PLAGIARISM IN LAWYERS' ADVOCACY: IMPOSING DISCIPLINE FOR CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

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INTRODUCTION

On August 5, 2010, a Kentucky jury convicted Karen Sypher on six counts of extortion, lying to federal investigators, and retaliating against a witness.[1] The federal prosecution stemmed from a one-night sexual encounter between Sypher and University of Louisville men's basketball coach Rick Pitino at a local restaurant in 2003. At the eight-day trial, prosecutors proved that Sypher demanded $10 million plus a home and a car from the coach in exchange for her silence, falsely accused him of rape when he reported the attempted extortion to authorities, and later lied to the FBI.[2]

By the time Sypher began serving her eighty-seven-month prison sentence in April of 2011,[3] she was not the only member of the defense team who emerged scarred. When District Judge Charles R. Simpson III denied the defendant's posttrial motions seeking a new trial, the court criticized her lawyer for writing a brief that "appear[ed] to have cobbled much of his statement of the law governing ineffective assistance of counsel claims by cutting and pasting, without citation, from the Wikipedia web site."[4] "[S]uch cutting and pasting, without attribution," warned Judge Simpson, "is plagiarism."[5]

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1. United States v. Sypher, No. 3:09-CR-00085, 2011 WL 579156, at *1 (W.D. Ky. Feb. 9, 2011), *aff'd*, 684 F.3d 622, 628–29 (6th Cir. 2012) (affirming the denial of the defendant's recusal motion because the trial judge's statements about counsel's plagiarism did not establish bias).

2. *See, e.g.*, Brett Barrouquere & Will Graves, *Pitino Accuser Is Found Guilty; Sypher Convicted in Extortion Trial*, BOS. GLOBE, Aug. 6, 2010 (Sports), at 6; Andrew Wolfson & Jason Riley, *Sypher Found Guilty on All Six Counts*, COURIER-JOURNAL (Louisville, Ky.), Aug. 6, 2010, at A1.

3. Jason Riley, *Sypher Again Asks to Stay Free While Fighting Conviction*, COURIER-JOURNAL (Louisville, Ky.), Apr. 5, 2011, at B1.

4. *Sypher*, 2011 WL 579156, at *3 n.4.

5. *Id.*

United States v. Sypher follows other recent decisions that have chastised lawyers for briefs or other written submissions marked by plagiarism, "[t]he deliberate and knowing presentation of another person's original ideas or creative expressions as one's own."[6] Some lawyers have copied passages from earlier judicial opinions that rest in the public domain and some lawyers (as in *Sypher*) have copied passages from private sources that are subject to copyright laws. In either event, courts have labeled lawyers' plagiarism in court filings as "reprehensible,"[7] "intolerable,"[8] "completely unacceptable,"[9] and "unprofessional."[10]

Part I of this Article discusses decisions that have found or intimated that counsel's plagiarism violated Rule 8.4(c) of the American Bar Association ("ABA") Model Rules of Professional Conduct, which states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[11] Perhaps because one or more of Model Rule 8.4(c)'s four proscriptions normally seem such natural fits for plagiarism, courts have not yet explored application of Model Rule 8.4(d), which reaches lawyers who "engage in conduct that is prejudicial to the administration of justice."[12]

Part II of this Article discusses why lawyers' plagiarism in written submissions to the court violates Model Rule 8.4(d) as an independent ground for sanction. By its very nature, a lawyer's plagiarism is prejudicial to the administration of justice because it

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6. BLACK'S LAW DICTIONARY 1267 (9th ed. 2009).

7. Velez v. Alvarado, 145 F. Supp. 2d 146, 160 (D.P.R. 2001).

8. *Id.* at 161.

