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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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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.

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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.