their shattered dreams, he imagined our book among them. Clearly, he needed some encouragement. I do not recall my exact words, but I said something to the effect that I was sure that would not happen to *our* book, and that if one person bought the book and used our advice, it would be

seem to take the view that the job of scrubbing or editing is best left to the editors at the publishing house. I disagree. As I point out in other sections of this Essay, my goal is to send in the cleanest manuscript possible. *See infra* Section X(A)(5) (pointing out that sending in a clean manuscript also avoids conflicts among the co-authors). The job of an editor at most major publishing houses has changed over the years. In my experience, I rarely received suggestions or corrections from legal publishers pointing out mistakes in grammar, or even style.

22. *See* Part H of this Section (commenting that clean manuscripts from co-author teams build rapport with publishers).

worth the effort. Fortunately, the book did well; but more importantly, the co-authorship benefited from some cheerleader support.

D. *A “Worker Bee”*

Hopefully there will be a co-author on the team with a strong work ethic and the necessary time to churn out the work without complaining about being the *only one* doing all of the work. This role, the worker bee, takes on added importance if one or more of the authors are free riders, a point discussed below.²³ The worker bee can also simultaneously, and sometimes unknowingly, take on the role of a cheerleader; the generation of work in a timely and efficient manner can serve as inspiration to other members of the team.

But it is important to remember that quantity is only part of the equation: Quality is critical. Years ago, one of my supervisors came to me with a request to edit one of my coworker’s writing; he was *the* worker bee in the office and constantly published new material. My supervisor said my coworker was very productive, but his writing needed a lot of work.²⁴ He added that he liked my writing style and wanted me to clean up my coworker’s work before he sent it out. So, in the interest of office harmony, I fixed it and kept my mouth shut about the matter.

Any law review editor or publisher can relate stories about how they received a lot of “stuff” from a worker bee author, but had to spend countless hours cleaning it up. Therefore, selecting a worker bee with a proficient writing ability will save the co-authors future headaches.

E. *A “Free Rider”*

There are co-authors who are free riders—the exact opposite of the worker bee. This is a negative role the co-authors need to deal with, or else the project will suffer. When choosing to work with another co-author, it is wise to do some informal background checks on your potential partner. Do not assume simply because their name appears on a number of projects that they will be a worker bee. In talking with colleagues and friends, I learned over the years that many book projects have died because one or more co-authors simply did not hold up their end of the log; resentment set in, and the worker bees concluded their time would be better spent on other projects. I was fortunate in that none of

23. See Part E of this Section.

24. In that office, we had to submit our articles and columns to our supervisor for clearance before sending them to a publisher.

the co-authors I worked with were, or are, free riders.

But in the marriage-like relationship of co-authorship, there are always at least two sides to the story. The so-called free rider may have lost interest in the project or be offended by the worker bee's poor writing. For my part, I do not want the free rider badge because it would hinder my working relationship with other co-authors. If I sense that I am losing the vision, interest, or time for the project, I want to be the first to say it is time for me to leave. I have withdrawn from projects for this reason and recommend it to anyone else in a similar situation.

F. *A "Manager"*

The role of a co-author as manager is to make sure the project is coordinated, each author is meeting his or her deadlines, and the publisher is aware of the progress of their work. The manager need not be the lead author, and he or she does not necessarily need to be a contributing author, i.e., a worker bee. The manager may also serve as the primary point of contact for the publisher.

G. *A "Point of Contact"*

It is important for one of the co-authors to take on the role of point of contact with the publishers or the editors. I learned early on that publishers really appreciate it if the co-authors on a project speak with one consistent voice. I worked on projects where each co-author dealt separately with the publisher, which resulted in sometimes-inconsistent style, format, deadlines, proofreading schedules, etc. It is also a problem when the authors have different conflict-resolution skills, which can lead to strains between the co-authors and with the publishers or editors.²⁵

To avoid this problem, I often volunteer to serve as the point of contact even if it requires extra work on the project from my end. I recently asked one of my editors, whom I work with on three different titles, if he had any comments on dealing with a single point of contact from each co-author team. I received the following:

I have given some thought to the co-author question you posed What works best for us is if our interaction is with one designated point-person as we typically have with you This allows for consistency of communication and work product. It is also preferred that the point-person

25. Cf. SANFORD KAYE, *WRITING UNDER PRESSURE: THE QUICK WRITING PROCESS* 154-69 (1989) (discussing the challenges that accompany writing a piece for an organization, including communication problems, tact, brevity, and the need for a "uniform writing code").

be an affable sort, as we like to keep an open and easy exchange with our authors, but as you probably imagine, we are not always so fortunate! Personally, I have not been privy to disputes between co-authors, but I have been exposed to authors on a team that are, shall we say, prickly at best to work with, and I tend to channel my communications to whichever author I am fortunate enough to have an amicable relationship with, if one exists.²⁶

It is important to work hard to maintain cordial relationships with the publishers to build trust, a method I refer to as “making deposits in the good will bank.” Such geniality is important because the time will come in any project when one of the authors will need to call the publishers and ask for a time extension or some other accommodation—to make a withdrawal from the good will bank.

H. *A “Lead Author”*

The role of lead author is typically summarized as the person who originally developed the idea for the book, serves as the lead editor on the project, and is the primary point of contact with the publisher—but that is not always true. Being a lead author does not necessarily mean being the CEO of the project; nor is the lead author a worker bee. In the context of this Essay, I treat the lead author as the person whose name appears first in the list of authors on the book.

For example, I am the lead author on several writing projects, but the original idea for the book came from someone else, and that person’s name is actually farther down on the list of authors. On each of those projects, I contribute to the project by writing sections of the book.

