Something Bad in Your Briefs

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Something Bad in Your Briefs?

Richard H. Underwood†

Abstract

In a profession heavily driven by writing, plagiarism is an ethical issue that plagues the legal community. The legal profession generally views plagiarism as unethical, but often sends mixed messages by condemning it in some settings, but not others. In this short Commentary, Professor Underwood discusses the ethical implications of plagiarism in legal writing.

A recent post on Above the Law1 brought back a memory of a § 19832 case I defended almost thirty-five years ago. The Above the Law post reported that Lindsay Lohan’s lawyer was fined $750 for plagiarism in a brief.3 The opinion in the case cited the judge’s “inherent power” to punish such misconduct,4 but also alluded to how such misconduct would likely be reprehensible under Rule 8.4 of the New York Rules of Professional Conduct.5 In my old case, I was defending a county sheriff, who, along with several other officers, was accused of mistreating a teenage malefactor. Being an enthusiastic new member of the bar, I

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4 Lohan, 924 F. Supp. 2d at 460; see also id. at 457 (“The court has inherent power to sanction parties and their attorneys . . . where the party or the attorney has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” (quoting Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 78 (2d Cir. 2000) (alterations in original)).

5 See id. at 460 n.9 (citing In re Steinberg, 620 N.Y.S.2d 345 (N.Y. App. Div. 1994) (per curiam) (ordering public censure for submission of plagiarized memoranda as writing sample in support of an employment upgrade application); N.Y. RULES OF PROF’L CONDUCT R. 8.4 (2013)). I found it amusing that opposing counsel in Lohan tried to pile on and get sanctions under Rule 11. See id. at 460. The court was having none of that, noting that the "affront" was to the court and not the opposing party. Id. at 460-61.
worked up a motion for summary judgment supported by a lengthy and compelling memorandum. A week or so after filing my masterpiece, I received a call from counsel for one of the other defendants. He told me he was much impressed by my work, and asked if he could borrow from it. Flattered, I said “sure.” Days later, I received a copy of his filing. He simply copied my work word-for-word and slapped his name on it. I was bemused and mentioned this to one of the young partners at my firm. He shrugged it off with a smile, observing that “plagiarism is the highest form of flattery,” or something like that. I was too new to the game to ask the obvious question: “What did he bill his client?”

I have long had the sense that lawyers do not think much about this sort of thing. Indeed, when my colleagues and I have struggled in the past with plagiarism cases in the law school environment, we have encountered what can only be called indifference on the part of lawyers participating in the proceedings. The Lohan case got me wondering if there was any law on plagiarism out there that should be brought to the attention of practitioners and legal writing instructors. No surprise—there is law out there.

The motion was granted.


Students charged with honor code violations sometimes “lawyer up.” More than one lawyer has lectured us on how there is no such thing as plagiarism in law practice.

I should note as an aside that the term plagiarism is thrown about rather carelessly by some. For example, in Castrataro v. Urban, 802 N.E.2d 689 (Ohio Ct. App. 2003), appeal denied, 807 N.E.2d 368 (Ohio 2004), the appellant rather foolishly complained that the trial court had abused its discretion and showed bias and prejudice “by constantly making plagiarized statements throughout its discretion [sic] identical to defendant’s motion for summary judgment and citations which are exactly identical to defendant’s motion for summary judgment.” 802 N.E.2d at 695 (alteration in original). The appellate court wryly observed that “the fact that the trial court may have cited the same cases in its decision as appellee cited in his motion . . . merely indicates that the trial court found such cases to be relevant.” In another case, a federal magistrate dismissed a pro se petition which alleged that his lawyer’s plagiarized brief amounted
In some reported opinions, the trial judge or appellate judges are taking a lawyer to task, not so much for plagiarism as for shoddy work.\textsuperscript{10} For example, before affirming a conviction for first-degree murder, the Supreme Court of Indiana dedicated several introductory paragraphs of its opinion to addressing counsel’s plagiarized brief, which contained lengthy passages from American Law Reports and other sources, lifted word for word “without quotation marks, indentation or citation.”\textsuperscript{11} The opinion uses the term plagiarism, but the court seemed most concerned with the brief writer’s disregard of an appellate rule relating to proper briefing: “[t]o place all this conglomeration of uncited material in a Brief is an imposition on the Court. . . . A brief is not to be a document thrown together without either organized thought or intelligent editing on the part of the brief-writer.”\textsuperscript{12}

In another instance, the Second Circuit referred a case to the court’s Committee on Admissions and Grievances partly on “the issues of whether [the lawyer] engaged in plagiarism, whether he violated his duties to his client and the Court by presenting facts and argument that did not bear on the issues in his case, and whether he charged his client fees for services which he did not render.”\textsuperscript{13} The lawyer had gotten permission from another lawyer to “share a brief” intending to “adapt the . . . Brief to the facts of his case.”\textsuperscript{14} In the end, the Committee concluded that the use of the shared brief did not amount to plagiarism.\textsuperscript{15} The court nevertheless reprimanded the lawyer for his shoddy work.\textsuperscript{16}


\textsuperscript{10} In the process of researching this little piece, I also came across some discussion of rule-based sanctions and contempt for inflammatory and otherwise inappropriate pleadings and written material. See, e.g., Judith D. Fischer, Incivility in Lawyers’ Writing: Judicial Handling of Rambo Run Amok, 50 WASHBURN L.J. 365 (2011); Marianne Vorhees, Best Practices: Dealing with Inappropriate Written Materials, IND. CT. TIMES (Feb. 6, 2012), http://indianacourts.us/times/2012/02/best-practices-dealing-with-inappropriate-written-materials.


