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To: State Bar Committee on Professional Responsibility and Conduct
Attn: Andrew L. Tuft, Esq.

From: Elliot L. Bien, Esq.[*]

Date: June 4, 2018

REQUEST TO CONSIDER A RULE PROPOSAL OR ADVISORY OPINION ON PLAGIARISM

California has long prohibited dishonesty by lawyers, whether with courts or anyone else. The Legislature has insisted on "means consistent with truth" ever since 1939. (Bus. & Prof. Code § 6068(d)) Former Rule 5-200 included the same requirement, and the Supreme Court's newly adopted Rule 8.4(c) prohibits any "conduct involving dishonesty." While the new Rule 3.3 more narrowly prohibits "knowingly mak[ing] a false statement of fact or law to a tribunal," the Supreme Court recently held broadly and emphatically that "[h]onesty is absolutely fundamental in the practice of law; without it, the profession is worse than valueless in the place it holds in the administration of justice." (*In re Glass* (2014) 58 Cal.4th 500, 524, cit. and internal quots. omitted)

Not surprisingly, then, the ABA's *Annotated Model Rules of Professional Conduct* (8th Ed. 2015), in its analysis of Rule 8.4, cites plagiarism as the first example of "Misleading, Defrauding, or Lying to Tribunals." (*Id.* at 9) A lengthy paragraph (copy attached) documents why "[p]lagiarizing another's work may violate Rule 8.4(c)." (*Id.* at 10) The authors also explain that, "[a]lthough Rule 3.3 expressly requires candor toward tribunals, Rule 8.4(c) is also implicated when a lawyer misleads or lies to a tribunal." (*Id.* at 9) Moreover, a recent study of lawyers' plagiarism concludes it can violate Rule 8.4(d) as well. (Abrams, *Plagiarism in Lawyers' Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice* (2012) 47 Wake For. L.Rev. 921)

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* Former law professor; appellate specialist certified by State Bar; past president of California Academy of Appellate Lawyers; frequent writer and speaker on legal ethics.

This Committee should act because, despite the foregoing authorities, there is a persistent view in our profession that plagiarism is acceptable — even in submissions to courts, where as "officers" we owe the highest duty of honesty and overall professionalism. As a recent ABA article reports, "[p]lagiarism 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." (Joy & McMunigal, *The Problems of Plagiarism as an Ethics Offense* (Summer 2011) 26 ABA Criminal Justice No. 2, at 1)

That view is all the more worrisome because of modern technology. "The age of information sharing facilitates the temptation to plagiarize because of the widespread availability of information in digital form and the ease with which the information can be copied and pasted into another document." (Bast & Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: the Need for Intellectual Honesty* (2008) 57 Cath. U. L. Rev. 777, 813)

This Committee might appropriately ask, however, whether it should decline to address the plagiarism issue out of deference to the State Bar's recent Rules Revision Commission. This writer submitted a proposal on the subject on June 8, 2015 (copy attached), and the Commission declined to address it in its recommendations to the Supreme Court. But the relevant history actually support this Committee's attention.

To begin with, the Commission's drafting team assigned to my proposal, led by Mark L. Tuft, Esq., reported back firmly that plagiarism in litigation is unacceptable. The team's attached report began by citing the "pros" of my proposal as follows:

> Plagiarism in [a] brief or other submission to the court in effect is a false statement about the source of the document being submitted and violates a lawyer's duty of candor to the court. Specifically prohibiting plagiarism in a rule should increase confidence in the legal profession and improve the administration of justice, as well as help promote a useful national standard. (Pg. 28)

For the following reasons, however, the drafting team recommended against my proposal and the Commission implicitly agreed:

> A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed Rule 8.4(c) or Bus. & Prof. Code § 6106. [Fn.] Moreover, there is no evidence that adopting such a provision would promote a national standard as the drafting team is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules. (*Ibid.*)

Notably, the Supreme Court had directed the Commission to "focus on revisions that . . . eliminate, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states . . . ." (Commission's Charter, ¶ 3) Moreover, the Commission was engaged in the huge task of appraising and fine-tuning the entire body of California's Rules of Professional Conduct, so the Commissioners were understandably reluctant to add the subject of plagiarism to their agenda.

This Committee, however, is not similarly constrained. For one thing, it can consider an advisory opinion in lieu of a rule proposal, and there are legitimate arguments to weigh that clarifications or exceptions are required for some forms of unattributed copying. Even this writer, whom some would consider a fanatic on this subject, recommended an exception where the true author of language had permitted its use by another without attribution. (See my attached proposal at p. 9 & Appendix B.)

But this Committee is also free to consider new rule language, or simply a new comment, as I suggested to the Commission on May 2, 2016. Especially in light of the ABA's annotation on Rule 8.4, the Commission's duty to seek maximum uniformity with other states' rules should not limit this Committee's ongoing purview and responsibilities.

Finally, the drafting team's leader took me aside after the Commission's discussion of my proposal on May 7, 2016, and recommended that I broach the subject of plagiarism with this Committee. I decided to wait until the rules revision process had fully played out, and now it has. I would be honored to participate any way I can in your consideration of this request.

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Attachments:

1. Excerpts from ABA's *Annotated Model Rules of Professional Conduct* (8th Ed. 2015), Section on "Misconduct" and Rule 8.4
2. Bien's Proposal on Plagiarism to the California State Bar Commission for Revision of the Rules of Professional Conduct; June 8, 2015
3. Commission Drafting Team's Report and Recommendation [on] Rule 5-200 [3.3] [excerpts]; April 20, 2016, prepared for May 6-7, 2016 Commission meeting
4. Memorandum to Commission modifying plagiarism proposal given drafting team's recommended Rules 3.3 and 8.4; May 2, 2016
5. Bien, *Officers of a Court Do Not Plagiarize* (Spring 2014) 27:1 Cal.Litig. 9

CC: Michael G. Colantuono, Esq.
Mark L. Tuft, Esq.
Randall Difuntorum, Esq.

