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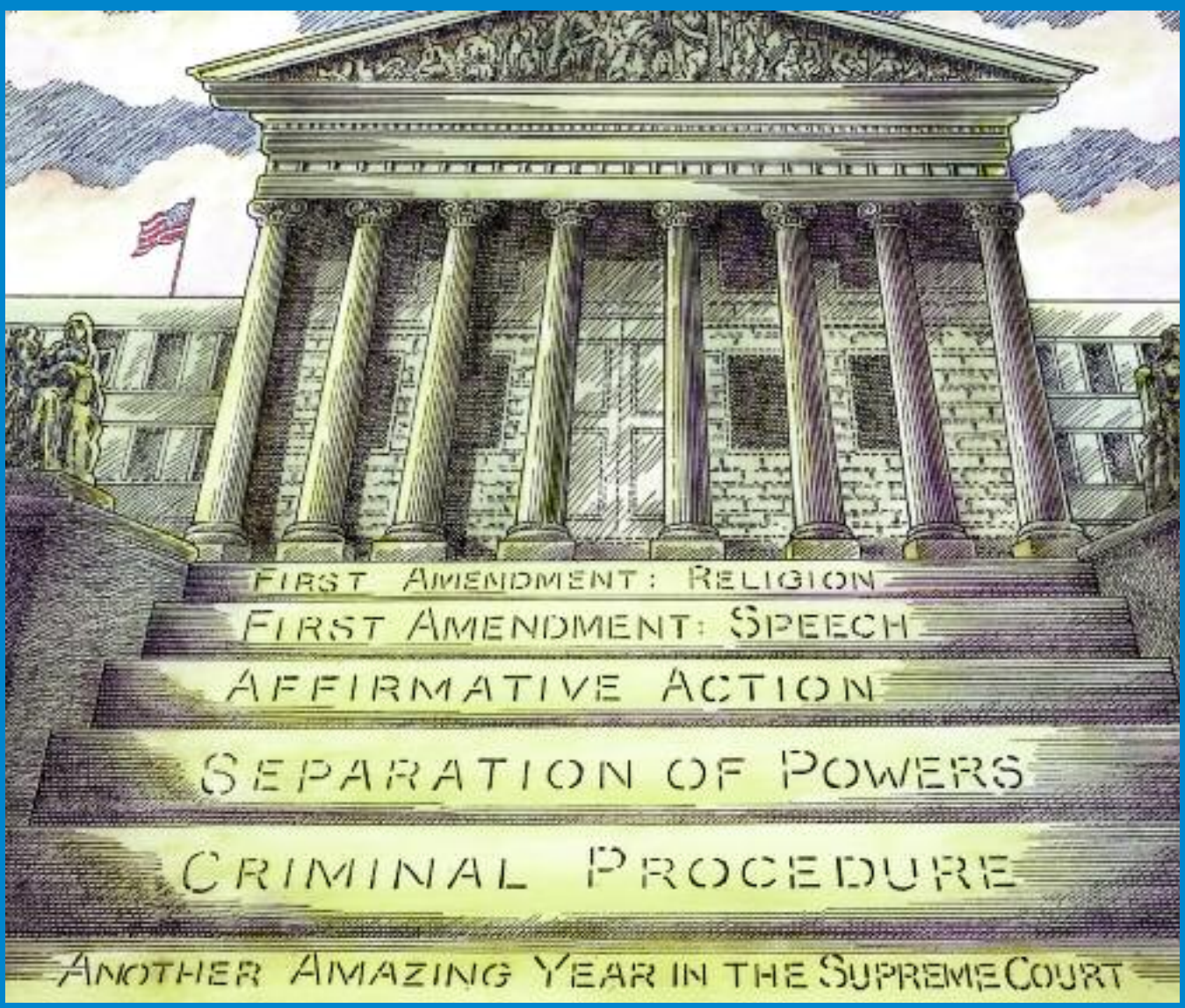

Editor's Foreword

Signing On: Big Shoes to Fill

By Benjamin G. Shatz

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Your immediate past Editor-in-Chief, John Derrick, had a pre-law background as a publisher and editor. John was an outstanding Editor-in-Chief, and had he chosen to decree himself Editor-in-Chief-for-Life, the Section leadership no doubt would have responded with a cheer. Alas, one of the best parts of volunteer work is calling it a day and passing the torch. Hence, John's farewell Editor's Foreword in our last issue displayed near giddy delight in relinquishing the administrative reins, allowing the heady joy of freedom to drive his purple prose ever upward in prematurely extolling his successor. (Too bad his column lacks an audio feature, because his encomiums would indubitably sound even more creditable in his impeccable Received Pronunciation, or — for you non-linguistics majors out there — his refined British accent.)