I. *A “Name”*

An author may be on a project because he or she has a reputation that will add weight to the project. If that person is a free rider, there can be negative repercussions. At some point, the other authors may view this co-author as a burden, especially if that person appears to be taking unfair advantage of the good graces and hard work of the others.

J. *A “Collaborator”*

On one of my projects, my co-author and I were discussing our respective roles. When I asked him to be a co-author, he said we could collaborate on the project. But it turned out that he and I had very

26. E-mail from editor to David A. Schlueter (Jan. 27, 2011, 08:48 CDT) (on file with the *St. Mary’s Law Journal*).

different ideas about what it meant to collaborate. He wanted to talk on the phone for extended periods of time discussing and editing what each of us wrote. For me, this was a very inefficient way to write a book. I often suggested that we hang up and I would attempt to incorporate his suggestions and send him a revised draft. This worked for a while, but over time, I sensed frustration on his part that we were not working together on the project. In his view, we were not truly collaborating.

VI. WHAT DOES A CO-AUTHOR "MARRIAGE" LOOK LIKE?

No two co-authorship arrangements are alike. In my experience, even if I am working with the same co-authors on different books, the chemistry is different in each arrangement because each project has its own unique history and function. In speaking recently with one of my editors about what I intended to cover in this Essay, I suggested that editors were probably not interested in the details of the relationships and dramas between co-authors. I likened it to making sausage and he readily agreed it was an apt description. He stated that most editors are only interested in getting a clean manuscript submitted in a timely fashion—they do not need to know the mechanics of how the manuscript is prepared.

For someone new to the world of co-authorship, it might be helpful to review possible models for working as a team on a writing project. I have been personally involved in most of the models outlined below. In the following discussion, I refer to the authors with the letter designations A, B, C, and so on. *Those designations reflect the order of the authors' names on the book or article.* But as I note in each model or version, the order of the authors' names on the book may not actually identify who developed the idea for the project, who obtained the contract for the project, or the respective roles of the co-authors.

The various models are divided according to the number of co-authors on the particular project.

A. *Two Authors*

1. Two Authors—Version One

Co-Author A, the lead author, develops the proposal for the book, obtains the contract with a publisher, and asks Co-Author B to join the project. Co-Author A divides the project and each co-author works on their sections of the book independently. They share their drafts with each other and send them individually to the publisher. The lead author makes any decisions about future editions or other similar matters after

consulting with the co-author. Because Co-Author A does very little editing of Co-Author B's work, the individual writing styles of each co-author are evident in the book. Each author maintains contact with the book's editor, copying the other co-author on any pertinent e-mails.

2. Two Authors—Version Two

A publisher contacts Co-Author B to ask him to take over a book that the publisher recently acquired from another publishing company.²⁷ Co-Author B agrees to write the book on the condition that he could convince Co-Author A to join in the project as the lead author,²⁸ and Co-Author A agrees. Co-Author B negotiates the contract, becomes the primary point of contact on the work, and prepares the first draft of the materials.²⁹ Co-Author A, the lead author, reviews all of the materials and adds his edits and suggestions. Co-Author B prepares the final version of the manuscript.

B. *Three Authors*

1. Three Authors—Version One

Co-Author C develops the concept for the book and recruits Co-Authors A and B to join in the project. Co-Author A, the lead author, obtains the contract for the book. Co-Authors B and C prepare the initial drafts and submit their work to Co-Author A, who edits their work and returns it to Co-Author C, who acts as a manager for the project. Co-Author C checks for consistency in style, spelling, and terminology, and serves as the primary point of contact for the publisher.

2. Three Authors—Version Two

Co-Author C develops the project and obtains the contract for the book. He asks Co-Author A, the lead author, to prepare a spin-off version of his original work. Co-Author A, in turn, asks Co-Author B to join in

27. Apparently, the original two authors on the book had a disagreement or lost interest in the project, and decided not to continue to work on the book. The original publisher decided to sell the book rather than find two new authors.

28. Co-Author B asked Co-Author A to be the lead author because of his national standing and expertise on the subject matter of the book.

29. The publisher provided Co-Author B with an electronic copy of the latest edition of the book, which had not been updated in about four years. Co-Author B reformatted the material, added section headings and numbers, and expanded the substantive discussion throughout the text.

the work. They split the work and submit their drafts to Co-Author C, who exercises little control over the content of the project.³⁰

C. *Four Authors*

1. Four Authors—Version One

Co-Author D develops the project, which is a spin-off from a book he previously wrote. He asks Co-Author A to serve as lead author (for marketing purposes), who in turn asks Co-Authors B and C to join the project. Co-Author A manages the project and prepares the initial draft for the other authors to review and suggest changes. Co-Author D, who recounts the origins of the project and the roles of the other authors, writes the preface. Co-Author D makes similar arrangements in producing three or four other spin-off titles with other authors.

2. Four Authors—Version Two

Co-Author D develops the vision for the book and asks Co-Author A to take on the project as lead author and obtain a contract for the book. Together they ask Co-Authors B and C to join the project. Co-Author A, the lead author, agrees to write some sections of the book and divides the remaining portions with the other three authors. For many months, the co-authors heard nothing from Co-Author D, who eventually returns their phone calls, explaining that he changed jobs. After additional conversations, Co-Author D graciously decides to withdraw from the project and let someone else take up his share of the work. The remaining three authors locate another willing co-author (Co-Author E), who prepares his drafts in record time. The preface to the book spells out Co-Author E's role and vision for the book.

