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When is Copying OK in Legal Writing?

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? WHEN IS **COPYING** OK IN LEGAL WRITING?

By Diane B. Kraft

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We all know that plagiarism is bad. We also know that the point of legal writing is not originality – in fact, it's the opposite. As Judge Richard Posner has noted, "originality is not highly prized in law."¹ A transactional attorney would be crazy to create completely new and original language for every contract he drafts. A litigator who relies on her original ideas rather than on precedent in making her client's case will lose.

What we don't always know is where to draw the line between acceptable and unacceptable copying of the work produced by others in the practice of law. In other words, when is an attorney who copies another's work following accepted

practice, and when is that attorney plagiarizing? Sometimes the line is clear, but often it is not.

First, the easy calls:

It is almost certainly OK, and sometimes even preferable, to copy or sign work that is not entirely your own when:

- You're using language from a form book.²
- You're using boilerplate language from a contract.³
- You're using language from pleadings written by attorneys within your firm or organization.
- You're looking at pleadings written by attorneys both within and outside of your firm or organization to see how

other attorneys have handled similar issues.⁴

- You're signing pleadings written by other lawyers at your firm or organization.⁵
- Your clerks write your judicial opinions.⁶

It is almost certainly NOT OK to copy or take credit for work that is not your own when:

You're copying large amounts of material from a treatise or article without quotation marks and proper attribution. For example, in 2010 an Iowa bankruptcy court sanctioned an attorney who had copied large sections of an article from a law firm website, verbatim and without attribution, into a brief he filed with the court.⁷ In 2011, a federal district court in Kentucky deemed "cutting and pasting" from Wikipedia, without attribution, to be plagiarism in violation of Rule 8.4 of the Kentucky Rules of Professional Conduct.⁸

Apart from these relatively clear examples, the question of when copying is OK gets murkier.

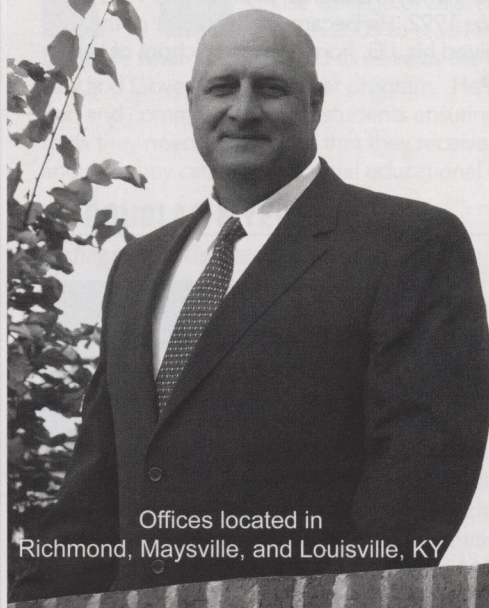
It is unclear if copying or taking credit for work that is not your own is OK when:

- You're using language from pleadings written by attorneys from other firms or organizations, or from judicial opinions. Some authors and attorneys believe that copying from briefs written by attorneys unaffiliated with one's law firm or organization is ethically questionable.⁹ Indeed, courts in numerous jurisdictions have sanctioned attorneys for copying large sections of other attorneys' briefs.¹⁰ On the other hand, the North Carolina State Bar has given attorneys the green light to copy parts of pleadings.¹¹ One author has suggested that "it is likely appropriate to borrow 'structure, rhetorical devices, apt analogies, and perhaps even well-turned phrases' in preparing a brief. It may even be appropriate in many cases to copy verbatim 'routine matters involving established law, such as the standard of review or well-established

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lished points of substantive law.”¹² However, a federal district court in Pennsylvania rebuked an attorney for verbatim copying at length from court opinions, including a one-page standard of review that “mirrors... with suspicious equivalence” one used by a federal district court judge.¹³ Similarly, the Sixth Circuit called it “completely unacceptable” when an attorney copied almost 20 pages verbatim, without attribution, from a district court opinion.¹⁴ The line seems to be the amount of language that has been copied; when large amounts of a brief or other pleading are copied from other pleadings or judicial opinions without attribution, most legal professions consider it unacceptable.

