

Ghostwriting and Plagiarism by Attorneys and Judges in the USA

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keywords

attorney, ghostwriting, ghostwritten, ghost-writing, ghost writing, judge, judicial, law, law clerk, lawyer, legal, plagiarism, plagiarist, plagiarization, plagiarize, plagiarized, plagiary

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Introduction

In June 2007, when I was revising my earlier essay — Plagiarism in Colleges in the USA at <http://www.rbs2.com/plag.htm> — I became aware of a few articles in legal journals that mentioned routine plagiarism by practicing attorneys and judges. Since 1990, several law professors suggested that such routine plagiarization by practicing attorneys was confusing law students about plagiarization in law school.¹ In her article, Prof. Yarbrough challenged the legal community:

If using the thoughts or words of another without attribution is permissible in some instances but not in others, then legal professionals have an ethical obligation to articulate the differences.

Marilyn V. Yarbrough “Do As I Say, Not As I Do: Mixed Messages for Law Students,” 100 *DICKINSON. LAW REVIEW* 677, 683 (Spring 1996). However, in her seven-page article, she did not address the different styles in different kinds of legal documents.

¹ Kevin J. Worthen, “Discipline: An Academic Dean’s Perspective on Dealing With Plagiarism,” 2004 *BRIGHAM YOUNG UNIVERSITY EDUCATION AND LAW JOURNAL* 441, 443-444 (2004) (Students “assert, ‘In my summer clerkship, lawyers “borrowed” phrases, sentences, forms, entire sections of briefs from one another without attribution all the time. Why all the fuss? Isn’t this something that will be a non-issue the day I graduate?’ ”). Also see other articles cited in the bibliography, beginning at page 92.

Prof. Yarbrough says “we need to clean up our own house.”² Unfortunately, 15 years later, the task of articulating rules for practicing attorneys and for judges apparently has not yet begun. I hope by posting this essay publicly at my website, I can encourage attorneys and judges to evaluate their own practices and begin any reforms they believe are necessary.

As I did research on the topic of plagiarism by attorneys and judges, I became aware of a larger problem: ghostwriting by attorneys and judges. I was tempted to write two separate essays, one on plagiarism and one on ghostwriting, to clearly separate different kinds of conduct. However, plagiarism and ghostwriting are related, and discussing one of them can illuminate the other.

There are several purposes of this essay. I began with the intent of discussing plagiarism by practicing attorneys for the benefit of law school faculty, like Prof. Yarbrough, who are grappling with plagiarism in law schools. Second, the same information can be used to amend the rules of civil procedure and/or the rules of professional responsibility for attorneys. Third, the same information can be used to amend the rules of judicial conduct.

It is a misuse of this essay to use my legal research and analysis in any attempt either to criticize the entire legal profession or to criticize the judiciary. The focus should be on amending the rules to forbid plagiarism and ghostwriting, and *not* on criticizing professions or individual people who comply with the rules as written. Currently, the rules of professional responsibility for attorneys and judges are silent on plagiarism and ghostwriting. I have made some specific suggestions in the conclusion of this essay, beginning on page 86. Please suggest to the relevant authorities specific improvements to the rules for attorneys and judges, instead of simply complaining.

definitions

Plagiarism and ghostwriting are related kinds of conduct, in which the true author’s name is concealed. The distinction between plagiarism and ghostwriting is:

- (1) A plagiarist copies text without the permission of the true author.
- (2) A ghostwriter *knowingly* and *willingly* produces text to appear as someone else’s speech or writing.

A plagiarist does *not* pay the true author for his/her services, while a ghostwriter is nearly always paid for his/her work.

² Marilyn V. Yarbrough “Do As I Say, Not As I Do: Mixed Messages for Law Students,” 100 DICKINSON. LAW REVIEW 677, 683 (Spring 1996).

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because I am not under any limitation on the number of pages, I have included longer quotations from court cases than typical writing for attorneys, to make it less necessary for the reader to look at the source of the quotation.

Ghostwritten Speeches & Books by Politicians

Major politicians, including both candidates for president of the USA and the president himself, hire ghostwriters to write speeches, which are displayed on a teleprompter for the politician to read during the “speech”. The speech is not a spontaneous speaking to the audience, but a carefully scripted event in which most of the words were actually written by an anonymous ghostwriter.

This practice is *not* copyright infringement, because the written employment contract for the ghostwriter should specifically say that the writer’s words are a “work made for hire” as that phrase is understood in the copyright law.

I’m sure that politicians would respond to this criticism of them by saying that they are “too busy” to write and polish speeches, particularly when they may deliver several new speeches in each week. But that excuse sounds like the student who says he was forced to plagiarize because he waited until the night before the term paper was due to begin work on the term paper.

The same analysis applies to books that are allegedly written by a prominent politician or other famous personality, but are actually written by a hired ghostwriter. As Prof. Lastowka said,³ this is a legal and voluntary transaction, in which the writer agrees to be anonymous and invisible, in exchange for payment for writing services. However, I believe it is at least arguable that the alleged author has perpetrated a fraud on the public, in that the alleged author receives credit and praise for a book he/she did not write. In my view, ghostwritten books are a despicable practice. In my opinion, the ghostwriter *should* be named as co-author (or author) of the book, which ends the practice of ghostwritten books.

³ Greg Lastowka, “The Trademark Function of Authorship,” 85 BOSTON UNIVERSITY LAW REVIEW 1171, 1222 (Oct 2005).

As with plagiarism, there are two factors to consider in evaluating ghostwriting: (1) the amount of text that was ghostwritten, and (2) the value of the ghostwritten text to the alleged author. Small amounts of ghostwritten text is de minimis, unless the sentences are frequently quoted by journalists or commentators. Ghostwritten text that is published in a book has a higher value than ghostwritten text that is read during a speech in a small town and then forgotten.

One might also question whether the ghostwriting contract is really voluntary. The ghostwriter may be an unemployed person who was an English major in college, with limited employment opportunities. Ghostwriting a best-selling book by a famous alleged author may be the most lucrative work they can obtain. In that view, the relationship between alleged author and ghostwriter is similar to the relationship between pimp and prostitute — the pimp keeps most of the money, and the prostitute does most of the work. Is this *really* voluntary, or a form of exploitation? One is correct to hesitate to endorse ghostwriting, because — in other cultures — an author's right to attribution is perpetual and inalienable under the French copyright statute⁴ and adopted internationally under the Berne Convention for the Protection of Literary and Artistic Works.⁵

It's rare to see judicial condemnation of ghostwriting in the USA. One exception is the *Dorsey* case that is quoted at page 43, below.

I don't want to dwell on ghostwriting by politicians and other famous people. However, their pervasive ghostwriting in the USA by politicians, as well as in the legal profession, may supply a bogus "justification" for ghostwriting by others:

1. senior attorneys who copy text from anonymous associates in a Brief (see page 20)
2. attorneys who ghostwrite for a pro se litigant (see page 22)
3. judges who copy text from a Brief (see page 38)
4. judges who copy text from an anonymous law clerk (see page 56)
5. judges who ask an attorney for a party to ghostwrite the findings of fact (page 66)
6. judges who ask an attorney for a party to ghostwrite the judicial opinion (see page 76)

⁴ Law Nr. 57-298, Article 6, (enacted 1957).

⁵ Article 6^{bis} (1986).

The “everyone does it” excuse for ghostwriting is a bogus⁶ justification that not only purports to justify blatantly unethical and fraudulent conduct, but also pushes society into an ethical spiral downward.⁷

Contracts and Complaints

Practicing attorneys often copy significant portions of the first draft of a Contract or a Complaint from a form book. Because the copying is done without any indication of the source of the verbatim quotation or close paraphrase, such copying is plagiarism. As explained below, I believe such plagiarism can be justified.

Normally, I would quote judicial opinions first, then give my own opinion, but on this topic there are few published judicial opinions, and only a few paragraphs in law review articles, so I am essentially starting from scratch in writing this section.

Contracts

The important things in a written Contract are for the attorney to memorialize *all* of the parties’ agreements, to specifically anticipate future problems (e.g., risk allocation), and to provide a resolution for each of anticipated problems. While a good Contract requires some creativity, knowledge of the law, and careful writing, a typical Contract would *not* contain any novel ideas that are worthy of publication in a law review. No one relies on a Contract for a correct statement of the law, so a citation to a source would *not* enhance either the credibility or the value of the Contract.

It is well known that many attorneys copy the first draft of a Contract from a form book on their bookshelf or from a form book in a local law library. Plagiarism from form books is *not* copyright infringement, because there is an implied license that the user of such form books will copy or paraphrase text. There is no other purpose to publishing such form books.

There is no representation by the author of a Contract that all of the writing therein is original expression. Attorneys often do not put their name on Contracts that they write, as the important thing is the content of the Contract, *not* who drafted the Contract. The Contract belongs to the parties — indeed, in a Contract between experienced businessmen, the words in the Contract are often written by one of the businessmen and revised by the other businessman.

⁶ The inappropriateness of this so-called justification can be more clearly understood in a different context: the fact that murders are common in big cities in the USA does *not* excuse any murderer.

⁷ If we accept one kind of unethical conduct, someone will use that accepted conduct to justify an even more unethical conduct, sending us down the slippery slope.

Because of the widely accepted custom of copying or paraphrasing from other sources, without citing those sources when preparing Contracts, such custom effectively exempts attorneys' words in Contracts from the scholarly rule about citing sources. In other words, Contracts are *not* scholarly writing. The parties are legally bound by the text in their Contract, and any indicia of quotations and citations to sources of quotations would be superfluous. I have never heard of a Contract that contained citations to statutes or cases, except that sometimes one might see (1) a general reference to statute⁸ or (2) reliance on the holding(s) in a cited case.

Important parts of a Contract consist of generic phrases that are copied from statutes or judicial opinions. For example, an integration clause in a Contract is a generic sentence that is not appropriate for original, creative writing. Copying standard phrases found in cases and statutes into a Contract makes it easier for the attorneys and judge who are litigating a contract dispute to link the particular Contract with established law. Such copying makes it difficult for anyone to copyright a Contract, because the writing is *not* original.

A Contract is *not* the place to publish significant, novel ideas that are created by the attorney. A Contract is generally a private document that belongs to the parties: the only copies of a Contract would be in the files of the two parties and their attorneys.⁹ In short, attorneys do not receive any public recognition for writing good Contracts. For that reason, it may not be important if the attorney copies or paraphrases from form books or other Contracts.