3. Four Authors—Version Three

Co-Author B develops an initial draft for the book and sends it to a publisher. The publisher contacts Co-Author A, who previously wrote several titles for the publisher, and asks if A would be interested in working on the project. After reviewing the material and speaking to Co-

30. On the first edition, this seemed to work well. Although Co-Author B and Co-Author C had very different writing styles, Co-Author A's modest edits avoided many of the debates and personality conflicts that might otherwise have occurred between B and C. On a second edition, however, Co-Author A volunteers to prepare the draft updates and send them to Co-Authors B and C for their comments, again with the thought of avoiding conflicts between B and C. Co-Author B declines to work under those conditions and withdraws from the project.

Author B, Co-Author A agrees to help with the project. Co-Author A becomes the lead author and, with B's consent, asks Co-Authors C and D to join the project. Co-Author A divides the work assignments, assigns portions to each author, edits their work, and manages the project. After two editions, Co-Authors A, C, and D decide they do not want to continue with the project. Co-Author B becomes the lead author and edits the third edition himself. The publishers keep the names of all four authors on the third edition.

D. *Five or More Authors*

This model requires a great deal of management time. Associate Editors B and C develop the concept for the book, and ask A to be the Editor in Chief of the book. The Associate Editors recruit ten contributing authors to prepare draft commentary. Each author submits their drafts to the two Associate Editors who edit the material, then forward those edits to the Editor in Chief for a final edit and compilation of all the materials. Although the book is relatively short in length, the project requires a great deal of time in (1) editing the work while maintaining consistent style and format; (2) staying in touch with the Co-Authors and Associate Editors; and (3) insuring that everyone meets their deadlines. In several instances, the work product of the contributing authors falls short, and it becomes necessary to get the help of research assistants to finish the project.

VII. THREATS TO THE CO-AUTHORSHIP "MARRIAGE"

No matter which model the co-authors use to form the partnership, problems will inevitably arise. In looking back over thirty years of co-authorship marriages, I am struck by how fortunate my co-authors and I were in that we weathered pretty bad storms yet are still working together on projects, some of which were originally thought to only last a few years.

This section briefly addresses some of the possible problems in any co-author relationship. Some of them reflect my personal experience, while others reflect accounts I heard about through discussions with a few of my co-authors—referring to their own separate co-author marriages—or in conversations with colleagues.

Several of these issues can test even the deepest friendships and can, if unresolved, lead to a breakup of the co-author marriage.

A. *Who Gets the Top Billing?*

One issue every co-author team must address is who will be the lead author and have their name listed first on the book or article.

As I mentioned at the beginning of this Essay, in my first co-authorship experience, the lead author suggested we put our three names in alphabetical order. That meant my name went last. He assured us—we were new to the game—that this would avoid problems down the road. He was absolutely right.

In talking with one of my colleagues about this issue, he recounted a story about two co-authors who could not agree on who would be the lead author. He recalled a discussion about flipping a coin at one point. They also considered taking turns being listed first on subsequent editions of the book.

Sometimes the lead author should be the person whose name will jump out at a potential reader because of his or her expertise or reputation. This may require, however, that the other authors be willing to put their egos aside and let that person go first.

Age, rank, and position will sometimes dictate the order of the authors.

The order of the names may also be determined by the order in which the co-authors joined the team. If one of the authors developed the vision for the project, normally that person's name should go first, unless the authors believe someone else on the project is more deserving. For example, I co-authored a book with one of my former law school professors. Although I was the one who developed the project and obtained the contract for the book, I never hesitated in putting his name first. Not only was he my friend and mentor, but he taught me the subject which we were writing about.

B. *Are You Willing to Be an "Et Al.?"*

Related to the issue of deciding the order of the names on the project, co-authors may want to consider the possibility of being an "et al."

I did not think about this issue until I got a call from one of my co-authors some years ago. He complained to me that he and I were not listed as authors when the book was cited. When the first edition of the book was cited, all three authors were listed in the citations. Courts and commentators, however, were not recognizing our roles as co-authors on the project. After all, my friend explained, we were doing most of the work on the project. And what recognition did we receive? He said that

we were nothing more than “et als.”³¹

I responded that I was sure no insult was intended and that whoever wrote the judicial opinions or articles was simply following the Bluebook³² or a similar guide on how to cite books or articles with multiple authors. Sure enough, using “et al.” is permissible under the Bluebook rule for citing works with more than two co-authors,³³ though it is discretionary whether to list the names of all the authors.³⁴

For my part, when I serve as the lead author and I have more than one co-author, I always cite the other authors’ names. I believe it is the right thing to do because in some cases they are doing more heavy lifting than I am on the project.

C. *Lack of a Shared Level of Commitment—Why Am I Doing All of the Heavy Lifting?*

I know of few co-authors who do not wonder at some point whether any of their other co-authors are even working on the project. It is very discouraging when one or more of the authors lose interest in the project or seem to have other priorities. Ironically, the sort of person who normally makes a welcomed partner on a writing project may not be a good choice for a co-author partnership if he or she is involved in a number of other writing projects with other authors.³⁵

Years ago, a colleague and I were working on a book with a short deadline.³⁶ Because of our daytime work schedules, we spent our evenings writing our respective portions of the book and exchanging our submissions. Well into the project, with the deadline looming, I noticed my colleague was not turning in his work and concluded that he had hit a particularly tough section and asked him if he needed help. No, he said, he was taking time off to watch the NBA Finals. “What?” I responded, “This project is important! We need to keep moving.”

I recently recounted that story to him, and we both had a good laugh.

31. I had a similar conversation with my wife, an author in her own right, about being an “et ux.” on various legal documents.

32. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

33. *Id.* R. 15.1(b), at 138–39.

34. *Id.* at 139 (providing that listing all the authors’ names is appropriate when “particularly relevant”).

