THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2018-3: Ethical Implications of Plagiarism in Court Filings

TOPIC: Lawyer's duties when copying from other sources while drafting litigation filings.

DIGEST: Although a lawyer's verbatim use of another's writing without attribution in a brief or litigation filing is not *per se* deceptive under Rule 8.4(c), lawyers are well-advised to cite source material, particularly where language is lifted from published writings or judicial opinions as distinguished from prior briefs. Under specific circumstances, lifting language from source materials without attribution may violate any of several other Rules, including those requiring competence and diligence and forbidding frivolous filings. Moreover, although there does not appear to be a consensus of judicial opinion or an authoritative judicial rule or ruling in New York, many courts have disapproved of extensive copying in briefs.

RULES: 1.1(a), 1.3(b), 3.1, 3.3(a), 8.4(c)

QUESTION: Is it a violation of Rule 8.4(c) for a lawyer to copy verbatim from other sources without attribution when drafting a litigation filing?

OPINION:

I. INTRODUCTION

This Opinion addresses the ethical implications of a lawyer's verbatim use of another's writing in a brief or litigation filing. Specifically, we address whether the New York Rules of Professional Conduct (the "Rules") forbid a litigator from copying from other sources without attribution.

Rule 8.4(c) of the Rules provides that "[a] lawyer or law firm shall not: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Although, as detailed below, courts have invoked Rule 8.4(c) to discipline lawyers who plagiarize in academic settings,[1] we recognize that litigation filings serve a different purpose. Unlike academic papers (or writing samples), which purport to reflect the author's original work and analysis, legal briefs are submitted to present an argument on behalf of a client, and their value derives from their persuasiveness, not from their originality of thought or expression. A lawyer's signature on a brief is not a representation of authorship, much less of sole authorship, but rather a commitment to take responsibility for the contentions in the brief and an implied representation that the brief is not frivolous. For these reasons, we conclude 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

[1] For the purposes of this Opinion we interpret plagiarism to mean the use of "another person's original ideas or creative expression" as one's own. Black's Law Dictionary (10th Ed. 2014).

Rule 8.4(c).[2]

We emphasize, however, that the filing lawyer is responsible for the brief and cannot rely on the prior author to ensure compliance with the Rules. In particular, as discussed below, Rule 1.1(a) (competence), Rule 1.3 (diligence), Rule 3.1 (non-meritorious claims and contentions), and Rule 3.3 (conduct before a tribunal), are implicated when a lawyer files a document in court. In addition, if the lawyer subjectively intends to commit deception by omitting a citation in a litigation filing, then the lawyer may be violating Rule 8.4(c) and risks discipline under that Rule as well as under Rules 1.1, 1.3, 3.1, and 3.3.

That said, we strongly, encourage lawyers to cite their sources, particularly when the copied source is a prior judicial opinion or a published writing. And we emphasize that, notwithstanding the views expressed herein regarding the reach of the Rules, some judicial decisions disapprove of the practice of filing briefs that employ language from prior writings without attribution, and some judges have sanctioned lawyers for doing so on the grounds that the absence of a citation makes the brief misleading. Lawyers must take care to comply with the applicable judicial decisions on litigation conduct, whether based on an interpretation of the jurisdiction's professional conduct rules or derived from inherent judicial authority or other sources.

II. JUDICIAL DISAPPROVAL

In several cases, courts have disciplined lawyers for copying without attribution. The strongest condemnations are in a pair of Iowa opinions: *Iowa Sup. Ct. Atty. Disciplinary Bd. v. Cannon*, 789 N.W.2d 756 (Iowa 2010), and *Iowa Sup. Ct. Bd. of Prof. Ethics and Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002).

In *Lane*, the court suspended a lawyer for copying from a treatise without attribution. 642 N.W.2d at 298, 302. *Lane* held that this was a "misrepresentation to the court," which violated Iowa's version of Rule 8.4(c). *Id.* at 299. The court reasoned that "plagiarism itself is unethical," citing decisions involving *academic* plagiarism by lawyers. *Id.* at 300 (citing *In re Zbiegen*, 433 N.W.2d 871, 875 (Minn. 1988) (term paper); and *In re Lamberis*, 93 Ill.2d 222, 227-28 (1982) (masters of law thesis)). Aggravating factors may have informed the *Lane* court's view. When confronted, Lane initially admitted that he had "borrowed liberally," but then delayed responding to an order requiring him to identify the source; when he eventually complied, it was by submitting a four-page single-spaced list of sources in which he drew no attention to the treatise from which he had copied. 642 N.W.2d at 298, 300. This led the disciplinary court to conclude that Lane had "*knowingly* plagiarized and *intended* to deceive." *Id.* at 300 (emphasis added). Lane also claimed he had spent eighty hours drafting the brief,

[2] The law of copyright may constrain the extent to which lawyers can copy from prior sources while drafting litigation filings. *See, e.g.*, *Newegg v. Ezra Sutton, P.A.*, No. 15-CV-01395, 2016 WL 6747629 (C.D. Cal. Sep. 13, 2016) (lawyer infringed plaintiff's copyright by copying brief authored by plaintiffs); *cf. White v. West Pub'l. Corp.*, 29 F. Supp.3d 396, 399 (S.D.N.Y. 2014) ("finding "fair use" where publishing company uploaded others' litigation briefs to database). We do not opine on whether such copying constitutes a violation of the prior author's copyright. However, if it does, the copying lawyer may be violating Rule 8.4(b), which prohibits lawyers from engaging in "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

which the Court found "brings [his] integrity into question and the entire legal profession into disrepute." *Id.* at 301.

