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Plagiarism in Lawyers' Written Advocacy (Part II)

By Douglas E. Abrams

This two-part article discusses disciplinary sanctions that have been, and may be, imposed on lawyers who commit plagiarism in briefs and other filings submitted to the court. Part I discussed 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."

Part II now discusses why, as an independent ground for sanction, lawyers' plagiarism in written submissions to the court also violates Model Rule 8.4(d), which reaches lawyers who "engage in conduct that is prejudicial to the administration of justice." Courts, however, have yet to explore advocates' plagiarism through the Model Rule 8.4(d) lens.

PREJUDICE TO THE ADMINISTRATION OF JUSTICE

"If our adversary system is to function according to design," wrote Justice Thurgood Marshall, "we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client."⁴⁶ By upsetting this design, counsel's plagiarism in a submission to the court violates Model Rule 8.4(d) as "conduct that is prejudicial to the administration of justice."

The lawyer's plagiarism creates a genuine risk that the court's written opinion itself will inadvertently plagiarize, and also distorts the meaning and import of the lawyer's adversary argument on the client's behalf.

Inadvertent Judicial Plagiarism

As "an officer of the legal system,"⁴⁷ a lawyer submits briefs and other papers with the expectation that the court may incorporate portions of the prevailing party's argument and analysis in the opinion that accompanies the interlocutory or final decision.⁴⁸ Whether or not the opinion cites to the lawyer's submission, incorporation can be a professional badge of honor for counsel who prevail. "When an attorney writes such an excellent brief that some of its passages make their way into the eventual decision, he experiences a sense of gratification," said Chief Justice George Rossman of the Oregon Supreme Court more than a half century ago.⁴⁹

The prospect of judicial incorporation means that unless the judge or law clerk parses the parties' briefs and other submissions in search of paragraphs or pages of copied work, a plagiarizing lawyer's "literary theft"⁵⁰ can land in the written opinion as the court's own inadvertent literary theft. Successful parsing is by no means guaranteed because in the academic arena, as elsewhere, much plagiarism

goes undetected despite determined efforts to uncover it. Whether or not judicial sleuthing for lawyers' plagiarism actually detects unauthorized copying in any of the hundreds of cases that busy courts consider each year, however, sleuthing would compromise the sound administration of justice by expending time and other finite resources that courts can more efficiently spend managing their "pressing dockets" and deciding cases.⁵¹

The court's inadvertent incorporation of plagiarized portions of a brief may smack of shortcutting that questions the competence and diligence that the ABA Model Code of Judicial Conduct expects from judges.⁵² Where the lawyer plagiarizes an article or other private source, the court's incorporation may also smack of misappropriating intellectual property, and thus may implicate "impropriety and the appearance of impropriety" that the judicial code summons judges to avoid.⁵³ Inadvertence would remove basis for judicial discipline, but would not necessarily blunt public or professional criticism of the judge, who holds ultimate "responsibility personally to decide the matter" under the judicial code.⁵⁴

The Illinois Supreme Court has held that lawyers' plagiarism "displays an extreme cynicism towards the property rights of others" and "a lack of honesty."⁵⁵ "All honest scholars are the real victims."⁵⁶ When lawyers infect the

proceeding with plagiarism that may find its way into the court's opinion, they prejudice the administration of justice because the ABA Model Code of Judicial Conduct summons judges to "aspire at all times to conduct that insures the greatest possible public confidence in their . . . integrity."⁵⁷

"Judges hold a position of public trust," concludes Chief Justice John G. Roberts, Jr., "and the public has a right to demand that they adhere to a demanding code of conduct."⁵⁸ At the least, this aspiration and public right contemplate that judges will meet the standards of integrity that Model Rule 8.4 demands from the lawyers who appear before them.

Distorting the Adversary Argument

"[T]he judicial process [is] at its best," wrote Justice Felix Frankfurter, when courts receive "comprehensive briefs and powerful arguments on both sides."⁵⁹ Counsel's plagiarism compromises the sound administration of justice (and, as Justices Frankfurter and Marshall suggested, may also weaken the client's cause) by inducing the court to mistake the brief's copied passages as products of counsel's own partisan thought processes, rather than as an uncompensated non-party's analysis presumably helpful to the proponent. "[C]ases are won on the facts and the law," said Judge John C. Godbold of the U.S. Court of Appeals for the 11th Circuit, "not on the eminence, polished writing, oratory, or personality of counsel."⁶⁰

The three decisions discussed in Part I of this article demonstrate how undetected plagiarism can distort the meaning and import of the adversary argument that underlies judicial

decision-making. In *United States v. Bowen*, defense counsel sought to overturn the client's 30-year prison sentence with a brief that appeared to reflect counsel's own unadorned argumentation. Counsel would have reduced the prospect of judicial error by candidly informing the 6th Circuit panel that the argument rested on the earlier opinion of the Massachusetts district court, which held constitutional authority to hear and decide the merits without a personal or professional stake in the outcome.