35. Many of the co-authors I work with simultaneously co-author other projects.

36. See generally SANFORD KAYE, WRITING UNDER PRESSURE: THE QUICK WRITING PROCESS 152–53 (1989) (outlining an agenda for authors to follow when pressing through the research and writing process).

He said he did not recall saying that. The story reflects how the two of us view our roles as co-authors: the levels of commitment do not always match. There were other occasions in the life of that book when we talked about adjusting our respective roles to accommodate those differences. His primary interests turned to other areas of the law, so part of my role for that book was to remain a cheerleader and to remind him how important the book is to the courts and practitioners to encourage him to continue his work on the project.

D. *Losing Interest in the Project*

In some of the projects I worked on, one or more of the authors reached a point where working on the book was no longer as appealing as it once was. Writing a book with annual supplements further exacerbates this issue. Many years ago, one of my co-authors wisely told me that while it was always exciting to publish a new edition of a book, the annual supplements often become a major burden that challenge even the most determined individual. He was right. Legal publishers depend on the income their “subscribers” pay for the annual releases and supplements, and the deadlines just keep coming year after year.

It is always better to address this issue sooner rather than later. Resentment and discontent can destroy the co-authorship marriage.

Even after co-authors realize they are losing interest in the project, many people have a sense of obligation and loyalty to the other co-authors that spurs continued involvement in the project. In an attempt to fulfill that perception, it may take a co-author some time to admit openly that they are no longer interested. The signs of someone losing interest in the project may be subtle at first. For example, there may be increased lag time in responding to e-mails and their written contributions to the project may become slimmer. They are more likely to miss important new developments. Their mind is elsewhere; focused on family commitments, job changes, other writing projects, health issues, or other matters.³⁷ Sometimes the distraction or loss of interest is temporary. Nevertheless, if the condition continues, the authors should have an honest discussion about their respective levels of interest, their willingness to continue to

37. See generally Susan P. Liemer, Essay, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007, 1008–09 (2001) (bemoaning the frustration of finding time to write as a mother and a legal writing professor).

work on the project, and their plans for the future.³⁸

I reached that point some years ago on a book I was working on. I was the lead author and two of my three co-authors told me they could no longer continue with their portion of the work. One of them, a long-time dear friend, was going through cancer treatments; the other, a former student of mine, said that his new job and family commitments would make it impossible for him to continue. The remaining co-author—the one who had a real passion for the project—said he would continue the work alone if necessary. After thinking a lot about it, I finally said I needed to step down as well. While the project was worthwhile, I did not have the necessary “fire in the belly” to continue. My enthusiasm for the project was waning, and I dreaded the thought of doing yet another supplement or new edition. After talking with the remaining author—who originally developed the idea for the book—I called the publisher and said that three of us would be leaving the project. The publisher worked up a new contract with the remaining author, who agreed to keep all of our names on the next edition. His name, however, would now be listed as the lead author.

Before agreeing to join others in a co-authorship marriage, I recommend you take a “gut check” to determine if the project is something you could see yourself working on for the long haul. If not, it is probably best to decline.

E. *Keeping It in the Co-Author Family*

One problem that can arise in any co-author relationship consisting of three or more authors is the temptation to complain to others about another’s loss of interest in the project, missed deadlines, or writing style. I learned through my years of working with many co-authors that family and friends have only so much time and patience to listen to the latest woes about co-authors. It is probably natural to share frustration with the other co-authors on the project because, after all, they know what is really going on. But there is also a risk that co-authors will side against one another and possibly jeopardize the entire project in the process. To avoid line-drawing and side-taking, I have on more than one occasion requested a telephone conference call or a meeting to air any concerns. I

38. As I approach the age of retirement, I find myself thinking about fixing a date when I would withdraw from a project. While retirement from teaching does not mean retiring from writing, the reality is that with retirement comes a completely new set of priorities.

recommend this tactic for authors who sense frustration building amongst their co-authors.

F. *What Word-Processing Program Are You Using?*

Although most modern word-processing programs are compatible with one another, it has not always been that way. Word-processor compatibility can still be an issue depending on the co-author's proficiency in using the requisite programs. For years, I worked with a co-author who only recently mastered word-processing. Before then, he would send me his typewritten drafts for my secretary to transpose into a word-processing program. When he finally learned a word-processing system, we still spent countless hours reformatting his material to match the format in the electronic version of the book.

For the occasional co-author who uses a different program than everyone else, take a deep breath, check for inconsistencies, and work it out. I heard others say that they do not see a problem with the variations. They say the publisher can work it all out—that this is the publisher's job. I respectfully disagree. My goal is to generate good will with the publishers, and submitting a final draft wrought with inconsistencies is not the best way to build a good working relationship. In talking to editors about word-processor inconsistencies, they always appreciate getting a clean manuscript with those issues worked out beforehand by the co-authors.³⁹

G. *Talking to Each Other Through E-Mail*

E-mail can be both a bane and a blessing for co-authors. It provides an instantaneous method of sending drafts, page proofs, and proposed alternative language; it is also an efficient way of contacting a publisher. With the arrival of smart phones, the capacity for easy communication grew exponentially.

But the same system that provides so many benefits can also potentially injure a co-authorship marriage. Over the years, I witnessed e-mail traffic from co-authors saying things they would never say to each other in person. Ironically, some of the most slashing e-mails come from people who are in the business of writing books and articles.

To prevent friction among co-authors facilitated by electronic

39. The cynic would claim the publishers are grateful because I am doing their job for them. Perhaps. Editors at publishing houses explained to me, however, that if publishers must correct word-processing inconsistencies, there is a risk something will get lost in translation.

communication, I purposefully slow down the fast-paced e-mail system: If I need to send an e-mail to a co-author concerning a subject that may not be received well, I write the e-mail and then sit on it for a day or two. That delay provides me with an opportunity to rethink the content of the message.⁴⁰

I used this method on more than one occasion, and sometimes decided not to send the drafted e-mail.