- You’re using language from non-pleadings written by attorneys from other firms.¹⁵ Thirty-seven years ago, the Kentucky Supreme Court wrote in a footnote to an opinion about a mortgage that “[l]egal instruments are widely plagiarized,” and found “no impropriety in one lawyer’s adopting another’s work, thus becoming the ‘drafter’ in the sense that he accepts responsibility for it.”¹⁶ However, while copying language from form books is expected, copying documents such as contracts, wills, and trusts from other law firms is not uniformly smiled upon.¹⁷

The best practice, then, is to proceed with caution when copying in legal writing. In Kentucky, it is probably acceptable to copy non-litigation documents from other sources, provided you have taken care to modify the documents to fit your clients’ needs.¹⁸ On the other hand, when writing pleadings, do not copy large sections from other documents, and always cite your sources. Originality is not prized in legal writing, but professionalism certainly is. **B&B**

¹ Richard A. Posner, *The Little Book of Plagiarism* 15 (2007).
² E.g., Cooper J. Strickland, *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession*, 90 N.C. L. Rev. 920, 937 (2012); Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 Cath. U. L. Rev. 777, 804 (2008); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 Brandeis L.J. 199, 245 (2007); Judith D. Fischer, *Avoiding Plagiarism in Legal Documents*, Ky. Bench & Bar, May 2006, at 68.
³ E.g., Strickland, *supra* note 2, at 937; Jeanne L. Schroeder, *Copy Cats: Plagiarism and Precedent* 58-61 (Benjamin N. Cardozo School of Law, Jacob Burns Inst. for Advanced Legal Studies, Working

Paper No. 185, 2007).

⁴ Brian Craig, *Legal Briefs: Helpful But Also Hazardous*, 13 Persps: Teaching Legal Res. & Writing 132 (Spring 2005).
⁵ Richmond, *supra* note 2, at 245; Schroeder, *supra* note 3, at 68-69.
⁶ E.g., Posner, *supra* note 1, at 20-23; Bast & Samuels, *supra* note 2, at 800; Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 Geo. L.J. 49, 96 (2006).
⁷ Iowa Sup. Ct. *Attorney Disciplinary Bd. v. Cannon*, 789 N.W.2d 756, 759 (Iowa 2010); Strickland, *supra* note 2, at 925-29. The court in *Cannon* was particularly irked that the attorney charged his client more than \$5000 for preparing the largely plagiarized brief.
⁸ *U.S. v. Sypher*, No. 3:09-CR-00085, 2011 WL 579156, at *3 n.4 (W.D. Ky. 2011). The court also gently reminded the offending attorney “that Wikipedia is not an acceptable source of legal authority in the United States District Courts.”
⁹ E.g., Craig, *supra* note 4; Richmond, *supra* note 2, at 245-46; Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories*, Scribes J. of Legal Writing, 2003-2004, at 104. In addition to potential charges of plagiarism, an attorney who copies the work of other attorneys could be infringing on copyright, although the law on this issue is not clear. Craig, *supra* note 4; Scott Moise, *Rocket Docket: The Joys and Perils of Online Court Documents*, S.C. Law., May 2011, at 48; Bast & Samuels, *supra* note 2, at 805.
¹⁰ E.g. Moise, *supra* note 9, at 47.
¹¹ Strickland, *supra* note 2, at 938-39 (citing N.C.

State Bar, 2008 Formal Ethics Op. 14 (2009)). According to the Ethics Opinion, “[a]lthough consent and attribution are not required, if a lawyer uses, verbatim, excerpts from another’s brief and the lawyer knows the identity of the author of the excerpt, it is the better, more professional practice, [sic] for the lawyer to include a citation to the source.”

¹² Strickland, *supra* note 2, at 947.
¹³ *Venesevich v. Leonard*, No. 1:07-CV-2118, 2008 WL 5340162, at *2 n.2 (M.D. Pa. 2008).
¹⁴ *U.S. v. Bowen*, 194 F. App’x 393, 402 n.3 (6th Cir. 2006).
¹⁵ Strickland, *supra* note 2, at 938.
¹⁶ *Fed. Intermediate Credit Bank of Louisville v. Ky. Bar Ass’n*, 540 S.W.2d 14, 16 n.2 (Ky. 1976); Moise, *supra* note 9, at 47; Bast & Samuels, *supra* note 2, at 804.
¹⁷ Strickland, *supra* note 2, at 938 n.128 (citing Terry LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 250 (1999)).
¹⁸ Fischer, *supra* note 2, at 68.



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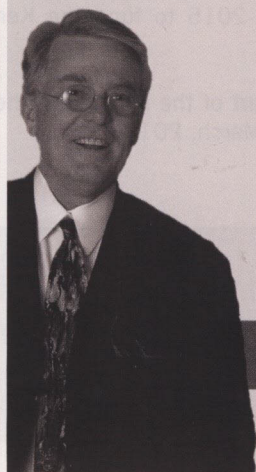
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