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Careful what you copy

Repurposing briefs can prove costly

LEGAL MALPRACTICE

By Timothy J. Miller

Timothy J. Miller is partner and general counsel at Novack and Macey. He is a member of the Association of Professional Responsibility Lawyers and The Chicago Bar Association. He is a frequent author and speaker on legal malpractice.
tmiller@novackmacey.com

Many, perhaps most, lawyers regularly recycle their old briefs and use them again when issues reoccur. In addition, firms have brief banks and encourage lawyers to reuse old briefs. Further, many lawyers rely on briefs available online to prepare their own briefs. As a result, it was a surprise to learn that at least one federal court considers reusing briefs without attribution to be dishonest and unethical.

In *United States v. Flynn*, No. 17-232, 2019 WL 6836790 (D.D.C. Dec. 16, 2019), the U.S. District Court for the District of Columbia wrote that it had "ethical concerns" about a party's brief.

Specifically, the court was concerned that a brief "lifted verbatim portions from a source without attribution." The "lifted" source was an amicus brief filed with the U.S. Supreme Court. Although the brief at issue provided a hyperlink to the "excellent briefing" in the nation's high court case that it copied, that was insufficient attribution to satisfy the court.

In *Flynn*, the court appeared to hold that copying another brief violated D.C. Rule of Professional Conduct 8.4(c). That rule condemns "dishonesty, fraud, deceit or misrepresentation."

Flynn cited three cases in support of its conclusion, but all three cases are readily distinguishable. In fact, only one of the three cases involved copying of a brief. In *In re Ayeni*, 822 A.2d 420 (D.C. Cir. 2003), a lawyer was disciplined in part because he filed a brief "that

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was virtually identical to the brief filed earlier by his client's co-defendant." 822 A.2d at 421.

Notably, that lawyer claimed to the court that he had never seen the co-defendant's brief. Moreover, the lawyer submitted a voucher "asserting that he expended more than [19] hours researching and writing the brief." In other words, he sought payment for a brief he copied from a co-defendant and falsely denied he had seen the brief he copied.

Neither of the other two cases cited in *Flynn* involved copying a brief. In *United States v. Bowen*, 194 F. App'x 393 (6th Cir. 2006), the court noted that a brief copied 20 pages of a published U.S. District Court opinion that the brief did not cite. 194 F. App'x at 402 n.3.

The court held that "citation to authority is absolutely required when language is borrowed." It further held that counsel's conduct was "completely unacceptable." Similarly, in *Kilburn v. Republic of Iran*, 441 F. Supp. 2d 74, 77 n.2 (D.D.C. 2006), the court addressed a brief that copied a paragraph from a published opinion.

The court "impress[ed] upon defense counsel its intolerance for plagiarism." The language used in these last two decisions is broad enough to condemn copying from a brief without attribution, but neither court addressed the differences between briefs and other works.

There is some relevant Illinois authority that discusses plagiarism, but none that addresses lifting passages from a brief. In *In re Lamberis*, 93 Ill. 2d 222 (1982), a lawyer submitted a thesis to his law school that was subsequently discovered to be copied "substantially verbatim" from two published works. Id. at 225.

The Illinois Supreme Court censured the lawyer, finding that he had "complete disregard for values that are most fundamental in the legal profession." Id. at 227.

Lamberis does not address copying from a brief and it is not surprising that passing off copied work as original scholarship was viewed as dishonest.

Similarly, two Illinois federal court decisions condemn copying from published opinions, but do not address copying from a brief. In *A.L. v. Chicago Public School District 299*, No. 10 C 494, 2012 WL 3028337 (N.D. Ill. July 24, 2012), the court reduced a requested fee award to 10% of the requested fee (from $27,117 to $2,711) because counsel's briefs were largely copied from court opinions without citation. Id. at *6-7.

Similarly, in *Consolidated Paving Inc. v. County of Peoria, Illinois,* No. 10 C 1045, 2013 WL 916212 (C.D. Ill. March 8, 2013), the court addressed a fee request from a lawyer who had copied large portions of a brief from a 7th U.S. Circuit Court of Appeals opinion.

The court wrote that it “does not look lightly upon passing off as one’s own the analysis and work of another.” As a result, the court refused to award any fees to the offending lawyer for preparing the brief in question.

As with the cases cited by the *Flynn* court, while these courts’ words could be applied to a brief that is copied without attribution, the courts did not address the differences between a brief and other written works.

My next column, running in May, will discuss authority that directly addresses copying a brief.