H. *Who Owns the Copyright?*

Although book publishers and law review journals hold the copyright for the content of a work, authors and co-authors may be able to convince them to relinquish that interest. Holding the copyright as an author can be a valuable interest for future editions or spin-off materials. But it can also cause real problems in a co-author relationship, somewhat akin to child custody battles in domestic-relations cases.

I did not put much thought into the issue of joint copyright ownership until I spoke with a colleague about this Essay. That, in turn, led to a discussion about my colleague's problem with a co-author who did not show any real interest in moving forward with a new edition. The two authors produced the first edition together and jointly held the copyright. After almost a year of impasse, my colleague seriously considered using the material he produced in the book to author a new book. Upon hearing that news, his co-author threatened to sue on grounds of copyright infringement.

Knowing what I know now, I would not jointly hold a copyright—even with my closest friend.⁴¹

I. *Mind the Time—“So What is Your Excuse for Being Late This Time?”*

I was raised in a household where it was impolite to be late. We learned being late often meant that someone else would be held up—the food would get cold or someone might miss an appointment. That thinking still drives my work as an author and a co-author, which explains why this topic is so important to me. It is so imperative that I would probably not agree to a co-authorship with someone who had a reputation for not submitting manuscripts in a timely fashion. Tardiness can lead to tensions

40. As a colleague pointed out to me, sarcasm rarely comes across kindly in e-mails. Co-authors should always be wary of the possibility that a comment will be misconstrued as offensive when no offense was intended.

41. If I felt strongly enough about keeping the copyright, I would probably write the book myself.

between co-authors and nasty e-mails from publishers.

I was encouraged to write this piece, in part, after observing colleagues and publishers plagued with serious problems when working with co-authors and authors who did not mind the time.

If you are working on a casebook or treatise, you may find the publisher's deadlines are sometimes set a year in advance. Such was the case with several of my past projects. I typically receive an annual e-mail with the next year's publication submission deadlines and an inquiry about the possibility of a new edition. In most cases, those deadlines are very specific; they are rarely set out in general terms like "sometime in April next year."⁴² Once the submission date is set, the publisher creates its internal deadlines for submission by the editor to the formatter, the projected dates for sending proof sheets, and a date for shipping or publishing the work. Book publishers often work out their annual financial planning based on what books they will publish in a particular quarter. Therefore, a late submission can have a significantly negative impact on the publisher's budget.

Recently, I raised the question about deadlines with one of my editors. In response, he wrote:

[Y]ou would be amazed at the excuses we get for late manuscript[s] from lawyers and law professors alike. I can tell you for certain that some of them would not suffice were one to submit a late paper in law school or filing into court! That said, we are usually able to accommodate some delay, but it is always most helpful the more advance notice we receive.⁴³

Once the publisher sets the deadline, I put it on my calendar. If I am working with co-authors who will be submitting their materials to me for editing and compilation, I give them a deadline sufficiently in advance to finish that task, usually thirty days out. As that date approaches, I send out "friendly" reminders. Even then, I do not always succeed in receiving all the submissions on time. It is particularly hard when the tardy co-author is a good friend. Friendship or not, if a co-author is a repeat offender, you should carefully consider whether to include that person on future projects.

42. In dealing with a smaller company with a more informal attitude, a general idea on when the manuscript will be due is fine. But even in those cases, the publisher wants to know, for example, if I am going to use the text for one of my classes and, if so, when the book should reach the bookstores. They plan accordingly. Thus, even the most flexible publishing houses have deadlines.

43. E-mail from editor to David A. Schlueter (Jan. 27, 2011 08:48 CDT) (on file with the *St. Mary's Law Journal*).

J. *Clash of the Egos—The Pride of Authorship*

It can be both satisfying and fulfilling to see your name on a book cover before the title of an article. Whether you are the sole author or one of several co-authors, you created something worthwhile. But the pride of authorship, if it rises to the level of egomania, can destroy a co-authorship marriage. The adage that there is no “I” in the word “team” is important to remember when it comes to co-authorship.⁴⁴

A byproduct of egocentrism in co-authorship is ignorance to good advice. Egos often get in the way of accepting constructive criticism, a topic discussed below.⁴⁵ It can happen to anyone involved in a writing project.⁴⁶

Over the course of my career, I had the opportunity to write for a wide variety of supervisors, audiences, and students. In each of those situations, I learned a great deal about writing.⁴⁷ Unfortunately, when I tried to share those lessons with some of my co-authors, my suggestions were not always well received. I have, at times, found myself in a clash of writing egos that required great care as to how I provided my suggestions to a co-author. I must admit that on more than one occasion, I sat with my red pen or keyboard poised, only to reconsider the option and put it down because I

44. David K. Sherman & Heejung S. Kim, *Is There an “I” in Team? The Role of the Self in Group-Serving Judgments*, 88 J. PERSONALITY & SOC. PSYCHOL. 108, 108 (2005), available at http://www.psych.ucsb.edu/labs/kim/Site/Publications_files/Sherman%26Kim%2705.pdf (explaining that the phrase means “group members should suspend self-interest and instead defend the interests of the group”).

45. See Part L of this Section (describing the importance of constructive criticism).

46. My wife’s experience exemplifies the consistency of egocentric ignorance: For a number of years, my wife taught a course on legal research and writing. Students who could never admit their writing needed improvement constantly confronted her and her colleagues. Their refusal to accept constructive criticism greatly impeded their learning process.

