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Attribution aggravation: Make sure to cite your sources

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The first part of this column (which ran in March) began addressing the issue of whether it is inappropriate to copy from a brief without attribution. This column continues that discussion.

Unlike the authorities discussed in the last column, one source that directly addresses copying a brief is Formal Opinion 2018-3 of the New York City Bar Association. The opinion is titled: The "Ethical Issues of Plagiarism in Court Filings." In a nuanced discussion, the opinion largely approves of copying from briefs without attribution. Indeed, the opinion concluded that "copying from other writings without attribution in a litigation filing is not per se deceptive and therefore is not a per se violation of Rule 8.4(c)." (Id. at p. 1).

The New York opinion discusses cases (some of which were discussed previously) in which courts disapproved of copying without attribution. It notes that "most of the cases" it discussed "involved instances of copying without attribution from judicial opinions or published non-litigation sources such as treatises or articles, rather than copying from prior briefs." (Id. at 5).

Unlike the *Flynn* court, the New York City Bar Association's opinion recognized that "academic writing and litigation writing have very different purposes and norms." (Id. at 6). The opinion describes two primary differences between academia and litigation. "First, the purpose of a litigation filing is to persuade the court, not to convey an original idea or express an idea in an original way… Second, litigation filings are tailored for clients, who often pay for a lawyer's time." (Id).

The opinion recognizes that "clients have an interest in efficiency. If the lawyer can make an effective argument by recycling arguments articulated by others, then the client stands to save money." (Id). The opinion also acknowledges the reality that lawyers routinely copy from form books and their own prior work. Such conduct would, however, be condemned in academic writings. (Id. at 7). As a result of the differences between academic writing and litigation, the opinion concludes that "[t]hese goals – persuasiveness and efficiency – lead to acceptance in litigation of many kinds of unacknowledged copying which would require citations in academia." (Id. at 6).

The *Flynn* opinion that criticized a lawyer for copying a brief relates to a copied brief that was written by different lawyers than the lawyers who wrote the brief to which the court objected. It might be argued that quoting without attribution a brief that a lawyer personally wrote is different than quoting a brief written by a different lawyer. The New York City Bar Association opinion persuasively discusses the particular issue of quoting a brief written by another lawyer. It first notes that briefs are not precedential, "so citing the prior brief would not add to the persuasive force of the new brief." (Id. at 8). The opinion then states that an original author is not harmed by lack of attribution in a new brief because the original author was compensated by the original client. (Id). Finally, the opinion recognizes that signing a brief "is not a claim of authorship" or originality. (Id). In particular, Federal Rule of Civil Procedure Rule 11 does not suggest that a signature implies authorship. Indeed, local counsel routinely sign briefs written by non-local counsel. Thus, copying another lawyer's brief is not significantly different than copying one's own brief.

The lawyers involved in *Flynn* were called out for copying a brief even though they acknowledged the "excellent" brief they copied. It probably provides little comfort to those lawyers to know that the New York City Bar Association disagrees with the judge who criticized them. And, the fact that the judge's criticism is largely unsupported by case law does not erase the criticism. Ultimately, lawyers should know that at least one federal judge believes copying a brief without attribution is improper.