

Beg, Borrow, Steal:

Plagiarism vs. Copying in Legal Writing

By Benjamin G. Shatz and Colin McGrath

*“If you copy from one author, it’s plagiarism.
If you copy from two, it’s research.”*

Wilson Mizner (See also Tom Lehrer (1951) “Lobachevsky”)



Benjamin G. Shatz



Colin McGrath

Did you hear about the litigator who was sanctioned for plagiarism? Given that a litigator’s job is to prevail against a client’s adversaries in court — not to create original works of legal scholarship — this sounds like the lead-in to a joke.

Pleadings and legal briefs serve practical, not academic or artistic, purposes. Indeed, effective legal writing requires the application of precedent and, to a certain extent, the

selective quotation of legal authorities. There are no bonus points for creative writing, rhetorical flourish, or intellectual brilliance.

In fact, novel ideas are typically the weakest legal positions and the hardest to argue. Heavy reliance on earlier documents and thinkers is par for the course.

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So does it really matter if a lawyer's strongest argument (and articulation of that position) derives from a court decision, law review article, or brief filed in another case? Apparently, it might.

Earlier this year, a federal judge imposed \$1,500 in sanctions against actress Lindsey Lohan's attorney for plagiarism. (*Lohan v. Perez* (E.D.N.Y., Feb. 13, 2013, 2:11-CV-05413) 2013 WL 630100 at *8-*10.) The lawyer had filed a brief that was copied "nearly entirely and verbatim" from unacknowledged sources and was practically identical to

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a brief the lawyer had filed in another case. (*Id.* at *8, fn. 6.)

More prosaically, and not surprisingly given how it was drafted, the brief also failed to address any of the cases cited or arguments made by the other side. The court held that

submitting a brief that was almost entirely taken from unidentified, unattributed sources was "[o]bviously...unacceptable" (*id.* at *10) and sanctionable under New York State Rule of Professional Conduct 8.4, "which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." (*Id.* at *10, fn. 9.)

Undoubtedly, cut-and-paste briefing, lack of proper citation, and failure to squarely respond, are all hallmarks of poor practice. But is that sort of briefing really "plagiarism," worthy of sanctions for dishonesty?

How, exactly, did the attorney's conduct materially differ from what happens in courtrooms on a daily basis? Using language from various sources — published and unpublished court opinions, treatises, articles, even blogs — is widespread in legal writing. Both Westlaw and Lexis have extensive brief banks enabling lawyers to see how other lawyers have briefed given issues. Should litigators worry about plagiarism sanctions stemming from these practices? Does *any* form of copying without attribution constitute plagiarism in the litigation context?

— What is "Plagiarism"? —

Black's Law Dictionary defines "plagiarism" as the "deliberate and knowing presentation of another person's original ideas or creative expressions as one's own." (*Black's Law Dict.* (9th ed. 2009) p. 1267, col. 1.) This definition is not particularly helpful for determining what constitutes plagiarism for practicing lawyers. Legal arguments are presented to courts for evaluation of their merits, not their origins. The quality of an attorney's presentation may be a factor of its persuasiveness, but is not itself directly evaluated.

Nor does a lawyer making an argument necessarily mean to imply that "this is *my* argument; the product of my genius, and not the result of ideas from my clients, partners, associates, research sources, or anyone else." Judge Richard Posner has written that plagiarism is "innocent" when done in a context in which "no value is attached to originality,"

noting that judges “ ‘steal’ freely from one another without attribution or any ill will.” (Posner, *On Plagiarism* (April 2002) *The Atlantic Monthly*, at p. 23.)

The law dictionary definition seems to encompass a broad range of activity, including conduct that is standard operating procedure for writing pleadings and briefs. Many lawyers rely on form books written for the *specific purpose* that other lawyers may copy them. (See *Federal Intermediate Credit Bank v. Kentucky Bar Assn.* (Ky. 1976) 540 S.W.2d 14, 16 [no impropriety in plagiarizing legal instruments].) Law firms and legal offices of all sorts maintain copies of briefs and pleadings for their attorneys to consult and reuse. Senior attorneys often sign documents drafted primarily by junior lawyers (named or unnamed) in their employ.