47. In my legal career, I have been very fortunate to work with many fine writers with a variety of styles and approaches to legal writing. In my first job after graduation, I worked on several hundred appellate briefs as an Army JAG Officer. I was blessed to work for supervisors who mastered the arts of writing and advocacy. Later, as a supervisor myself, I edited the briefs of other appellate counsel. In each of my successive assignments, I continued to learn the art of writing from a variety of individuals who passed along their secrets to writing good prose. When I left the military to work for the Supreme Court of the United States, I moved into a job that required more writing than ever before, including twenty to thirty weekly memos for the Justices, and drafting orders and opinions. For seventeen years, I served as a Reporter for the Federal Rules of Procedure Advisory Committee. My written product was under constant scrutiny, and I learned many valuable writing lessons from countless judges and academics who served on the committee. To this day, I continue to learn from my co-authors and colleagues.

knew with a high degree of certainty my edits would be met with icy silence, or worse yet, an angry e-mail.⁴⁸

K. *"We Can't Say That"*

One lesson I learned early in my legal writing career was that it was alright to be bold in advancing a particular theory or proposition, as long as you backed up your words with persuasive arguments and facts. I collaborated with former trial judges as co-authors on several of my projects with the view that their perspective would ensure palatable content for our intended readers. I recall several conversations with those co-authors who would explain, "We can't say that." A judge, for example, would argue, "I would never allow a lawyer to say that or do that in my courtroom," referring to advice written in our book. I would counter argue that other courts permitted such conduct, and we owed it to our readers to point out that possibility. Fortunately, we always managed to reach a compromise despite our differences. Nonetheless, these examples always remind me of the need for co-authors to acknowledge each other's viewpoints, and to sometimes step outside their comfort zone to say "what we couldn't say."⁴⁹

L. *Constructive Criticism*

The issue of how to best offer constructive criticism on your co-author's work product is related to the foregoing topics.⁵⁰ Not surprisingly, a critique of a co-author's work in brash terms such as "Your writing sucks" or "Are you kidding me?" normally does not go over well. I have been on the receiving end of similar comments, and that is not a good way to convince someone of your position—even if the reviewer is right.

If you do not take criticism well, then you may find it more attractive to

48. See *supra* Section VII(G) (commenting on the pros and cons of fast, easy communication between co-authors).

49. On a recent edition of an evidence book, my co-authors and I discussed the practice of pre-marking exhibits and whether it was something we should recognize, discourage, or encourage in the new edition. We decided to point out the benefits and costs of doing so. Some months later, I was working on the new edition of a similar text, but with different co-authors, and included language to the same effect. My phone rang. It was one of my co-authors. He expressed very strong opposition to including any language that would suggest counsel should consider pre-marking their trial exhibits. As a former trial judge, he presided over cases where counsel pre-marked exhibits and made a complete mess of the record. We struck a balance and rewrote that section to address his concerns.

50. See Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 970-72 (2007) (detailing the importance of seeking feedback on drafted material).

work alone on your writing projects. Criticism is a natural part of the co-authorship process: Every co-authored project I worked on involved both giving and receiving constructive criticism.

M. *"Hey, That Is My Section"*

One issue I repeatedly confront is how far a co-author may go in recommending substantive changes to another co-author's work. If the authors divide the project into chapters or sections, they should probably talk about whether the others are free to suggest changes to each other's work.

I worked on several projects where each of the co-authors provided a diversity of experience and expertise. It is often worthwhile to offer and receive proposed changes or additions. Drawing from my experience on both the receiving and giving end of this issue, I found the most effective method of proposing change is to suggest it with grace: When I think someone else's material could be expanded or improved,⁵¹ I draft proposed language and send it to my co-author with a note explaining my thinking, taking care to reaffirm that the final decision is entirely within their discretion and that there is no pressure to include my changes. This approach usually works. Fellow co-authors are happy to receive suggested language they can use as a starting point for further edits.

As with other potential threats to the co-authorship marriage, the parties need to work out an understanding beforehand about crossing over and taking on someone else's territory. The degree of required diplomacy will depend on whether the co-author can take constructive criticism or suggestions in stride, or if they are fiercely territorial.

Generally, it is in all co-authors' best interests to fix mistakes in each other's sections. A mistake in any section of the book reflects poorly on all of the authors collectively.

N. *"I Am in This Only for the Money"*

One of my law professors offered me advice almost thirty-five years ago about writing books for the legal profession. He said writing books for practicing lawyers and judges was a means of giving back to the profession. While it is nice to be paid for the work, there should be as much satisfaction in the knowledge that a lawyer, a trial judge, or an

51. See SANFORD KAYE, *WRITING UNDER PRESSURE: THE QUICK WRITING PROCESS* 170–84 (1989) (suggesting ways to improve both the author's own writing and colleagues' writing—e.g., tips on engaging the reader, and how to appropriately give constructive feedback).

appellate court judge read the book, used it, or cited it.

Entering into the co-authorship marriage with the intent to make a lot of money can present a threat to the marriage.

Over the years, I thought a lot about the role royalties play in the co-author relationship. Granted, the income is a nice addition to any household budget. But, short of writing a New York Times bestseller, writing books is a very inefficient way to make a living. Even if the work finds an audience, timing may be prohibitive from a financial standpoint—it may be years and several editions later before the consumer even finds the product. Although I never calculated the total number of hours I dedicated to legal writing, I suspect that if economics was my sole motivation, I would have been sorely disappointed.

Several years ago, I spoke to someone who wanted to write a legal “how-to” book and make a lot of money on it. That person was very disappointed when I pointed out how much work was involved, the demands of the publishing world, the low percentage of royalties actually paid, and the number of books the publisher would need to sell to receive any decent royalty income.