This is not the first time I've followed in John's footsteps — literally. John is addicted to half-marathons, seemingly running one every month or so. I am not a runner. But with his encouragement, I followed him — as best I could — in completing the Santa Barbara half last November. Thus I know I have big shoes to fill, because I have seen his actual shoes racing off into the distance ahead of me.

For fans of John — and to know him is to fall into that category — rest assured that he cannot escape this journal's responsibilities as quickly and as ably as he can run 13.1 miles. He will remain actively involved on the editorial board for as long as I can coax, persuade, and beguile him to do so.

I'm also incredibly humbled to be following in the footsteps of this journal's inaugural EIC, the amazing Mark Herrmann. I do not know Mr. Herrmann, but I feel like I know him, first because we both worked for Ninth Circuit Judge Dorothy W. Nelson (albeit many years apart) and second, because I have been a devoted fan of his oeuvre ever since reading his classic ditty *How to Write: A Memorandum from a Curmudgeon* (1997) 24:1 Litigation 3, upon which he expounded in *The Curmudgeon's Guide to Practicing Law* (ABA 2006). He is a superstar, as prolific and renowned in legal circles as his fellow prosopagnosiac, Brad Pitt, is in Hollywood. (See Herrmann, *Have We Met?* NYT 12/11/2013.) Again, another incredibly tough act to follow.

Indeed, it's an honor to be tracing the steps of the many legal luminaries who have helmed this journal, many of whom (thankfully!) remain on the board. As an Eagle Scout, all I can say is "I will do my best."

In the following pages, we offer a guide to the U.S. Supreme Court's upcoming term from one of America's leading legal scholars, followed by several articles suggesting improvements to our system of litigation. Next, we feature a healthy debate about plagiarism, which we hope will prompt you to share your thoughts. We conclude with some of our more or less regular columns on ADR and wisdom from highly experienced practitioners. I take that back: There's nothing "regular" about any of these articles, they are all outstanding. Enjoy — and provide your feedback or, better yet, submit an article of your own.

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Plagiarism:
Naughty, Knotty

By Benjamin G. Shatz

Officers of a Court erects as its foil the assertion that *Beg, Borrow, Steal* was itself an "argument" that plagiarism is "generally acceptable." This launching pad is a straw man. *Beg, Borrow, Steal* presented no "arguments" and most certainly did not in any way advocate, let alone, condone plagiarism. Rather, the article — like similar ethics columns in this series — noted an issue and described how various courts have reacted to it in recent decisions. It discussed various common activities that toe (or arguably cross) the plagiarism line, noting whether they drew sanctions or not. The article made no real normative analysis (i.e., was it right or wrong for sanctions to have been imposed?) nor did it attempt to exhaustively explore the wider issue under California law or otherwise. (Not that there's much to report; *Officers of a Court* offers scant citations that do little to further the analysis.)

Had our article provided advice of a questionably ethical nature, we would have expected significant and strenuous outrage. As it was, Mr. Bien's was the only critical feedback we received. We suspect most readers understood that we never said "plagiarism is ok." To the contrary, our only hortatory admonition was that authors should — of course! — provide crediting citations to sources. Our article proposed no solutions and took no positions, other than to expressly deride plagiarism as "poor practice" and urge practitioners to be careful about it.

To use Mr. Bien's own phrasing, we "respectfully disagree" with his characterization of our article, which we believe he has misread, confusing positions taken by various courts and commentators with our own advice, which was sparing (and urged full dis-

closure) to say the least. We, of course, agree with Mr. Bien wholeheartedly that plagiarism is "bad." And we recognize in his article the main premise of our own, which is the current lack of any bright-line rule.

'…nothing in the rules of court say that the lawyers whose names are on a pleading or brief are claiming originality or even authorship to the ideas or language in a brief as their own.'

Those interested in this topic should read Cooper J. Strickland's *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession*, 90 N.C.L. Rev. 920 (2012). Strickland explains the "reality" that "many forms of unattributed copying by attorneys are necessary and respectable and thus not deserving of the plagiarism label." (*Id.* at p. 922.)