Copyrightability of Contracts

In the discussion of plagiarism in preparation of contracts, it is illuminating to consider whether contracts can be copyrighted. The U.S. Supreme Court famously said:

The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper & Row, [v. Nation Enterprises, 471 U.S. 539,]* at 547-549, 105 S.Ct., at 2223-2224. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, COPYRIGHT §§ 2.01[A], [B] (1990) (hereinafter Nimmer).

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 345 (1991).

⁸ For example: "The Parties agree that the Work is *not* a 'work for hire' as that phrase is used in the copyright laws of the USA." or "The Corporation is a nonprofit organization, as defined in the U.S. Internal Revenue Code § 501(c)(3)."

⁹ Any copyright on original text in a Contract is owned by authors. 17 U.S.C. § 201(a). A Contract is *not* a work-for-hire, unless the author is an employee of a party to the Contract. Davida H. Isaacs, "The Highest Form of Flattery? Application of the Fair Use Defense against Copyright Claims for Unauthorized Appropriation of Litigation Documents," 71 MISSOURI LAW REVIEW 391, 400-401 (Spring 2006). However, I think it would be inappropriately greedy for an attorney to charge for his time to draft a Contract and *also* to demand that his client pay a copyright license fee for any further copying of the Contract.

This absolute rule of law limits what can be copyrighted in most contracts.

In 1938, the U.S. Court of Appeals in Oklahoma heard a case involving copyrightability of life insurance form contracts.

Insurance policies were old at the time Dorsey's copyrights were granted. Standard provisions had been worked out through long study and experience. Many of such standard provisions are now inserted in life insurance policies pursuant to statutory requirement. Oklahoma requires that certain provisions be included in each policy of life insurance issued or delivered in Oklahoma or issued by a life insurance company organized under the laws of Oklahoma. See Section 10524, O.S. 1931, 36 Okl.St. Ann. § 218.

The copyrighted forms here involved in the main are an aggregation of these standard provisions including those required by statute. As to those provisions it is clear that there is no infringement. One work does not violate the copyright in another simply because there is a similarity between the two if the similarity results from the fact that both works deal with the same subject or have the same common source. *Affiliated Enterprises, Inc., v. Gruber*, 1 Cir., 86 F.2d 958, 961.

Dorsey v. Old Surety Life Insurance Co., 98 F.2d 872, 873 (10th Cir. 1938).

The court in *Dorsey* suggested that copyright infringement would have occurred if the infringer had copied Dorsey's original expression, but that did not happen, so there was no infringement. Note that copying statutory text is *not* copyright infringement, because law is not copyrightable in the USA, as explained in detail in my essay at <http://www.rbs2.com/cgovt.pdf> (2009).

In 1958, the U.S. Court of Appeals for the Second Circuit heard a case involving copyright on a novel bond for lost securities.

These cases indicate that in the fields of insurance and commerce the use of specific language in forms and documents may be so essential to accomplish a desired result and so integrated with the use of a legal or commercial conception that the proper standard of infringement is one which will protect as far as possible the copyrighted language and yet allow free use of the thought beneath the language.

Continental Casualty Co. v. Beardsley, 253 F.2d 702, 706 (2d Cir. 1958) (Forms copyrightable, but infringement not proved.), *cert. den.*, 358 U.S. 816 (1958).

In 1970, the U.S. Court of Appeals in Texas heard a case involving copyright of short paragraph of legal contract that was printed on business forms for radio/television repairmen. The Court held this short paragraph was not copyrightable.

The plaintiff did no original research which resulted in a significant addition to the standard conditional sales contract or chattel mortgage forms; he merely made trivial word changes by combining various forms and servilely imitating the already stereotyped language found therein. In fact it may be fairly assumed that such variations in language as did occur in plaintiff's 'Agreement' were deliberately insignificant, for he plainly wanted a valid conditional sales contract or chattel mortgage, and validity was an attribute which the earlier forms had been proved through use to have.

Donald v. Zack Meyer's T. V. Sales and Service, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. den.*, 400 U.S. 992 (1971).

The U.S. Court of Appeals concluded that the form contract at issue "is nothing more than a mosaic of the existing forms, with no original piece added. The Copyright Act was not designed to

protect such negligible efforts.” *Donald*, 426 F.2d at 1031. See also *Donald v. Uarco Business Forms*, 344 F.Supp. 338 (W.D.Ark. 1972) (Granting judgment notwithstanding the jury verdict, because Donald’s words were not original.), *aff’d*, 478 F.2d 764, 766 (8thCir. 1973) (not copyrightable: “[We] find that the appellant had knowledge of, and drew upon, legal forms which already existed in the public domain when he drafted his form. Most of the form is phrased in standard legal language.”).

In 1973, the U.S. Court of Appeals in Ohio heard a similar case to *Donald*, also involving copyrightability of blank contract forms.

We hold that appellant's product does not reflect the requisite originality. Even though word arrangements have been altered, they are at best merely a paraphrasing of earlier forms.[FN6] There is nothing recognizably different from the language used in form books or earlier business forms. Elementary legal words and phrases are in the public domain and no citizen may gain monopoly thereover to the exclusion of their use by other citizens. Mr. Fabbri's [Plaintiff-Appellant's] attorney testified that his effort was focussed on syntax changes and the addition of the words “security interest” in order to use terms consistent with the Michigan Uniform Commercial Code. The admitted lack of original legal research enforces our conclusion that creative, original work is lacking. The “Guarantee” provision is substantially the same as that contained in earlier forms Mr. Fabbri used in his business. Similarly, the “Chattel Mortgage Provision” is substantially the same as earlier forms and, further, it contains verbiage identical to what was rejected as copyrightable material in *Donald v. Zach Meyer’s T.V. Sales and Service*, 426 F.2d 1027 (5thCir. 1970). The “Storage Fee Provision” is actually patterned on the chattel mortgage provision and is in substance no different from bailments and the language of warehousemen who charge for the storage of goods if left beyond a given period of time. Accordingly, we see no distinguishable variation in any of these simplistic legal arrangements that can be attributed to the drafter’s own creativity.

FN6. The author must show “. . . that his work contains some substantial, not merely trivial, originality.” *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2dCir. 1945); see, also, *Donald v. Zach Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5thCir. 1970).

M. M. Business Forms Corp. v. Uarco, Inc., 472 F.2d 1137, 1140 (6thCir. 1973).

Because contracts commonly paraphrase or copy stock phrases (i.e., public domain material that is not copyrightable) or statutory phrases (i.e., not copyrightable as a matter of law), many contracts will contain little significant original expression that can be copyrighted. Because originality and creativity are less important than obtaining a valid contract with certain meaning, I think copying from form books or other sources is permissible when writing a contract. The court cases cited above for lack of a valid copyright in form contracts supports the conclusion that it is acceptable to copy stock phrases or statutory phrases, even if such copying might appear to be plagiarization.

Complaints

The important things in a Complaint is to allege *all* of the elements of a tort or contract dispute and to put the other party on notice of claims. While a good Complaint requires knowledge of the law and careful writing, a routine Complaint would *not* contain any novel ideas that are worthy of publication in a law review.¹⁰ No one relies on a Complaint for a correct statement of the law, so a citation to a source would *not* enhance the credibility of the Complaint.

The reasons given above to justify plagiarism in a Contract are also generally valid when considering Complaints.

While the rules of civil procedure require an attorney to put his/her name, address, and telephone number at the end of a Complaint, such information is generally used only to inform the court and opposing party that the plaintiff is represented by counsel, to whom a copy of the response should be sent. Rule 11 of the Federal Rules of Civil Procedure says that the attorney's signature on a Complaint, Answer, or Motion represents to the court four things:

1. "not being presented for any improper purpose",
2. "claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"
3. "the allegations and other factual contentions have evidentiary support"
4. "the denials of factual contentions are warranted on the evidence"

There is nothing in this list of representations that the attorney's words are original.

Important parts of a Complaint consist of generic phrases that are copied from statutes or judicial opinions. For example, each count in a Complaint must allege *all* of the elements of a cause of action, and those elements are specified in judicial opinions or in a statute. Other important parts of a Complaint allege facts, but facts are not copyrightable.¹¹ For these reasons, routine Complaints may not be copyrightable.¹² I consider Complaints in routine cases (e.g.,

¹⁰ If the Complaint does contain novel ideas, the time to write the law review article is *after* the case has concluded and the author of the article will mostly quote the judicial opinion, as well as the Briefs of the parties.

¹¹ See, e.g., Standler, Copyright Protection for Nonfiction or Compilations of Facts in the USA, <http://www.rbs2.com/cfact.pdf>, (Feb 2009).

¹² Prof. Thomas Field said that Complaints lack sufficient creativity to justify copyright protection under *National Basketball Association v. Motorola*, 105 F.3d 841, 843 (2dCir. 1997) (no property right in facts). First reported in Janet L. Conley, "Milberg Weiss Tries to Nail Class Action Imitators," <http://www.law.com/jsp/article.jsp?id=1036630458145> (20 Nov 2002). Quoted by Davida H. Isaacs, "The Highest Form of Flattery? Application of the Fair Use Defense against Copyright Claims for Unauthorized Appropriation of Litigation Documents," 71 MISSOURI LAW REVIEW 391, 394, n.14

motor vehicle accident, dog bite, etc.) as unworthy of copyright protection. The situation may be different in a Complaint that alleges a novel cause of action (e.g., the first case in a state against a church for abuse by one of its clergy), where there is creative expression in the Complaint that is not only original, but also novel.

A Complaint is *not* the place to publish significant, novel ideas that are created by the attorney. While a Complaint is a public record that is filed with the court and copies are available from the clerk of the court, most Complaints are seen only by the parties, their attorneys, and the judge.

both Contracts and Complaints

Note that plagiarism in Contracts and Complaints works both ways. When I prepare a Contract or Complaint, I do not need to cite phrases that are copied from another source. And, if I put something original in one of my Contracts or Complaints, then I can *not* complain if my original words are copied by other attorneys in the future, without any attribution to me. In effect, there is an implied license in Contracts and Complaints to disclaim both copyright and the right of attribution.

Consulting at least one form book gives the attorney some assurance that he/she has not overlooked conventional issues that should be included in a Contract or Complaint. This use of form books not only helps the parties obtain a satisfactory Contract or an adequate Complaint for a reasonable legal fee, but also it helps the attorney avoid future malpractice claims.

self-plagiarization

In addition to copying from form books, attorneys routinely copy material from previously prepared Contracts and Complaints that are in the files of the law firm. The justification is the same as copying from form books: copying from the files helps get a good document quickly. Such copying spares the client the need to pay an expensive attorney to reinvent the wheel — the attorney simply copies his/her past good work. In the solo practice of law this is self-plagiarization, because the copying is from earlier work written by the same attorney. In a law firm with more than one attorney, the clients technically belong to the law firm and *not* to the individual attorney who is doing the work on the client's case. Therefore, it is appropriate to use any resources of the law firm to benefit a particular client, including plagiarizing Contracts or Complaints written by other attorneys in the law firm.

