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Plagiarism in Lawyers' Written Advocacy (Part 1)

By Douglas E. Abrams

On August 5, 2010, a Kentucky jury convicted Karen Sypher on six counts of extortion, lying to federal investigators, and retaliating against a witness.¹ The federal prosecution stemmed from a one-night sexual encounter between Sypher and University of Louisville men's basketball coach Rick Pitino in a local restaurant in 2003. At the eight-day trial, prosecutors proved that Sypher demanded \$10 million plus a home and a car from the coach in exchange for her silence, falsely accused him of rape when he reported the attempted extortion to authorities, and later lied to the FBI.²

By the time Sypher began serving her 87-month prison sentence in April of 2011,³ she was not the only member of the defense team who emerged scarred. When District Judge Charles R. Simpson III denied the defendant's post-trial motions seeking a new trial, the court criticized her lawyer, whose brief "appear[ed] to have cobbled much of his statement of the law governing ineffective assistance of counsel claims by cutting and pasting, without citation, from the Wikipedia web site."⁴ "[S]uch cutting and pasting, without attribution," warned Judge Simpson, "is plagiarism."⁵

Sypher follows other recent decisions that have chastised lawyers for briefs or other written submissions marked by plagiarism, "[t]he

deliberate and knowing presentation of another person's original ideas or creative expressions as one's own."⁶ Some lawyers had copied passages from earlier judicial opinions that rest in the public domain, and some lawyers (as in *Sypher*) had copied passages from private sources that are subject to the copyright laws. In either event, courts have labeled lawyers' plagiarism in court filings "reprehensible,"⁷ "intolerable,"⁸ "completely unacceptable,"⁹ and "unprofessional."¹⁰

This two-part article discusses ethical obligations that lawyers violate when they commit plagiarism in briefs and other filings they submit to the court. This Part I discusses decisions that have found or intimated that counsel's plagiarism violated Rule 8.4(c) of the ABA Model Rules of Professional Conduct, which states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."¹¹ Perhaps because one or more of Model Rule 8.4(c)'s four proscriptions normally seem such natural fits for disciplining advocates' plagiarism, courts have not yet explored application of Model Rule 8.4(d), which reaches lawyers who "engage in conduct that is prejudicial to the administration of justice."¹²

In the next issue of *Precedent*, Part II of this article will discuss why lawyers' plagiarism in written submissions to the court violates Model Rule 8.4(d) as an independent

ground for sanction. By its very nature, a lawyer's plagiarism is prejudicial to the administration of justice because it creates a risk that the court's written opinion itself will inadvertently plagiarize. A lawyer's plagiarism can also distort the argument's meaning and import by inducing the court to mistake the copied passages as products of the lawyer's own thought processes, rather than as an uncompensated non-party's analysis presumably helpful to the proponent. In the adversary system, said former American Bar Association President Whitney North Seymour, the administration of justice "depends heavily on the skill and breadth of the advocacy which [judges] consider in reaching their judgments."¹³

Grounding professional discipline on violations of both provisions of Model Rule 8.4 would not be redundant because Model Rule 8.4(c) focuses primarily on the character of the lawyer's conduct, and Model Rule 8.4(d) focuses primarily on the conduct's detrimental effect on the judicial system. In an appropriate case, invoking both provisions of Model Rule 8.4 would hold practical significance because "[t]he fact that the lawyer's misconduct has violated more than one duty may be relevant to the sanction" that the disciplinary commission or the court imposes.¹⁴

Section 3.0 of the *ABA Standards for Imposing Lawyer Sanctions* underscores this relevance by reciting four controlling questions

in disciplinary proceedings: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.”¹⁵ Where a lawyer’s single act of misconduct violates more than one Model Rules provision, “[t]he duty or duties violated are important to evaluate the harm of the misconduct”¹⁶ to the public, the courts or the legal system.¹⁷

DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION

Judicial condemnation of lawyers’ plagiarism in court filings does not exalt technical niceties. The Iowa Supreme Court observes that courts do not “play a ‘gotcha’ game with lawyers who merely fail to use adequate citation methods,” but instead target “massive, nearly verbatim copying of a published writing without attribution.”¹⁸ Once massive copying of a public or private source appears, courts have found intentional “dishonesty, fraud, deceit or misrepresentation” in violation of Model Rule 8.4(c).