9. United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006), *postconviction relief denied*, Hall v. United States, No. 1:08-CV-482, 2008 WL 2696832 (W.D. Mich. July 1, 2008); State Farm Fire & Cas. Co. v. Harris, No. 3:11-36-DCR, 2012 WL 896253, at *1 n.3 (E.D. Ky. Mar. 15, 2012) (citing *Bowen*, 194 F. App'x at 402 n.3); *see also* Venesevich v. Leonard, No. 1:07-CV-2118, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec. 19, 2008) (noting that attorney plagiarism is "unacceptable behavior"), *appeal dismissed*, 378 F. App'x 129 (3d Cir. 2010) (dismissing appeal for lack of jurisdiction).

10. Vasquez v. City of Jersey City, No. 03-CV-5369 (JLL), 2006 WL 1098171, at *1 n.4 (D.N.J. Mar. 31, 2006).

11. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2011). In addition to *Sypher*, see, e.g., *Venesevich*, 2008 WL 5340162, at *2 n.2 ("[P]lagiarism violates the prohibition that state ethics codes place on misrepresentation and deceit."); Kingvision Pay Per View, Ltd. v. Wilson, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (finding that plagiarism "may violate" state rules of professional conduct); *In re* Burghoff, 374 B.R. 681, 684–85 (Bankr. N.D. Iowa 2007) (finding that plagiarism is "a form of misrepresentation"); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 299 (Iowa 2002) ("This plagiarism constituted, among other things, a misrepresentation to the court."); *cf. In re* Zbiegien, 433 N.W.2d 871, 875 (Minn. 1988) (finding that academic plagiarism while in law school "does involve an element of deceit").

12. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2011).

creates a risk that the court's written opinion will inadvertently plagiarize. A lawyer's plagiarism can also distort the argument's meaning and import by inducing the court to mistake the copied passages as products of the lawyer's own thought processes rather than as an uncompensated nonparty's analysis presumably helpful to the proponent. In the adversary system, said former ABA President Whitney North Seymour, the administration of justice "depends heavily on the skill and breadth of the advocacy which [judges] consider in reaching their judgments."[13]

Grounding professional discipline in violations of both provisions of Model Rule 8.4 would not be redundant, because Model Rule 8.4(c) focuses primarily on the character of the lawyer's conduct and Model Rule 8.4(d) focuses primarily on the conduct's detrimental effect on the judicial system. In an appropriate case, invoking both provisions would hold practical significance because "[t]he fact that the lawyer's misconduct has violated more than one duty may be relevant to the sanction" that the disciplinary commission or the court imposes.[14]

Section 3.0 of the ABA Standards for Imposing Lawyer Sanctions underscores this relevance by reciting four controlling questions in disciplinary proceedings: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors."[15] Where a lawyer's single act of misconduct violates more than one Model Rules provision, it is important to consider "[t]he duty or duties violated . . . to evaluate the harm of the misconduct"[16] to the public, the courts, or the legal system.[17]

I. MODEL RULE 8.4(C): DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION

Judicial condemnation of lawyers' plagiarism in court filings does not exalt technical niceties. The Iowa Supreme Court observed

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13. Whitney North Seymour Sr., *Foreword* to EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING & ORAL ARGUMENT, at iii (7th ed. 1993).

14. *In re* Eugster, 209 P.3d 435, 447 (Wash. 2009); *see also, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Netti, 797 N.W.2d 592, 607 (Iowa 2011) (ruling that "[i]n light of the multiple violations" a lawyer's "suspension of two years is warranted in this case").

15. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 3.0 (1992).

16. *Eugster*, 209 P.3d at 447.