EXCERPTS FROM ABA's *ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* (8th Ed. 2015), SECTION ON "MISCONDUCT" AND RULE 8.4 [PP. 9-10]

Misleading, Defrauding, or Lying to Tribunals

Although Rule 3.3 expressly requires candor toward tribunals, Rule 8.4(c) is also implicated when a lawyer misleads or lies to a tribunal. *See, e.g.*, *In re Alcorn*, 41 P.3d 600 (Ariz. 2002) (en banc) (defense lawyers secretly settled with plaintiff and agreed to engage in sham trial to create record for use against other defendant); *Ligon v. Stilley*, 371 S.W.3d 615 (Ark. 2010) (lawyer applying for pro hac vice admission misled court about his disciplinary history); *People v. Casey*, 948 P.2d 1014 (Colo. 1997) (lawyer failed to inform court that client was using someone else's identity); *In re Cleaver-Bascombe*, 986 A.2d 1191 (D.C. 2010) (appointed counsel sought compensation for services she had not rendered); *In re Lemmons*, 522 S.E.2d 650 (Ga. 1999) (lawyer falsely represented to IRS, courts, and others that he was certified public accountant); *In re Feiger*, 887 N.E.2d 87 (Ind. 2008) (lawyer applying for pro hac vice admission failed to disclose disciplinary actions pending in other states); *In re Stover*, 104 P.3d 394 (Kan. 2005) (lawyer testified falsely in court); *Att'y Grievance Comm'n v. Goodman*, 850 A.2d 1157 (Md. 2004) (lawyer prosecuted case using another lawyer's name); *In re Balliro*, 899 N.E.2d 794 (Mass. 2009) (lawyer who was assaulted by her boyfriend testified falsely about source of her injuries at boyfriend's trial); *O'Meara's Case*, 834 A.2d 235 (N.H. 2003) (in his own divorce, lawyer filed pleading containing "gross embellishments on the truth"); *In re Forrest*, 730 A.2d 340 (N.J. 1999) (lawyer failed to disclose client's death, misrepresented to arbitrator the reasons for client's absence, encouraged client's wife not to tell arbitrator, and misled opposing counsel throughout discovery and negotiation processes); *Disciplinary Counsel v. Rohrer*, 919 N.E.2d 180 (Ohio 2009) (lawyer leaked information to local newspaper in violation of court order and then lied to court about it); *In re Diggs*, 544 S.E.2d 628 (S.C. 2001) (lawyer submitted false report of attendance at CLE seminar); *In re Disciplinary Proceeding against Conteh*, 284 P.3d 724 (Wash. 2012) (lawyer lied about his employment history on asylum application); ABA Formal Ethics Op. 97-407 (1997) (lawyer who served as expert witness subject to discipline under Rule 8.4 for testifying falsely); *see also People v. Roose*, 69 P.3d 43 (Colo. 2003) (en banc) (lawyer filed notice of appeal containing omissions and misstatements of fact); *Att'y Grievance Comm'n v. Brown*, 725 A.2d 1069 (Md. 1999) (paying court filing fee with check drawn on insufficient funds violates Rule 8.4(c); lawyer's continued failure to pay filing fee after repeated notice of bad check demonstrated intent to deceive court).

• *Plagiarizing*

Plagiarizing another's work may violate Rule 8.4(c). *See, e.g.*, *Venesevich v. Leonard*, No: 1:07-CV-2118, 2008 WL 5340162 n.2, 2008 BL 280879 n.2 (M.D. Pa. Dec. 19, 2008) ("[p]lagiarism constitutes misrepresentation and is therefore a violation of Rule 8.4(c)"; significant portion of lawyer's brief plagiarized from court opinions without attribution); *In re Burghoff*, 374 B.R. 681 (Bankr. N.D. Iowa 2007) (lawyer plagiarized material in two briefs; in one brief, plagiarized material consisted of string cites); *In re Ayeni*, 822 A.2d 420 (D.C. 2003) (appointed counsel filed brief in criminal appeal that was virtually identical to brief filed earlier by co-defendant; he then submitted voucher for payment claiming he spent more than nineteen hours researching and writing it); *Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon*, 789 N.W.2d 756 (Iowa 2010) (lawyer's

brief contained seventeen pages of material copied from published article without attribution); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002) (lawyer submitted brief plagiarized from legal treatise, then applied to court for $16,000 in fees for eighty hours spent working on it); *In re Steinberg*, 620 N.Y.S.2d 345 (App. Div. 1994) (in application for appointment to criminal defense panel, lawyer submitted writing samples of other lawyers claiming they were his own); *cf.* *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013) (lawyer sanctioned for filing plagiarized memorandum; court noted conduct "would likely be found to violate [Rule 8.4(c)]"); *United States. v. Sypher*, No. 3:09-CR-0085, 2011 WL 579156 n.4, 2011 BL 33239 n.4 (W.D. Ky. Feb. 9, 2011) (reminding lawyer whose statement of law contained material cut and pasted from Wikipedia without attribution that doing so amounts to plagiarism and may violate Rule 8.4). *See generally* Douglas E. Abrams, *Plagiarism in Lawyers' Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice*, 47 Wake Forest L. Rev. 921 (Winter 2012) (arguing that lawyer plagiarism also violates Rule 8.4(d) by creating "risk of inadvertent plagiarism by the court" and distorting "the meaning and import of the adversarial argument that underlies reasoned decisionmaking"); Peter A. Joy & Kevin C. McMunigal, *The Problems of Plagiarism As An Ethics Offense*, 26 Crim. Just. 56 (Summer 2011) (arguing against labeling lawyer copying as plagiarism and treating it as per se ethics violation).

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PROPOSAL TO THE CALIFORNIA STATE BAR COMMISSION FOR REVISION OF THE RULES OF PROFESSIONAL CONDUCT

To: Honorable Lee S. Edmon, Chair
Jeffrey L. Bleich, Esq., Co-Chair
Dean J. Zipser, Esq., Co-Chair

From: Elliot L. Bien, Esq.[*]

Date: June 8, 2015

Re: *Adding a provision on plagiarism to Rule 5-200 and related amendments*

The Commission, embarking on a comprehensive review of California's Rules of Professional Conduct, has invited suggestions for matters to address. I respectfully suggest that Rule 5-200 ("Trial Conduct") be amended by adding a provision barring plagiarism in briefs or other submissions to a court. The Commission's charter from the State Bar (copied as Appendix A) supports a rule on this subject for a number of reasons: (1) plagiarism falls within the existing ambit of Rule 5-200; (2) there has been a marked increase in judicial attention to plagiarism since that rule was adopted; (3) its relevant language is too uncertain to provide any useful guidance and deterrence; (4) a provision specifically barring plagiarism will increase confidence in the legal profession and improve the administration of justice; and (5) adopting such a rule in California will help promote a useful national standard.