In *Cannon*, eight years after *Lane*, the Iowa Supreme Court publicly reprimanded a lawyer for copying seventeen pages out of a nineteen-page brief from an article without attribution. 789 N.W.2d at 758. *Cannon* acknowledged *Lane*'s holding that plagiarism is misconduct, and (like *Lane*) cited *Zbiegen*, the case involving plagiarism of a term paper. *See Cannon*, 789 N.W.2d at 759. *Cannon* also cited two additional disciplinary decisions post-dating *Lane*, both of which had characterized a lawyer's use of another's brief without citation as misconduct. *See id.* at 759 (citing *In re Ayeni*, 822 A.2d 420, 421 (D.C. 2003) and *Columbia Bar Ass'n v. Farmer*, 111 Ohio St.3d 137 (Ohio 2006)). Both *Ayeni* and *Farmer*, like *Lane*, involved evidence of a subjective intent to mislead.

In *Ayeni*, the lawyer filed a brief that was virtually identical to one filed by another lawyer on behalf of a codefendant. When confronted, the lawyer "denied having plagiarized," claimed that he had "never seen the co-defendant's brief," and asserted that his client's brief had been written "by an intern" – but the lawyer also submitted a voucher asserting he had personally spent nineteen hours researching and writing the brief. *See In re Ayeni*, 822 A.2d at 421. The court adopted the D.C. Board on Professional Responsibility's conclusion that this conduct violated Rule 8.4(c). *Id.*

In *Farmer*, the lawyer convinced a client to retain him after denigrating prior counsel's brief, but then re-filed the brief as his own. *Farmer*, 111 Ohio St.3d at 139-140. When questioned by the disciplinary board, the lawyer insisted that his clients were "lying about his promises and puffery." *Id.* at 141. The court concluded that the lawyer violated DR 1-102(A)(4) (the Ohio equivalent of Rule 8.4(c)) by "overpromising to perform in a way that would persuade the Martin family to retain him and continue to pay for his services." *Id.* at 142. For that violation, and others, the court suspended the lawyer from the practice of law for two years. *Id.* at 148.

The Iowa Supreme Court in *Cannon*, after citing *Zbiegen*, *Ayeni*, and *Farmer*, offered the following explanation:

> We do not believe our ethical rules were designed to empower the court to play a "gotcha" game with lawyers who merely fail to use adequate citation methods. This case, however, does not involve a mere instance of less than perfect citation, but rather wholesale copying of seventeen pages of material. Such massive, nearly verbatim copying of a published writing without attribution in the main brief, in our view, does amount to a misrepresentation that violates our ethical rules. We note that before this court, Cannon has candidly admitted that his activity represented dishonesty and not negligence or incompetence.

789 N.W.2d at 759.

In another case, *In re Mundie*, 453 Fed.Appx. 9 (2d Cir. 2011), the court disciplined a lawyer, in part for copying without attribution in a brief. However, *Mundie* did not analyze Rule 8.4(c) (or the prior relevant Code provision, DR 1-102(A)(4)). Instead, *Mundie* considered the issue as one of inadequate diligence. The brief "contained a number of defects and referenced irrelevant facts

and issues as a result of Mundie having incorporated portions of a brief from a different case without making necessary changes." *Id.* at *1. Mundie had obtained a model from a fellow practitioner and admitted that his adaptation had been careless. *Id.* at *7. The grievance committee (whose findings were adopted by the court) found that the conduct "does not amount to plagiarism," but did (together with the lawyer's having defaulted on dozens of other cases) warrant a finding that the lawyer breached his duty of diligence in violation of DR 6-101(A)(3) and Rule 1.3(b). *Id.* at *20-21.[3] While the Court did not invoke Rule 1.1 (competence), the deficiencies in the brief clearly represent a violation of that Rule. *See, e.g., id.* at *20 ("his failure to take proper care in that case had the potential to prejudice his client"). The court issued a public reprimand. *Id.* at *1. The First Department imposed reciprocal discipline without additional analysis. *See In re Mundie*, 97 A.D.3d 194 (1st Dep't 2012).

Additionally, two federal district courts in the Eastern District of New York have expressed the view that copying without attribution is deceptive and likely a violation of Rule 8.4(c). See *Liberty Towers Realty, LLC v. Richmond Liberty, LLC*, 569 B.R. 534, at 541 n. 6 (E.D.N.Y. 2017) (admonishing counsel not to omit citations in the future and asserting that plagiarism "violates rules of professional conduct in jurisdictions including New York"); *Lohan v. Perez*, 924 F. Supp.2d 447 (E.D.N.Y. 2013) (sanctioning counsel and asserting that "plagiarism of the type at issue here would likely be found to violate" Rule 8.4(c)). Both *Liberty Towers* and *Lohan* relied on *In re Steinberg*, 206 A.D.2d 232 (1st Dep't 1994), in which the court publicly censured a lawyer who submitted briefs written by others as writing samples in support of his application to be appointed to an assigned counsel panel. *See id*. at 233-34. While the misconduct involved briefs, the lawyer was not filing these briefs in a lawsuit as an act of advocacy but was instead relying on them as purported evidence of his own skill as a writer. See *id*. at 233.

