2011

The Problems of Plagiarism as an Ethics Offense

Peter A. Joy

Kevin C. McMunigal
Case Western University School of Law, kevin.mcmunigal@case.edu

LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 12-05-13

Summer 2011

THE PROBLEM OF PLAGIARISM AS AN ETHICS OFFENSE

by

Peter A. Joy
Henry Hitchcock Professor of Law and
Co-Director of the Civil Justice Clinic

and

Kevin C. McMunigal
Judge Ben C. Green Professor,
Case Western Reserve University School of Law

The Problems of Plagiarism as an Ethics Offense

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Plagiarism as a potential pitfall does not burn brightly on the ethical radar screens of litigating lawyers. They are likely to view plagiarism as a species of offense peculiar to academia and the publishing world, not litigation filings. A recent disciplinary case from Iowa, though, demonstrates that judges and ethics authorities do discipline lawyers for what they label as plagiarism in connection with court filings. In this column, we question the practices of labeling attorney copying, even without acknowledgment, as plagiarism, and treating it as a per se ethics violation. We argue, instead, that 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.

Copying in Litigation

In *Iowa Supreme Court Attorney Disciplinary Board v. Cannon*, 789 N.W. 2d 756 (Iowa 2010), Peter Cannon represented a client in connection with a bankruptcy proceeding. He filed a motion to disqualify another lawyer who had been appointed as special counsel to a bankruptcy trustee. In support, Cannon filed both prehearing and posthearing briefs. The judge denied the motion but "having found Cannon's briefs to be of unusually high quality" ordered him to certify that he was their author. In response, Cannon admitted that he had "relied heavily" upon a law review article and that in doing so had "exceeded permissible fair use."

PETER A. JOY *is the Henry Hitchcock Professor of Law and director of the Criminal Justice Clinic at Washington University School of Law in St. Louis, Missouri; he can be reached at joy@wulaw.wustl.edu.* KEVIN C. McMUNIGAL *is the Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law in Cleveland, Ohio; he can be reached at kcm4@case.edu. Both authors are contributing editors to* Criminal Justice *magazine.*

In sanction proceedings, the judge found that Cannon had taken 17 pages in his initial brief verbatim from the law review article and deleted items contrary to his position. In the posthearing brief, Cannon took several pages of string citations from the article. The judge imposed a number of sanctions, such as disgorgement of the fee and notifying the law review article's authors of his copying of their work.

In disciplinary proceedings, the Iowa Supreme Court found that Cannon had committed what it termed "plagiarism" and in doing so had violated Iowa's version of Model Rule 8.4 (c), proscribing attorney "dishonesty, fraud, deceit or misrepresentation." The court concluded, though, that Cannon had not charged an excessive fee because, among other things, he had forgiven the fee for the briefs, waived other fees owed by the client, and had paid to have another lawyer take over the case. The court sanctioned him with a public reprimand.

Cannon is not the only disciplinary case involving an attorney copying the work of another. In an earlier case, *Iowa Supreme Court Board of Professional Ethics and Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002), the Iowa Supreme Court suspended for six months a lawyer who copied large portions of a brief from a treatise. In addition to the copying, the court found that during the investigation, Lane was first unresponsive and then evasive. He had also made a number of unreasonable fee claims.

The Ohio Supreme Court in *Columbus Bar Association v. Farmer*, 855 N.E. 2d 462 (Ohio 2006), suspended a lawyer who took over a criminal case on appeal from another lawyer. Farmer, having told the client that an appellate brief filed by his predecessor "wasn't worth the paper it was written on," withdrew that brief without, it later turned out, having read it. He then filed under his name an appellate brief the court described as "a nearly verbatim recasting" of his predecessor's brief.

Academic Plagiarism by Law Students and Lawyers

Not all cases that ethics authorities categorize as dealing with plagiarism relate to briefs or pleadings. Some deal with academic work done by law students, triggering bar admission questions, or by lawyers, raising attorney discipline issues. *In re Zbiegien*, 433 N.W.2d 871 (Minn. 1988), is a case in which the Minnesota Supreme Court refused to bar a recent law school graduate from admission based on a single incident of plagiarism in law school. An

earlier case from Illinois, *In re Lamberis*, 443 N.E.2d 549 (Ill. 1982), also deals with academic plagiarism. In *Lamberis*, unlike *Zhiegien*, the academic plagiarism was committed by someone already admitted to the practice of law. Lamberis enrolled in an LLM program after seven years of practice. He submitted a thesis to fulfill one of the LLM program's requirements, large portions of which were plagiarized from two legal treatises. The Illinois Supreme Court imposed the sanction of censure.

