

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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TO THE FORUM:

My adversary in a case is representing himself *pro se*, but his briefs are very sophisticated and appear to have been ghostwritten by an attorney. I asked him whether an attorney helped him with it and he just changed the subject. I am frustrated because I feel like the judge is sympathetic to him because he is *pro se*, but I suspect that his legal arguments are actually being crafted by an attorney. I think that this puts me at a big disadvantage. Since he is not a lawyer, I know that he is not bound by the Rules of Professional Conduct. If he is getting help from a lawyer, are there rules that are being violated and is there anything that I can do?

This issue got me thinking about the ease in which anyone can just “cut and paste” briefs, opinions, and articles into their own submissions without attribution. For all I know, maybe my *pro se* adversary isn't really working with an attorney and just found good briefs by other attorneys that were publicly available. In the “old days,” firms had banks of old briefs to work from, but with public e-filing access to literally thousands of briefs from the comfort of home, anyone can access briefs on any subject matter easily. Are there any limitations on where to draw the line on plagiarizing briefs? I admit, I am guilty of occasionally taking good citations and arguments from briefs I find online, but I always check the citations and craft the arguments around my client's specific cases. But should I be concerned I am lifting from briefs too liberally? I recently had an insurance carrier tell me they wouldn't pay for my research time unless I used their legal research firm which includes a bank of briefs. I am fine using the briefs from this service, but should I be concerned that I am signing my name to a brief that was largely written by someone I don't know?

Sincerely,
Jacob Marley

DEAR JACOB:

Your question presents an interesting dilemma: to what extent can we, as lawyers, rely upon and actually republish the work of others? The vast majority of our work product (i.e., legal briefs and pleadings) consists of restatements of the law and recitations of legal analysis adopted and followed by courts and tribunals. But many lawyers may be surprised to learn that there are limits to this practice, and plagiarism in the legal profession is sanctionable. And a *pro se* litigant's use of attorney-created work product without disclosing that he or she had the assistance of counsel is an offense cut from the same cloth.

There is unfortunately no clear consensus for New York lawyers about ghostwriting. Three New York ethics opinions have addressed this topic without a uniform result: two emphasize the need for disclosure of an attorney's contribution, and one indicates that disclosure is only required in certain situations.

In 1987, the New York City Bar Association (NYCBA) Professional Ethics Committee issued a formal opinion that focused upon your specific concern – that because *pro se* litigants are already viewed in a gentler light than seasoned attorneys, a *pro se* litigant's failure to disclose his or her use of a ghostwriter could tip the scales further in his or her favor. *See* NYCBA Professional Ethics Committee Formal Opinion 1987-2 (1987). After all, when initially low expectations are surpassed even the slightest bit, it is basic human nature to view that product favorably, particularly in comparison to the work of a professional who does this routinely. Additionally, nondisclosure could cause the court to waste valuable judicial resources. *Id.* Typically, courts go out of their way to protect the interests of *pro se* litigants whom they perceive (often, correctly) to be at a disadvantage when it comes to understanding civil procedure and preparing legal documents. *Id.* If a court is unaware that the legal documents were actually reviewed and/or prepared by a licensed attorney, clerks and judges may waste valuable

time needlessly combing through documents. *Id.* In its 1987 opinion, the Committee concluded that this non-disclosure could be viewed as “a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings.” *Id.* While the Committee did not say what exactly constitutes “active and substantial assistance,” it did expressly state that providing manuals and forms to a *pro se* litigant and offering legal advice did not violate any ethics or professional rules. *Id.*

Three years later, in 1990, the New York State Bar Association (NYSBA) Committee on Professional Ethics published its own opinion on ghostwriting. *See* NYSBA Committee on Professional Ethics Opinion 613 (1990). Adopting a view similar to that of the NYCBA Ethics Committee, this opinion determined that a lawyer’s role *should* be disclosed. *Id.* While the Committee underscored the importance of affordable and accessible legal services in our society, it nevertheless concluded that any

documents for a *pro se* litigant without disclosing his or her involvement or identity. *Id.* As rationale for their position, the Committee cited a recent uptick in the use of ghostwriting and a burgeoning consensus in the legal community that the practice does not raise ethical concerns. *Id.* The Committee also pointed to New York Rules of Professional Conduct (RPC) 1.2 for support, noting that “limited scope representation” is an important service that lawyers provide – one that is beneficial not only to clients, but to the judicial system overall. *Id.* If attorneys were required in all circumstances to disclose their involvement, it could reduce the number of attorneys willing to assume limited scope work and undermine RPC 1.2. *Id.* Therefore, the Committee adopted a nuanced opinion of ghostwriting, and opined that disclosure is only necessary “where mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge’s rule, (4) a judge’s order in a specific case, or any other situation in which an attorney’s ghostwriting would



work prepared by an attorney – even the mere preparation of a pleading – could and should be deemed “active and substantial” assistance and requires disclosure of the attorney’s identity. *Id.* Thus, the NYSBA Committee took the disclosure requirement a step further than the NYCBA Committee – not only must the attorney’s involvement be disclosed, his or her *name* must be on the document. *Id.*