17. *E.g.*, *In re* Coleman, 793 N.W.2d 296, 308 (Minn. 2011) (quoting *In re* Plummer, 725 N.W.2d 96, 98 (Minn. 2006) ("The purpose of discipline for professional misconduct is not to punish the attorney, but rather to protect the public, to protect the judicial system, and to deter future misconduct . . . ."); *In re* Voss, 795 N.W.2d 415, 422 (Wis. 2011) (discussing "the need to protect the public, courts, and legal system from repetition of misconduct and to deter attorneys from engaging in similar misconduct").

that courts do not "play a 'gotcha' game with lawyers who merely fail to use adequate citation methods" but instead target "massive, nearly verbatim copying of a published writing without attribution."[18] Once massive copying of a public or private source appears, courts have found intentional "dishonesty, fraud, deceit or misrepresentation" in violation of Model Rule 8.4(c).[19]

As government publications, reported federal and state judicial opinions rest in the public domain beyond copyright protection.[20] Public status, however, relieves users only of the obligation to secure permission for republication. Public status does not immunize users from rules and conventions concerning failure to identify or credit the public source in court filings.[21]

This distinction made a difference in *United States v. Bowen*,[22] where the Court of Appeals for the Sixth Circuit affirmed the defendant's thirty-year sentence for conspiracy to distribute drugs.[23] The defense counsel's brief, nearly twenty pages long, was copied almost verbatim from a Massachusetts federal district court opinion that the brief did not cite.[24] "While our legal system stands upon the building blocks of precedent, necessitating some amount of quotation or paraphrasing," the Court of Appeals concluded, "citation to authority is absolutely required when language is borrowed."[25]

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18. Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 759 (Iowa 2010).

19. *Id.* at 758.

20. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.2, at 2:50.1 (3d ed. 2012).

21. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 8 (rev. ed. 2003) ("Plagiarism occurs when someone . . . falsely claims someone else's words, whether copyrighted or not, as his own.").

22. 194 F. App'x 393 (6th Cir. 2006), *postconviction relief denied*, Hall v. United States, No. 1:08-CV-482, 2008 WL 2696832 (W.D. Mich. July 1, 2008).

23. *Id.* at 395.

24. *Id.* at 402 n.3.

25. *Id.; see also, e.g.*, United States v. Lavanture, 74 F. App'x 221, 223 n.2 (3d Cir. 2003) ("[I]t is certainly misleading and quite possibly plagiarism to quote at length a judicial opinion (or, for that matter, any source) without clear attribution."); United States v. Jackson, 64 F.3d 1213, 1219 n.2 (8th Cir. 1995) (expressing "disapproval of a style of brief-writing that appropriates both arguments and language [from a prior judicial opinion] without acknowledging their source"); A.L. v. Chi. Pub. Sch. Dist. # 299, No. 10 C 494, 2012 WL 3028337, at *6 (N.D. Ill. July 24, 2012) (reducing plaintiff counsel's attorney's fee request by ninety percent because large portions of counsel's briefs were lifted, without attribution, from prior decisions of the court); Venesevich v. Leonard, No. 1:07-CV-2118, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec. 19, 2008) (noting that without reference or citation, plaintiff counsel's reply brief quoted verbatim a section of a prior decision of the court), *appeal dismissed,* 378 F. App'x 129 (3d Cir. 2010) (dismissing appeal for lack of jurisdiction); Denton v. Rievley, No. 1:07-CV-211, 2008 WL 4899526, at *2 n.2 (E.D. Tenn. Nov. 12,

Where a private author's work implicates copyright laws, unauthorized reproduction constitutes copyright infringement.[26] The lawyer's plagiarized submission may initially reach no further than the court and the parties, but the submission remains a public record accessible to others.[27]

In *In re Burghoff*,[28] for example, seventeen pages of defense counsel's nineteen-page prehearing brief consisted of verbatim excerpts from an article written by two prominent New York lawyers, available on the Internet.[29] The brief did not acknowledge the article, and defense counsel did little more than delete a few passages from the article, including some that did not support his client's position. Defense counsel's posthearing brief also "borrowed heavily" from the article without attribution.[30]