Is Attorney Copying in Litigation Plagiarism?

Copying by lawyers in briefs and pleadings from the work of others bears a deceptive superficial similarity to plagiarism. It is thus tempting for ethics authorities to label and denounce such copying as plagiarism without examining whether such labeling and classification make sense. Our view is that the better practice is to avoid labeling and treating copying by attorneys in the context of litigation filings as plagiarism. It is also preferable not to treat such copying, even if not openly acknowledged, as an ethics violation in and of itself. Rather, the primary focus should be on (1) the legal and factual merits of the positions advanced in the filing; and (2) the competence and diligence of the lawyer who signed the filing.

Originality

Work subject to the offense of plagiarism typically involves an explicit or implicit claim of originality by its author. Examples include papers submitted by students for academic credit, articles published by academics in a tenure system, and works of fiction published commercially. Originality is a critical criterion in assessing the quality of such work. Copying the work of others without attribution accordingly is thus a cardinal sin.

Litigating lawyers, by contrast, often and appropriately copy from the work of other lawyers in preparing pleadings and briefs. Form books, frequently based on work done by lawyers in prior litigated cases, are openly created and sold by lawyers for lawyers. Such books are bought and used precisely for the purpose of copying. The Federal Rules of Civil Procedure include an appendix of forms to be copied by lawyers. Law firms and government offices often maintain pleading and brief banks and encourage their lawyers to copy portions from them to avoid the delay and expense of creating litigation documents from scratch. Copying from such sources is viewed as efficient and effective lawyering, not a type of fraud, theft, or misrepresentation.

This tradition and culture of copying by lawyers demonstrates that lack of originality is typically seen as irrelevant in regard to litigation filings. In other words, originality in and of itself is not central to the quality of litigation documents and by signing them lawyers make no claim of originality. Originality, for example, is notably absent from the list of representations Rule 11 states that a lawyer certifies by signing a pleading, motion, or other paper in federal court.

Sole Authorship

Sole authorship is also the norm with papers submitted by students for academic credit, articles published by academics in a tenure system, and commercially published works of fiction. Attorneys who sign briefs and pleadings, in contrast, make no explicit or implicit claim of sole authorship. Again Rule 11 is illustrative. It does not include sole authorship as one of the representations that a lawyer certifies by signing a pleading, motion, or other paper in federal court.

Litigation filings, such as briefs and pleadings, as well as judicial opinions, are widely recognized as often being a blend of research, writing, and editing by multiple lawyers. The name of a lawyer who did a substantial portion of the research and writing in a brief, such as an associate, a summer clerk, or a lawyer outside a firm hired for specific research and writing tasks, may not appear on the brief, while the name of a lawyer who did no actual research or writing, such as a partner or local counsel, may appear prominently on a brief or pleading.

In *The Little Book of Plagiarism* (2007), Judge Richard Posner discusses how judges construct their written opinions by routinely incorporating work written by law clerks and at times incorporating passages from lawyers' briefs, all without open acknowledgment. The judge's work, in other words, is frequently that of a compiler and editor of an opinion rather than its sole author.

No one accuses judges of plagiarism. For one thing, there is no detrimental reliance. All lawyers know how it works. Also, judges make no implicit claim of originality. The quality of a judicial opinion is a function of the soundness of its reasoning, not its originality. And the judge's signature on the opinion does not signal to anyone a claim to originality or sole authorship, but rather the judge's commitment to the soundness of the

factual and legal content of the opinion.

Judge Posner notes that a lawyer's signature on a filing, like that of a judge on an opinion, should not be and is not taken as a claim of either sole authorship or originality. The solicitor general of the United States, for example, signs many briefs that he or she did not personally write. Here again, signature signifies a commitment to the legal and factual positions set forth in the brief, not originality or sole authorship.

Proper Focal Points

Opinions such as *Cannon*, *Lane*, and *Farmer* bootleg the offense of plagiarism from the academic and publishing arenas into the litigation world without examining whether doing so makes sense. Because of the lack of explicit or implicit claims to originality or sole authorship in litigation filings, such transfer is unsound. Attorney copying of the sort found in these cases does raise significant ethical concerns. But attaching the label of plagiarism to such copying and importing that concept into the legal ethics arena in our view tends to mask rather than reveal ethical concerns such conduct may raise.