As government publications, reported federal and state judicial opinions rest in the public domain beyond copyright protection.¹⁹ Public status, however, relieves users only of the obligation to secure permission for re-publication. Public status does not immunize users from rules and conventions concerning failure to identify or credit the public source in court filings.²⁰

The distinction made a difference in *United States v. Bowen*, which affirmed the defendant’s 30-year sentence for conspiracy to distribute drugs. The defense counsel’s brief, nearly 20 pages long, was copied almost verbatim from a Massachusetts

federal district court opinion that the brief did not cite.²¹ “While our legal system stands upon the building blocks of precedent, necessitating some amount of quotation or paraphrasing,” concluded the U.S. Court of Appeals for the 6th Circuit, “citation to authority is absolutely required when language is borrowed.”²²

Where a private author’s work implicates the copyright laws, unauthorized reproduction constitutes copyright infringement.²³ The lawyer’s plagiarized submission may initially reach no further than the court and the parties, but the submission remains a public record accessible to others.²⁴

In *In re Burghoff*, for example, 17 pages of defense counsel’s 19-page pre-hearing brief consisted of verbatim excerpts from an article written by two prominent New York lawyers and available on the Internet.²⁵ The brief did not acknowledge the earlier article, and defense counsel did little more than delete a few passages, including ones that did not support his client’s position. Defense counsel’s post-hearing brief also “borrowed heavily” from the article without attribution.²⁶

Burghoff held that defense counsel’s plagiarism violated Model Rule 8.4(c) as “a form of misrepresentation.”²⁷ The court ordered counsel to return the fees he charged the client for the two briefs, and to complete a professional responsibility course at an accredited law school or by private arrangement with a law professor.²⁸ On review of the state grievance commission’s findings, the Iowa Supreme Court publicly reprimanded counsel for plagiarism, which the court labeled “misrepresentation, plain and simple” in violation of Model Rule 8.4(c).²⁹

In *Kingvision Pay Per View, Ltd. v. Wilson*, the plaintiff’s 19-paragraph response to a summary judgment

motion contained approximately seven paragraphs copied wholly or partly, without citation or attribution, from the multi-volume Wright-Miller-Cooper federal civil practice treatise, plus three of the paragraphs’ seven footnotes copied verbatim.³⁰ The treatise’s multiple volumes dwarfed the misappropriated passages, but the district court nonetheless found plagiarism because, as Judge Learned Hand admonished decades earlier, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”³¹ Plaintiff’s counsel received a private informal admonition from the state’s disciplinary authorities.³²

In a disciplinary proceeding, “[w]hat a lawyer knows may be inferred from the circumstances.”³³ Lawyers caught copying prior sources have not denied knowledge of plagiarism’s general constraints, perhaps because they, like so many lay people, are products of educational systems that roundly condemn plagiarism as “academic malpractice,”³⁴ “literary theft,”³⁵ and “perhaps the most serious professional indictment that can be made against an author.”³⁶ In one decision censuring a lawyer for plagiarism in his LL.M thesis submitted to a private university, the Illinois Supreme Court agreed with the disciplinary hearing board, which found it “inconceivable . . . that a person who has completed undergraduate school and law school would not know that representing extensively copied material as one’s own work constitutes plagiarism.”³⁷

With lack of knowledge effectively neutralized as a defense to a violation of Model Rule 8.4(c), lawyers’ proffered explanations for plagiarism typically prove unavailing. In *Bowen*, for example, the 6th Circuit

rejected the lawyer's explanation that the earlier Massachusetts district court decision was only persuasive precedent in the Michigan federal prosecution, and that the lawyer "would lose the essence of the argument if he had changed even one word."³⁸

Similarly unavailing are excuses that the lawyer succumbed to plagiarism to meet a pressing deadline;³⁹ concluded that plagiarism would best serve the client's cause;⁴⁰ improperly failed to make greater changes to the misappropriated material;⁴¹ or misappropriated only string citations and not text.⁴² In one case, counsel sought unsuccessfully to justify wholesale copying from an earlier judicial opinion because "discussion of law and authority based on prior precedent is almost never the work of an attorney's own mind, but rather the work of the authoring judges."⁴³

Plagiarism implicating Model Rule 8.4(c) may be the predicate for finding a violation of Model Rule 1.5, which provides that a lawyer shall not "make an agreement for, charge, or collect an unreasonable fee."⁴⁴ A fee's reasonableness depends, among other factors, on "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly."⁴⁵ Copying a previously published work may diminish or neutralize the lawyer's assertion of novelty and difficulty, and such copying of a located source normally consumes little time, labor or skill.

Next issue: The prospect of disciplinary sanctions for "conduct that is prejudicial to the administration of justice."

This two-part article appeared in volume 47 of the Wake Forest Law Review.

ENDNOTES

1 *United States v. Sypher*, No. 3:09-CR-00085, 2011 WL 579156 * 1 (W.D. Ky. Feb. 9, 2011), *aff'd*, 684 F.3d 622, 628-29 (6th Cir. 2012) (affirming denial of the defendant's recusal motion because the trial judge's statements about counsel's plagiarism did not establish bias).