These practices seemingly fall within the wide definition of “plagiarism,” yet such practices are expected and encouraged by the legal profession as efficient and effective lawyering. Thus, “plagiarism” as applied to litigators must be more than merely using another attorney’s “original ideas or creative expressions as one’s own.”

— Lessons from Iowa? —

Recent cases from the Iowa Supreme Court provide a perspective on what constitutes unethical plagiarism in the litigation context. In *Iowa Supreme Court Attorney Disciplinary Board v. Cannon* (Iowa 2010) 789 N.W.2d 756, 759, an attorney was publicly reprimanded for submitting a brief that included the “wholesale copying” of a law review article published on a law firm Web site. The issue arose when a judge questioned whether the attorney had authored this brief of such “unusually high quality.” (*Id.* at p. 757.) The attorney responded that the brief “relied heavily” on an uncited article. (*Id.* at pp. 757-758.)

The judge initiated sanction proceedings, finding that 17 of the brief’s 19 pages of legal analysis were verbatim excerpts from the uncited article, with the only significant dif-

ferences being the removal of cases unhelpful to the attorney’s position. (*Id.* at p. 758.) Iowa’s Supreme Court found that the attorney’s conduct constituted plagiarism in violation of Iowa Rule of Professional Conduct 32:8.4(c), which prohibits lawyers from engaging in “conduct involving...misrepresentation.” (*Id.* at p. 759.)

The court distinguished the attorney’s misconduct from other, more common forms of attorney copying, stating, “This case...does not involve a mere instance of less than perfect citation, but rather wholesale copying of seventeen pages of material. Such *massive, nearly verbatim copying* of a published writing without attribution in the main brief, in our view, does amount to a misrepresentation that violates our ethical rules.” (*Cannon, supra*, 789 N.W.2d at p. 759 (emphasis added).) The court was less concerned with the copying of lengthy string citations and parentheticals, finding that those do not represent “any unique intellectual work product.” (*Ibid.*)

In finding unethical plagiarism in *Cannon*, the Iowa Supreme Court relied on an earlier plagiarism decision, *Iowa Supreme Court Board of Professional Ethics & Conduct v. Lane* (Iowa 2002) 642 N.W.2d 296, 300, in which an attorney filed a brief that contained 18 pages of plagiarized material, including text and footnotes, from a legal treatise. The attorney had included only the relevant portions of the treatise and renumbered the footnotes, but never cited the treatise itself.

Significantly, the court in *Lane* explained that “[e]xamination of [the attorney’s] brief does not reveal any independent labor or thought in the legal argument” (*id.*) and found that the plagiarism “constituted, among other things, a misrepresentation to the court.” (*Id.* at p. 299.) The court suspended the attorney for six months, although that punishment also rested on the attorney’s “lack of candor” in identifying his source to the court (*id.* at p. 300) and his request for 80 hours worth of fees for “writing” the brief. (*Id.* at pp. 300-301.)

— **Practical Impact** —

Although the cases above focused primarily on the copying of unattributed sources, they provide possible guideposts for discerning the difference between unethical plagiarism versus mere copying. First, there seems to be an implied distinction between the

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copying of citable sources from outside the litigation context, such as law review articles and Web sites, versus the copying of litigation-related materials (such as briefing from another case). The courts seem most perturbed by copying from citable sources without attribution. And the more material copied, the worse the affront becomes. (See

United States v. Lavanture (3d Cir. 2003) 74 Fed.Appx. 221, 223, fn. 2 [“it is certainly misleading and quite possibly plagiarism to quote at length from a judicial opinion (or, for that matter, any source) without clear attribution”].)

Second, aside from the word-for-word copying of large amounts of material, courts may also look to whether the copied material represents “unique” intellectual work product, and also whether the attorney who copied the material applied “independent labor or thought” in preparing the brief.

Although vague, these considerations can be summed up in two guidelines to decrease the likelihood of a “plagiarism” finding: (1) always provide attribution for language taken from citable, external, non-litigation sources; and (2) always make sure any copied material is relevant and applicable to the facts and circumstances of the case at issue. These guidelines should be obvious to conscientious practitioners, and may prove useful for dispelling the threat of “plagiarism” in court filings.