In 2010, the New York County Lawyers Association (NYCLA) Committee on Professional Ethics addressed ghostwriting after a seismic shift in internet technology had occurred and diverged from its sister-committees. *See* NYCLA Committee on Professional Ethics, Op. 742 (2010). In the view of the NYCLA Committee, it is ethically permissible for an attorney to prepare legal

constitute misrepresentation or otherwise violate a law or rule of professional conduct.” *Id.*

While there have been conflicting opinions over the years, unless the work product produced by your *pro se* adversary borders on a “misrepresentation” to the court, or expressly violates the court or the judge’s rules, he is probably in the clear as is the assisting attorney (if there is one).

We now turn to your broader question regarding the use of “brief banks” and other prepared materials. We were all taught from a young age that copying the prose of another without proper attribution is an academic sin and can carry some serious consequences. But there are many aspects of our jobs as attorneys where we are actually *encouraged* to copy from the works of others.

Perhaps it is counterintuitive that a profession that heralds honesty and integrity would condone such conduct, but the fact of the matter is that the impetus of non-academic legal writing is not originality of thought, but the application of precedent. While there are exceptions, a brief anchored by established legal authority is usually more persuasive than one that relies on novel ideas and arguments. And, as we all learned in law school, precedent is important. It provides a degree of stability and predictability in our legal system and gives judges some assurance that the decision they are about to make has sound legal footing. Therefore, as lawyers, we are taught that reciting arguments and excerpts from court decisions, law review articles, and even briefs filed in other cases, is not plagiarism – it is good advocacy. Plus, as a practical matter, when you are billing clients by the hour, it is more economical when you do not have to reinvent the wheel.

But there are boundaries to this practice and, in recent years, those boundaries have become clearer thanks to a handful of judicial and ethics opinions concerning attorney plagiarism. RPC 8.4(c) provides that “[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Legal and ethics opinions on attorney plagiarism treat it as a type of “deceit,” and, accordingly, will often invoke RPC 8.4(c) when disciplining an attorney for such conduct. Other Rules relevant to attorney plagiarism may include RPC 7.1 (prohibiting false statements about the lawyer’s services) and RPC 3.3 (requiring candor toward a tribunal).

The Iowa Supreme Court dealt a significant blow against attorney plagiarism in the litigation context in 2010. In *Iowa Supreme Court Attorney Disciplinary Board v. Cannon*, 789 N.W.2d 756 (Iowa 2010), an attorney was sanctioned for filing a brief that included the “wholesale copying” of a law review article pulled from a law firm’s website. After questioning the “unusually high quality” of the lawyer’s work, the attorney admitted that the brief relied heavily on an article that he had failed to cite. The judge initiated sanction proceedings and discovered that 17 out of the brief’s 19 total pages were copied directly from the law review article without attribution. Relying on Iowa Rule of Professional Conduct 32:8.4 – Iowa’s equivalent of RPC 8.4(c) – the court opined that “[t]his case . . . [did] 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.” *Id.* at 759. The Iowa Supreme Court based its determination in part on a 2002 plagiarism decision, *Iowa Supreme Court Board of Professional Ethics & Conduct v. Lane*, 642 N.W.2d

296 (Iowa 2002). There, an attorney submitted a brief that included 18 pages of material copied from a legal treatise, but failed to cite the treatise itself. Reprimanding the attorney, the court stated that “[e]xamination of [the attorney’s] brief does not reveal any independent labor or thought in the legal argument.” *Id.* at 300. Ultimately, the court determined that the attorney’s conduct “constituted, among other things, a misrepresentation to the court” in violation of Iowa Rule of Professional Conduct 32:8.4. *Id.* at 299.

These two Iowa cases – *Cannon* and *Lane* – laid the foundation for judicial and ethics opinions concerning attorney plagiarism nationwide. Indeed, in 2013, a federal judge in the Eastern District of New York imposed a \$1,500 sanction against an attorney for plagiarism and relied in part on the *Cannon* and *Lane* decisions. See *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013). In that case, the attorney was sanctioned not for republishing another’s writing, but for recycling a brief *she* had previously written in an unrelated case without properly crafting the brief to suit the particular set of facts for the present case or addressing the arguments raised by her adversary. The court noted that “the plagiarism of the type at issue here would likely be found to violate New York State Rule of Professional Conduct 8.4, which prohibits a lawyer from ‘engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.’” *Id.* at 460, n. 9.