2 *See, e.g.*, Andrew Wolfson & Jason Riley, *Sypher Found Guilty on All Six Counts*, COURIER-JOURNAL (Louisville, Ky.), Aug. 6, 2010, at A1; Brett Barrouquere & Will Graves, *Pitino Accuser Is Found Guilty*, BOSTON GLOBE, Aug. 6, 2010, at 6.

3 Jason Riley, *Sypher Again Asks to Stay Free While Fighting Conviction*, COURIER-JOURNAL (Louisville, Ky.), April 5, 2011, at B1.

4 *United States v. Sypher*, *supra* note 1, at * 3 n.4.

5 *Id.*

6 BLACK'S LAW DICTIONARY 1267 (9th ed. 2009).

7 *Velez v. Alvarado*, 145 F. Supp.2d 146, 160-61 (D.P.R. 2001).

8 *Id.* at 161.

9 *United States v. Bowen*, 194 F. App'x 393, 402 n.3 (6th Cir. 2006), post-conviction relief denied, *Hall v. United States*, 2008 WL 2696832 (W.D. Mich., July 1, 2008); *State Farm Fire and Cas. Co. v. Harris*, No. 3:11-36-DCR, 2012 WL 896253, at * 1 n.3 (E.D. Ky., March 15, 2012 (citing *Bowen*)); *see also Venesevich v. Leonard*, No. 1:07-CV-2118, 2008 WL 5340162 *2 n.2 (Md. Pa., Dec. 19, 2008) ("unacceptable behavior"), appeal dismissed for lack of jurisdiction, 378 Fed. App'x 129, 2010 WL 1784056 (3d Cir. 2010); *Premier Ins. Co. v. Commonwealth Dep't of Labor*, 2012 N. Mar. I. LEXIS 19, No. 2011-SCC-0032-CIV, at * 14 n.7 (S. Ct of the N. Mariana Islands, Dec. 18, 2012) ("totally unacceptable conduct").

10 *Vasquez v. City of Jersey City*, No. 03-CV-5369, 2006 WL 1098171 * 8 n.4 (D.N.J. Mar. 31, 2006); *see also Nevels v. Contarino*, 2012 Tenn. App. LEXIS 798, No. M2012-00179-COA-R3-CV (Tenn. Ct. App. Nov. 16, 2012) ("misleading and improper").

11 ABA MODEL RULES OF PROF'L CONDUCT, R. 8.4(c). In addition to *Sypher*, *see, e.g., Venesevich v. Leonard*, *supra* note 9, at * 2 n.2 (misrepresentation); *Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp.2d 914, 916 n.4 (W.D. Tenn. 2000) (plagiarism "may violate" state rules of professional conduct); *In re Burghoff*, 374 B.R. 681, 684-85 (Bankr. N.D. Iowa 2007) ("a form of misrepresentation");

Iowa S. Ct. Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 298 (Iowa 2002) (misrepresentation); *cf. In re Petition of Zbiegien*, 433 N.W.2d 871, 875 (Minn. 1988) (deceit; academic plagiarism while in law school).

12 ABA MODEL RULES OF PROF'L CONDUCT, R. 8.4(d).

13 Whitney North Seymour, *Foreword to EDWARD D. RE, BRIEF WRITING AND ORAL ARGUMENT* iii, iii (7th ed. 1993).

14 *E.g., In re Disciplinary Proceeding Against Eugster*, 209 P.3d 435, 447 (Wash. 2009); *see also, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. Netti*, No. 10-1081, 797 N.W.2d 592, 607 (Iowa 2011) (court found that the lawyer violated 13 ethical rules; "[i]n light of the multiple violations," the court suspended the lawyer for two years).

15 ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 3.0 (1992; reaffirmed 2012).

16 *Eugster*, *supra* note 14, at 447.

17 *E.g., In re Coleman*, 793 N.W.2d 296, 308 (Minn. 2011) ("The purpose of discipline for professional misconduct is not to punish the attorney, but rather to protect the public, to protect the judicial system, and to deter future misconduct") (citation omitted); *In re Voss*, 795 N.W.2d 415 (Wis. 2011) (discussing "the need to protect the public, courts, and legal system from repetition of misconduct and to deter attorneys from engaging in similar misconduct").

18 *Iowa S. Ct. Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756, 759 (Iowa 2010).

19 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.2, at 2:50 (3d ed. 2012).

20 PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 8 (rev. ed. 2003) ("Plagiarism occurs when someone . . . falsely claims someone else's words, whether copyrighted or not, as his own.").

21 194 F. App'x 393, 402 n.3 (6th Cir. 2006), postconviction relief denied, *Hall v. United States*, No. 1:08-CV-482, 2008 WL 2696832 (W.D. Mich., July 1, 2008).