There are some routine situations that appear in nearly every litigated case, such as responding to a summary judgment motion. I see absolutely nothing wrong with copying from a Brief in a previous case a paragraph on the law of summary judgments, including the citation to *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). Note that I am only endorsing self-plagiarization here: copying from text previously written by the attorney, *not* copying from an old Brief written by someone else.

cases

In 1969, California disbarred an attorney for a number of reasons, one of which was copying a contract from a form book “without researching any of the applicable law”, so that the contract met “virtually none of the” statutory requirements. *Eschwig v. State Bar*, 459 P.2d 904, 906 (Calif. 1969).

In 1976, the Kentucky Supreme Court unanimously held that a bank would engage in *unauthorized* practice of law if it used printed form contracts prepared by an attorney, but *not* supervised and approved by an attorney after a layperson had filled in the blanks on the form.

Addressing ourselves to the question as it was presented to and answered by the Bar Association, we are of the opinion that when a lending agency presents to the borrower for execution a real estate mortgage that has been completed on a form prepared by one lawyer, with information such as the property description and payment schedule copied by a lay person from a loan application and a title certificate furnished by another attorney, neither of the respective attorneys having examined the instrument in its final form prior to execution by the borrower, the lending agency is practicing law without a license.

As a corollary proposition, it is fundamental that no person, lawyer or not, can truthfully certify that he has drafted an instrument unless and until it is completed and ready for signature, because until then it is not an instrument, but merely a form that can be sold by the bundle at any bookstore. It is no answer in this particular instance to say that each of the parts has been prepared by a licensed attorney. The fact is that when the instrument is presented to the unschooled layman as a fit and proper subject for his signature neither attorney has seen or passed on it as a whole.

Of course we shall not be trapped into declaring that when a typist copies a property description into a deed or mortgage form she is practicing law. Cf. *Carter v. Brien*, Ky., 309 S.W.2d 748, 749 (1956). It is the person for whom she is doing the work, and who will pass upon and cause the completed product to be presented for signature, who undertakes the responsibility for its legal sufficiency.[footnote omitted] Cf. *Pioneer Title Trust Ins. & Trust Co. v. State Bar of Nevada*, 74 Nev. 186, 326 P.2d 408, 411 (1958).

Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Association, 540 S.W.2d 14, 16 (Ky. 1976) (per curiam). In a footnote, the Kentucky Supreme Court gave a rare judicial notice to the common use of form books by practicing lawyers:

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. That, after all, is the object at which Kentucky Revised Statute § 382.335 [Instrument conveying title to real estate requires “showing the name and address of the

individual who prepared the instrument, and the statement is signed by the individual.”] is directed.

Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Association, 540 S.W.2d 14, 16, n.2 (Ky. 1976) (per curiam). This footnote is quoted by authors of several law review articles,¹³ but this footnote seems to have been ignored by courts during the past thirty years.¹⁴ I believe the Kentucky court is correct — what is important is that the attorney takes personal responsibility, *not* authorship credit — for the adequacy and legal enforceability of a contract, regardless of whether the words in the contract are original with the attorney or copied by the attorney. Note that the footnote by the Kentucky court is obiter dictum, because the footnote is not necessary for the decision in that case.

A convicted criminal, ungrateful for the public defender, challenged his conviction in federal court on grounds of ineffective assistance of counsel. The U.S. Court of Appeals rejected the challenge, saying in passing: “We do not judge defendant’s counsel’s performance by the variety of motions copied from a form book.” *U.S. v. Horton*, 845 F.2d 1414, 1421 (7th Cir. 1988).

There are few judicial opinions that admonish a lawyer not to mindlessly copy a Complaint from a form book. One exception is Lorraine Harris, an attorney who copied a Complaint from a form book without reading and understanding the statute on which the cause of action was based. The federal judge wrote:

Harris copied a form complaint out of a practice manual without regard to the facts and law applicable to this case. Attorneys who merely copy form complaints and file them in this Court without conducting independent legal research and examining the facts giving rise to a potential claim do so at their peril. Lawyers are not automatons. They are trained professionals who are expected to exercise independent judgment.

Clement v. Public Service Electric and Gas Co., 198 F.R.D. 634, 636 (D.N.J. 2001). The court found Harris had violated Federal Rule 11(b)(2) of Civil Procedure, and the judge ordered her to take two specific law school classes. The judge also raised the question of Harris’ competence to practice law¹⁵ and referred her to the New Jersey bar for further investigation.¹⁶ Subsequently,

¹³ The first article to cite this Kentucky case in the context of plagiarism seems to be Lisa G. Lerman, “Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship,” 42 *SOUTH TEXAS LAW REVIEW* 467, 468, n.5 (Spring 2001). Why were legal periodicals silent about this Kentucky case for 25 years? Clearly, plagiarism by practicing attorneys was *not* a topic for public discussion.

¹⁴ On 2 Jan 2010, I searched all state and federal courts in Westlaw for the query `impropriety /s lawyer /s drafter /s responsibility`, but I found only the Kentucky case quoted above. I also searched for the query `legal /s (contract complaint instrument) /s plagiar!` and again found only the one Kentucky case, plus six irrelevant cases.

¹⁵ Harris displayed a “... shocking lack of diligence and incompetence.” 198 F.R.D. at 635-636. “... not only has Ms. Harris failed to conduct a reasonable inquiry into the facts and law ..., it appears that she is incapable of doing so, and does not even understand why.” 198 F.R.D. at 636.

¹⁶ “... to determine whether Harris is competent to practice law at all.” 198 F.R.D. at 637.

Harris was disbarred in New Jersey. *In re Harris*, 868 A.2d 1011, 1014 (N.J. 2005) (“Respondent is a persistent violator of the Rules of Professional Conduct.”).

In 2006, the Ohio Supreme Court enjoined a labor-relations consulting firm from “drafting or writing of [employment] contracts”, because that was an unlawful practice of law:

Lastly, respondents draft employment contracts and collective-bargaining agreements based upon the previous negotiations. Sometimes respondents simply copy and fill in the blanks of previously used contracts, sometimes they write contracts themselves, and sometimes they use a combination of efforts.

We have consistently held that drafting contracts or legal instruments on behalf of another is the practice of law. *Land Title Abstract*, 129 Ohio St. at 28-29, 1 O.O 313, 193 N.E. 650, and at syllabus. (“The greater, more responsible, and delicate part of a lawyer’s work is in other directions. Drafting instruments creating trusts, formulating contracts, drawing wills and negotiations, all require legal knowledge and power of adaptation of the highest order”).

The fact that respondents may copy the contracts or use forms from a form book does not change the nature of the act. In *Geauga Cty. Bar Assn. v. Canfield* (2001), 92 Ohio St.3d 15, 748 N.E.2d 23, the respondent argued that simply copying a form contract was not the practice of law. We rejected that argument: “Although he copied the documents from a form book, the fact is that respondent completes those forms not for himself, but for the benefit of another.” *Id.* The drafting or writing of a contract or other legal instrument on behalf of another is the practice of law, even if the contract is copied from a form book or a contract previously prepared by a lawyer.

It is not the unauthorized practice of law for a nonlawyer to represent another in union-election matters or in the negotiation of a collective-bargaining agreement when the activities of the nonlawyer are confined to providing advice and services that do not require legal analysis, legal conclusions, or legal training. It is the unauthorized practice of law for a nonlawyer to draft or write a contract or other legal instrument on behalf of another that is intended to create a legally binding relationship between an employer and a union, even if the contract is copied from a form book or was previously prepared by a lawyer.

Ohio State Bar Association v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc., 858 N.E.2d 372, 377, 2006 -Ohio- 6511, ¶¶21-24 (Ohio 2006).

Only a robot — an uncreative automaton — would mindlessly copy from a form book, without adding/deleting words to address the specific needs or desires of the parties. A more appropriate use of form books involves an attorney reading several form books, and then (1) making an intelligent selection of the best phrases from those books or (2) creating original text to more clearly express the ideas in the form books. And any unusual or specific terms desired by the parties must be included in their contract by an attorney writing original text.

Briefs

A Brief — sometimes called a Memorandum of Law — submitted to a judge is distinguished from a Contract and Complaint. Contracts and Complaints are *not* relied on for a correct statement of the law. In contrast, judges in preparing their published opinion often rely on statements of the law from Briefs. Unlike a Contract or Complaint, a Brief is a scholarly document that should contain citations to authority. Every quotation and every paraphrase in a Brief must have a citation to its original source, so that the judge can consider the credibility of the quotations and paraphrases. Most importantly, attorneys must not plagiarize in their Briefs, because judges condemn such plagiarization, as explained below, beginning at page 17.

It is important that the Brief be the personal work of the attorney who appears in court, for the following reasons:

- the attorney must have personally read the cases cited in the Brief, and be familiar with the content and arguments in the Brief, so that attorney can orally argue law with the judge.
- the Brief contain only facts and law that are applicable to the case before the court, and not some previous case
- the style of the Brief is consistent throughout the Brief.

In the early 1800s, it was then common practice for the reported case to first summarize the Briefs of each of each attorney before the court, and then present the judicial opinion. Sometime around the year 1879, the official reporter for the U.S. Supreme Court, U.S. REPORTS, stopped publishing arguments of counsel.

Each Contract and Complaint are seen by only a few people. However, Briefs filed at the U.S. Supreme Court are available online,¹⁷ which constitutes public display of those Briefs. Westlaw also contains Briefs filed in U.S. Courts of Appeals, beginning in 1972 for the Fifth Circuit and later for the each of the other Circuits. More recently, Briefs filed in U.S. District Courts and state appellate courts are available online.¹⁸ Such public display makes it essential that the writer *not* plagiarize in a Brief.

¹⁷ Briefs filed with the U.S. Supreme Court are since 2003 also available via the Internet at the American Bar Association's website. The Findlaw website contains these Briefs since 1999. The proprietary Westlaw database has contained these Briefs since 1990.