Other decisions outside New York and the Second Circuit have invoked the rules of ethics as a basis to criticism the unattributed use of others' writings. For the most part, these decisions also appear to rely, directly or indirectly, on prior cases involving academic plagiarism. *See Consol. Paving, Inc. v. City of Peoria*, 2013 WL 916212, at *6 (C.D. Ill. Mar. 8, 2013) (declining to award otherwise compensable fees for preparation of fee application, based on counsel's having copied 5 out of 13 pages of a brief from prior cases (citing, *inter alia*, *Lamberis* and *Venesevich v. Leonard*, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec. 19, 2008)); *United States v. Sypher*, 2011 WL 579156, at *3 n. 4 (W.D. Ky. Feb. 9, 2011) (admonishing counsel for having copied legal standard section from Wikipedia without citation (citing *In re Burghoff*, 374 B.R. 681)); *Venesevich*, 2008 WL 5340162, at *2 n.2 (admonishing counsel for having copied 5 out of 8-page legal discussion section of brief from prior cases without citation (citing, *inter alia*, *Lamberis* and *Kingvision Pay Per View Ltd. v. Wilson*, 83 F. Supp.2d 914, 916 n. 4 (W.D. Tenn. 2000)); *Kingvision*, 83 F. Supp.2d at 916 n. 4 (admonishing counsel for having copied from treatise without citation (citing *Lamberis*; *Hinden*; and *Steinberg*)).

A number of other courts have condemned copying without attribution in litigation filings

[3] Rule 1.3(b) provides that "A lawyer shall not . . . [n]eglect a matter entrusted to the lawyer." DR 6-101(A)(3) was the corresponding provision under the prior Code of Professional Responsibility. Its text was identical to Rule 1.3(b).

without citing specific ethics rules. Foremost among these are three opinions from the federal Courts of Appeals for the Third, Sixth, and Eighth Circuits. *See, e.g., United States v. Bowen*, 194 Fed. Appx. 393, 402 n.3 (6th Cir. 2006) (counsel's "plagiarism" of a district court decision was "completely unacceptable" and "citation to authority is absolutely required when language is borrowed"); *United States v. Lavanture*, 74 Fed.Appx. 221, 224 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) (condemning counsel's appropriation of "both arguments and language without acknowledging their source"). These decisions have been cited for the proposition that citations must be provided when lawyers copy from prior sources.[4] With a handful of exceptions, all of the cases discussed in Part II 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.[5]

III. DIFFERENT CONTEXT, DIFFERENT NORMS

The above-discussed cases in which discipline was imposed – *Lane*, *Cannon*, *Ayeni*, *Farmer*, and *Mundie* – presented ethical issues beyond copying without attribution. In *Lane*, *Cannon*, and *Ayeni*, the circumstances (extensive copying, conscious lack of candor to court, and the amounts charged by lawyers for their work on briefs) suggested a subjective intent to mislead. In *Farmer*, the nature of the conversations between lawyer and client surrounding the copied brief led to a

[4] *See Ayala v. Lockheed Martin Corp.*, 2017 WL 838490, at *10-12 (V.I. Super. Mar. 3, 2017) (asserting that counsel's having copied half of brief from prior case without citation "does not rise to the level of a violation of the rules and standards governing the practice of law," but warning counsel not to repeat conduct on pain of sanctions (citing *Bowen* and *Lavanture*)); *Goza v. City Of Ellisville*, 2015 WL 4920796, at *2 n. 4 (E.D. Mo. Aug. 18, 2015) (expressing "strong disfavor" for counsel's having failed to cite paragraph copied from prior case without citation (citing *Bowen*, *Lavanture*, and *Jackson*)); *C.L. ex rel. K.B. v. Mars Area Sch. Dist.*, 2015 WL 3968343, at *6 n. 5 (W.D. Pa. June 30, 2015) (asserting that verbatim copying of "large portions" of brief from judicial opinion without citation "is plagiarism, and it is unacceptable" (citing *Bowen* and *Lavanture*)); *A.L. v. Chicago Pub. Sch. Dist. No. 299*, 2012 WL 3028337, at *6 n. 2 (N.D. Ill. July 24, 2012) (decreasing fee award to 10% of amount requested based on counsel's having copied "more than half" of brief from prior case without citation (citing *Bowen* and *Lavanture*)); *State Farm Fire & Cas. Co. v. Harris*, 2012 WL 896253, at *1 n. 3 (E.D. Ky. Mar. 15, 2012) (admonishing counsel for having copied almost all of 7-page brief from prior case without citation (citing *Bowen*)); *Denton v. Rievley*, 2008 WL 4899526, at *2 n. 2 (E.D. Tenn. Nov. 12, 2008) (criticizing counsel's having copied 8 pages from judicial opinion without adequate citation, and rejecting defense that "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" (citing *Bowen* and *Lavanture*)); *In re Reid*, 569 F. Supp. 2d 220, 221 n. 1 (D.D.C. 2008) (admonishing counsel for having cut-and-pasted entirety of "legal discussion" section from article without citation (citing *Bowen*)); *Venesevich*, 2008 WL 5340162, at *2 n.2 (criticizing counsel's "mass appropriation" from judicial opinions without citation (citing *Bowen* and *Lavanture*)); *Alamo v. Commonwealth of Puerto Rico*, 2006 WL 1716422, at *3 (D.P.R. June 19, 2006), *aff'd in part sub nom. Torres-Alamo v. Puerto Rico*, 502 F.3d 20 (1st Cir. 2007) (admonishing counsel for having submitted brief which was entirely copied from Supreme Court opinion without citation (citing *Lavanture*)).