The first and primary focus of this memorandum is to amplify the foregoing points. Thereafter, I highlight some drafting issues that would arise and conclude by suggesting two other relevant amendments to Rule 5-200: broadening its scope from trials to any litigation, and broadening its rule on the misquotation of sources. The complete text of Rule 5-200 as I recommend it appears in Appendix B.

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* Appellate specialist certified by the State Bar, past president of the California Academy of Appellate Lawyers, and frequent writer and speaker on litigation ethics.

1.

PLAGIARISM FALLS WITHIN THE AMBIT OF THE EXISTING RULES

The Commission has been charged to "begin with the current Rules" (Appendix A, ¶ 3), and plagiarism falls within the ambit of Rule 5-200 in two ways. First, the rule broadly compels candor. Subdivision (A) prohibits any "means" in litigation that are not "consistent with truth. . . ." Similarly, subdivision (B) bars any "artifice" that could mislead a court. Both subdivisions prohibit plagiarism in its classic definition. It is not consistent with truth to imply authorship of someone else's language, and the recipient court is likely to be misled to that effect.

Second, Rule 5-200 already addresses the permissible use of sources by litigators. Subdivision (C) prohibits the intentional misquotation of primary or secondary sources, and subdivision (D) prohibits the misrepresentation of primary sources by omitting their current invalidity. (See Appendix B.) Thus, a new provision on copying from sources would address the same subject matter as the existing rule.

The next question presented, then, is whether the Commission *should* adopt a rule on plagiarism. Four different criteria in its charter point to an affirmative answer, beginning with an increase of judicial attention to this subject since Rule 5-200 was adopted.

2.

THERE HAS BEEN AN INCREASE IN JUDICIAL ATTENTION TO PLAGIARISM IN RECENT YEARS

Paragraph 3 of the Charter directs the Commission to "focus on revisions [to the current rules] that . . . are necessary to address changes in the law. . . ." (Appendix A) One such change is the marked increase of judicial attention to plagiarism in California and throughout the country since 1988, when Rule 5-200 was adopted.

A recent (and excellent) study of this subject notes that "[r]eported decisions calling attention to lawyers' plagiarism were rare before 2000." (Abrams, *Plagiarism in Lawyers' Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice* (2012) 47 Wake For. L.Rev. 921, 932) There is no need to repeat Abrams' documentation here. But there has been a similar rise of scholarly interest in plagiarism in recent years, no doubt reflecting the increase of judicial concern and the reported increase of plagiarism itself. It is no surprise that prominent Seventh Circuit Judge Richard Posner published a book on this subject in 2007. (Posner, *Little Book of Plagiarism* (Pantheon 2007))

3.

RULE 5-200 IS TOO UNCERTAIN TO BE HELPFUL ON THIS SUBJECT

Paragraph 2 of the charter directs the Commission to "ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." (Appendix A) Similarly, paragraph 4 provides that "[t]he Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties." (*Id.*)

Few would dispute the general importance of candor in submissions to a court. But the authors of Rule 5-200 recognized that, in some instances, a rule of conduct that only broadly insists on candor provides insufficient guidance and deterrence to be effective. Otherwise, the authors would not have added specific provisions such as those addressing the use of sources. (I hasten to point out that their failure to mention plagiarism hardly implies approval. As noted earlier, this subject was much less prominent when Rule 5-200 was adopted.)

As matters stand today, however, the subject warrants at least as much specificity as the practices currently singled out in Rule 5-200: intentionally misquoting sources (subd. (C)) and failing to cite the invalidity of statutes or cases. (Subd. (D)) Plagiarism appears to be far more frequent today than those practices, and our broad provisions about truth and artifice are too aspirational, ambiguous and uncertain for a satisfactory rule on this subject. While the literature is divided on the proper content of a plagiarism rule, there is no dispute that our nation's broad rules insisting on candor (including the ABA's model rules) are no longer sufficient.

4.

A RULE BARRING PLAGIARISM WOULD INCREASE CONFIDENCE IN THE LEGAL PROFESSION AND THE ADMINISTRATION OF JUSTICE

Paragraph 1 of the Commission's charter provides that "its work should promote confidence in the legal profession and the administration of justice. . . ." (Appendix A) A well-crafted rule disapproving plagiarism would advance both of those goals. I begin with the legal profession.

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a.

The Legal Profession

Low confidence in the legal profession persists, and sad to say a principal reason is the perception that lawyers are immoral in general and dishonest in particular. This harsh reality is the proper context for assessing a plagiarism rule.

Nothing has changed since the following report in 1998 (Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse* (Spring, 1998) 66 U. Cin. L. Rev. 805, 808):

> Lawyers' ethical standards and practices are thought to be middling by most people, with a much larger contingent regarding them as poor (21%) than as excellent (3%). . . .Those who thought lawyers less honest than most people rose from 17% in 1986, to 31% in 1993. . . . [An] ABA poll reports that "[h]alf the public thinks that about one-third or more of lawyers are dishonest, including one in four Americans who believe that a majority of lawyers are dishonest."

Despite efforts to combat that perception, a Gallup poll taken only 6 months ago, in December 2014, ranks lawyers in 7th place out of 10 professions for "honesty and ethical standards." (Gallup, Inc., *Honesty/Ethics in Professions*; see http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx)[1]

Given this persistent state of public opinion, it is high time for our profession to come out against plagiarism. As Judge Posner writes, plagiarism is "the capital intellectual crime" in the eyes of the general public as well as some professional groups. (Posner, *Little Book of Plagiarism, supra*, at 53) The public shares the harsh view expressed in a general writing program at Harvard, whose very definition of plagiarism brands the practice as "an act of lying, cheating, and stealing."[2]

Accordingly, every report of lawyer plagiarism will confirm and magnify the public's persistent moral critique of our profession. Indeed, too many lawyers are

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[1] Lawyers followed nurses, medical doctors, pharmacists, police officers, clergy and bankers, in that order. Bringing up the rear were business executives, advertisers, car salespeople, and lastly members of Congress.