In *In re Burghoff*, counsel disserved the administration of justice by failing to inform the bankruptcy court that his analysis reflected the presumably disinterested perspectives of two prominent practitioners in a law review article, or at least by failing to cite the article and invite the court to consider it for whatever value the court might ascribe. Similarly, in *Kingvision Pay Per View, Ltd. v. Wilson*, counsel overlooked the prospect that the court might have deliberated differently if it had known that argumentation came from the iconic multi-volume Wright-Miller-Cooper federal civil practice treatise, and not from counsel's own prose created on retainer.

CONCLUSION

Reported decisions calling attention to lawyers' plagiarism were rare before about 2000.⁶¹ Plagiarism today, however, imposes professional embarrassment when the list of counsels' appearances or the court's opinion itself identifies the lawyer whose "literary theft"⁶² fits so naturally within Model Rule 8.4(c)'s recitation of "conduct involving dishonesty, fraud, deceit or misrepresentation."⁶³ Even where the

court does not recommend a sanction for violation,⁶⁴ being labeled a plagiarist in the bound reporter or on electronic retrieval is a serious professional setback for a lawyer, whose reputation for integrity is a core personal asset.⁶⁵

Lawyers' plagiarism also violates Model Rule 8.4(d) as "conduct that is prejudicial to the administration of justice."⁶⁶ Not only does this plagiarism create genuine risk of inadvertent plagiarism by the court, but it also distorts the meaning and import of the adversary argument that underlies reasoned decision-making.

"The process of deciding cases on appeal," wrote Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court, "involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state."⁶⁷

ENDNOTES

⁴⁶ *Geders v. United States*, 425 U.S. 80, 93 (1976) (Marshall, J., concurring).

⁴⁷ ABA MODEL RULES OF PROF'L CONDUCT, Pmb1. para. [1]; see also, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("[L]awyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"); *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1308 (11th Cir. 2010) ("[E]very lawyer serves, not only as an advocate, but as an officer of the court.").

⁴⁸ See, e.g., Herbert F. Goodrich, *A Case on Appeal – A Judge's View*, in CLASSIC ESSAYS, supra note 49, at 517 ("[S]ome judges lift a portion of the successful party's brief and incorporate it into the opinion of the court.").

⁴⁹ George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 403 (1955).

⁵⁰ WEBSTER'S NEW COLLEGIATE DICTIONARY 898 (9th ed. 1983).

WRITING IT RIGHT

51 JOHN G. ROBERTS, JR., CHIEF JUSTICE'S 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (discussing the federal courts' "pressing dockets" and efforts to produce "cost savings, improved efficiency, and reduced backlogs"), <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

52 ABA MODEL CODE OF JUDICIAL CONDUCT, R. 2.5 (2010).

53 *Id.*, R. 1.2 (2010).

54 *Id.*, R. 2.9(A)(3) (2010).

55 *In re Lamberis*, 443 N.W.2d 549, 551-52 (Ill. 1982).

56 *Id.* at 552.

57 ABA MODEL CODE OF JUDICIAL CONDUCT, pmbl. para. [2] (2010).

58 *Chief Justice's 2007 Year-End Report on the Federal Judiciary* 5, <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

59 *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

60 John C. Godbold, *Twenty Pages and Twenty Minutes: Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 808 (1976).

61 *See, e.g., In re Hinden*, 654 A.2d 864 (D.C. Ct. App. 1995) (lawyer publicly censured for plagiarism in article he wrote); *In re*

Lamberis, supra note __ (lawyer censured for plagiarism in LL.M. thesis he submitted to a law school); *Frith v. State*, 325 N.E.2d 186, 188 (Ind. 1975) (about 14 pages of defense counsel's brief were copied without quotation marks, indentation or citation from a volume of Am. L. Rep. (ALR) 3d).

62 WEBSTER'S NEW COLLEGIATE DICTIONARY 870 (1980).

63 ABA MODEL RULES OF PROF'L CONDUCT, R. 8.4(c).

64 *See, e.g., State Farm Fire & Cas. Co. v. Harris*, 2012 WL 896253, No. 3:11-36 (E.D. Ky. Mar. 15, 2012) (defense counsel's argument "is easily summarized, as all but six sentences (out of seven pages) are lifted – without attribution – directly from" a recent decision of the court; "It should go without saying that such plagiarism is 'completely unacceptable.'" (citation omitted).

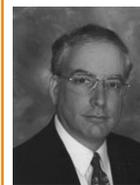
65 *See, e.g., Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs.*, 9 F.3d 1263, 1269 (7th Cir. 1993) ("A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter."); *People ex rel. Karlin v. Culkun*, 162 N.E. 487, 492 (N.Y. 1928) (Cardozo, J.) (a lawyer's reputation

"is a plant of tender growth, and its bloom, once lost, is not easily restored"); Stephen P. Younger, *Reflections on the Life and Work of the Honorable Hugh R. Jones*, 65 ALB. L. REV. 13, 13 (2001) (quoting Judge Jones of the N.Y. Court of Appeals; "a lawyer's reputation is his principal asset").

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

57 *In re Greenberg*, 104 A.2d 46, 49 (N.J. 1954).

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Douglas E. Abrams, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.