[5] *See, e.g.*, *Bowen*, 194 F. App'x at 402 n. 3 (20 pages copied from case); *Lavanture*, 74 F. App'x at 224 n. 2 ("more than half" of 5-page section copied from case); *Liberty Towers Realty*, 569 B.R. at 541 n. 6 (5 pages copied from ABA article); *Goza*, 2015 WL 4920796, at *2 n. 4 (one paragraph copied from case); *Consol. Paving, Inc.*, 2013 WL 916212, at *6 (5 pages from case); *Lohan*, 924 F. Supp. 2d at 460 (entire brief copied from articles and blogs); *Venesevich*, 2008 WL 5340162, at *2 n.2 (5 pages copied from case); *Kingvision*, 83 F. Supp. 2d at 916 n. 4 (7 paragraphs (and related footnotes) out of 19 paragraph brief copied from treatise).

finding of misconduct. And in *Mundie*, the brief was hastily prepared and likely incompetent.

We are skeptical of the suggestion in some decisions that, like academic plagiarism, any copying without attribution is inherently unethical and deceptive. The academic plagiarism which led to the ruling in, for example, *Lamberis*, 93 Ill., 2d 222 (1982), which is widely cited in later opinions, was clearly deceitful and warranted discipline under Rule 8.4(c). *See id.* at 225 (46 pages of 93-page masters-of-law thesis incorporated verbatim unacknowledged excerpts from prior works). But academic writing and litigation writing have very different purposes and norms. As a result, we do not believe that copying without attribution in a brief is necessarily deceitful. *Cf.* Joy & McMunigal, 26 *Criminal Justice* 56, at 58 ("[a]ttaching the label of plagiarism to such copying and importing that concept in to the legal ethics arena in our view tends to mask rather than reveal ethical concerns such conduct may raise."). Two primary differences between academia and litigation drive this conclusion.

First, the purpose of a litigation filing is to persuade the court, not to convey an original idea or to express an idea in an original way. *See* Shatz & McGrath, *Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing*, California Litigation Vol. 26, No. 3 (2013) ("There are no bonus points for creative writing, rhetorical flourish, or intellectual brilliance. In fact, novel ideas are typically the weakest legal position and the hardest to argue."). This contrasts with academic works, which aim to present an original idea in the author's own words.

Second, litigation filings are tailored for clients, who often pay for the lawyer's time. As a result, 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. *See, e.g.* DuVivier, *Nothing New Under the Sun: Plagiarism in Practice*, Colo. Law., 32-May Colo. Law 53 at *54 ("The client has nothing to gain from paying an attorney to start from scratch with each new document").[6]

These goals – persuasiveness and efficiency – lead to acceptance in litigation of many kinds of unacknowledged copying which would require citations in academia:

Ideas: Litigators are not obligated to cite sources for their *ideas*, and typically do not do so unless citing the source strengthens the client's argument.

To illustrate: suppose that a lawyer finds a section from a treatise, law review article, or other secondary source addressing the client's legal issue. The secondary source states some propositions which are helpful, and some which are adverse to the client. If the lawyer writes a brief which paraphrases the helpful propositions, and cites the authorities which the secondary source cites (after reviewing them to ensure that the secondary source has characterized them accurately and that they have not been reversed, amended, or abrogated), then the lawyer has no obligation to cite the secondary source itself. Indeed, omitting a citation to the secondary source is routine. *See, e.g.*, DuVivier, *supra* (many lawyers find it to be "more effective to build the argument in the same way as the source, without specifically referencing the creator of this

[6] Of course, a lawyer who saves time by copying from the work of others must pass the cost savings onto the client or risk discipline for charging an excessive fee. *Cf., e.g., Lane*, 642 N.W.2d at 301 (lawyer improperly charged eighty hours for copied brief).

particular construction."). Moreover, the lawyer is not required to alert the Court to the unhelpful portions of the source. At most, the lawyer would have a duty under Rule 3.3(a)(2) to alert the Court to the cases cited in the unhelpful portions of the source—though not to the secondary source itself—and even then, only if the underlying cases were controlling, adverse, and have not been cited by the adversary.[7]

In academia, on the other hand, it is plagiarism to omit a citation for the source of an idea, whether or not the exact words are copied. *See, e.g.*, Columbia Law School Faculty Resolution on Principles of Academic Honesty (defining student "plagiarism" to include "[f]ailure to cite . . . *ideas* or phrases gained from another source . . . .") (emphasis added), *available at* www.law.columbia.edu/academic-rules/certifications-academic-integrity (last visited March 13, 2018).