If I ask a person with no prior experience in book publishing or royalties to join a project as a co-author, I make it a point to inform them upfront that if they are on the project with the thought of putting their children through college, they should reconsider the enterprise.

If one of the members of the co-author marriage joins the project primarily motivated by anticipated fortunes, the marriage can suffer if sales do not meet that co-author's expectations. That person will soon lose interest in the project and eventually become a free rider, which can cause resentment among the other co-authors. Thus, one financially motivated co-author can be a danger to the collaboration as a whole.

VIII. MOVING ON

At some point in the co-author partnership, one or more of the co-authors will be ready to move on to other projects, retire, or take a break from writing. As I noted earlier, one of the benefits of having multiple co-authors is the option to continue the project when one of the co-authors decides to withdraw. There are times, however, when the project is at risk because multiple co-authors consider withdrawal and the publisher consequently loses confidence in the collaboration.

The authors need to give some thought to several issues that can occur

when a co-author leaves the project.⁵² First, will the departing co-author's name remain on the book? If so, for how many editions? Second, if royalties are being paid, will the departing co-author continue to receive any royalties for future editions and supplements? Third, will the departing co-author be permitted to have any input on the future content of the project?

On one of my first books as a co-author, there was a provision in the contract with the publisher that addressed the issue of the names on the book and sharing of royalties. The contract said in part:

The Publisher agrees to pay the Writers a royalty on the money actually received by the Publisher from the sale of derivative works prepared by the Writers, less returns, at the rate specified in Paragraph 14 of this Agreement, except that for the first edition of the book not prepared by the Writers, the Writers will receive one-half the royalty specified in Paragraph 14. Thereafter, no royalties will be due or payable to the Writers on derivative works otherwise prepared. The heirs, legatees, successors, assigns, and personal representatives of the Writers shall have no interest in or rights to royalties on derivative works not prepared by the Writers, except for the first edition of the book not prepared by the Writers.⁵³

At the time, we were not sure anyone would buy the book or that we would be able to continue to work on it. We agreed that if any of us withdrew from the project for any reason, we would continue to receive some recognition for our work for at least one more edition after we left the project.

Even without such language in the contract, the authors can instruct the publisher to leave a person's name on the book, ensure the departing co-author continues to receive royalties, or both. Absent any contractual language, the publishers have no legal obligation to do either. But, in my experience, they generally attempt to accommodate such requests.⁵⁴

On one of my projects—in which one of my former law professors was the lead author on the book—I asked the publisher to keep his name as the lead author after he left the project. His name remained in that position on the book's cover until he passed away years later. Regarding the royalties, we asked the publisher to send a small portion of the

52. As one of my co-authors pointed out to me, it is good for any co-authorship to have a "business plan" for a book in preparation for unexpected events.

53. Excerpt from a contract agreement between David A. Schlueter, his co-authors, and their publisher executed in 1980. This provision of the contract provided, at the inception of the co-authorship, how royalties would be handled if any co-author chose to leave the project.

54. I recently signed a publishing contract in which we agreed to permit the co-authors, in their sole discretion, to direct in writing that the publisher distribute the royalties to third parties.

royalties to him on all future editions in recognition of his original work and his role on the first two editions of the book, but he did not receive any royalties for the annual supplements. After he passed away, we continued to pay a portion of the royalties to his widow.

On another project—with which I am familiar, though not personally involved—the lead author set out detailed written instructions for the names on the book and payment of royalties to himself and his heirs over the course of future editions. After a set number of editions, his name would be removed from the book and the entirety of the royalties would be paid to the remaining author.

IX. SAYING THANKS

In the life of co-authorship marriage, it is vital that the co-authors thank and congratulate each other on the successful completion of a project. With each new edition, I send a note to the editor and my co-authors thanking them for all of their hard work. I find that editors particularly appreciate a pat on the back. They are working on multiple projects with many authors and co-authors, and are under the constant pressure of deadlines from their supervisors.

With each new edition of the books where I was asked to join as a co-author, I make a point of thanking the other authors for including me in the project.

Sometimes saying “thank you” or “job well done” can be difficult if the co-authors faced any of the problems or issues outlined in the previous sections. All the same, it needs to be said.

X. THE PRENUP

A. *In General*

I began this Essay with the purpose of cataloging issues and questions that the reader should consider before entering into a co-authorship partnership. I wanted the reader to consider those issues with a view toward reaching an agreement, a prenup, for the co-author marriage. While a formal written document is not always necessary, an informal writing—such as an e-mail or letter—should capture the following points:

1. A Shared Vision

One of the early lessons that all teachers, speech writers, and advocates

learn is: Remember your audience.⁵⁵ Whether your audience is a class of students, practicing attorneys, trial judges, or appellate courts, it is important to maintain a purpose-driven goal of reaching the intended audience in a shared vision.

It is critical that the members of the co-author marriage have a common goal or purpose for their writing. For example, is the book intended to be largely a “how to” book, a treatise, a combination, or a thought piece? Defining a shared vision becomes very important over time as new ideas flow from original co-authors to new project members. If, on the other hand, there is no shared vision about how to reach the audience, problems are likely to develop later in the relationship.

2. Roles of the Co-Authors

Before beginning work on the project, the co-authors should address the issue of what they expect from each other in terms of the roles they will play, or will not play, in the project. As noted above, a co-author may play multiple roles on one project.⁵⁶

3. Whose Name Goes First?

As awkward as it may be, someone’s name will have to go first on the book. How the co-authors address and resolve this issue will define much about their future working relationship. If the second or third co-author resents the fact that someone else is listed as the lead author, there will certainly be problems later in the life of the project, especially if they perceive the lead author as a free rider.