The *Burghoff* court held that defense counsel's plagiarism violated Model Rule 8.4(c) as "a form of misrepresentation."[31] The court ordered counsel to return the fees he charged the client for the two briefs and to complete a professional responsibility course at an accredited law school or by private arrangement with a law professor.[32] On review of the state grievance commission's findings, the Iowa Supreme Court publicly reprimanded counsel for plagiarism, which the court labeled "misrepresentation, plain and simple," in violation of Model Rule 8.4(c).[33]

In *Kingvision Pay Per View, Ltd. v. Wilson*,[34] the plaintiff's nineteen-paragraph response to a summary judgment motion contained approximately seven paragraphs copied from the multivolume Wright-Miller-Cooper federal civil practice treatise,

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2008), *aff'd*, 353 F. App'x 1 (6th Cir. 2009) (noting that about eight pages of defense counsel's memorandum appeared to be taken almost verbatim from an earlier decision of the court); Vasquez v. City of Jersey City, No. 03-CV-5369 (JLL), 2006 WL 1098171, at *1 n.4 (D.N.J. Mar. 31, 2006) (discussing counsel's plagiarism); Velez v. Alvarado, 145 F. Supp. 2d 146, 160 (D.P.R. 2001) (finding that about sixty-six percent of the plaintiff's brief was a verbatim reproduction of the earlier decision).

26. GOLDSTEIN, *supra* note 21.

27. *See, e.g.*, Bos. Prop. Exch. Transfer Co. v. Iantosca, 686 F. Supp. 2d 138, 142 (D. Mass. 2010) (discussing "matters of public record, such as prior litigation documents"); Peviani v. Hostess Brands, Inc., 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010) (quoting C.B. v. Sonora Sch. Dist., 691 F. Supp. 2d 1123, 1138 (E.D. Cal. 2009)) (discussing "public record[s], including . . . court records available . . . via the internet").

28. 374 B.R. 681 (Bankr. N.D. Iowa 2007).

29. *Id.* at 683.

30. *Id.* at 683–84.

31. *Id.* at 684–85.

32. *Id.* at 687.

33. Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 760 (Iowa 2010) (finding that the lawyer, who had already returned the fee in compliance with the bankruptcy court order, did not violate Model Rule 1.5).

34. 83 F. Supp. 2d 914 (W.D. Tenn. 2000).

wholly or partly, without citation or attribution, plus three of the paragraphs' seven footnotes copied verbatim.[35] The treatise's multiple volumes dwarfed the misappropriated passages, but the district court nonetheless found plagiarism because, as Judge Learned Hand admonished decades earlier, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[36] Plaintiff's counsel received a private, informal admonition from the state's disciplinary authorities.[37]

In a disciplinary proceeding, "[w]hat a lawyer knows may be inferred from the circumstances."[38] Lawyers caught copying prior sources have not denied knowledge of plagiarism's general constraints, perhaps because they, like so many lay people, are products of educational systems that roundly condemn plagiarism as "academic malpractice,"[39] "literary theft,"[40] and "perhaps the most serious professional indictment that can be made against an author."[41] In one decision censuring a lawyer for plagiarism in his LLM thesis submitted to a private university, the Illinois Supreme Court agreed with the disciplinary hearing board, which found it "inconceivable . . . that a person who has completed undergraduate school and law school would not know that representing extensively copied material as one's own work constitutes plagiarism."[42]

With lack of knowledge effectively neutralized as a defense to a violation of Model Rule 8.4(c), lawyers' proffered explanations for plagiarism typically prove unavailing. In *Bowen*, for example, the Sixth Circuit rejected the lawyer's explanation that the earlier Massachusetts federal district court decision was only persuasive precedent in the Michigan federal prosecution and that the lawyer "would lose the essence of the argument if he changed even one word."[43]

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35. *Id.* at 916 n.4. *See generally* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4519 (2d ed. 1996).

36. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (finding infringement of the plaintiff's copyrighted play).