Form books: Litigators routinely copy without attribution from form books. Forms are published specifically to be mined for ideas, language, and structure. *See* Band and Schruer, "*Dastar*, Attribution, and Plagiarism," 33 AIPLA QJ 1, at 14 (2005) ("Presumably, few lawyers think twice when duplicating formatting suggested by *Bender's* Federal Forms, or downloading templates from a court website."). And forms are not precedential, so a citation to a form book would add no persuasive force to a lawyer's argument.

Reuse of one's own prior work product: Litigators also routinely recycle their (or their law firm's) prior briefs. A brief that was successful for one client might be just as successful for another, and the second client would likely prefer not to incur the unnecessary cost of re-inventing that winning brief. Indeed, in *In re Mundie*, 453 Fed.Appx. 9 (2d Cir. 2011), the court did not condemn the lawyer's admitted practice of using prior briefs as uncited models; this practice only led to discipline when the lawyer neglected to adequately modify the model to fit the facts of the case. *See* 454 Fed.App'x at 18 (lawyer's other briefs based on the same model were "properly tailored" and "generally well-drafted").

In academia, on the other hand, self-plagiarism is condemned as a close cousin to plagiarism of others' work. *See, e.g.*, Columbia Law School Faculty Resolution on Principles of Academic Honesty (defining student "self-plagiarism" to include "[t]he submission of one piece of work in more than one offering or in any two exercises for credit without explicit permission of the instructors involved"); *see also, generally*, Lederman, "A Study of Self-Plagiarism," Inside Higher Ed (Dec. 3, 2010), *available at* www.insidehighered.com/viewes/2010/12/03/zirkel (last visited March 13, 2018).

IV. USE OF OTHER LAWYERS' BRIEFS

Having reviewed these litigation norms, we turn to the question whether it is a *per se* violation of

[7] Rule 3.2(a)(2) provides that a lawyer shall not knowingly "fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." If the brief in question is an opening brief, the lawyer may wait to cite adverse authority until after opposing counsel has filed the opposition brief, because the lawyer has the opportunity to acknowledge the adverse precedent in reply. *See* Roy D. Simon & Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* at 1096-1097 (2017).

Rule 8.4(c) for a lawyer to copy without attribution from a brief written by *another* lawyer or law firm (as distinct from copying without attribution from the lawyer's own prior work product). We do not believe that it is.

The interests in persuasiveness and efficiency discussed in Part III do not apply any differently if the underlying source is a brief written by another lawyer. Briefs are not precedential, so citing the prior brief would not add persuasive force to the new brief. As a result, the lawyer's client is not prejudiced if the lawyer omits a citation to a prior brief.

Nor is the original author harmed by the omission of a citation in the new brief. The original author drafted the prior brief to serve the lawyer's own client's objectives. Once the brief was filed, those objectives were served. The lawyer was entitled to receive compensation for drafting and filing that brief in accordance with the lawyer's contractual relationship with the client, and that compensation is not diminished if some other lawyer later copies from the brief.

Nor is the court deceived. A lawyer's signature on a brief is not a claim of authorship or of exclusive authorship. While procedural rules require that briefs be signed by a lawyer, the purpose of these rules is to identify the lawyer who is subject to sanction if the brief is frivolous, not to identify the author. *See, e.g.*, Rule 11 of the Federal Rules of Civil Procedure; Rule 130-1.1 of the Uniform Rules of the New York Trial Courts; *see also* Joy & McMunigal, "The Problems of Plagiarism as an Ethics Offense," *Criminal Justice*, Volume 26, Number 2, Summer 2011 ("Originality, for example, is notably absent from the list of representations Rule 11 states that a lawyer certifies by signing [a brief]."); *cf. Fed. Intermediate Credit Bank of Louisville v. Kentucky Bar Ass'n*, 540 S.W.2d 14 (Ky. 1976) ("Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer's adopting another's work, thus becoming the 'drafter' in the sense that he accepts responsibility for it.").

In re Ayeni, 822 A.2d 420 (D.C. App. 2003), and *In re Farmer*, 111 Ohio St.3d 137 (Ohio 2006), both imposed discipline on lawyers who copied without attribution from briefs written by others. But, as discussed in Part I above, both *Ayeni* and *Farmer* involved clear evidence of a conscious subjective intent to deceive, above and beyond the mere omission of a citation. In *Ayeni*, the lawyer overbilled for the copied brief, but then blamed an intern for the misconduct. *See* 822 A.2d at 421. And in *Farmer*, the primary nature of the violation was not the recycling of the brief, but rather that the lawyer lied to his own client about the brief. *See* 111 Ohio St.3d at 141-42. We do not read either case as implying a general rule that lawyers must always provide attribution when they copy from briefs written by others.