4. Primary Point of Contact

I always recommend that one of the authors be the primary point of contact with the publisher. That person should always keep the co-authors informed and copy them on any correspondence with the publisher.

55. This maxim holds significant meaning for legal authors because they write various documents for a myriad of audiences. See Interview by Bryan A. Garner with Justice Anthony M. Kennedy, United States Supreme Court Justice (Mar. 21, 2007), *published in* 13 SCRIBES J. LEGAL WRITING 79, 84–85 (2010) (“Most young lawyers will have their first experience in sending a memo to another lawyer in the firm or to draft a memo to the client, and you have to remember who your audience is.”).

56. See generally *supra* Section V (discussing the various roles in the co-authorship marriage).

5. Style and Format

Of all the issues that co-authors might cover in their pre-nup, at first blush, style and format would seem to be inconsequential. But, in my experience, differences in the style and format of a book can be magnified over time. The issue may escalate to the point where the editors step in and try to establish consistency throughout the piece. I recommend the co-authors develop a list of conventions to be uniformly used, or not used, in the book to avoid future disputes. I did this myself on several projects, and found that it vastly improved the consistency throughout the project while avoiding conflicts among the co-authors.

The co-authors should also determine if the publisher has its own style manual. I once worked with a publisher that provided me with a three-ring notebook full of style and citation rules for the book.⁵⁷

6. Who Will Have the Final Say?

It is helpful to have some preliminary understanding about who will cast the tiebreaking vote on content or style. If the co-authors agree that each will independently send his or her work directly to the publisher, there may be problems with consistency.⁵⁸ On the other hand, if they agree to review and comment on each other's work, there will inevitably be a time when they do not agree about certain changes to the work product. At that point, one will need to accede to the other. Therefore, the co-authors should discuss beforehand how that process will work. One simple solution is to agree that the lead author will have the final say on such matters.

7. Planning for the End

Inevitably, the co-authorship marriage will end. The co-authors may wish to include provisions in their agreements with each other and with the publisher about this issue. For example, will the name of the departing co-author remain on the project, and if so, for how long?

57. Similarly, in a book on the national practice of law, a publisher once told my wife that the manner in which she cited state cases—developed by the very courts she cited—was inappropriate. The publisher went through the entire two-volume book and changed all of the citations to conform to the publisher's format. See generally Shane Tintle, Note, *Citing the Elite: The Burden of Authorial Anxiety*, 57 DUKE L.J. 487, 501–04 (2007) (summarizing the history of legal citation that led to its standardization).

58. See SANFORD KAYE, WRITING UNDER PRESSURE: THE QUICK WRITING PROCESS 126–38 (1989) (listing and describing areas for authors to consider when striving for consistency, such as the scope of the subject, the balance of the language styles, and the space required to cover the topic).

B. *A Sample Prenup*

The following is a hypothetical e-mail sent to a group of co-authors, relating to some of the issues that could be outlined in a prenup:

Mary, Al, and Barry—

Good news. I just got a call from Ted Wilson at Eastland Publishing. He said they would do the book and wants to know how we want to set up the contract with them.

I propose the following: Our names can appear in the following order—Me, Mary, Al, and Barry. That reflects the order in which you were asked to join the project. Second, I am willing to serve as the overall manager and editor of the book and also as the point of contact with Eastland.

I suggest the following division of labor: I can do the first two chapters; Mary can do chapters 3 through 6; Al, chapters 7 through 9; and Barry, chapters 10 through 14. I did a quick calculation on the length of the chapters, and I think this comes out pretty close to an equal division of the work. I will also do the three appendices we talked about last week.

We would split the royalties four ways.

Eastland needs our manuscript by May 1st because they want the book on the street by the end of the year. They tend to be pretty firm on submission dates so please look at your calendars and let me know if that is doable for you. Backtracking on the calendar, I would really need your materials by April 1st—about seven months from now. Barry, I know that you and Sally are expecting in March. Are those dates OK with you? If not, let us know ASAP so we can make any necessary adjustments.

Once I hear back from you on my proposals, we can talk about developing some common citation forms, section numbering, etc. for this book. I will try to get one of my chapters to you quickly so you can see how I propose we set up the chapter headings, etc. I expect the first chapter will help outline our vision, scope, and purpose for the book—based on our conversations this past month.

Let me know what you think. I told Ted Wilson I would try to get back to him next week.

It's great to have all of you on board!

This e-mail reflects an incremental approach to putting the co-author team together. It addresses some of the key provisions in the working relationship. In subsequent e-mails, the team could work out some of the other unspecified issues, such as planning for future editions and dealing with the departure of a co-author.

XI. CONCLUSION

At the beginning of this Essay, I recounted an e-mail I sent to a co-author about needing a marriage ref to work out our problems over specific language in our book.⁵⁹ We eventually resolved that particular issue. But that problem was symptomatic of other issues in our partnership, and the damage was done. Several months later, my friend decided to withdraw from the project. I accepted his withdrawal and thanked him for his invaluable contributions to the project.

Thankfully, that experience is not common for me. But I find some comfort in the fact that our situation was not unique among co-authors. It should come as no surprise that producing a book while attempting to work with other people is not an easy task. I am no expert on human behavior, but I have learned many times over that being a co-author presents both rewards and challenges.

In reflecting on my experiences, I was blessed to work with a group of distinguished co-authors on a variety of projects. I am forever grateful to them. I could have never been involved in as many interesting and professionally challenging projects without the partnership of truly remarkable colleagues. True, those projects all presented their own list of problems to our partnerships, but all personal relationships, whether social or professional, are bound to have bumps along the way.

My co-author marriages were worth the effort. I recommend such marriages—with a prenup, of course.

59. *Supra* Section I.