22 *United States v. Bowen*, *supra* note 9, at 402 n.3; *see also, e.g., United States v. Lavanture*, 74 Fed. App'x 221, 224 n.2 (3d Cir. 2003) ("it is certainly misleading and quite possibly plagiarism to quote at length a judicial opinion (or, for that matter, any source) without clear attribution"); *United States v. Jackson*, 64 F.3d 1213, 1219 n.2 (8th Cir. 1995) (expressing "disapproval of a style of brief-writing that appropriates both arguments and language [from a prior judicial opinion] without acknowledging their source"); *Denton v. Rievley*, 2008 WL 4899526 * 2 n.2 (E.D. Tenn. Nov. 12, 2008), *aff'd*, 353 Fed. App'x 1 (6th Cir. 2009) (about eight pages of the defense

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counsel's memorandum appeared to be taken almost verbatim from an earlier decision of the court); *Venesevich v. Leonard*, *supra* note 9, at * 8 n.4 (without reference or citation, defense counsel's reply brief quoted verbatim section of a prior decision of the court); *Vasquez v. City of Jersey City*, *supra* note 10, at * 8 (without reference or citation, defense counsel's reply brief quoted verbatim from sections of a prior decision of the court); *Velez v. Alvarado*, *supra* note 7, at 160 (about 66 percent of the plaintiff's brief was a verbatim reproduction of the earlier decision).

23 PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY, *supra* note 20.

24 *See, e.g., Bost. Prop. Exch. Transfer Co. v. Iantosca*, 686 F. Supp.2d 138, 142 (D. Mass. 2010) (discussing "matters of public record, such as prior litigation documents"); *Peviani v. Hostess Brands, Inc.*, 750 F. Supp.2d 1111, 1116 (C.D. Cal. 2010) (discussing "public record[s], including . . . court records available . . . via the internet").

25 374 B.R. 681, 683 (Bankr. N.D. Iowa 2007).

26 *Id.* at 683-84.

27 *Id.* at 684-85.

28 *Id.* at 686-87.

29 *Iowa S. Ct. Attorney Disciplinary Bd. v. Cannon*, *supra* note 18, at 760 (finding that the lawyer, who had already returned the fee in compliance with the bankruptcy court order, did not violate Model Rule 1.5).

30 83 F. Supp.2d 914, 916 n.4 (W.D. Tenn. 2000); 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4519 (2d ed. 1996).

31 *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.1936) (finding infringement of plaintiff's copyrighted play).

32 *Threadgill v. Bd. of Prof'l Resp.*, 299 S.W.3d 792, 796 (Tenn. 2009), overruled on other grounds by *Lockett v. Bd. of Prof'l Responsibility*, No. E2011-01170-SC-R3-BP, 2012 WL 2550586 (Tenn. July 3, 2012).

33 RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 5 cmt. d (1998).

34 The University of Manchester, GUIDANCE TO STUDENTS ON PLAGIARISM AND OTHER FORMS OF ACADEMIC MALPRACTICE (2008), <http://documents.manchester.ac.uk/DocuInfo.aspx?DocID=2870>.

35 WEBSTER'S NEW COLLEGIATE DICTIONARY 898 (9th ed. 1983).

36 *Cornwell v. Sachs*, 99 F. Supp.2d 695, 708 (E.D. Va. 2000).

37 *In re Lamberis*, 443 N.W.2d 549, 551 (Ill. 1982).

38 *United States v. Bowen*, *supra* note 9, at 402 n.3.

39 *Iowa S. Ct. Attorney Disciplinary Bd. v. Cannon*, *supra* note 18, at 758.

40 *Columbus Bar Ass'n v. Farmer*, 855 N.E.2d 462, 467-68 (Ohio 2006).

41 *In re Burghoff*, *supra* note 11, at 685.

42 *Id.*

43 *Denton v. Rievley*, *supra* note 22, at * 2 n.2.

44 ABA MODEL RULES OF PROF'L CONDUCT, R. 1.5(a) (2007); *see also Lane*, *supra* note 11, at 299-301 (finding a violation because the lawyer requested \$200 per hour for 80 hours for a plagiarized brief that "d[id] not reveal any independent labor or thought in the legal argument"); *In re Ayeni*, 822 A.2d 420, 421 (D.C. Ct. App. 2003) (defense counsel disbarred for, among other things, submitting a voucher for 19 hours of work on a brief that was "virtually identical" to the co-defendant's brief filed earlier).

45 ABA MODEL RULES OF PROF'L CONDUCT, R. 1.5(a)(1) (2007); *see also* RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 34 (discussing "Reasonable and Lawful Fees" a lawyer may charge).



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