A prior opinion by the North Carolina State Bar Association ("NC Bar") is consistent with our analysis. In Formal Ethics Opinion 2008-14, the NC Bar held that "it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer." The NC Bar reasoned:

> Lawyers often rely upon and incorporate the work of others when writing a brief, whether that work comes from a law firm brief bank, a client's brief bank, or a brief that the lawyer finds in a law library or posted on a listserv on the Internet. By its nature, the application of the common law is all about precedent, which

> invites the re-use of arguments that have previously been successful and have been upheld. It would be virtually impossible to determine the origin of the legal argument in many briefs. Moreover, the utilization of the work of others in this context furthers the interests of the client by reducing the amount of time required to prepare a brief and thus reducing the charge to the client. *See* RPC 190 (1994). It also facilitates the preparation of competent briefs by encouraging lawyers to use the most articulate, carefully researched, and comprehensive legal arguments.

In the same opinion, the NC Bar also asserted that, if the lawyer knows the identity of the author of the excerpt which he or she intends to use, "it is the better, more professional practice, for the lawyer to include a citation to the source." In this respect only, we part ways with the NC Bar. We do not believe, as a general matter, that the reader of a brief would expect to see a citation to a prior brief on which the argument is modeled. If the argument was successful in the prior case, the more typical practice would be to draw the new court's attention to the prior court's *ruling*, which is precedential, and presumably would add some persuasive force to the new brief. If the argument was unsuccessful before, then the lawyer might not wish to draw the court's attention to what the prior court did, and is not required to do so unless the prior opinion is adverse and binding, and has not been cited by opposing counsel. *See* Rule 3.3(a)(2).

We also find instructive a prior opinion by the New York State Bar Association which discussed whether a lawyer could ethically follow the direction of an insurance carrier to rely on the insurance carrier's suggested third-party research service and "brief bank." *See* NYSBA Ethics Op. 721 (1999). Among other things, the State Bar concluded that the lawyer could ethically draw from the brief bank if the lawyer concluded, "in the exercise of independent professional judgment," that no additional work was necessary. Notably, the State Bar did *not* express any reservation about the contemplated undisclosed use of briefs authored by others as a potential violation of Rule 8.4(c) (or DR 1-102(A)(4)).

V. JUDICIAL OPINIONS AND PUBLISHED WRITINGS.

Lastly, we consider whether lawyers may copy without attribution from judicial opinions and published writings such as articles, treatises, and blog posts, or whether to do so is inherently deceptive and a violation of Rule 8.4(c).[8] We are not aware of any ethics committee which has previously considered this question.

There are certain ways in which published writings and judicial opinions are different from prior

[8] A preliminary question to be addressed is whether there is any non-deceptive reason why a lawyer might want to omit a citation to quoted material from a case or published writing. While the explanation which springs quickest to mind is laziness or inattention (which can in extreme cases amount to a violation of Rule 1.1(a)), we think there are at least three non-deceptive reasons for omitting a citation. First, as in the example discussed in Part II above, the quoted source might include statements that are adverse to the client but not binding precedent. The lawyer might not want to (and has no obligation to) alert the court to those statements. Second, the source might have expressed an idea in a particularly cogent and compelling way, but in service to a conclusion or holding which would be different enough to require explanation, if the lawyer were to cite the source. In such a case the lawyer might conclude that to invoke the source and explain it would distract unduly from the flow of the argument. Third, the lawyer might believe that there is something about the source (perhaps the author or the publication) which would lead the judge to unfairly discount the argument if the judge knew of it.

briefs written by others. But in our view, these differences lead us to conclude that it is invariably deceptive to lift unattributed language from published writings and opinions.

Published writings: The primary difference between published writings and briefs is that there is arguably a greater risk of harm to the original author if the quoted work is not cited. Published writings, unlike briefs, are written in a context in which originality is prized and attribution is expected. In legal academia, in particular, authors are rarely compensated directly, and the benefit of publication is reputational. *See* Band and Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA Q. J. 1 (2005) ("Because reputational credit is the currency, attribution is essential for the scholar to realize the value of his or her research."). For legal scholars, it is a mark of influence to be cited in a judicial opinion, and commentators have even ranked the relative influence of scholars based on the rates at which they are cited. *See* Farris et al., *Judicial Impact of Law School Faculties (*Aug. 18, 2016), *available at* SSRN: ssrn.com/abstract=2826048. When a litigator copies material from an article, but does not cite the scholar, the court cannot credit the scholar even if the court finds the reasoning persuasive, and the scholar will not be perceived to be as influential as he or she in fact is.