37. Threadgill v. Bd. of Prof'l Responsibility, 299 S.W.3d 792, 796 (Tenn. 2009), *overruled on other grounds by* Lockett v. Bd. of Prof'l Responsibility, No. E2011-01170-SC-R3-BP, 2012 WL 2550586 (Tenn. July 3, 2012).

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. d (1998).

39. UNIV. OF MANCHESTER, GUIDANCE TO STUDENTS ON PLAGIARISM AND OTHER FORMS OF ACADEMIC MALPRACTICE 1 (2008), *available at* http://documents.manchester.ac.uk/DocuInfo.aspx?DocID=2870.

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

41. Cornwell v. Sachs, 99 F. Supp. 2d 695, 708 (E.D. Va. 2000).

42. *In re* Lamberis, 443 N.E.2d 549, 551 (Ill. 1982).

43. United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006).

Similarly unavailing are excuses that the lawyer succumbed to plagiarism to meet a pressing deadline;[44] concluded that plagiarism would best serve the client's cause;[45] improperly failed to make greater changes to the misappropriated material;[46] or misappropriated only string citations and not text.[47] In one case, counsel unsuccessfully sought to justify wholesale copying from an earlier judicial opinion because "discussion of law and authority based on prior precedent is almost never the work of an attorney's own mind, but rather the work of the authoring judges."[48]

Plagiarism implicating Model Rule 8.4(c) may be the predicate for finding a violation of Model Rule 1.5, which provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . ."[49] A fee's reasonableness depends, among other factors, on "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly . . . ."[50] Copying a previously published work may diminish or neutralize the lawyer's assertion of novelty and difficulty, and such copying of a located source normally consumes little time, labor, or skill.

II. MODEL RULE 8.4(D): PREJUDICE TO THE ADMINISTRATION OF JUSTICE

"If our adversary system is to function according to design," wrote Justice Thurgood Marshall, "we must assume that an attorney will observe his responsibilities to the legal system, as well

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44. Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon, 789 N.W.2d 756, 758 (Iowa 2010).

45. Columbus Bar Ass'n v. Farmer, 855 N.E.2d 462, 467–68 (Ohio 2006).

46. *In re* Burghoff, 374 B.R. 681, 685 (Bankr. N.D. Iowa 2007).

47. *Id.*

48. Denton v. Rievley, No. 1:07-CV-211, 2008 WL 4899526, at *2 n.2 (E.D. Tenn. Nov. 12, 2008).

49. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2011); *see also In re* Ayeni, 822 A.2d 420, 421–22 (D.C. 2003) (disbarring defense counsel for, among other things, submitting a voucher for nineteen hours of work on a brief that was "virtually identical to the brief filed earlier by his client's co-defendant"); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 299–301 (Iowa 2002) (finding a violation because the lawyer requested $200 per hour for eighty hours of work on a plagiarized brief that "d[id] not reveal any independent labor or thought in the legal argument").

50. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(1) (2011); *see also* A.L. v. Chi. Pub. Sch. Dist. # 299, No. 10 C 494, 2012 WL 3028337, at *6 (N.D. Ill. July 24, 2012) (reducing plaintiff counsel's attorney's fee request by ninety percent because large portions of counsel's briefs were lifted, without attribution, from prior decisions of the court); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2000) (discussing "Reasonable and Lawful Fees" an attorney may charge).

as to his client."[51] By upsetting this design, a lawyers' plagiarism in a submission to the court violates Model Rule 8.4(d) as conduct "prejudicial to the administration of justice . . . ."[52] The lawyer's plagiarism creates a genuine risk that the court's written opinion will inadvertently plagiarize, and it also distorts the meaning and import of the lawyer's adversarial argument on the client's behalf. Courts, however, have yet to explore advocates' plagiarism through the Model Rule 8.4(d) lens.