[2] See Bast & Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: the Need for Intellectual Honesty* (2008) 57 Cath. U. L. Rev. 777, 782 and n. 26. The quotation follows an initial phrase that plagiarism means "passing off a source's information, ideas, or words as your own by omitting to acknowledge that source. . . ."

inviting that result. A surprising number of studies agree that "[p]lagiarism 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." (Joy & McMunigal, *The Problems of Plagiarism as an Ethics Offense* (Summer 2011) 26 ABA Criminal Justice No. 2, at 1)

Candor aside, however, plagiarism also bolsters another persistent critique of our profession: that litigation has suffered a sharp decline of professionalism. In 2007, for example, the State Bar saw fit to adopt "California Attorney Guidelines of Civility and Professionalism." (Posted at http://ethics.calbar.ca.gov/Portals/9/documents/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf) And the first guideline, on "Responsibilities to the Justice System," states as follows:

> The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

(*See also, In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537; review den. [admonishing the bar that "[z]eal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."])

Candor aside, our tradition of professionalism has no place for the disrespect for authors and authorship implicit in plagiarism. For that reason too, Rule 5-200 should take direct aim at plagiarism in the interest of building confidence in the legal profession.

b.

The Administration of Justice

The administration of justice will benefit as well. At one level, it will benefit if the rules of conduct strengthen litigators' commitment to candor. As our Supreme Court recently stated, "[h]onesty is absolutely fundamental in the practice of law; without it, the profession is worse than valueless in the place it holds in the administration of justice." (*In re Glass* (2014) 58 Cal.4th 500, 524; cit. and internal quot. omitted) A rule barring plagiarism will reduce one dishonest practice and underscore the importance of honesty in general.

Similarly, the administration of justice will benefit from lawyers' stronger commitment to professionalism. That tradition is irreconcilable with plagiarism, and a rule against it will underscore the overall value of professionalism to the justice system.

Most lawyers, however, do recognize the general value of candor and professionalism. Yet many find plagiarism justifiable on pragmatic or other grounds, such as the claimed irrelevance of academic or craftsmanship values in litigation. Accordingly, I conclude this discussion by citing more specific reasons why a rule against plagiarism will benefit the administration of justice.

(1) Academic and craftsmanship values *are* important to courts. They would be hobbled without reliable and verifiable research results from counsel, and skillful writing greatly assists courts as well as clients. But plagiarism of citable sources guts the research value of a brief, and plagiarism of *any* source dishonors the true writer and the craft of writing as a whole. Just like plagiarism rules elsewhere (academia, journalism, etc.), a rule barring plagiarism in litigation would underscore the high value of research and` writing in our work as well.

(2) Courts appropriately consider the credibility and credentials of the author of language submitted to them in appraising its value. When the author is another court, for example, the need to know which one is obvious. But plagiarism always withholds the true authorship, to say the least. While the importance of the information can vary widely, of course, that presents a matter for disciplinary judgment; it is no reason to reject or dilute a plagiarism rule. (See part 6 of this memorandum on the important discretionary role of enforcement officials.)

(3) Plagiarism by counsel risks repetition in decisions with resulting reputational harm to the entire system of justice. (This point was fully developed in Abrams, *Plagiarism in Lawyers' Advocacy, etc., supra,* 47 Wake For. L.Rev. 921.) Courts frequently and appropriately use language from briefs and other submissions by counsel in opinions and shorter rulings. Accordingly, courts might unwittingly include plagiarized language in their decisions, exposing themselves and the judiciary as a whole to the risk of a damaging plagiarism scandal. We should not expect courts to run plagiarism-detection software on every document they receive.

(4) Tolerance of plagiarism makes it more likely its practitioners will cut other ethical corners as well. As one author aptly states: "[i]f an attorney purposefully engages in plagiarism to deceive the reader, court, client, or other end user, then this may have predictive value regarding the attorney's other professional conduct." (Strickland, *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession* (2012) 90 N.C. L.Rev. 920, 948) While plagiarism may not be the most harmful form of litigation misconduct, it will aid the battle against all forms to establish stronger deterrence against each one.

(5) Last but not least, tolerance of plagiarism weakens litigators' resolve to act as an officer of the court when it becomes necessary to do so. The instinct for zealous advocacy runs strong, and is always difficult to control at the behest of higher duties to a

court or the public. Yet effective advocacy is frequently a private motive or public rationale for plagiarism: that its perceived benefits to client-advocacy outweigh any competing claims of the justice system. Accordingly, restoring the proper balance in the plagiarism context will help protect it in other situations as well.

c.

Changing the Future

By way of coda on this subject, an effective rule against plagiarism would enlist potent allies in the fight to increase confidence in the legal profession and the administration of justice: law school faculties and the new generations of lawyers they can influence.

One of the most surprising and dismaying aspects of the literature is a perception by legal educators themselves that plagiarism, while anathema in law school, is fair game after bar admission. Some go so far as to recommend greater clarity in law schools about that asserted distinction. In LeClercq, *Failure To Teach* (1999) 49 J. Legal Educ. 236, for example, it is said that:

> [a] useful plagiarism policy [in law schools] will differentiate plagiarism standards for law students from standards for legal practitioners. . . . [¶] Teaching the contrast between attribution in school and attribution in the workplace ought to be an integral part of a legal education, if not an explicit part of a school's written plagiarism policy. (*Id.* at 250)

If the legal profession finally comes out against plagiarism, however, law faculties will start conveying and explaining that fact to students and keep doing so for years to come. That should have lasting benefits for the profession and the justice system. New practitioners might arrive with higher and firmer ethical standards in their use of sources and, by extension, every other aspect of their service as officers of courts.

5.

A CALIFORNIA RULE BARRING PLAGIARISM COULD STIMULATE A BENEFICIAL NATIONAL STANDARD

Paragraph 3 of the Commission's charter supports rule changes that would "help promote a national standard with respect to professional responsibility issues whenever possible." (Appendix A) While that language addresses a different issue, conforming California's rules to those "used by a preponderance of the states" (*id.*), the charter nonetheless expresses support for national standards whenever possible.