On the other hand, as discussed in Part III above, lawyers routinely employ paraphrased ideas in legal briefs without citing their sources. And a failure to acknowledge the scholar from whom one learns an idea may be similarly prejudicial to the scholar whether the exact words are borrowed or the paraphrased idea is borrowed. Although arguably a scholar might expect to be cited when his ideas (whether paraphrased or copied verbatim) are used in a legal brief, the central question with respect to Rule 8.4(c) is not what the author expects but, rather, what the court expects. And since courts routinely expect, and accept, copying in legal briefs, we conclude that there may be circumstances where copying text from published writings without attribution in legal briefs is not deceptive and, therefore, that it is not a *per se* violation of Rule 8.4(c).[9]

Judicial opinions: The concern articulated above relating to the risk that the original authors would suffer concrete harm if their work were quoted without attribution does not apply as strongly when the prior source is a judicial opinion. While some judges develop reputations as influential thinkers and writers, many do not, and it is not commonly required by rules of citation that the individual judge who wrote an opinion be named when the opinion is cited. *Cf.* The Bluebook (20th Ed. 2015) § 10.4 (suggesting that "every case citation must indicate which court decided the case," but not requiring identification of the authoring judge). Moreover, judges are salaried public servants whose livelihoods do not depend on their being recognized for the influence of their opinions.

A separate concern potentially applies to the practice of copying without attribution from judicial opinions (and to particularly influential secondary sources such as Restatements of the law). Judges rely on precedent in issuing their rulings. The orderly development of the common law is advanced when a judge is aware of what other judges have said concerning an issue. Judges rely on the lawyers to alert them to these prior pronouncements. Indeed, some judges even copy

[9] As discussed in note 2, *supra*, this opinion does not address whether copying without attribution constitutes a violation of the copyright laws.

reasoning from the prevailing party's brief into their ruling. If a court copied the prevailing party's argument verbatim, only to learn that the lawyer had copied that argument from a case which would have been readily distinguishable if the court had known of it, the result could be a confusing pair of cases with similar language but different holdings. The same risk is not present when the lawyer copies from a prior brief or other non-precedential document. Despite the heightened potential for complications where ideas or language are lifted from prior judicial opinions, however, we are not persuaded that copying from a prior judicial opinion without attribution in a brief is always deceptive and therefore a *per se* violation of Rule 8.4(c).

VI. OTHER RULES, IN ADDITION TO RULE 8.4(C), REGULATE LITIGATION FILINGS

Our opinion that copying without attribution is not *per se* deceptive is based on our view of the norms of litigation practice and the purposes of litigation filings. Over time, courts will continue to express opinions on the propriety of copying without attribution, and it is possible that these decisions will coalesce into a clear judicial consensus that copying without attribution is *per se* deceptive for certain kinds of sources or when a certain volume of material is copied. If that consensus emerges (or if courts in New York issue an authoritative rule or ruling), we would need to revisit this opinion. To fail to cite a source, despite having knowledge that the court expects that source to be cited, would constitute a lack of candor and, in all likelihood, an act of deliberate deception in violation of Rule 8.4(c). As of now, however, we do not believe such a consensus exists in New York.[10]

Instead, we believe that in many of the cases described in Part II, the courts' condemnation is better understood as a response to *extensive* and *ill-considered* copying, which implicates a host of other Rules – in addition to court procedural rules such as Rule 11 of the Federal Rules of Civil Procedure and Rule 130-1.1 of the Uniform rules of the New York Trial Courts.

Rule 1.1(a) requires lawyers to "provide competent representation to a client," which entails "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." If the lawyer copies extensively and inaptly from a treatise or prior judicial opinion, the brief may give the court little guidance on how the law applies to the facts of the case and may leave the adversary's arguments unrebutted. The resulting brief may advocate

[10] The norms of ghostwriting (a lawyer's undisclosed drafting of papers on behalf of a supposedly *pro se* party) show the importance of judicial expectations. Some jurisdictions have historically viewed ghostwriting as a *per se* violation of Rule 8.4(c). In *Lane*, for instance, the Iowa Supreme Court asserted that ghostwriting is "akin" to plagiarism, and that "[j]ust as ghost-writing constitutes a misrepresentation on the court, so does plagiarism of the type we have before us." 642 N.W.2d at 299 (collecting cases condemning ghostwriting). By contrast, this Committee, in Formal Opinion 1987-2, took a more nuanced view, concluding that ghostwriting "may" amount to dishonesty, depending upon whether the lawyer "is rendering active and substantial legal assistance" behind the scenes. More recently, following the enactment of Rule 1.2(c) (which explicitly permits limited-scope representations), the New York County Lawyers' Association, in Opinion 742, issued an even more permissive opinion, concluding that disclosure of the fact that a brief was "prepared with the assistance of counsel" is required by Rule 8.4(c) only when disclosure is mandated by "(1) a procedural rules, (2) a court rule, (3) a particular judge's rule, (4) a judge's order in a specific case," or when nondisclosure would "constitute a misrepresentation." We believe a similar standard applies to the question whether omission of a citation is deceptive and a violation of Rule 8.4(c).

ineffectively for the client and may therefore violate Rule 1.1(a). *See* Shatz & McGrath, "Beg, Borrow, Steal" ("[C]ourts are especially concerned not so much with the mere copying of someone else's work, but rather the act of copying *in lieu* of customizing a brief to the issues and circumstances of the case."); Joy & McMunigal (urging courts to focus on competence and diligence in reviewing whether particular instances of copying without attribution rise to the level of ethics offenses).