¹⁸ The proprietary Westlaw database contains such Briefs. These Briefs are also commonly posted at websites operated by courts.

cases with a plagiarized Brief

Occasionally, judges publicly sanction an attorney for submitting plagiarized material in a Brief. These cases establish the basic requirement that a Brief is the original work of the attorney(s) whose name(s) appear at the end of the Brief, except for quotations and paraphrases, each of which *must* have a citation to the original source. Practicing attorneys who submit a partially plagiarized brief to a court are typically admonished by the judge, but usually allowed to continue their practice of law. See, e.g.:

- *Frith v. Indiana*, 325 N.E.2d 186, 188-189 (Ind. 1975) (“Williams [i.e., his attorney, William C. Erbecker] has filled his Brief with plagiarized material. The material has been copied in the Brief without quotation marks, indentation or citation in violation of Rule AP. 8.2(B)(6) with reference to the preparation of Briefs. For example, although 39 ALR 3d is not listed in the ‘Table of Citations’ section, nor anywhere else in the Brief, more than ten pages of 39 ALR 3d are copied out in the Brief, comprising about fourteen pages of the Brief.”)
- *Dewilde v. Guy Gannett Pub. Co.*, 797 F.Supp. 55, 56, n.1 (D.Maine 1992);
- *U.S. v. Jackson*, 64 F.3d 1213, 1219, n.2 (8thCir. 1995) (Attorney Alfredo Parrish copied part of a district court’s opinion into his brief without citing the source.);
- *Velez v. Alvarado*, 145 F.Supp.2d 146, 160-161 (D.Puerto Rico 2001) (“In fact, by our estimation, approximately sixty-six percent of the brief [prepared by Plaintiff’s attorney, Jose Ramon Olmo Rodriguez] is a verbatim reproduction of the Judge Casellas’ Opinion and Order [in the unpublished case *Ortiz v. Colon*, without “a single citation to *Ortiz*”]. This behavior is reprehensible. We find counsel’s behavior to be intolerable. In addition to the self-evident reasons for denouncing this practice, the impugnable brief was a disservice to Plaintiff, counsel’s client, and this court, as it did not fully address all the arguments raised in Defendants’ motion for summary judgement. In the future, we expect counsel to maintain the highest standards of integrity in all of his representations with this court. We will not treat so gingerly further lapses in his judgement.”).
- *U.S. v. Lavanture*, 74 Fed.Appx. 221, 224, n. 2 (3rd Cir. 10 Sep 2003) (“... this section of Lavanture’s brief is five pages, and more than half of the text appears to have been cut and pasted directly from *Twitty*, [44 F.3d 410 (6thCir. 1995)] with almost no alteration or attribution. In so doing, Lavanture’s counsel ill-represents his client’s interests and for several reasons we note our strong disfavor of the practice. First, it is certainly misleading and quite possibly plagiarism to quote at length a judicial opinion (or, for that matter, any source) without clear attribution. Second, by simply reprinting the Sixth Circuit’s work out of its original context, certain statements in Lavanture’s brief are inaccurate.”).
- *Vasquez v. City of Jersey City*, 2006 WL 1098171 at n. 4 (D.N.J. 31 Mar 2006) (“In Defendants’ Reply Brief, Defendants’ counsel quotes verbatim this Court’s language from sections of this Court’s opinion in *Capodici v. City of Jersey City*, Civil Action No. 03-2306, without reference or citation. In addition, for any case cite in Defendants’ Reply Brief not plagiarized from this Court, counsel provides no pinpoint cites. While this Court’s opinion has not been affected by defense counsel’s unprofessional submission, this Court shall use

this opportunity to express its displeasure with counsel and to set forth its expectation that all future submissions from City of Jersey City attorneys will be properly cited.”).

- *U.S. v. Bowen*, 194 Fed.Appx. 393, 402, n.3 (6thCir. 2006) (Attorney Robert Little plagiarized 20 pages from a published district court opinion. “... citation to authority is absolutely required when language is borrowed.” “... this behavior is completely unacceptable....”);
- *In re Burghoff*, 374 B.R. 681 (Bkrcty.N.D.Iowa 2007) (Attorney Peter Cannon plagiarized a scholarly article in his brief. Judge ordered attorney to take “a law school course on professional responsibility” and refund \$5737 fees to his client.);
- *Venesevich v. Leonard*, Not Reported in F.Supp.2d, 2008 WL 5340162 at *2, n.2 (M.D.Pa. 2008) (Attorney Don A. Bailey “plagiarized a significant portion of plaintiff’s brief in opposition to the motion to dismiss. Approximately five of the eight pages of discussion are copied verbatim from judicial opinions....”), *Venesevich v. Leonard*, 2009 WL 36437 (M.D.Pa. 2009) (Bailey unsuccessfully attempted to blame unidentified attorney-ghostwriter.), *Venesevich v. Leonard*, 378 Fed.Appx. 129, 130 (3dCir. 2010) (“Pages six through ten of the brief consist almost entirely of text lifted from judicial opinions without attribution.” Court of Appeals refuses to vacate FN2 in original criticism.).

But, in a few cases, an attorney is suspended from the practice of law for plagiarizing a Brief:

- *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Lane*, 642 N.W.2d 296 (Iowa 3 Apr 2002) (Attorney submitted Brief that contained 18 pages copied verbatim from a treatise, without citing the treatise. Attorney billed \$16,000 (80 hours) for research and preparation of that Brief. Attorney was suspended from practice of law for six months.).
- *In re Ayeni*, 822 A.2d 420, 421 (D.C. 1 May 2003) (Attorney disbarred for misappropriation of client funds and plagiarizing one brief. “... respondent was appointed to represent a criminal defendant on appeal, respondent filed a brief in this court that was virtually identical to the brief filed earlier by his client’s co-defendant. Respondent denied having plagiarized the brief, claiming to have never seen the co-defendant’s brief. He later stated that the brief was primarily written by an intern. However, respondent submitted a voucher for payment asserting that he expended more than nineteen hours researching and writing the brief. The Board concluded that respondent’s conduct in that matter violated Rule 8.4(c).”).
- *Columbus Bar Assn. v. Farmer*, 855 N.E.2d 462, 467-468, 2006-Ohio-5342, ¶20 and ¶22 (Ohio 1 Nov 2006) (“... respondent had acted dishonestly and in violation of DR 1-102(A)(4) by dismissing as worthless the April 19 brief [filed by another attorney] and then filing a duplicate version.” “... Smith reported respondent’s excuses — he was up against a filing deadline and had needed to work on another case — when [client’s sister] called on him to account for his dereliction. These excuses, unflattering as they are, are far more believable than respondent’s explanation to the Disciplinary Counsel that he had, after careful research and contemplation, decided that [client’s] appeal would be best served by essentially plagiarizing his predecessor’s work.” Attorney-respondent was suspended from practice of law for two years.).

In an Iowa Supreme Court case cited above, that Court explained why plagiarism demonstrated an unfitness to practice law:

Lane plagiarized from a treatise and submitted his plagiarized work to the court as his own. This plagiarism constituted, among other things, a misrepresentation to the court. An attorney may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 1-102(A)(4). This issue is akin to the matter of ghost-writing attorneys who "author pleadings and necessarily guide the course of the litigation with unseen hand." *Johnson v. Bd. of County Comm'rs*, 868 F.Supp. 1226, 1231 (D.Colo. 1994), *aff'd in part and disapproved in part*, 85 F.3d 489 (10thCir.), *cert. denied sub nom. Greer v. Kane*, 519 U.S. 1042, 117 S.Ct. 611, 136 L.Ed.2d 536 (1996). In this situation, an attorney authors court documents for a pro se litigant who, in turn, submits the court document as his or her own writing. This practice is widely condemned as unethical and a "deliberate evasion of the responsibilities imposed on attorneys." *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 886 (D.Kan. 1997); *see, e.g.*, Iowa State Bar Ass'n Comm. on Prof'l Ethics & Conduct, Formal Op. 96-31 (June 5, 1997); Iowa State Bar Ass'n Comm. on Prof'l Ethics & Conduct, Formal Op. 94-35 (May 23, 1995); *Duran v. Carris*, 238 F.3d 1268, 1273 (10thCir. 2001); *In re Ellingson*, 230 B.R. 426, 435 (Bankr.D.Mont. 1999); *Ricotta v. State*, 4 F.Supp.2d 961, 987 (S.D.Cal. 1998). *See generally Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 292 (E.D.Va. 2001). Just as ghost writing constitutes a misrepresentation on the court, so does plagiarism of the type we have before us.

Plagiarism itself is unethical. "Plagiarism, the adoption of the work of others as one's own, does involve an element of deceit, which reflects on an individual's honesty." *In re Zbiegien*, 433 N.W.2d 871, 875 (Minn. 1988). Use of "appropriated material ... cannot go undisciplined, especially because honesty is so fundamental to the functioning of the legal profession...." *In re Lamberis*, 93 Ill.2d 222, 228, 66 Ill.Dec. 623, 443 N.E.2d 549, 552 (1982). Undoubtedly, Lane's plagiarism reflects poorly on both his professional ethics and judgment.

It was not difficult to find similarity between Lane's post-trial brief and the Grossman treatise. The legal argument of Lane's post-trial brief consisted of eighteen pages of plagiarized material, including both text and footnotes, from the treatise. In copying this material, Lane cherry-picked the relevant portions and renumbered the footnotes to reflect the altered text. Examination of Lane's brief does not reveal any independent labor or thought in the legal argument. *See Alexander v. Irving Trust Co.*, 132 F.Supp. 364, 367 (S.D.N.Y. 1955).

....

Equally troubling is Lane's application for attorney fees. Lane copied the entire portion of his legal argument out of a book and then claimed it took him eighty hours to write the brief containing the copied material. He requested attorney fees for this work at the rate of \$200 per hour. Other than Lane's assertions that perhaps he works less efficiently than other lawyers, there is little in the record to indicate Lane actually spent this amount of time writing the brief. Because he plagiarized the entire legal argument, the chances are remote that it took Lane eighty hours to write the argument. Rather, the facts show Lane stole all eighteen pages of his legal argument from a single source. Then to justify his request for attorney fees for the eighty hours it took to "write" the brief, Lane submitted a list of over 200 legal sources to the court. In doing so, Lane attempted to have the court believe he researched and relied on

each of these sources in writing the brief. These circumstances only support the conclusion Lane endeavored to deceive the court.

The Ethics Board argues Lane's plagiarism was part of a larger scheme to defraud the court by means of inflated time and expense billings. When Lane requested compensation for time he did not spend working on the case, he violated the professional rule forbidding a lawyer from entering into an agreement for, charging, or collecting an illegal or clearly excessive fee. See DR 2-106(A); see, e.g., *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Hoffman*, 572 N.W.2d 904, 909-10 (Iowa 1997) (attorney's charging excessive fee warranted six month suspension where attorney attempted to mislead grievance commission and supreme court with untenable excuses for seeking such an excessive fee). Even after the plagiarism issue arose, Lane continued to assert he was entitled to receive \$200 for the eighty hours it took him to copy the material in his brief. He did not at any time admit that it did not take, nor could it have taken him that long to simply copy his legal argument out of a treatise. Charging such a clearly excessive bill brings Lane's integrity into question and the entire legal profession into disrepute.

Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Lane, 642 N.W.2d 296, 299-301 (Iowa 2002).

my comments

Why would an attorney plagiarize in a Brief? Quoting or paraphrasing from a judicial opinion or law review article, with a citation to the source, is persuasive authority. Plagiarizing pretends that this material is only legal analysis or argumentation by a partisan attorney, which is *less* persuasive than quoting and citing a judicial opinion. The only reason I can see for plagiarizing in a Brief is that the attorney can pretend he did more work, and thus “justify” a higher fee. Such plagiarism breaches the fiduciary duty of an attorney to his client, both with higher fees and less effective advocacy, and such plagiarism is also a misrepresentation to the court. Attorneys *ought* to be disciplined by their state bar for such misconduct.

Beginning on page 38, I discuss judicial plagiarism from Briefs. If an attorney plagiarizes from a law review article, legal encyclopedia, or other published source in a Brief submitted to a judge, and if the judge then plagiarizes that Brief in writing the official opinion in the case, someone might recognize the words and accuse the judge of plagiarism. A cynic might say this concern explains why judges condemn plagiarism in Briefs submitted to them.

ghostwriting by associates

There is another way that attorneys can copy in Briefs. They can use original work from law students, paralegals, associate attorneys, and legal consultants in a Brief without giving credit to the people who did the legal research and analysis. Technically, this is ghostwriting. In some cases, it might be justifiable.

If the work by subordinates is routine and uncreative (e.g., finding the one leading opinion on dog bites in the local jurisdiction), I see this as a de minimis issue. In a scientific or engineering

publication describing a new device, authorship credit is only given to those who created the new ideas described in the paper. A skilled machinist or technician who built a prototype might be acknowledged, but someone who simply followed instructions of the author(s) is generally not even acknowledged in a paper. A similar rule should apply to authorship of legal Briefs.

Only names of attorneys who are licensed to practice in the court receiving the Brief can be included at the end of the Brief — a rule that generally prohibits names of law students and paralegals from appearing at the end of the Brief. Such a rule differs from the rule in other learned professions, where the names of graduate students routinely appear on publications describing their work — an earned Ph.D. or M.D. degree is *not* a requirement for authorship of a scientific or medical paper. The rule in law means that paralegals are excluded from authorship credit on a Brief. However, one does not expect that a paralegal will be supplying creative, innovative ideas to a Brief, because such a paralegal would be functioning at the level of an attorney.

On the other hand, if someone supplies creative, intellectual work for a Brief — especially a novel legal argument — then their name *should* be mentioned. Without such mention, the attorneys whose names appear on the Brief fraudulently claim credit for novel ideas of someone else. Reputations in the legal community are built on receiving credit for good work, in the same way as reputations in scientific research, engineering, medicine, and other learned professions.

In a law firm with multiple attorneys, and especially in a law firm with many associate attorneys, preparation of a Brief in a major case is often a team effort. Generally, a partner in the firm who is in charge of the case will have his/her name at the end of the Brief, perhaps along with one associate who is heavily involved in the case. Other attorneys, especially junior associates, are expected to contribute work to a Brief, in return for receiving a salary. However, in my opinion, receiving payment for work does *not* justify denying credit to an associate who supplies a novel legal argument or some other significant, creative work to the Brief.

Exploitation of anonymous associates raises issues similar to exploitation of anonymous law clerks who write opinions for a judge, which is discussed below, beginning at page 56. However, when a judge copies from an anonymous law clerk, there is also the issue of improper delegation of judicial duties.

attorney ghostwriting for pro se litigant

Apart from traditional litigation in which a licensed attorney represents each party, there is a modern practice to “unbundle” litigation services: the attorney frames issues, does legal research, and ghostwrites a Brief for the client, but the pro se client does all of the discovery and the pro se client appears alone in court. Judges can easily tell when a pro se litigant presents a Brief that was written by an attorney.¹⁹ Many judges have condemned the practice, as the citations below show. I attempted to cite only published opinions, however I have cited a few unpublished opinions that either (1) strongly condemned ghostwriting or (2) contained an unusually thorough analysis of ghostwriting.

cases in U.S. Courts of Appeals

In October 1971, the U.S. Court of Appeals in Maine said in dictum:

We add one final matter, not for this case, but with an eye to the future. In a growing number of petitions, of which this is one, the petitioner appears pro se, asserts complete ignorance of the law, and then presents a brief which, however insufficient, was manifestly written by someone with some legal knowledge. We are entirely agreeable to a petitioner having what is colloquially termed a jailhouse lawyer. What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.

Ellis v. Maine, 448 F.2d 1325, 1328 (1stCir. 1971).

In February 1996, the Tenth Circuit disbarred an attorney for writing Briefs for pro se litigants in four cases while the attorney was suspended for filing frivolous appeals. *In re Smith*, 76 F.3d 335 (10thCir. 1996) (per curiam).

¹⁹ See, e.g., *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 886-887 (D.Kan. 1997) (“The court has reviewed both her pleadings and the other documents filed in this case. They reflect a sophisticated level of legal training or experience on the part of whoever drafted them. They are reasonably well organized and articulate, reflect substantial legal research and analysis, and for the most part address the relevant issues. They do not reflect a confusion about the case or its issues.”).

In July 2000, the U.S. Court of Appeals in Kansas issued a nonprecedential opinion with the following terse footnote:

We note that an attorney who “ghost writes” a brief for a pro se litigant may be subject to discipline both for a violation of the rules of professional conduct and for contempt of court. See, e.g., *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 885-87 (D.Kan. 1997); *Johnson v. Board of County Comm'rs for County of Fremont*, 868 F.Supp. 1226, 1231-32 (D.Colo. 1994), *reversed in part on other grounds*, 85 F.3d 489 (10th Cir. 1996).; *Washington v. U.S.*, 2000 WL 985885, n.1 (10thCir. 2000)

In January 2001, the U.S. Court of Appeals in New Mexico wrote a long discussion that condemned attorneys who ghostwrite a Brief for a pro se litigant:

Lastly, we address defendants' request for sanctions alleging that Mr. Duran's pro se brief was actually “ghost-written” by his former attorney, Harry Snow. We issued a show cause order requesting that Mr. Duran and Mr. Snow show cause as to why this court should not sanction this behavior. We have received and considered the parties' response.

This court is concerned with attorneys who “author[] pleadings and necessarily guide[] the course of the litigation with an unseen hand.” *Johnson v. Bd. of County Comm'rs*, 868 F.Supp. 1226, 1231 (D.Colo. 1994). Fed.R.Civ.P. 11(a) requires that “[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney, shall be signed by the party.” Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefit of this court's liberal construction of pro se pleadings, see *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel.

As stated in a recent law review article:

The duty of candor toward the court mandated by Model Rule 3.3 is particularly significant to ghostwritten pleadings. If neither a ghostwriting attorney nor her pro se litigant client disclose the fact that any pleadings ostensibly filed by a self-represented litigant were actually drafted by the attorney, this could itself violate the duty of candor. The practice of undisclosed ghostwriting might be particularly problematic in light of the special leniency afforded pro se pleadings in the courts. This leniency is designed to compensate for pro se litigants' lack of legal assistance. Thus, if courts mistakenly believe that the ghostwritten pleading was drafted without legal assistance, they might apply an unwarranted degree of leniency to a pleading that was actually drafted with the assistance of counsel. This situation might create confusion for the court and unfairness toward opposing parties. It is therefore likely that the failure to disclose ghostwriting assistance to courts and opposing parties amounts to a failure to “disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,” which is prohibited by Model Rule 3.3. Undisclosed ghostwriting would also likely qualify as professional misconduct under Model Rules 8.4(c) and (d), prohibiting conduct involving a misrepresentation, and conduct that is prejudicial to the administration of justice, respectively.

John C. Rothermich, Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice, 67 *FORDHAM L.REV.* 2687, 2697 (1999) (citing Model Rules of Prof'l Conduct R 3.3(a)(2)) (footnotes omitted).

It is disingenuous for Mr. Duran and Mr. Snow to argue that ghost writing represents a positive contribution such as reduced fees or pro bono representation. Either of these kinds of professional representation are analogous to the concept of rescue in the field of torts. A lawyer usually has no obligation to provide reduced fee or pro bono representation; that is a matter of conscience and professionalism. Once either kind of representation is undertaken, however, it must be undertaken competently and ethically or liability will attach to its provider.

Competence requires that a lawyer conduct a reasonable inquiry and determine that a filed pleading is not presented for an improper purpose, the positions taken are nonfrivolous, and the facts presented are well grounded. Fed.R.Civ.P. 11(b). Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers. See *Haines*, 404 U.S. at 520-21, 92 S.Ct. 594.

We determine that the situation as presented here constitutes a misrepresentation to this court by litigant and attorney. See *Johnson*, 868 F.Supp. at 1231-32 (strongly condemning the practice of ghost writing as in violation of Fed.R.Civ.P. 11 and ABA Model Code of Professional Responsibility DR 1-102(A)(4)). Other jurisdictions have similarly condemned the practice of ghost writing pleadings. See, e.g., *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (finding that a brief, “prepared in any substantial part by a member of the bar,” must be signed by him); *Ostrovsky v. Monroe (In re Ellingson)*, 230 B.R. 426, 435 (Bankr.D.Mont. 1999) (finding “[g]host writing” in violation of court rules and ABA ethics); *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 885-86 (D.Kan. 1997) (expressing legal and ethical concerns regarding the ghost writing of pleadings by attorneys); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1077 (E.D.Va. 1997) (finding it “improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as pro se”); *United States v. Eleven Vehicles*, 966 F.Supp. 361, 367 (E.D.Pa. 1997) (finding that ghost writing by attorney for pro se litigant implicates attorney's duty of candor to the court, interferes with the court's ability to supervise the litigation, and misrepresents the litigant's right to more liberal construction as a pro se litigant).

We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to “substantial” assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature.FN2 In fact, we agree with the New York City Bar's ethics opinion that “an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.” Rothermich, supra at 2712 (citing Committee on Prof'l and Judicial Ethics, Ass'n of the Bar of the City of New York, Formal Op.1987-2 (1987)). We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. See id. at 2711-12. We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved.