As suggested earlier, there is no consensus in national literature about the propriety of litigation plagiarism in principle or as applied to different kinds of sources. I strongly suspect a state-by-state survey of rules and bar officials would reveal a similar disparity. If so, establishing a uniform disapproval of plagiarism would assist greatly in promoting confidence in lawyers and the justice system. A suitable rule in California could usefully stimulate other jurisdictions to follow its lead.

6.

ISSUES PRESENTED IN DRAFTING A RULE

I now highlight some issues that may arise in drafting a rule on plagiarism, and Appendix B to this memorandum indicates how I would resolve them in the context of Rule 5-200. But legitimate arguments can be made for different approaches.

One drafting issue involves intent. The closest analogy in Rule 5-200 instructs lawyers not to "intentionally misquote" language from certain sources. (Subd. (C)) I believe a provision barring plagiarism should require a similar state of mind, and the appropriate one is a "knowing" use of another's language without attribution. Accidental plagiarism can occur and the sloppiness is deplorable, in some cases even actionable on competence grounds. But Rule 5-200 should maintain its focus on candor and related matters.

Other drafting issues involve specificity. To begin with, the rule could attempt to specify *how much* language from a source must be plagiarized before a violation occurs. If so, qualifiers like "material" or "significant" could be considered, but they would still leave the amount uncertain.

Alternatively, the rule could bar *any* plagiarism as a matter of principle, and let enforcement and review bodies decide how much discipline is warranted – if any at all – given the amount copied and other aggravating or mitigating circumstances. That is the way many important rules operate, and I believe it is the preferable course here. For one thing, the use of quantifiers like "material" or "significant" would weaken the deterrent force of the rule. Those tempted to plagiarize at all would be tempted to do so "just a little" and hope to avoid accountability.

Another specificity issue involves sources. The rule could attempt to list the possibilities, and specify whether or how much plagiarism is permissible in each case. That approach could promote certainty, but a long list with instructions would detract from the clarity and force of the basic principle. Moreover, the omission of a source from the list, intentionally or not, would invite claims of implied approval to plagiarize it.

Alternatively, the rule could maintain both certainty and potency by barring plagiarism from *any* source – again letting enforcement and review bodies appraise the

seriousness of each case. I believe this alternative is preferable as a matter of rule-drafting, and also on the merits of the source issue.

But a broad and strong rule of that kind need not be absolute. If an exception makes sense and can be stated clearly and succinctly, it might not detract from the rule's purpose and deterrent force. In fact, I recommend that one such exception be considered seriously.

Counsel of record sometimes have *permission* to use another's language without attribution. Typical examples are contract lawyers, special consultants, and colleagues (or clients) at the same firm filing the brief. Similarly, some "form book" authors may permit, if not encourage, the use of their language without attribution. Although the classic definition of plagiarism still applies to those situations, an exception may be warranted.[3]

Actual permission can distinguish many of the reasons for a plagiarism rule cited in this memorandum. For example, the unattributed copying may involve no impropriety to the author, no tendency to violate ethical precepts or professionalism, and little risk of moral condemnation by the public. While it does not reveal every contributing author to the court, and implies there were none other than those identified, the consequences appear minimal in most cases. As for collaborative briefs, the court can still appraise the credibility and credentials of the counsel of record identified, who are always responsible for all content. And as for "form books," any permission to use language without attribution is likely confined to standardized material of little or no influence on the outcome of a case. But if the Commission considers this exception at all, it should review relevant publications and consult the publishers if appropriate.

For the foregoing reasons the text I suggest in Appendix B includes a narrow exception for permission. But a short comment might be in order (see Appendix A, ¶ 5) explaining that only actual and provable permission qualifies for the exception.

7.

Two Other Proposals for Amending Rule 5-200

Finally, the Commission should consider two other amendments to Rule 5-200 relevant to plagiarism, but warranted independently as well. First, the title of the rule

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[3] I am indebted to Shatz & McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing* (Winter 2013) 26:3 Cal.Litig. 14, for highlighting these and other nuances in applying the classic plagiarism definition to litigation. Though I published a critique (Bien, *Officers of a Court Do Not Plagiarize* (Spring 2014) 27:1 Cal.Litig. 9), they did a great service and have influenced my own thinking.

should be changed from "Trial Conduct" to "Litigation Conduct." This will make clear the entire rule applies to pretrial and appellate litigation as well as trials.

Second, subdivision (C) prohibits "intentionally misquot[ing] . . . language" but only from "a book, statute, [or] decision. . . ." That limitation is hard to justify, and it creates doubt about law reviews and other unlisted sources. For example, courts and regulatory bodies issue a myriad of documents short of "decisions," such as rules and policies of general application and interlocutory documents in particular cases. There is no justification for affording such documents less ethical protection than decisions. The rule should be expanded by adding "or any other source."

8.

Conclusion

I thank the Commission for the opportunity to present these suggestions, and will be happy to follow up any way that might be useful.

Respectfully,

/S/
ELLIOT L. BIEN

(Appendices A and B follow.)

APPENDIX A:

STATE BAR'S CHARTER TO THE COMMISSION FOR REVISION OF THE RULES OF PROFESSIONAL CONDUCT[*]

The commission is charged with conducting a comprehensive review of the existing California Rules of Professional Conduct and preparing a new set of proposed rules and comments for approval by the Board of Trustees and submission to the Supreme Court no later than March 31, 2017. In conducting its review of the existing rules and developing proposed amendments to the rules, the commission should be guided by the following principles:

1. The commission's work should promote confidence in the legal profession and the administration of justice and ensure adequate protection to the public.

2. The commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.

3. The commission should begin with the current rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.

4. The commission's work should facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties.

5. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules and should be used sparingly to elucidate and not to expand upon, the rules themselves. The proposed amendments developed by the commission should be accompanied by a report setting forth the commission's rationale for retaining or changing any rule and related commentary language.

The proposed amendments developed by the Commission should be accompanied by a report setting forth the Commission's rationale for retaining or changing any rule and related commentary language.

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* Posted at http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx

APPENDIX B:

AUTHOR'S RECOMMENDED TEXT OF RULE 5-200 OF THE RULES OF PROFESSIONAL CONDUCT

[Proposed additions are in blue and underlined,
deletions in red and strikeout.]