A. The Design of the Adversary System

In the adversary system, said former ABA President Whitney North Seymour, "[e]xperienced judges know and, indeed, many proclaim that the quality of their performance depends heavily on the skill and breadth of the advocacy which they can consider in reaching their judgments."[53] "The law is made by the Bar, even more than by the Bench," said then-Judge Oliver Wendell Holmes in 1885.[54] Justice Louis D. Brandeis concurred as he ascended to the Supreme Court bench in 1916: "[A] judge rarely performs his functions adequately unless the case before him is adequately presented."[55]

The courts' acknowledged reliance on adversary parties to identify and develop legal issues is nearly as old as the nation itself. The Supreme Court has long held that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[56] This holding serves as a safety valve that relieves courts of any perceived obligation to give precedential effect to questions previously overlooked by the parties and not determined by the court. The holding dates from a majority opinion delivered by Chief Justice John Marshall in 1805.[57] To this day,

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

52. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2011).

53. Seymour, *supra* note 13.

54. OLIVER WENDELL HOLMES, *The Law*, *in* SPEECHES BY OLIVER WENDELL HOLMES 16, 16 (1896) (speech delivered Feb. 5, 1885), *available at* http://ia700408.us.archive.org/30/items/cu31924014419547/cu31924014419547.pdf.

55. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916); *see also, e.g.*, Walter V. Schaefer, *The Advocate as a Lawmaker: The Advocate in the Reviewing Courts*, *in* CLASSIC ESSAYS ON LEGAL ADVOCACY 420, 420 (George Rossman ed., 2009) ("[R]eviewing courts make law; and . . . advocates have a part in the lawmaking process.").

56. Webster v. Fall, 266 U.S. 507, 511 (1925).

57. *See* United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) ("No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.").

"[j]udicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."[58]

The central role of the parties' arguments in the administration of justice is not universal among western legal systems. In the inquisitorial process that marks many European legal systems, the judge investigates cases, calls and questions witnesses, and presents evidence; the parties' lawyers generally assume subordinate roles, often limited to submitting questions that the judge may ask.[59] Consistent with the inquisitorial process is the European maxim *ius curia novit* ("the court knows the law"), which suggests that regardless of the content or quality of counsel's submissions, the court will apply relevant sources of law to the facts determined at trial.[60]

The Court of Appeals for the Fifth Circuit may have exaggerated when it likened judges to "sophisticated uninitiates" when they receive adversary argument.[61] As the Court of Appeals for the Seventh Circuit acknowledges, however, the sheer breadth and intricacy of the American legal fabric mean that the Supreme Court and the lower federal and state courts "rely on lawyers to identify the pertinent facts and law."[62] American judges are generalists with "limited knowledge of specialized fields,"[63] and the adversary system assumes that the court does not necessarily "know the law" unless the submissions of the parties and amici curiae present the law, together with claims and arguments.

B. Inadvertent Judicial Plagiarism

Judicial reliance on the lawyers' adversary presentations has immediate consequences for the courts' opinion writing and thus for the administration of justice. As "an officer of the legal system,"[64] a

58. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting).

59. *See, e.g.*, Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 264–65 (2000).

60. *See, e.g.*, C.H. van Rhee, *Introduction* to EUROPEAN TRADITIONS IN CIVIL PROCEDURE 185, 190 (C.H. van Rhee ed., 2005); *see also* P. Oberhammer & T. Domej, *Germany, Switzerland, and Austria*, *in* EUROPEAN TRADITIONS IN CIVIL PROCEDURE 295, 303 (C.H. van Rhee ed., 2005).

61. Dall. Typographical Union, No. 173 v. A.H. Belo Corp., 372 F.2d 577, 579 (5th Cir. 1967).

62. *In re* Cont'l Cas. Co., 29 F.3d 292, 295 (7th Cir. 1994).

63. Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc., 513 F.3d 652, 658 (7th Cir. 2008).

64. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2011); *see also, e.g.*, Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) ("[L]awyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"); Norelus v. Denny's, Inc., 628 F.3d

lawyer submits briefs and other papers with the expectation that the court may incorporate portions of the prevailing party's argument and analysis in the opinion that accompanies the interlocutory or final decision.[65] Whether or not the opinion cites to the lawyer's submission, incorporation can be a professional badge of honor for counsel who prevail. "When an attorney writes such an excellent brief that some of its passages make their way into the eventual decision, he experiences a sense of gratification," said Chief Justice George Rossman of the Oregon Supreme Court more than a half century ago.[66]

The prospect of judicial incorporation means that, unless the judge or law clerk parses the parties' briefs and other submissions in search of paragraphs or pages of copied work, a plagiarizing lawyer's "literary theft"[67] can land in the written opinion as the court's own inadvertent literary theft. Successful parsing is by no means guaranteed because, in the academic arena as elsewhere, much plagiarism goes undetected despite determined efforts to uncover it. Regardless of whether judicial sleuthing for lawyers' plagiarism actually detects unauthorized copying in any of the hundreds of cases that busy courts consider each year, however, sleuthing would compromise the sound administration of justice by forcing courts to expend time and other finite resources that they could more efficiently spend managing their "pressing dockets" and deciding cases.[68]

The court's inadvertent incorporation of plagiarized portions of a party's brief may smack of shortcutting that questions the competence and diligence that the ABA *Model Code of Judicial Conduct* expects from judges.[69] Where the lawyer plagiarizes an article or other private source, the court's incorporation may also smack of misappropriating intellectual property and thus may implicate "impropriety and the appearance of impropriety" that the judicial code summons judges to avoid.[70] Inadvertence would

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1270, 1308 (11th Cir. 2010) ("[E]very lawyer serves, not only as an advocate, but as an officer of the court.").

65. *See, e.g.*, Herbert F. Goodrich, *A Case on Appeal—A Judge's View*, *in* CLASSIC ESSAYS, *supra* note 55, at 517 ("[S]ome judges lift a portion of the successful party's brief and incorporate it into the opinion of the court.").

66. George Rossman, *Appellate Practice and Advocacy*, 34 OR. L. REV. 73, 73 (1955).

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

68. JOHN G. ROBERTS, JR., CHIEF JUSTICE'S 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf (discussing the federal courts' "pressing dockets" and efforts to produce "cost savings, improved efficiency, and reduce[] backlogs").

69. MODEL CODE OF JUDICIAL CONDUCT R. 2.5 (2010).

70. *Id.* at R. 1.2.

remove the basis for judicial discipline but would not necessarily blunt public or professional criticism of the judge, who holds ultimate "responsibility personally to decide the matter" under the judicial code.[71]

The Illinois Supreme Court has held that lawyers' plagiarism "displays an extreme cynicism towards the property rights of others" and "a lack of honesty,"[72] declaring that "all honest scholars are the real victims."[73] When lawyers infect the proceeding with plagiarism that may find its way into the court's opinion, they prejudice the administration of justice because the ABA Model Code of Judicial Conduct summons judges to "aspire at all times to conduct that insures the greatest possible public confidence in their . . . integrity."[74]

"Judges hold a position of public trust," concludes Chief Justice John G. Roberts, Jr., "and the public has a right to demand that they adhere to a demanding code of conduct."[75] At the least, this aspiration and public right contemplate that judges will meet the standards of integrity that Model Rule 8.4 demands from the lawyers who appear before them.

C. Distorting the Adversary Argument

"[T]he judicial process [is] at its best," wrote Justice Felix Frankfurter, when courts receive "comprehensive briefs and powerful arguments on both sides."[76] Counsel's plagiarism compromises the sound administration of justice (and, as Justices Frankfurter and Marshall suggested, may also weaken the client's cause) by inducing the court to mistake the brief's copied passages as products of counsel's own partisan thought processes, rather than as an uncompensated nonparty's analysis presumably helpful to the proponent. "[C]ases are won on the facts and the law," said Judge John C. Godbold of the Court of Appeals for the Eleventh Circuit, "not on the eminence, polished writing, oratory, or personality of counsel."[77]

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

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71. *Id.* at R. 2.9(A)(3).