Rule 1.3(a) requires lawyer to "act with reasonable diligence and promptness in representing a client," and Rule 1.3(b) provides that "[a] lawyer shall not neglect a legal matter entrusted to the lawyer." A lawyer who copies large sections of a brief at the last minute before a filing deadline, leaving little time to tailor the brief to the facts, may violate Rule 1.3 by neglecting the matter, in addition to violating Rule 1.1(a).

Rule 3.1(a): When the amount of copying is extensive, the failure to tailor the brief to the situation before the court may be so egregious that the brief no longer stands as a good-faith filing made for a proper purpose. Rule 3.1(a) specifically prohibits the lawyer from engaging in "frivolous" litigation conduct. Rule 3.1(b) defines "frivolous" conduct as including the advancement of "a claim or defense that is unwarranted under existing law," as well as conduct which "has no reasonable purpose other than to delay or prolong the resolution of litigation . . . or serves merely to harass or maliciously injure another." The Comment to Rule 3.3 state that a filing is not frivolous "merely because the facts have not first been fully substantiated," but emphasizes that: "Lawyers are required, however, to inform themselves about the facts of their clients' cases and the applicable law, and determine that they can make good-faith arguments in support of their clients' positions." Rule 3.1 Cmt. 2.

To copy almost an entire brief from a secondary source or prior judicial opinion – as occurred in many of the cases discussed in Part II – suggests that the lawyer did not make a sufficient effort to determine the applicable law or to ensure that it truly supports the client's position.[11] If an inapposite brief were filed in support of a motion, then the lawyer would seem not to have a good faith basis for seeking the relief. If such a brief were filed in opposition to a motion, then the lawyer would seem not to have a good faith reason to oppose the relief sought. In either case, the purpose of the filing would possibly be frivolous.

Rule 3.3(a)(1) provides that lawyers may not knowingly "make a false statement of fact or law to a tribunal." By omitting quotation marks, the lawyer is adopting the prior source's words together with the prior source's mistakes. *See* Scott Moise, *Rocket Docket: The Joys and Perils of Online Court Documents*, 22 S.C. Law. 46, 47 (May 2011) ("[t]he briefs may look good and read well, but they may not be substantively correct. For example, the cases cited in the briefs could have been misquoted, mischaracterized, or even overturned. . . ."). Even when the lawyers copies only a short excerpt, the omission of quotation marks and citations makes the lawyer responsible for the text in a way that the lawyer would not necessarily have been if the

[11] This risk is less stark when the prior source is itself a brief rather than a treatise or judicial opinion, since litigation scenarios can recur, and the same arguments that were successful before might be successful again.

lawyer had attributed the text to the prior author.[12] The lawyer should review any authorities cited in the copied excerpt to ensure that the excerpt characterizes those authorities accurately and to ensure that those authorities have not been reversed, amended, or abrogated.

Rule 8.4(c): We add that, while we do not believe that copying without attribution is *per se* deceptive, there are circumstances in which the omission of a citation will violate Rule 8.4(c). For instance, if the lawyer omits a citation to the source material in order to support an inflated fee application, or subjectively intends to mislead the court or opposing counsel, then Rule 8.4(c) would apply.

Each of these rules provides guidance to lawyers drafting litigation filings. The guidance provided by these Rules aligns with the purpose of a litigation filing – to make the best argument possible for the client in an efficient way, while not misstating the law or the facts to the court. We believe that conscientious adherence to these Rules will eliminate almost all of the negative effects that ensue from copying without attribution.

VII. CONCLUSION

This opinion should not be read to suggest that we condone copying source material without attribution in litigation filings. Rather, we simply conclude that copying without attribution in litigation filings does not represent a *per se* violation of a lawyer's ethical obligations under Rule 8.4(c).

We close by re-emphasizing that many courts disapprove of extensive copying in briefs. In the era of electronic databases, it is not difficult for a court and (perhaps, more importantly) opposing counsel to learn the true source of any unattributed phrases in the brief which seem uncharacteristically learned, and which suggest that the filing lawyer has deliberately omitted a citation. If and when opposing counsel brings the omission to the Court's attention, the result could be a material loss of credibility for the drafting lawyer, and a real risk that the client's interests will be prejudiced, even if the Court declines to award sanctions under court procedural rules like Rule 11 of the Federal Rules of Civil Procedure or N.Y. Supreme Court Rule 130-1.1, and regardless of whether the conduct is a technical violation of Rule 8.4(c). It is beyond our purview to opine whether copying without attribution is sanctionable, but we note that many Courts — including two in the Eastern District of New York — plainly believe that it is. As a result, we strongly urge lawyers not to omit citations when copying, particularly when the underlying source is a published writing or judicial opinion.

In addition, we caution that, when copying from other sources (with or without attribution), lawyers should ensure that they are complying with their obligations under other Rules, including Rule 1.1(a) (competence), Rule 1.3 (diligence), Rule 3.1 (non-meritorious claims and contentions), and Rule 3.3 (conduct before a tribunal).

[12] We also note that Rule 3.3(a)(2), which imposes an obligation on lawyer to bring unfavorable, authoritative precedent to the court's attention if the opposing party has failed to do so, applies in the same way whether the lawyer is drafting the brief from scratch, or copying from prior sources.