\textsuperscript{12} Id.

\textsuperscript{13} In re Mundie, 453 F. App’x 9, 12, 13 (2d Cir. 2011).

\textsuperscript{14} Mundie, 453 F. App’x at 16, 18.

\textsuperscript{15} Id. at 18 (concluding that the lawyer had attempted to refund fees, and found that the lawyer “did not intentionally charge his client for services not rendered.”).

\textsuperscript{16} Id. at 9.
On the other hand, *Lohan* is not the only opinion using the "P word" and imposing sanctions. The bankruptcy case of *In re Burghoff*\(^{17}\) took a lawyer to task for billing his client $5,737.50 for 25.5 hours of work on a brief that consisted in large part of pages from articles written by others, without acknowledgment.\(^{18}\) The lawyer was required to disgorge the fees he charged and *(gulp)* ordered to complete a law school course in professional responsibility.\(^{19}\) What could be worse than the dreaded law school course in professional responsibility?\(^{20}\) In an earlier Iowa case, a lawyer was suspended from practice for six months for plagiarizing eighteen pages of material from a treatise in a brief, and asking for attorney fees for eighty hours of work in its preparation.\(^{21}\)

This is not just an Iowa thing. Consider, for example, *In re Ayeni*\(^{22}\) from the District of Columbia Court of Appeals. This disciplinary case involved misappropriation of client funds along with a violation of Rule 8.4(c) of the D.C. Rules of Professional Conduct.\(^{23}\) In *Ayeni*, the lawyer had filed a brief identical to a brief filed earlier on behalf of his client's co-defendant, and submitted a voucher claiming he had worked nineteen hours on it.\(^{24}\) The United States district judge in *Dewilde v. Guy Gannett Publishing Co.*\(^{25}\) criticized plaintiff's counsel for plagiarizing his opponent's brief.\(^{26}\) The judge opined that "[d]efense counsel has graciously or perhaps inadvertently failed to call this major breach in professional conduct to the Court's attention. The Court, however,

\(^{17}\) 374 B.R. 681 (Bankr. N.D. Iowa 2007).

\(^{18}\) See *Burghoff*, 374 B.R. at 683-85; see also Iowa Sup. Ct. Attorney Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 757-60 (Iowa 2010).

\(^{19}\) Id. at 687.

\(^{20}\) I ought to know how dreadful a punishment this is, since I have taught for thirty-two years.

\(^{21}\) See Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 297-98 (Iowa 2002).

\(^{22}\) 822 A.2d 420 (D.C. Cir. 2003) (per curiam).

\(^{23}\) See *Ayeni*, 822 A.2d at 421-22.

\(^{24}\) Id. at 421.


\(^{26}\) See *Dewilde*, 797 F. Supp. at 56 n.1.
cannot let it pass without condemnation. . . . Plagiarism . . . is wholly intolerable in the practice of law.”

In *Vasquez v. City of Jersey City*, the federal trial judge rebuked the city attorney for quoting verbatim the court’s language from another opinion without citation or attribution. Other judges take this seriously too. In *Pagan Velez v. Laboy-Alvarado*, a lawyer was called out for responding to a “summary judgment motion which plagiarizes full pages of *Ortiz v. Colon*. We found not a single citation to *Ortiz*. . . . In fact, by our estimation, approximately sixty-six percent of the brief is a verbatim reproduction of the . . . Opinion and Order. This behavior is reprehensible.”

On the other hand, perhaps plagiarism is not so reprehensible when the shoe is on the other foot. Consider the observation made in the Mississippi case of *Williams v. State*. In this case, the defendant had been convicted of receiving stolen property. The defendant appealed in part because of the prosecutor’s closing argument, which alluded to the giant squid in Jules Verne’s *Twenty Thousand Leagues Under the Sea*. The prosecutor was arguing that the defendant was the head of a crime organization in Oktibbeha County and noted that, as in the case of the creature, you have to cut off the organization’s head and not just the tentacles. The Supreme Court of Mississippi ruled that the prosecutor had properly used literature to draw an inference supported by the evidence. In passing, Justice Robertson quoted an “oft-quoted passage” from another Mississippi opinion dealing with the law of closing

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27 Id.
29 *Vasquez*, 2006 WL 1098171, at *8 n.4.
31 *Pagan Velez*, 145 F. Supp. 2d at 160 (discussing the “reprehensible” behavior of an attorney that plagiarized an unpublished opinion) (citing *Ortiz v. Colon*, No. 96-1153, slip op. at 2-7 (D.P.R. Feb. 11, 2000)).
32 595 So. 2d 1299 (Miss. 1992).
33 *Williams*, 595 So. 2d at 1302.
34 See id. at 1308.
35 Faulknerian?
36 *Williams*, 595 So. 2d at 1308.
37 Id. at 1309-10.
argument. In a footnote, he let us in on a bit of Mississippi "legal lore": "Legal lore has it that the Court plagiarized much of this passage from the brief of William Alexander Percy, long poet laureate of the Delta."\textsuperscript{39}

\textsuperscript{38} Id. at 1309 (quoting Nelms & Blum Co. v. Fink, 131 So. 817, 820-21 (Miss. 1930)).

\textsuperscript{39} Id. at 1309 n.12 (citation omitted).