Personally, we have encountered many briefs over the years that are blatant examples of plagiarism — briefs that copy swaths of text and citations from Witkin or other treatises, for example. These briefs have prompted the reaction, "wow, what terrible lawyering." We can all agree that plagiarism should not appear on any lawyer's list of best practices, and Mr. Bien is right to press that point home. But "best practices" versus punishable conduct are extremes with a wide continuum between. The sort of plagiarism that warrants punishment by a court is a different and more nuanced question. Our article attempted to provide some guidance based on recent cases directly on point (none from California). Our goal was an exercise in consciousness-raising, with a little bit of the standard "stick to the highroad" recommendation for prudence. We neither opined pleasure with the current gray state of the law nor did we attempt to propose any change. Our approach was more factual description than aspirational prescription. But we applaud Mr. Bien's vigor and raise a few points for further consideration.

— What's the Definition? —

The starting point for this analysis must be a definition of plagiarism. Mr. Bien argues that the Black's definition — the intentional presentation of another's ideas or expression as one's own — suffices for all contexts, including litigation. We are not so sure. Indeed, on the definitional point, "The reality is that legal practice is full of ethically acceptable forms of unattributed copying that fit neatly within many definitions of plagiarism but which do not warrant such a severe designation." (*Strickland, supra*, at p. 936; see also *id.* at p. 941.)

First, nothing in the rules of court say that the lawyers whose names are on a pleading or brief are claiming originality or even author-

ship to the ideas or language in a brief as their own. The rules require that attorneys' names be on briefs (e.g., Cal. Rules of Court, rule 8.204(b)(10)(D)) to serve the purpose of accountability: A court must know whom to hold responsible if the contents of a filing are false or misleading. Nothing in the rules indicates that names on a pleading or brief are a claim to authorship, as that term is understood in the arts or sciences.

"If a lawyer supports a black letter proposition of law by copying several case citations from a Rutter Guide or Witkin (something that probably happens every day) without citing the treatise, is that plagiarism?"

Indeed, as we noted, it is common for a lawyer's name to appear on a court submission when that lawyer had nothing or little to do with the actual thought and drafting that went into the document's creation. For example, a client-relationship partner may be "on a brief" simply by virtue of the lawyer-client relationship; or a trial lawyer's name may be on an appellate brief by virtue of that lawyer's past participation in the case, regardless of any input to the appellate brief. The actual author's name may or may not appear on the document. A paralegal may draft part of a brief or motion (Bus. & Prof. Code, § 6450, subd. (a)); or a lawyer may write a brief and yet have his or her name omitted for various reasons, with another lawyer's name appearing on the brief instead.

Under Mr. Bien's application, all these would be plagiarism because lawyers are presumably taking "credit" for ideas and expressions they did not personally "create." But as most lawyers, we believe, understand the purpose of a lawyer's name on the brief, those lawyers are merely taking responsibility for the brief, without necessarily claiming authorship. There is, therefore, no intent to deceive as to authorship, because authorship was never claimed to begin with.

Second, courts have expressed displeasure at lawyers who copy their own work, i.e., briefs they have written from other cases, calling that "plagiarism." But under the Black's definition, as long as the work really is from that same lawyer, it's not really plagiarism; it's just very poor practice — especially when documents are not properly proofed and names, dates and events from the earlier document are mistakenly included in the current one.

The practices noted above may not be best ones, but they do not necessarily seem, on their face, sanctionable. It would be preferable, perhaps, for lawyers to clearly explain

that "the idea for argument X in my brief, came from my brilliant partner, with whom I was discussing the case over lunch"; or that "significant portions of the brief on pages 3 and 4 were actually written by a crackerjack summer associate [who's not admitted to the bar, so I can't put her name on the brief]." Similarly, ideas and even written expressions of ideas may come from a lawyer's own client, partners, associates, co-counsel, paralegals, and perhaps others. Sure, it would be nice for credit to be given where due, but must it on pain of sanctions?

— Five Misreadings —

Mr. Bien argues against five positions supposedly "suggested" by our article. His characterization of these "suggestions" are misreadings.

First, he argues that we "suggest" plagiarism is only wrong if it involves large amounts of material. We took no position on that; what we did was describe case law where the courts involved apparently considered that to be an important factor. The more material that is copied, the more likely a court may be inclined to impose punishment.