FN2. “[A]ttorneys must recognize that if they continue to provide assistance to an ostensibly pro se litigant throughout the course of the litigation, then disclosure of drafting assistance alone would be insufficient to satisfy their obligations to the court.” Rothermich, supra at 2712 & n. 211.

Finally, in response to this court's show cause order, Mr. Snow claimed the high ground for "representing" Mr. Duran on appeal at a reduced fee. He suggests that his representation of Mr. Duran in the trial court afforded him enough familiarity with the case to be able to offer Mr. Duran assistance with his appeal at a much reduced fee. We note the irony in Mr. Snow's rationalization that he should be commended for assisting Mr. Duran on appeal at a reduced rate and yet failing to continue that representation on appeal, or to even acknowledge that some form of assistance was given.^{FN3} We do not allow anonymous testimony in court; nor does this circuit allow ghostwritten briefs. Therefore, we admonish Mr. Snow that this behavior will not be tolerated by this court, and future violations of this admonition will result in the possible imposition of sanctions.

FN3. "It is also important to recognize the Model Rule 1.16, generally prohibiting withdrawal that would materially harm the client's interest, is of particular importance to any analysis of ghostwriting." *Rothermich*, supra at 2697.

Duran v. Carris, 238 F.3d 1268, 1271-1273 (10thCir. 2001) (per curiam).

In April 2008, the U.S. Court of Appeals in Utah said in a footnote:

Contrary to plaintiff's self-proclaimed "pro se" status, her briefs, both to this court and to the district court, with the possible exception of her opening brief on appeal, are clearly written by someone with formal legal training. We note that an attorney who "ghost writes" a brief for a pro se litigant may be subject to discipline both for a violation of the rules of professional conduct and for contempt of court. See, e.g., *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 885-87 (D.Kan. 1997); *Johnson v. Bd. of County Comm'rs*, 868 F.Supp. 1226, 1231-32 (D.Colo. 1994), *rev'd in part on other grounds*, 85 F.3d 489 (10thCir. 1996).

Patton v. West, 276 Fed.Appx. 756, 757, n.1 (10thCir. 2008).

cases in trial courts

- *Klein v. Spear, Leeds and Kellogg*, 309 F.Supp. 341, 342-343 (S.D.N.Y. 1970) ("Plaintiff is an habitual litigant who in the past five or six years has commenced well over thirty lawsuits against a very large number of defendants. He does not desist when the loss of an action occurs. We are disquieted by yet another facet of plaintiff's approach to these proceedings. An unverified statement brought to our attention is to the effect that an attorney (or attorneys) have been, and still are, actively assisting him with legal advice and, in the main, by drawing up the papers before us now as well as those submitted on the prior motion. They are quite voluminous and by reason of their legal content and phraseology most strongly suggest that they emanate from a legal mind. If this be true, it should not be countenanced. It is one thing to give some free legal advice (incidentally, plaintiff is apparently not indigent); quite another to participate so extensively and not reveal one's identity. If this is the case, we see no good or sufficient reason for depriving the opposition and the Court of the identity of the legal representative(s) involved so that we can proceed properly and with the relative assurance that comes from dealing in the open. Besides, where it is unnecessary we should not be asked to add the extra strain to our labours in order to make certain that the pro se party is fully protected in his rights. Most importantly, this unrevealed support in the background enables an attorney to launch an attack, even against another member of the Bar (as was done by this same plaintiff), without showing his face. This smacks of the gross unfairness that characterizes hit-and-run tactics. If this is the situation here, we vigorously condemn it.");

- *Klein v. H. N. Whitney, Goadby & Co.*, 341 F.Supp. 699, 702-03 (S.D.N.Y. 1971) (Judge dismissed plaintiff's case as barred by statute of limitations. "Furthermore, as other judges of this court have noted, although Klein purports to be proceeding pro se, certain statements of his at arguments and the nature of his answering papers strongly suggest that he is enjoying the assistance of a lawyer or lawyers who have not formally appeared in this case. I agree with Judge Cooper that this practice, if it be the case here, is grossly unfair to both this court and the opposing lawyers and should not be countenanced. *Klein v. Spear, Leeds & Kellogg*, 309 F.Supp. 341 (S.D.N.Y. 1970).);

Johnson (1994)

In November 1994, a U.S. District Court in Colorado issued a landmark opinion about attorneys ghostwriting for pro se litigants. That trial court found three different legal wrongs in such ghostwriting: (1) giving pro se litigants an unfair advantage, (2) Rule 11 violation, and (3) violation of attorney's duty not to assist in fraud or misrepresentation.

Cheek [the defendant, who was then Sheriff of Fremont County] confirmed at the hearing that the documents he filed "in his individual capacity and pro se," although signed by him, were drafted by Fremont County Attorney Brenda Jackson. Such ghost-writing is far more serious than might appear at first blush. It necessarily causes the court to apply the wrong tests in its decisional process and can very well produce unjust results.

It is elementary that pleadings filed pro se are to be interpreted liberally. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972); *Swoboda v. Dubach*, 992 F.2d 286, 289 (10thCir. 1993). Cheek's pleadings seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party.

Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.

What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.

Ellis v. Maine, 448 F.2d 1325, 1328 (1stCir. 1971); see also *Klein v. H.N. Whitney, Goadby & Co.*, 341 F.Supp. 699, 702-03 (S.D.N.Y. 1971); *Klein v. Spear, Leeds & Kellogg*, 309 F.Supp. 341, 342-43 (S.D.N.Y. 1970). Such an evasion of the obligations imposed upon counsel by statute, code and rule is ipso facto lacking in candor.

The ABA Standing Committee on Ethics and Professional Responsibility has stated that an undisclosed counsel who renders extensive assistance to a pro se litigant is involved in the litigant's misrepresentation contrary to Model Code of Professional Responsibility DR 1-102(A)(4), which provides: "A lawyer shall not: ... (4) Engage in conduct involving

dishonesty, fraud, deceit or misrepresentation.” ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978). Similarly, such conduct will not be countenanced because it is contrary to Colorado Rule of Professional Conduct 1.2(d) which provides “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”

Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar.²⁰

....

A judge is constrained by Canon 3 of the Code of Conduct for United States Judges to initiate appropriate action when he or she becomes aware of the likelihood of unprofessional conduct by a lawyer. Having published this memorandum opinion is, in my view, sufficient appropriate action since I am confident that none of the offending conduct referred to was thought of as such by the lawyer or lawyers involved. Further, the Rules of Professional Conduct adopted by the Colorado Supreme Court and perforce by this court as well as existing ethics opinions of the Colorado Bar Association have not given adequate attention to the ethical considerations implicit in the practice of ghost-writing.

I have given this matter somewhat lengthy attention because I believe incidents of ghost-writing by lawyers for putative pro se litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghost-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.

Johnson v. Board of County Com'rs for County of Fremont, 868 F.Supp. 1226, 1231-1232 (D.Colo. 1994) (memorandum opinion), *aff'd on other grounds*, 85 F.3d 489, 492, n.3 (10th Cir. 1996) (ghostwriting not an issue on appeal), *cert. denied sub nom, Greer v. Kane*, 519 U.S. 1042 (1996).

other cases

- *Somerset Pharmaceuticals, Inc. v. Kimball*, 168 F.R.D. 69, 72 (M.D.Fla. 1996) (Plaintiff unable to prove that all of pro se defendant's pleadings were actually ghostwritten by an attorney. “While the practice of filing pro se pleadings which are actually prepared by a legal advocate does taint the legal process and create disparity between the parties, more than a mere supposition should be alleged before utilizing the inherent power of the Court to thoroughly prejudice a party by striking all of their pleadings.”);
- *Clarke v. U.S.*, 955 F.Supp. 593, 598 (E.D.Va. 1997) (“Notably, the true author of plaintiff's putatively pro se pleadings and supporting documents appears to have had formal legal training. Ghost-writing by an attorney of a “pro se” plaintiff's pleadings has been condemned as both unethical and a deliberate evasion of the responsibilities imposed on attorneys by Federal Rule of Civil Procedure 11. *Johnson v. Bd. of County Comm'rs*, 868 F.Supp. 1226,

²⁰ Boldface added by Standler.

1231-32 (D.Colo. 1994), *aff'd as modified* 85 F.3d 489 (10th Cir. 1996); see also Virginia Legal Ethics Op. 1592 (1994). Thus, if in fact an attorney has ghost-written plaintiff's pleadings in the instant case, this opinion serves as a warning to that attorney that this action may be both unethical and contemptuous. *Johnson*, 868 F.Supp. at 1232.”), *vacated and remanded on other grounds*, 1998 WL 559754 (4th Cir. 1998) (per curiam appellate opinion does not mention ghostwriting);

- *U.S. v. Eleven Vehicles*, 966 F.Supp. 361, 367 (E.D.Pa. 1997) (“Important policy considerations militate against validating an arrangement wherein a party appears pro se while in reality the party is receiving legal assistance from a licensed attorney. [¶] **One**,²¹ participating in a ghost writing arrangement such as this, where the lawyer drafts the pleadings and the party signs them, implicates the lawyer’s duty of candor to the Court. See Rule 3.1(a)(1) of the Pennsylvania Rules of Professional Responsibility. Clearly, the party’s representation to the Court that he is pro se is not true when the pleadings are being prepared by the lawyer. A lawyer should not silently acquiesce to such representation. **Two**, ghost writing arrangements interfere with the Court’s ability to superintend the conduct of counsel and parties during the litigation. For example, certain conduct may be sanctionable if committed by counsel but not if committed by a party. See, e.g., 28 U.S.C. § 1927. Knowing whether the pleadings were prepared by a lawyer or non-lawyer is therefore important to the administration of justice in the case. Moreover, the extent of pre-filing factual investigation and legal research required to be done in a particular case may vary depending upon whether a party is represented by counsel or proceeding pro se. See Fed.R.Civ.P. 11. **Finally**, it would be unfair to construe a pro se litigant’s pleadings more liberally than the pleadings of a counselled litigant when in reality the pro se litigant has had the benefit of counsel. See *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).”), *vacated and remanded on other grounds*, 200 F.3d 203 (3d Cir. 2000) (appellate opinion does not mention ghostwriting);

In June 1997, a U.S. District Judge in Virginia issued a good opinion about ghostwriting:

The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding pro se is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit’s mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers, ... (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure (“Rule 11”), and (3) circumvents the withdrawal of appearance requirements of Rule 83.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia ... [“which provides that once an attorney has entered an appearance in a civil or criminal action, withdrawal is permitted only by order of the court, and after reasonable notice to the party represented.”].

Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F.Supp. 1075, 1077-78 (E.D.Va. 1997). The judge then made a lengthy analysis and concluded:

The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, there is no specific rule which deals with such ghost-writing. Therefore, the Court FINDS that there is insufficient evidence to find that the

²¹ Boldface added in three places by Standler.

Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted. [¶] This Opinion and Order sets forth this Court's unqualified FINDING that the practices described herein are in violation of its Rules and will not be tolerated in this Court.

Laremont-Lopez, 968 F.Supp.at 1079-1080.

- *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 887 (D.Kan. 1997) (“Both the court and the parties, moreover, have a legitimate concern that an attorney who substantially participates in a case at least be identified and recognize the possibility that he or she may be required to enter appearance as counsel of record and thereby accept accountability for his or her participation, pursuant to Rule 11 and the rules of professional conduct applicable to attorneys.”);
- *Ricotta v. State of Calif.*, 4 F.Supp.2d 961, 987 (S.D.Cal. 1998) (“... even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in *Johnson* and *Laremont* explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions. [¶] This Court is persuaded by such reasoning and finds that the circumstances justifying such a conclusion have yet to change. The parties were unable to point the Court to any local, state or national rule addressing ghost-writing. By no means does this Court condone unprofessional conduct.”);
- *In re Mungo*, 305 B.R. 762, 767-770 (Bkrcty.S.Car. 2003) (Attorney was publicly admonished not to ghostwrite briefs for pro se litigants. Lengthy discussion of law.);
- *In re Brown*, 354 B.R. 535 (Bkrcty.N.D.Okla. 2006) (Attorney publicly admonished for ghostwriting brief after he withdrew as counsel of record, because of a conflict of interest. At 541: “Ghostwriting is a practice which has been met with universal disfavor in the federal courts.” At 546: “However, the publication of this opinion, together with the prior opinions of the United States Court of Appeals for the Tenth Circuit and this Court, can leave no misunderstanding regarding the Court's view that ghostwriting is a practice that will not be tolerated.”);
- *Delso v. Trustees For Retirement Plan For Hourly Employees of Merck & Co., Inc.*, 2007 WL 766349 at *12-*18 (D.N.J. 2007) (At *16: “Thus, the Court finds that although undisclosed ghostwriting may not per se violate Fed.R.Civ.P. 11 and L.Civ.R. 11. 1, it clearly violates the intention that attorneys be responsible for their submissions to the Court. But, when viewed under the current RPC, ghostwriting is antithetical to the public interest.”);
- *Kircher v. Charter Tp. of Ypsilanti*, 2007 WL 4557714 (E.D.Mich. 2007) (At *4: “Although ‘ghostwriting’ may not per se violate Fed.R.Civ.P. 11, the Court considers it improper for lawyers to assist in drafting pleadings submitted by litigants designated as pro se. See *Laremont-Lopez*, 968 F.Supp. [1075] at 1077 [(E.D.Va. 1997)]; *Delso*, 2007 WL 766349, at *16 [(D.N.J. 2007)].” At *5: “The court ... orders [attorney] George E. Ward to cease providing Plaintiff assistance with the pending federal case without filing an appearance and signing documents he assisted in preparing.”)

- *Bittle v. Electrical Railway Improvement Co.*, 576 F.Supp.2d 744, 755, n.9 (M.D.N.C. 2008) (“This court condemns the ghostwriting of pleadings for parties purporting to appear pro se. Ghostwriting legal documents ‘(1) unfairly exploits the Fourth Circuit’s mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers, (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure[,] ... and (3) circumvents the withdrawal of appearance requirements’ of Local Rule 83.1 of the Middle District of North Carolina. *Laremont-Lopez v. Se. Tidewater Opportunity Project*, 968 F.Supp. 1075, 1078 (E.D.Va. 1997) (internal citations omitted.)”);
- *Gordon v. Dadante*, 2009 WL 1850309 at *27 (N.D. Ohio 2009) (“This Court will continue to strike ghostwritten submissions from any party and will, in the future, entertain motions for contempt against a party submitting ghostwritten material.”);
- *L & M Companies, Inc. v. Biggers III Produce, Inc.*, 2009 WL 4823364, n.3 (W.D.N.C. 2009) (“Biggers’ motion and reply ... are not typical of most pro se writings, suggesting the possibility that these filings may have been ‘ghost-written’ by an attorney. If so, this practice is strongly disapproved. See *In re Mungo*, 305 B.R. 762 (Bkrcty.D.S.C. 2003).”);

discussion of ghostwriting for pro se litigant

My search on 7-9 Jan 2010 of all cases in state and federal courts in Westlaw for the query²² ghost-writ! found a total of 323 cases, of which half are after July 2003. While the term “ghost writer” has been used in judicial opinions in the USA since 1938, half of the cases are in the first 65 years and half of the cases are in the most recent 6 years. This statistic suggests that the general subject of ghostwriting is receiving more attention from judges in recent years. Furthermore, the cases cited above show that judges were aware that attorneys were ghostwriting for pro se litigants in 1970, but the first detailed judicial analysis of the problem did not occur until *Johnson* in Nov 1994.

Attorneys ghostwriting for a pro se litigant are mentioned in only a few of these 323 cases, of which the major cases are cited above. There are also cases that accuse an attorney of ghostwriting a report for an expert witness. Most of these 323 cases mention ghost-writing in the context of books and periodical articles by someone other than an attorney. Despite the fact that most litigation in the USA is in state courts, reported cases involving an attorney who ghostwrote a Brief for a pro se litigant are *all* in federal courts.

What is interesting to me is that judges consider a ghostwritten Brief submitted by a pro se party to be a misrepresentation to the court. If that is correct, then does it follow that a senior attorney in a law firm must list the names of all attorneys who substantially contributed to the Brief, in order to avoid a similar misrepresentation to the court about authorship of the Brief? The

²² This broad search will return cases with the word/phrase ending in: write, writes, written, or writing, either with a hyphen (e.g., ghost-writing), one word (e.g., ghostwriting), or two words (e.g., ghost writing).

answer appears to be “no”. While I would like judges to condemn failure to list the names of all attorneys who substantially contributed to the Brief, there are different issues when (1) a licensed attorney ghostwrites a Brief for a pro se litigant and (2) an anonymous attorney ghostwrites part of a Brief for a licensed attorney, who is the attorney of record in the case. In the former, an attorney avoids professional obligations to the court, moreover the pro se client may be given an unfair advantage by the judge.²³ In the latter, all of the authors — both real and alleged, both anonymous and openly declared — are attorneys and they all have the same professional obligations to the court. Said in another way, the prohibition against ghostwriting briefs for a nonattorney is *not* a concern about proper attribution of authorship, it is a concern about both (1) attorneys evading professional responsibilities and (2) pro se litigants obtaining an unfair advantage.

Judges in *Johnson v. Board of County Com'rs for County of Fremont*, 868 F.Supp. 1226 (D.Colo. 1994); *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F.Supp. 1075, 1077-78 (E.D.Va. 1997); *Ricotta v. State of Calif.*, 4 F.Supp.2d 961 (S.D.Cal. 1998); *Duran v. Carris*, 238 F.3d 1268 (10thCir. 2001) and progeny found three distinct legal wrongs when an attorney ghostwrites a Brief for a pro se litigant. In the following paragraphs, I discuss each of these wrongs.

1. pro se litigant held to “less stringent standards” in pleadings so ghostwriting gives pro se litigant unfair advantage

In 1972, the U.S. Supreme Court tersely reviewed the dismissal of litigation filed pro se by an inmate of the Illinois State Penitentiary and held that a pro se litigant was to be held to “less stringent standards” than an attorney in drafting a Complaint.

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’ *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). See *Dioguardi v. Durning*, 139 F.2d 774 (CA2 1944) [At 775: “We think that, however inartistically they may be stated, the [pro se] plaintiff has disclosed his claims....”]. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) (per curiam).

Judge Merhige of the U.S. District Court in Virginia wrote in 1974:

Furthermore, the Fourth Circuit takes the position that its district courts must be especially solicitous of civil rights plaintiffs. *Johnson v. Mueller*, supra, 415 F.2d [354] at 355 [(4thCir. 1969)].

This solicitude for a civil rights plaintiff with counsel must be heightened when a civil rights plaintiff appears pro se. In the great run of pro se cases, the issues are faintly articulated and often only dimly perceived. There is, therefore, a greater burden and a correlative greater

²³ See the discussion below for details.

responsibility upon the district court to insure that constitutional deprivations are redressed and that justice is done. So, although the Court of Appeals cannot mean that it expects the district courts to assume the role of advocate for the pro se plaintiff, radiations from *Burriss* strongly suggest that the district court must examine the pro se complaint to see whether the facts alleged, or the set of facts which the plaintiff might be able to prove, could very well provide a basis for recovery under any of the civil rights acts or heads of jurisdiction in the federal arsenal for redress of constitutional deprivations. Accordingly, the Court in considering the defendants' motion to dismiss will not permit technical pleading requirements to defeat the vindication of any constitutional rights which the plaintiff alleges, however inartfully, to have been infringed. See *Aiken v. United States*, 282 F.2d 215, 216 (4thCir. 1960). Cf. *Conley v. Gibson*, supra, 355 U.S. at 48, 78 S.Ct. 99.

Canty v. City of Richmond, Va., Police Dept., 383 F.Supp. 1396, 1399-1400 (E.D.Va. 1974), *aff'd*, 526 F.2d 587 (4thCir. 1975), *cert. denied*, 423 U.S. 1062, 96 S.Ct. 802, 46 L.Ed.2d 654 (1976). Quoted with approval in *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4thCir. 1978).

In June 1997, a judge in Virginia applied this law and clearly explained why attorneys who ghostwrite Briefs for a pro se litigant give that pro se litigant an unfair advantage.

However unartfully drafted, pro se pleadings are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *White*, 886 F.2d at 725. This less stringent standard is a necessary accommodation to those unable to obtain the assistance of one trained in the law. Under this standard, "a pro se complaint must survive a motion to dismiss under Rule 12(b)(6) for failure to state a claim unless it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Lugo v. I.N.S.*, 950 F.Supp. 743, 745 (E.D.Va. 1997) (quoting *Haines*, 404 U.S. at 521, 92 S.Ct. at 596).

When, however, complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The pro se plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court. See *Johnson*, 868 F.Supp. at 1231 (ghost-writing is ipso facto lacking in candor and an evasion of the obligations imposed on counsel by statute and rule); *Ellis v. State of Maine*, 448 F.2d 1325 (1stCir. 1971) (same).

Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F.Supp. 1075, 1078 (E.D.Va. 1997).