Despite the court’s ruling in *Lohan*, jurisdictions – including New York – vary in the degree to which they deem “recycling” a brief (such as those available in a brief bank) an offense. An ethics opinion authored by the North Carolina State Bar Association in 2008 held that while “it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer,” if the lawyer knows the identity of the author of the excerpt, “it is the better, more professional practice for the lawyer to include a citation to the source.” NC State Bar Formal Ethics Opinion 2008-14. In a recent opinion issued by the NYCBA Committee on Professional Ethics, however, it distinguished its own view from that of the North Carolina State Bar Association and stated that the reader of a brief “does not expect to see a citation to a prior brief on which the argument is modeled.” NYCBA Prof. Ethics Comm., Op. 2018-3 (2018).

That recent opinion cited to a NYSBA Committee on Professional Ethics Opinion from 1999 which expressly addressed the use of briefs from brief banks. See NYSBA Comm. on Prof’l Ethics, Op. 721 (1999). In that 1999 opinion, the question was whether an attorney could,

at the insistence of an insurance carrier, use materials from a third-party legal research service including a brief bank. *Id.* The Committee found that doing so would *not* violate any professional or ethics rules if the lawyer, “in the exercise of independent professional judgment,” concluded that no additional work was necessary. *Id.* In other words, if the work product and information available in the brief bank/database were adequate for the client’s specific needs without further independent research or writing, there was no ethical issue. To avoid the issues that arose in the *Lohan* case, however, it is vital that you verify the authority you find in the brief banks, apply the facts and arguments in your particular matter, and don’t blindly cut and paste an old brief.

As the contours of attorney plagiarism continue to develop, including whether you may be subject to copyright claims (which is a whole separate issue), best practices dictate that lawyers should cite to their sources and not make the mistake of cutting and pasting without regard to the particular facts and arguments the client needs to address. While the New York Rules of Professional Conduct leave “plagiarism” open to interpretation, the cases and ethics opinions discussed above make it clear that the threat of sanctions is real. While an attorney may be able to stomach the monetary fine, the professional embarrassment and potential damage to his or her reputation is likely to be far worse.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I’ve been a litigation attorney for about seven years now, but recently, a former colleague approached me with an opportunity to go in-house at his company. The offer is tempting because recent changes in my personal life have made the litigation grind difficult for me, and I feel like it’s a perfect time in my career to shift gears. I’ve been at my current firm for about five years, and when I came onboard, I signed an employment agreement that contained a non-compete clause. At the time, I was still a relatively young attorney and didn’t think much of it. After pulling out the agreement and looking at it now, even though the restrictions seem reasonable in time and scope, I am starting to question whether the non-

compete is enforceable at all. Are restrictive covenants contained in attorney employment contracts valid and enforceable? What about in my particular situation, where I am potentially going in-house and will not be “competing” against my old firm? If I ultimately decide that in-house life isn’t for me and move to another law firm before the expiration of the non-compete, will I be able to reach out to my former clients and bring them to my new firm? What if I ultimately decide to leave the legal profession altogether?

While we’re on the topic of restrictive covenants, I’m also curious about a confidentiality agreement that my colleague’s company gave me to review before I officially start work as in-house counsel. As a condition of my employment at the company, I am required to sign a confidentiality agreement. The agreement prohibits me from using or disclosing information that the company deems or designates confidential, and these confidentiality obligations survive the termination of my employment with the company. If I eventually decide to return to litigation or go to another law firm, will I still be bound by these obligations? I’m afraid that it could limit my employment opportunities in the future. There is a carve-out in the agreement that says that it is subject to the applicable rules of professional conduct, but is that enough? How do the rules of professional conduct treat these types of agreements?

Sincerely,

Soon B. Inhouse

LITIGATION FINANCING ETHICAL PITFALLS UPDATE

We wanted to update you on a litigation financing issue that was not addressed in our June and July/August 2018 Forums (Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., June and July/August 2018, Vol. 90, Nos. 5-6). Recently, the NYCBA Professional Ethics Committee issued a formal opinion regarding a lawyer’s ability to enter into a direct financing agreement with a litigation funder (NYCBA Professional Ethics Committee, Op. 2018-5 (2018)). The Committee opined that a lawyer is prohibited from entering into an agreement with a litigation finance entity (a non-lawyer) where the lawyer is due some future payment of legal fees because it would violate the prohibition on fee sharing with non-lawyers under RPC 5.4. *See id.* The Committee highlighted that RPC 5.4’s restriction on fee-sharing is designed to “protect the lawyer’s professional independence of judgment.” *See id.*, quoting RPC 5.4 Comment [1].