~~Trial~~ Litigation Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, ~~or~~ decision, or any other source;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; ~~and~~

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness; and

(F) Shall not knowingly use any language authored by another without attribution, unless the true author has so permitted.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: **Tuft**
Co-Drafters: **Chou, Martinez**

Meeting Date: **May 6 – 7, 2016**

I. INTRODUCTION

Proposed Rule 3.3 is based on Model Rule 3.3, a version of which has been adopted in every jurisdiction in the country. (See Section X, below.) The drafting team believes that the Model Rule approach regarding a lawyer's duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that is regulated under the rule, an attribute that is preferable in a disciplinary rule. For example, current rule 5-200(A) and (B) are nearly verbatim transcriptions of the two clauses of Bus. & Prof. Code § 6068(d), a provision that has remained virtually unchanged since California adopted the Field Code in 1872.[1] Paragraph (A) cautions a lawyer to "employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with the truth," but provides no insight into what "such means" are. Similarly, paragraph (B) prohibits a lawyer from "seeking to mislead the judge … by an artifice," but does not clarify what a prohibited "artifice" might be.

The proposed Rule's language, based on the Model Rule, in some respects provides a more clear statement of what conduct is required and prohibited under the rule. For example, paragraph (a)(1) provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." A lawyer is on notice that the lawyer may not knowingly make *any* false statement of fact or law or fail to correct a *material* false statement of fact or law. Similarly, paragraph (a)(2) [based on MR 3.3(a)(3)], states with precision what conduct is prohibited – offering false evidence – and then identifies steps the lawyer must take to remediate harm to the tribunal should the lawyer subsequently learn that of the evidence's falsity. Proposed paragraph (b), derived from MR 3.3(a)(2), clarifies the lawyer's duty to disclose to the tribunal adverse legal authority in the controlling jurisdiction, which is preferable to the narrowly defined duties in current rule 5-200(C) and (D). Proposed paragraph (c) confronts head-on a lawyer's duty when the lawyer knows that a person has engaged in criminal or fraudulent conduct related to a proceeding. Unlike Model Rule jurisdictions, however, the provision is limited by the lawyer's confidentiality duties under Rule 1.6 and Bus. & Prof. Code § 6068(e). Importantly, paragraph (d) of the proposed rule delimits the duration of the lawyer's duties under the preceding three paragraphs, and paragraph (e) proscribes appropriate conduct when a lawyer is appearing in an ex parte proceeding where the other side is not given notice or an opportunity to be heard.

Finally, there are seven comments that are limited to interpreting the rule or explaining how the rule is to be applied, appropriate functions of the comments.

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[1] Bus. & Prof. Code § 6068(d) provides it is the duty of an attorney:

> (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

The only change since 1872 has been to render the provision gender neutral.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: **Tuft**
Co-Drafters: **Chou, Martinez**

Meeting Date: **May 6 – 7, 2016**

II. CURRENT CALIFORNIA RULE 5-200

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

III. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section IV. The vote was unanimous in favor of making the recommendation.

IV. PROPOSED RULE 3.3 (CLEAN)

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or

(2) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code § 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer shall not seek to mislead a tribunal by failing to disclose legal authority in the

controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.

(c) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).

(d) The duties stated in paragraphs (a), (b) and (c) continue to the conclusion of the proceeding.

(e) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional

provisions.

Remedial Measures

[5] Reasonable remedial measures under paragraphs (a)(2) and (c) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Rule 1.6 and Business and Professions Code § 6068(e).

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know of a violation of paragraph (c) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

Withdrawal

[7] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

V. PROPOSED RULE 3.3 (REDLINE TO CURRENT CALIFORNIA RULE 5-200)

Rule ~~5-200~~ 3.3 ~~Trial Conduct~~ Candor Toward The Tribunal

~~In presenting a matter to a tribunal, a member:~~

~~(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;~~

~~(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement~~

~~any~~a request to withdraw that is premised on a client's misconduct.

VIII. PUBLIC COMMENTS SUMMARY

- **Elliot Bien, 6/8/2015:**

  Elliott Bien recommended adding add a provision to Rule 5-200 barring plagiarism in briefs or other submissions to a court.

IX. OCTC / STATE BAR COURT COMMENTS

A. Jayne Kim, OCTC, DATE:

[Insert summary of comments.]

B. Russell Weiner, OCTC, 6/15/2010:

1. OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as "actual knowledge." However, this is contrary to established California law. An attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rtpr. 80; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; *Zitny v. State Bar, supra,* 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct.
2. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current

- Cons: The comment neither interprets the black letter's meaning nor provides guidance on its application and should not be included.

B. Concepts Rejected (Pros and Cons):

1. In paragraph (d), recommend adoption of the approach taken by RRC1, i.e., that the lawyer's duties under the Rule to take reasonable remedial measures ends with the conclusion of the proceeding *or the conclusion of the representation, whichever comes first*.
   - Pros: See "Cons," section XI.A.7, above.
   - Cons: See "Pros," section XI.A.7, above.

2. Recommend adoption of a provision that would expressly bar plagiarism in briefs or other submissions to a court. (See Section VIII, above.)
   - Pros: Plagiarism in brief or other submission to the court in effect is a false statement about the source of the document being submitted and violates a lawyer's duty of candor to the court. Specifically prohibiting plagiarism in a rule should increase confidence in the legal profession and improve the administration of justice, as well as help promote a useful national standard.
   - Cons: A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed Rule 8.4(c) or Bus. & Prof. Code § 6106.[7] Moreover, there is no evidence that adopting such a provision would promote a national standard as the drafting team is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Incorporating a "knowledge" standard in paragraph (a) is a substantive change in the law as current rule 5-200 does not include such a standard. (See Section XI.A.2, above.)
2. For the same reason, incorporating a specific intent requirement (seek to mislead) in paragraph (b) arguably is a substantive change, although a majority of the drafting team believes it simply reflects the standard applied in existing California Supreme Court case law. (See Section XI.A.4, above.)
3. Mandating that a lawyer take reasonable remedial measures to correct fraudulent or criminal conduct related to a proceeding of which the lawyer is aware is a substantive change *to the Rules*, although such a duty already exists in the lawyer's role as an officer of the legal system. (See Sections XI.A.5, 6, above.)
4. [Insert summary of Changes in Duties or Substantive Changes Here]

[7] Proposed Rule 8.4 (c) provides it is professional misconduct for a lawyer to:

(c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation

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To: Commission for Revision of the Rules of Professional Conduct

From: Elliot L. Bien

Dated: May 2, 2016

Re: Options for Addressing Plagiarism

Because the Rule 5-200 drafting team prefers the approach of Model Rule 3.3, and cites Rule 8.4 as another rule relevant to plagiarism, the Commission could usefully address that subject in one or both of the following ways.