Another point to note is that courts are especially concerned not so much with the mere copying of someone else’s work, but rather the act of copying *in lieu of* customizing a brief to the issues and circumstances of the case. This is a subtle, yet significant, distinction. One reasonable interpretation of the Iowa cases is that copying material is neither inherently wrong nor unethical, provided proper attribution is given and effort is made to tailor the material to the specific case at issue.

Problems arise when an attorney abdicates the duty to draft a brief focused on the case at hand, and instead relies to a large extent on arguments and analyses done by others, for purposes unrelated to the given case. Even then, this may not be enough to constitute unethical plagiarism — unless the attorney also fails to acknowledge the actual source of the work.

Legal scholars have argued for a similar distinction between plagiarism and mere

copying within the litigation context. In *The Problems of Plagiarism as an Ethics Offense* (Summer 2011) ABA Criminal Justice, Professors Peter Joy and Kevin McMunigal argue that the “analysis of copying in the context of litigation should focus directly on the quality of the filing at issue and the competence and diligence of the lawyer who prepared it.”

They propose that copying by lawyers should not be considered an ethics violation, *per se*, because, unlike other kinds of written work, litigation filings do not purport to contain purely original work or be the sole work of the “author” or signing attorney. Given these key differences, attaching the “plagiarism” label to all forms of attorney copying masks the true ethical concerns involved — namely, whether the attorney drafted an argument tailored to the specific facts and circumstances of the case and was diligent in researching the law and finding up-to-date, relevant supporting authority.

One useful definition of plagiarism in the litigation context comes from Wisconsin litigators James Peterson and Jennifer Gregor: “in the ordinary work of the lawyer, plagiarism should be defined to consist only of the word-for-word copying of a substantial, non-routine portion of a document of which the lawyer expressly claims authorship.” (Peterson & Gregor, *Attorneys at Work: A Flexible Notion of Plagiarism* (Oct. 7, 2011) Law360 [also discussing copyright infringement issues].)

Of course, to paraphrase Judge Posner, what makes plagiarism so potentially serious is that it “may lead the reader to take steps...that he would not take if he knew the truth.” (Posner, *supra*, at p. 23.) This gravest of consequences should not be a factor in litigation: The better legal argument should prevail, whether plagiarized or not. Nonetheless, because litigation places a premium on attorney honesty, the candor and professionalism of counsel are serious enough issues for judges to take offense if being misled about an argument’s origins.

Nonetheless, an irony is that the restrictions that courts impose on citing to unpublished opinions mean that — depending on the jurisdiction and context — it may be itself a breach of the rules to cite to the source, when you borrow from such an opinion containing research and reasoning directly applicable to your argument. Even the sternest regulators of litigation plagiarism surely could not punish a lawyer who lifted from an unpublished opinion, but failed to provide proper attribution. Yet it would seem absurd for a lawyer to ignore such material, simply on the basis that it could not be cited.

— Final Thoughts —

Returning to the Lindsey Lohan case, the sanctions imposed should now seem less threatening to everyday practice. Although the court imposed plagiarism sanctions, the court was not focused merely on the filing of a brief that copied from unattributed sources. Rather, the copying involved material from numerous non-litigation sources, such as articles and Web sites, and much of which was irrelevant and inapplicable, but yet constituted most of the brief.

With all of these problems, the court may have used “plagiarism” as simply a convenient label for the attorney’s wholly deficient conduct. However, if the attorney had simply made the effort to provide citations for the sources in the brief and to properly tailor language taken from other briefs, it might have been just another brief.

Plagiarism is rightfully a mortal sin in academic settings, where original expression is paramount. Litigation is different, with far more room for borrowing ideas and writings. But be warned that significant unattributed copying may cross the line. Be forthright; give the cite.

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Benjamin G. Shatz, a certified appellate specialist, co-chairs the Appellate Practice Group at Manatt, Phelps & Phillips, LLP, in Los Angeles; Colin McGrath is a Manatt litigation associate.