Second, he argues that we condoned plagiarism in collaboratively produced works — and he argues that this is wrong because the entire team must be held accountable for copying. But our point addressed not that scenario, but rather the situation where a "team" consists of some lawyers who actually did no work on a brief at all, yet whose names appear on the document. We never argued that collaborative briefs should be treated differently; we merely pointed out that they generally are to this extent.

Third, he argues that we deemed it "permissible" to copy from books and treatises without attribution. But, again, we merely pointed out that this occurs. Our actual advice was to "give the cite," which is his position as well. The slippery slope here involves the copying of citations from treatises — reference works that exist seemingly for precisely this purpose. If a lawyer supports a black letter proposition of law by copying several case citations from a Rutter Guide or Witkin (something that probably happens every day) without citing the treatise, is that plagiarism? Does it matter whether the lawyer actually read the cases and confirmed that they really do support the point? (Again, of course that is obviously the best practice to follow. But if that is done, does that remove the plagiarism taint?)

'Presenting another person's ideas or expressions as one's own — in a context where originality is expected and valued — is a cardinal sin precisely because the reader is being deceived.'

Fourth, he argues that we "suggested" that plagiarism is more defensible when it is help-

ful to a client's cause. This, again, comes from the case law, not from us. Precedent shows that sloppy lawyers who copy large blocks of material inevitably end up copying wholly irrelevant material. This becomes the lightning rod that draws the court's fire: Judges are justly annoyed when tons of garbage is thrown at them; and when that irrelevant garbage happens to have been "plagiarized," the danger of sanctions looms even larger. It is just too tempting for a court to say "what you're giving me is crap, and you had the gall to copy it too!"

This also relates to the point about lawyers who copy their own work, a very poor practice that can lead to infuriating errors (such as using the wrong names for parties and discussing facts from another case). This is not, strictly speaking, plagiarism. But our point was that irrelevant material opened the door to court retribution.

Finally, Mr. Bien argues that we were wrong to suggest that copying from some materials may be less "blameworthy" than others. Again, this comes from the case law, and our point was that pirating from materials that typically are expected to be cited in litigation (such as published precedent, treatises, and law review articles) is — as the cases make it, not by our choice — apparently worse than copying from sources that are less likely to be cited — or indeed may not be cited as a matter of law (e.g., unpublished California opinions). Thus, not citing to a law review article that plainly should have been cited for an idea or phrasing is bad; but not citing to an encyclopedia for a fact is less bad. Again, this isn't our distinction; it is merely what we see in the caselaw.

Here are two examples: As part of the factual background in a brief, an attorney writes that "The dog was the first domesticated animal and is a widely kept pet." If this particular line comes directly from Wikipedia, is it sanctionable plagiarism not to credit the source? (And what if the attorney alters the wording slightly, so it is not a direct quote?) Although it is always best to source material, it seems less egregious not to do so here, than if the idea actually came from more typically cited litigation material.

Or consider this: An attorney finds a nice paragraph from a case she wants to use in a brief. If the case is published precedent, she could block quote it and give a citation. But if the case is unpublished, and thus the law prevents her from providing the citation, does that mean that she may not quote from it at all, because she may not provide attribution? That paradox seems unfair, and that is the unfairness we highlighted.

— The Gray Side of Bright Lines —

Presenting another person's ideas or expressions as one's own — in a context where originality is expected and valued — is a cardinal sin precisely because the reader is being deceived. Whether that is true in the litigation context is an open question. Judge Posner and the academics cited in our article apparently believe there is no harm; Mr. Bien believes otherwise. But even Mr. Bien can only go so far as to say that existing rules of professional conduct about behaving "honestly" only implicitly prohibit plagiarism, which is why he proposes a more express ethical rule. But he proposes no precise language for such a rule and does not seem to consider or address any of the problems that could arise from a bright-line rule (e.g., nearly everything in briefs would need to be sourced; how such a rule would be enforced as a practical matter, etc.).

Would you like to see such a rule? How would you draft it? Ponder the hypotheticals on page 2, fire up your word processor, and let us know.

Benjamin G. Shatz, a certified appellate specialist, co-chairs the Appellate Practice Group at Manatt, Phelps & Phillips, LLP, in Los Angeles. Like Mr. Bien, "he has written and spoken frequently on appellate practice and legal ethics." Co-author Colin McGrath, an associate at Manatt, endorses this response and assisted in its preparation.