1. Add language to Rule 3.3 (Candor Toward The Tribunal)

A new subsection (3) could be added to paragraph (a) as follows:

(a) A lawyer shall not knowingly:

. . . .

(3) in any submission to a tribunal, use language authored by another without attribution unless the true author had so permitted.

2. Add comment to Rule 8.4 (Misconduct)

A comment could be added to the rule as adopted by the Commission in January 2016 (copy follows) because paragraph (c) cites dishonesty and similar misconduct, and paragraph (d) cites conduct prejudicial to the administration of justice. Thus, a new comment could state:

> Plagiarism in any setting can violate paragraph (c), but if submitted to a tribunal it can also violate paragraph (d). See *In re Glass* (2014) 58 Cal.4th 500, 524 ("[h]onesty is absolutely fundamental in the practice of law . . . [and] the place it holds in the administration of justice" [cit. and internal quots. omitted]).

PROPOSED RULE 1-120 [8.4] OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE JANUARY 22ND – 23RD MEETING

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate these Rules or the State Bar Act, knowingly assist, solicit or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts of gross negligence involving moral turpitude.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

OFFICERS OF A COURT DO NOT PLAGIARIZE

[*California Litigation* Vol. 27, No. 1, 2014]

by Elliot L. Bien

To my great surprise, this State Bar journal recently published an argument that plagiarism is generally acceptable in lawyers' submissions to a court. (Shatz & McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing* (Winter 2013) 26:3 Cal.Litig. 14) The authors reason that "a litigator's job is to prevail. . . . Pleadings and legal briefs serve practical, not academic or artistic, purposes." (*Id.* at 14) "Plagiarism is rightfully a mortal sin in academic settings, where original expression is paramount. Litigation is different, with far more room for borrowing ideas and writings." (*Id.* at 18)

I respectfully disagree. Unauthorized "borrowing" is no more tolerable for officers of a court than scholars or artists. However "practical" our adversarial system may be, maintaining strict integrity is critical to the rule of law and the larger purposes it serves.

The essence of plagiarism is falsehood — "the deliberate and knowing presentation of another person's original ideas or creative expressions as one's own." (Black's Law Dict. (9th ed. 2009) p. 1267) To condone this or any other form of dishonest advocacy would spread that disease, undermining the administration of justice and diminishing public respect for it. "[I]f an attorney purposefully engages in plagiarism to deceive the reader, court, client, or other end user, then this may have predictive value regarding the attorney's other professional conduct." (Strickland, *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession* (2012) 90 N.C. L.Rev. 920, 948) These consequences are just as harmful to society as the effects of plagiarism in scholarship or art.

A California Court of Appeal recently wrote that "[t]he term 'officer of the court,' with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 292, *review denied*) True, some incidents of plagiarism are worse than others, and some kinds of dishonest advocacy may be worse than plagiarism. But as *Kim* aptly stated: "the distinction between little lies and big ones is difficult to delineate and dangerous to draw." (*Id.* at 293)

Unfortunately, plagiarism by lawyers is evidently pervasive despite rules of professional conduct that implicitly prohibit it. Those rules should now prohibit it expressly. Given the facts brought to light by *Beg, Borrow, Steal*, California stands in need of a bright-line rule barring any plagiarism at all — whether "little lies" or "big ones" (*Kim*) — in any submission to a court.

— The Problem Is a Serious One —

Regrettably, plagiarism appears widespread among litigators. *Beg, Borrow, Steal* reports that it "happens in courtrooms on a daily basis. Using language from various sources — published and unpublished court opinions, treatises, articles, even blogs — is widespread in legal writing. . . ." (*Id.* at 15) Other authors agree. "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." (Joy & McMunigal, *The Problems of Plagiarism as an Ethics Offense* (Summer 2011) 26 ABA Criminal Justice No. 2, at 1) Another writes: "lawyers plagiarize in pleadings and briefs. . . . Outside of litigation, they plagiarize when writing articles, books, and CLE materials." (Richmond, *Professional Responsibilities of Law Firm Associates* (2007) 45 Brand. L.J. 199, 240-241)

Also worrisome is the larger context of so much plagiarism by lawyers. It reflects a much broader decline in the values long associated with service as officer of a court. For example, a widespread perception of that decline has generated voluntary codes of civility and professionalism throughout California and elsewhere. (See Bien, *Toward a Community of Professionalism* (2001) 3 J. App. Prac. & Proc. 475) But voluntary codes are not enough. The broad decline of ethical standards makes it all the more important to combat plagiarism through our enforceable codes of conduct.

Finally, our law schools appear in disarray on the matter. There were 14 cases of plagiarism at one unnamed law school in 1996 alone. (LeClercq, *Failure To Teach: Due Process and Law School Plagiarism* (1999) 49 J. Legal Educ. 236) This prompted law professors at the University of Puget Sound to survey 177 schools, generating 152 responses. The result? "Our survey revealed an alarming institutional indifference to plagiarism and a disgraceful disparity in law schools' definitions of and punishments for plagiarism." (*Id.* at 236-237)

In short, anyone concerned about plagiarism in litigation has much to be concerned about, and California authorities are providing too little deterrence.

— California Is Not a Safe Harbor for Plagiarists —

Beg, Borrow, Steal is surprisingly silent about California authorities. And this is regrettable, because the article's focus on out-of-state cases condemning plagiarism may lead readers to believe California courts and other authorities are more hospitable to it. They are not. Similarly, *Beg, Borrow, Steal* fails to mention any rules of professional conduct in California that bar plagiarism. Several of them do.