Quality Rather than Originality

Rather than focusing on *originality*, ethics authorities investigating allegations of inappropriate copying in litigation should focus on the *quality* of the filing, how well it serves its function. Again, reference to Rule 11 is helpful. Rule 11 sets forth two key representations a lawyer makes to a court by signing any paper filed with the court. One has to do with the *legal* merits of the filing—that it is "warranted by existing law." A second concerns the *factual* merits of the filing—that its "allegations and factual contentions have evidentiary support." Model Rule 3.1 imposes a parallel ethical duty on a lawyer not to take a position "unless there is a basis in law and fact for doing so that is not frivolous."

If a lawyer cuts and pastes large segments from another lawyer's work into a pleading or brief, it raises serious concern that the lawyer has failed to investigate and research the factual and legal merits of the claims the brief raises as required by Rule 11 and Model Rule 3.1. But cutting and pasting in and of itself does not demonstrate such failure. In some circumstances, a section in a brief copied from the work of another lawyer or group of lawyers could be of higher quality than the work the signing and filing lawyer would likely produce on his or her own.

Assume Congress enacts a new evidentiary or sentencing provision, the constitutionality of which is seriously and hotly debated. Shortly after enactment, identical legal claims contesting the provision's constitutionality are filed in federal district courts throughout the country. In some major metropolitan areas, federal public defender offices with the help of national defense counsel organizations and interested academics prepare briefs that thoroughly and effectively advance the relevant constitutional challenges.

Before the constitutionality of the provision is resolved, a defendant charged in federal court in a rural area hires a sole private practitioner as counsel in a case raising the constitutionality of the provision. Through the Internet, the sole practitioner finds the briefs filed in the prior cases and cuts and pastes legal sections addressing the same constitutional claims raised in the earlier cases. Would the quality of the resulting brief necessarily be lower than what the sole practitioner would produce on his or her own? Would the court in this case be better educated about the legal questions without the copying? It is certainly plausible, perhaps even likely, that the copied sections will be better researched, written, and argued than sections this lawyer would or could have produced on his or her own given the client's limited budget.

Competence and Diligence

If a lawyer simply cuts and pastes an argument from a law review article, someone else's brief, or even his or her own prior brief, it raises significant concern about whether the lawyer has fulfilled one of a lawyer's most basic duties, competence. The duty of competence, set forth in Model Rule 1.1, requires thorough preparation, including adequate research into the facts of the case. If the brief to be filed addresses a purely legal question that remains unresolved in the jurisdiction, it may well be that a section from another brief by the same lawyer or another lawyer competently addresses the questions. But often competent drafting requires tailoring arguments to the facts and procedural posture of the particular case. Simple copying often will not adequately present an individual client's case. If an older brief from a brief bank was used, for example, was it updated to reflect new cases and changes in the law? The central issue here, again, should be the quality of the brief, not the fact that parts of it were copied.

Another fundamental ethical obligation is dili-

gence, found in Model Rule 1.3. Diligence speaks to performing the work for which the attorney is hired. As in the *Farmer* case, a lawyer copying from another lawyer's work may be inappropriate to the extent that it reflects on the lawyer failing to do the work for which he or she was hired, which would include at least ensuring that the copied material was relevant, accurate, and up to date.

Conclusion

In *Lane*, the Iowa Supreme Court stated that attorney copying "is akin to the matter of ghostwriting. . . ." "Ghost writing" in the legal ethics context describes a lawyer contributing to a litigation filing by a pro se party without either the lawyer or the party acknowledging that contribution. A number of courts and ethics authorities originally took the position that ghost writing is both improper and a per se ethics violation. Some jurisdictions still maintain this position, but an increasing number, after more thorough examination by ethics authorities and academic commentators, have abandoned that view. The ABA, for example, in Formal Opinion 07-446, concluded that a lawyer who acts as a ghost writer "is making no statement at all to the forum regarding the nature or scope of the representation" and thus "the lawyer has not been dishonest within the meaning of Rule 8.4(c)." The ABA explicitly abandoned a prior ethics opinion that came to a contrary conclusion on ghost writing.

Comparison of attorney copying in litigation to attorney ghost writing provides valuable insight. Both practices prompt an initially appealing but ultimately superficial and incorrect labeling as misleading. With ghost writing, *lack* of the attorney's signature on a pleading may initially be seen as misleading a court about the lawyer's participation. With copying, the attorney's signature may initially be seen as misleading a court regarding originality and authorship.

As the ABA's recent reexamination of ghost writing indicates and this column's examination of attorney copying in litigation reveals, such views upon closer examination should be seen as flawed. Just as a ghost-written pleading or brief makes no representation at all about an attorney's contribution, an attorney signing a brief or pleading with copied portions makes no representation about originality or sole authorship. Accordingly, neither should be viewed as necessarily involving misrepresentation or as a per se violation of Model Rule 8.4(c). ■