72. *In re* Lamberis, 443 N.E.2d 549, 551–52 (Ill. 1982).

73. *Id.* at 552.

74. MODEL CODE OF JUDICIAL CONDUCT pmbl. ¶ 2 (2010).

75. JOHN G. ROBERTS, JR., CHIEF JUSTICE'S 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2007), *available at* http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf.

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

77. John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 808 (1976).

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

In *Burghoff,* counsel would have better served the administration of justice by informing the bankruptcy court that his analysis reflected the presumably disinterested perspectives of two prominent practitioners in a law review article or, at least, by citing the article and inviting the court to consider it for whatever persuasive value the court might ascribe. Similarly, in *Kingvision Pay Per View*, counsel overlooked the prospect that the court might have deliberated differently if it had known that argumentation came from the iconic multivolume Wright-Miller-Cooper federal civil practice treatise and not from counsel's own prose created on retainer.

CONCLUSION

Reported decisions calling attention to lawyers' plagiarism were rare before 2000.[78] Plagiarism today, however, imposes professional embarrassment when the list of counsels' appearances or the court's opinion itself identifies the lawyer whose "literary theft"[79] fits so naturally within Model Rule 8.4(c)'s recitation of "conduct involving dishonesty, fraud, deceit or misrepresentation."[80] Even where the court does not recommend a sanction for a violation,[81] being labeled a plagiarist in the bound reporter or on electronic retrieval is a

78. *See, e.g.*, *In re* Hinden, 654 A.2d 864, 865 (D.C. 1995) (noting that a lawyer was publicly censured for plagiarism in an article he wrote); *Lamberis*, 443 N.E.2d at 550, 553 (censuring a lawyer for plagiarism in the LLM thesis he submitted to a law school); Frith v. State, 325 N.E.2d 186, 188 (Ind. 1975) (finding that about fourteen pages of defense counsel's brief were copied without quotation marks, indentation, or citation from a volume of American Law Reports (ALR) 3d).

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

80. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2011).

81. *See, e.g.*, State Farm Fire & Cas. Co. v. Harris, No. 3:11-36-DCR, 2012 WL 896253, at *1 (E.D. Ky. Mar. 15, 2012) (noting that defense counsel's argument "is easily summarized, as all but six sentences (out of seven pages) are lifted—without attribution—directly from" a recent decision of the court); *id.* at *1 n.3 ("It should go without saying that such plagiarism is 'completely unacceptable.'").

serious setback for a lawyer, whose reputation for integrity is a core personal asset.[82]

Lawyers' plagiarism also violates Model Rule 8.4(d) as "conduct that is prejudicial to the administration of justice."[83] Not only does this plagiarism create a genuine risk of inadvertent plagiarism by the court; it also distorts the meaning and import of the adversarial argument that underlies reasoned decisionmaking.

"The process of deciding cases on appeal," wrote Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court, "involves the joint efforts of the counsel and the court."[84] He continues: "It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state."[85] The joint efforts that Chief Justice Vanderbilt pinpointed underscore the role of Model Rule 8.4(d)'s specialized mandate when lawyers plagiarize in written submissions to the court.

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82. *See, e.g.*, Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., 9 F.3d 1263, 1269 (7th Cir. 1993) ("A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter."); People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 492 (N.Y. 1928) (finding by Chief Judge Cardozo, that a lawyer's reputation "is a plant of tender growth, and its bloom, once lost, is not easily restored"); Stephen P. Younger, *Reflections on the Life and Work of the Honorable Hugh R. Jones*, 65 ALB. L. REV. 13, 13 (2001) (quoting Judge Jones of the New York Court of Appeals, who stated that "a lawyer's reputation is his principal asset").

83. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2011).

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

85. *Id.*