To begin with, courts in California have condemned plagiarism in advocacy as unequivocally as courts elsewhere. A preliminary search turned up three examples:

● In 2009, a United States District Court declared it was “contemptible” that counsel had “stolen” a passage from an unpublished district court opinion for use in an opposition brief. (*Marques v. Mortgageit, Inc*. (C.D. Cal. 2009) 2009 WL 4980269 (*Id*. at *4-*5) *Marques* called out this single paragraph of plagiarism as “intellectual dishonesty.” (*Id*. at *5)

● In 2004, the Third District Court of Appeal published an opinion sanctioning counsel for plagiarism and other flaws in habeas corpus petitions. (*In re White* (2004) 121 Cal.App.4th 1453) Indeed, the court specified that it found the plagiarism in one petition “more troubling” than its reliance on rejected authority. (*Id*. at 1484) Counsel “for the most part. . . simply plagiarized [an] argument from [someone else’s] prior unsuccessful opening brief on appeal, changing the green cover used for an appellant’s opening brief to the red cover used for a writ petition.” (*Id*.)

● Finally, our Supreme Court recently rejected a Bar applicant — a serial fabricator as a journalist — because "[h]onesty is absolutely fundamental in the practice of law; without it, the profession is worse than valueless in the place it holds in the administration of justice .... " (*In re Glass* (Jan. 27, 2014) _ Cal.4th _ [2014 WL 280612, at *17]; cit. and internal quots. omitted.) The Court also appeared incredulous at a defense offered by one of his character witnesses, a journalism professor, that "[t]he most brilliant students plagiarize." (Quoted id. at p. * 11.) *Glass* strongly suggests that plagiarism by lawyers, at least, is intolerable.

As stated at the outset, however, judicial decisions are not the only official condemnation of plagiarism in California. Our official definition of "good moral character" features "honesty, ... candor, trustworthiness, ... and respect for... the judicial process." (State Bar Rule 4.40CB).) Similarly, Rule 5-200(a) of our Rules of Professional Conduct requires litigators to “employ . . . such means only as are consistent with truth.”

Finally, the Board of Trustees of our own State Bar appears to be opposed to plagiarism. In July 2007, it adopted “California Attorney Guidelines of Civility and Professionalism” with an introduction emphasizing the duty of honesty with courts: “[a]s officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with . . . the courts. . . . This obligation includes . . . professional integrity . . . [and] candor. . . [which are] essential to the fair administration of justice and conflict resolution.” A section on “Communications” also states that “[a]n attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.”

— California Needs a Bright-Line Rule Barring Plagiarism —

Although our rules of professional conduct bar plagiarism implicitly, they should be amended or supplemented to do so expressly. The seriousness of the problem demands it, and *Beg, Borrow, Steal* claims there is uncertainty today about the very

definition of plagiarism as applied to litigators. The authors say the Black's Law Dictionary definition — knowingly passing off another's work as your own — "is not particularly helpful for determining what constitutes plagiarism for practicing lawyers." (*Id.* at 15) I respectfully disagree; there is nothing ambiguous about the Black's definition. Nonetheless, the claim of uncertainty in *Beg, Borrow, Steal* cries out for a prompt and authoritative response. California needs a bright-line rule of professional conduct barring any plagiarism in papers submitted to a court.

The new rule should certainly reject several exceptions supported or openly advocated in *Beg, Borrow, Steal*:

First, the authors suggest plagiarism is wrong only if it involves "large amounts of material." (*Id.* at 17) But the problem with a *de minimis* exception was aptly summarized by *Kim, supra*, 201 Cal.App.4th 267, 293: "the distinction between little lies and big ones is difficult to delineate and dangerous to draw." The standard itself must be unequivocal. The punishment can be tailored to the specific offense and any mitigating or aggravating circumstances.

Second, *Beg, Borrow, Steal* contends plagiarism is permissible in legal briefs produced collaboratively, on the premise that there is no representation of originality in such work. But the entire collaboration team is plagiarizing — misrepresenting the *group's* originality — if it appropriates the work of someone outside the team without attribution. There is utterly no justification to exempt collaborating authors from any duty to a court that is applicable to a single author.

Third, *Beg, Borrow, Steal* deems it permissible to plagiarize from "form books" and the like (*id.* at 16) because "such practices are expected and encouraged by the legal profession as efficient and effective lawyering." (*Id.*) I oppose that exception too, because the need for integrity in litigation far outweighs the slight inconvenience of dropping a footnote of attribution. In addition, this simple footnote will avoid any temptation to imply original authorship to the client.

Fourth, *Beg, Borrow, Steal* suggests plagiarism is more defensible in a brief if the material copied is actually helpful to the client's cause. Thus, the authors advise litigators to "always make sure any copied material is relevant and applicable to the facts and circumstances of the case at issue." (*Id.* at 17) But relevancy and honesty in a brief are entirely different subjects, and it belittles the latter to lump them together. Plagiarism is wrong no matter how cogently it is used.

Fifth, *Beg, Borrow, Steal* suggests it is more blameworthy to plagiarize "citable sources from outside the litigation context, such as law review articles and Web sites, versus the copying of litigation-related materials (such as briefing from another case)." (*Id.* at 17) But I can perceive no principled difference. The problem at hand is passing off *anyone* else's work as your own.

Finally, *Beg, Borrow, Steal* contends it is permissible to plagiarize from unpublished opinions. "Even the sternest regulators of litigation plagiarism surely could

not punish a lawyer who lifted from an unpublished opinion, but failed to provide proper attribution. Yet it would seem absurd for a lawyer to ignore such material, simply on the basis that it could not be cited." (*Id.* at 18) There is no duty, however, to "ignore" unpublished opinions. It is perfectly legitimate to read them, learn from their reasoning, and check out the authorities they cite. But that is a far cry from passing off their language as the brief-writer's own.

— Conclusion —

Beg, Borrow, Steal does warn litigators that some judges might be "perturbed" or "take offense" at plagiarism. (*Id.* at 17 & 18) And for that reason alone, the authors conclude by advising litigators to watch their step: "[b]e forthright; give the cite." (*Id.* at 18) But the authors never advocate that policy on the merits. On the contrary, the thrust of their article is that most plagiarism by litigators is acceptable because litigation is all about winning and efficiency.

California's bench and bar leaders should respond vigorously to that notion by amending the rules of professional conduct. The new rule should unequivocally bar any plagiarism in any submission to a court.

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