Officers of a Court Do Not Plagiarize

By Elliot L. Bien

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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 p. 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 p. 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. 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.) 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 p. 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 pp. 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.

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, pp. *4-*5.) *Marques* called out this single paragraph of plagiarism as "intellectual dishonesty." (*Id.* at p. *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 p. 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." (*Ibid.*)
- 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.

'...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." I respectfully disagree...'

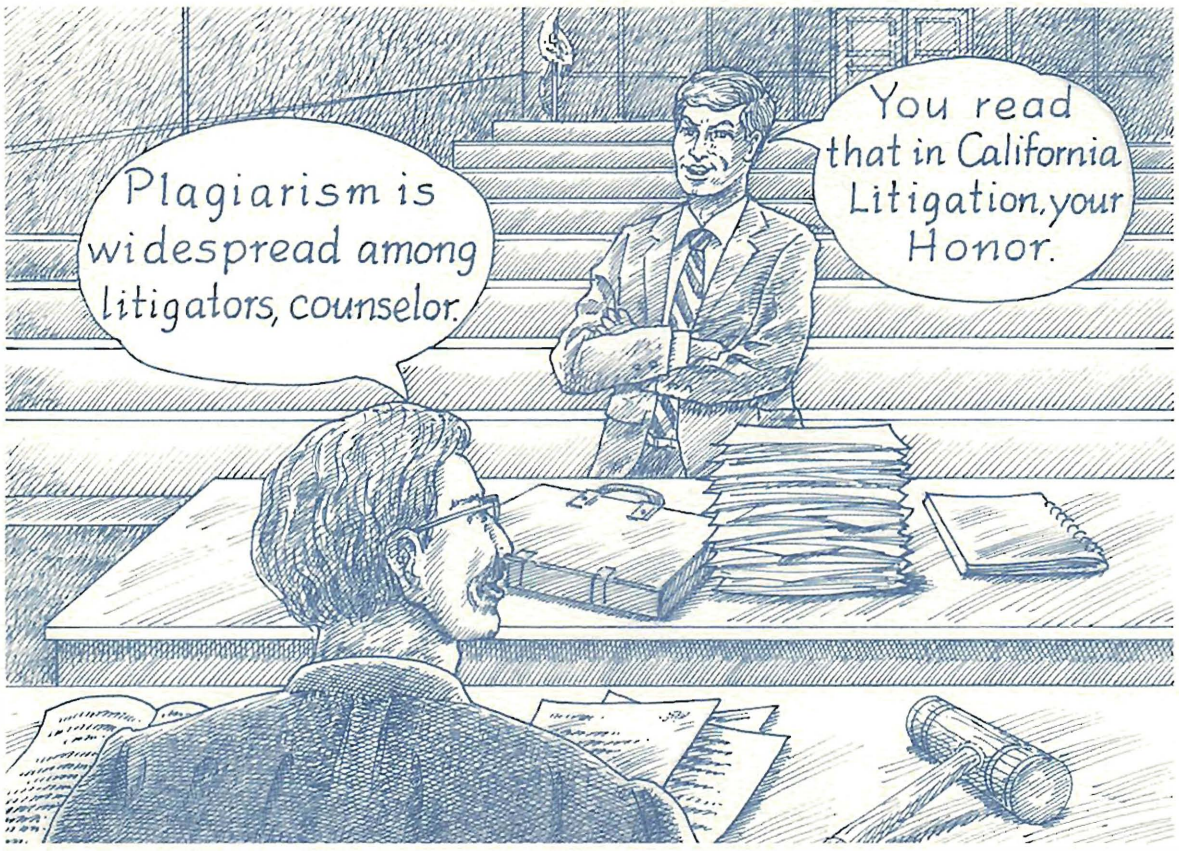
As stated at the outset, however, judicial decisions are not the only official condemnation of plagiarism in California. Our official definition of "good moral character" features "honesty,...candor, trustworthiness,...and

respect for...the judicial process." (State Bar Rule 4.40(B).) Similarly, Rule 5-200(a) of our Rules of Professional Conduct requires litigators to "employ...such means only as are consistent with truth." Both provisions encompass plagiarism.

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 p. 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 p. 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 p. 16) because "such practices are expected and encouraged by the legal profession as efficient and effective lawyering." (*Ibid.*) 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 p. 17.) But relevancy and honesty in a brief are entirely different subjects, and 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 p. 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 p. 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.

Beg, Borrow, Steal does warn litigators that some judges might be "perturbed" or "take offense" at plagiarism. (*Id.* at pp. 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 p. 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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