The reader is cautioned that judges sometimes confuse (1) the "less stringent standard" for evaluating the adequacy of a Complaint in a motion to dismiss or a motion for summary judgment with (2) the greater indulgence for pro se litigants under Rule 11. While each is motivated by a desire for Justice for those uneducated in law, they are separate issues.

2. rules of professional responsibility

The specific rules of professional responsibility that may be violated when an attorney ghostwrites for a pro se litigant include:

- Rule²⁴ 1.2(d) prohibits attorney from assisting anyone with fraudulent conduct;
- Rule 3.1 prohibits frivolous litigation;
- Rule 3.3(a)(2) duty of candor toward the tribunal requires an attorney not assist with a fraudulent act by the client;
- Rule 3.4 requires fairness to opposing party;
- Rule 8.4(c) forbids conduct involving dishonesty, fraud, deceit, or misrepresentations.

Because judges hold pro se litigants to “less stringent standards” than professional attorneys, it is a fraudulent act for a pro se litigant to submit a Brief to a court that was ghostwritten by an attorney, unless the attorney’s name appears on the Brief.

3. Rule 11

Many judges have stated that, when an attorney prepares a Brief for a pro se litigant, that attorney evades his/her responsibility under Federal Rule of Civil Procedure 11. At first impression, this is a strange statement, because Rule 11 applies *both* to licensed attorneys *and* to a “unrepresented party”. Sanctions can be imposed on whoever signed the Complaint, Brief, or other paper — regardless of whether they are a licensed attorney or pro se litigant. Federal Rule of Civil Procedure 11(b) explicitly says “By presenting to the court a pleading, written motion, or other paper ... an attorney or unrepresented party certifies” to the court. Further, the Notes of the Advisory Committee on Rules (1993) says:

The sanction should be imposed on the persons — whether attorneys, law firms, or parties — who have violated the rule or who may be determined to be responsible for the violation.

The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Despite the clarity of Rule 11, one judge wrote a hypothetical about whether the ghostwriter or pro se litigant should be sanctioned:

Who should the Court sanction if claims in the complaint prove to be legally or factually frivolous, or filed for an improper purpose? Thus, although the plaintiffs have signed the complaints, they may assert immunity from sanctions because they retained counsel to draft the complaints.

Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F.Supp. 1075, 1079 (E.D.Va. 1997). I think the obvious answer is the judge should sanction whoever signed the paper. If the pro se litigant signed, then that litigant could sue the attorney-ghostwriter for malpractice in a separate proceeding in state court. When a pro se litigant signs a paper that was

²⁴ Citations are to the American Bar Association Model Rules of Professional Conduct (1983, as amended to Feb 1996).

ghostwritten by an attorney, under Rule 11(b), the pro se litigant accepts legal responsibility for the paper. During the three years 2007-2009, the U.S. Courts of Appeals have affirmed at least three significant Rule 11 sanctions against pro se litigants, proving that pro se litigants are *not* immune from sanctions.²⁵

Judges who condemn ghostwriting as a potential Rule 11 violation omitted from their discussion of Rule 11 that a pro se litigant is held to a “more lenient standard” (i.e., more indulgence) than a professional attorney under Rule 11. An attorney *might* sloppily ghostwrite paper for a pro se litigant to file, knowing that the judge would be lenient with the pro se litigant’s responsibilities under Rule 11. In this way, an attorney could attempt to evade his/her responsibilities under Rule 11. Because a long string of citations to this rule of law would make an unreadable footnote, and because this rule is essential to understanding why ghostwriting might be a Rule 11 violation for attorneys, I am setting the citations in text:

- *Bacon v. American Federation of State, County and Municipal Employees Council, No. 13*, 795 F.2d 33, 34-35 (7thCir. 1986) (Posner, J.) (“In a civil case, where there is no right to appointment of counsel, courts naturally are more lenient when it comes to assessing against litigants not represented by counsel sanctions for frivolous litigation than they are in the case of litigants who do have counsel. A layman cannot be expected to realize as quickly as a lawyer would that a legal position has no possible merit, and it would be as cruel as it would be pointless to hold laymen who cannot afford a lawyer — which so far as appears is Mr. Bacon’s position — to a standard of care that they cannot attain even with their best efforts.”);
- *Maduakolam v. Columbia University*, 866 F.2d 53, 56 (2dCir. 1989) (“While it is true that Rule 11 applies both to represented and pro se litigants, the court may consider the special circumstances of litigants who are untutored in the law. See Fed.R.Civ.P. 11 advisory committee’s notes.”);
- *Baasch v. Reyer*, 827 F.Supp. 940, 944 (E.D.N.Y. 1993) (“Although pro se parties are held to a more lenient standard than professional counsel, [citation omitted], nothing prevents a court from imposing Rule 11 sanctions on a pro se litigant who has not complied with the guidelines set forth in Rule 11. *Burnett v. Grattan*, 468 U.S. 42, 50, n.13, 104 S.Ct. 2924, 2930, n.13, 82 L.Ed.2d 36 (1984).”);
- *Fariello v. Campbell*, 860 F.Supp. 54, 71 (E.D.N.Y. 1994) (“Although pro se litigants are afforded ‘special solicitude’ in the Second Circuit, that solicitude ‘does not extend to the willful, obstinate refusal to play by the basic rules of the system upon whose very power the plaintiff is calling to vindicate his rights.’ *McDonald v. Head Criminal Court Supervisor Officer*, 850 F.2d 121, 124 (2dCir. 1988).”);

²⁵ *U.S. ex rel White v. Apollo Group, Inc.*, Not Reported in F.Supp.2d, 2006 WL 1042881 (W.D.Tex. 2006) (Pro se plaintiff ordered to pay \$46,882 for frivolous litigation in violation of Rule 11.), *aff’d*, 223 Fed.Appx. 401 (5thCir. 2007); *Sieverding v. Colorado Bar Ass’n.*, 237 Fed.Appx. 355 (10thCir. 2007) (Four pro se plaintiffs ordered to pay \$101,865 for “groundless and frivolous” litigation in violation of Rule 11.); *Pellegrini v. Analog Devices, Inc.*, 312 Fed.Appx. 304 (Fed.Cir. 2008) (per curiam) (Pro se plaintiff sanctioned \$20,000 for violation of Rule 11(b)(3) when there was no factual basis for his continued litigation.).

- *Horton v. Trans World Airlines Corp.*, 169 F.R.D. 11, 16 (E.D.N.Y. 1996) (“Although Rule 11 applies to pro se litigants, pro se litigants are held to a more lenient standard than professional counsel, with Rule 11’s application determined on a sliding scale according to the litigant’s level of sophistication. See *Fariello*, 860 F.Supp. at 71; *Baasch v. Reyer*, 827 F.Supp. 940, 944 (E.D.N.Y. 1993); *Soling v. New York State*, 804 F.Supp. 532, 538 (S.D.N.Y. 1992).”);
- *Thomas v. Foster*, 138 Fed.Appx. 822, 823 (7thCir. 2005) (“Although Thomas’s appeal is indeed frivolous, apart from his deficient brief we see little evidence of bad faith [citations omitted], such that sanctions would be appropriate. And as pro se litigant in a civil case, Thomas is entitled to some leniency before being assessed sanctions for frivolous litigation. See *Pryzina v. Ley*, 813 F.2d 821, 823-24 (7thCir. 1987); see also *Bacon v. AFSCME Council # 13*, 795 F.2d 33, 34-5 (7thCir. 1986). However, we warn him that any future frivolous appeals will result in sanctions.”).

The above cases clearly show that judges treat Rule 11 violations by pro se litigants more leniently than the same violation by a professional attorney.

Interestingly, in my reading of all of the ghostwriting cases before Jan 2010, no judge presented evidence that a ghostwriting-attorney had actually engaged in conduct prohibited by Rule 11(b). The judicial concern is that an attorney *might* avoid responsibility. In passing, I note that if the intent of Rule 11 is to reduce frivolous litigation, then *all* frivolous litigation should be sanctioned,²⁶ regardless of whether it was presented by a professional attorney or by a pro se litigant who never attended law school.²⁷

Does ghostwriting by attorneys really involve Rule 11? The purpose of Rule 11(b) is to discourage frivolous litigation, unsupported allegations, or other “improper purpose” by the threat of sanctions.²⁸ But judges detect ghostwritten Briefs in cases with an alleged pro se party because the Brief is of a *higher quality* than the judge would expect from a pro se litigant. Judges should admit that a ghostwritten Brief makes it *easier* for the judge to decide the merits of a dispute

²⁶ The burdensome cost to the opposing party — and inconvenience to judges — is the same, regardless of whether the frivolous litigation is conducted by a licensed attorney or a pro se litigant.

²⁷ If society is really serious about access to courts, society should pay public-interest attorneys to represent indigent litigants in court in civil cases. It is *unreasonable* to expect someone who never attended law school to understand substantive law, legal research techniques, procedural rules, rules of evidence, how to preserve objections for appeal, etc. We don’t allow people who never attended medical school to practice surgery, and litigation is not easier than surgery.

²⁸ See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (“It is now clear that the central purpose of Rule 11 is to deter baseless filings in district court ...”); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 553 (1991) (“The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses.”).

involving a pro se litigant. A high-quality Brief, which reasonably frames issues and cites relevant cases, does *not* involve Rule 11 concerns — to the contrary, a high-quality Brief *avoids* frivolous or otherwise improper litigation.

Many judges have stated that Federal Rule of Civil Procedure 11(a) requires that the author of a Brief sign the Brief.²⁹ The Rule is a statute and should be interpreted as a statute. Rule 11(a) actually says:

Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number.
Federal Rules of Civil Procedure Rule 11(a) (enacted 1937, amended 1983, 1993, 2007, current Jan 2010). Notice that Rule 11 says *nothing* about the *author* of the paper signing the paper. The Rule only says that either "at least one attorney of record" or the unrepresented party must sign. A literal reading of Rule 11 does *not* prohibit ghostwriting, it only requires someone who can be sanctioned take responsibility for the paper. I am *not* attempting to defend either ghostwriting or plagiarism, I am only observing that a literal reading of the Rule does *not* support the interpretation that many judges have given to this Rule.³⁰

The judicial misstatements about Rule 11 in the context of ghostwriting suggest to me that judges have not carefully thought about the legal implications of ghostwriting, but are condemning an obviously unprofessional practice without stating precisely correct reasons. The real problem is that judges rarely sanction anyone for irresponsible or unprofessional litigation.³¹

possibility that a pro se litigant plagiarized

Finally, when a pro se litigant submits a high-quality Brief, judges suspect ghostwriting by an attorney. However, there is a possibility that the pro se litigant plagiarized from paper (e.g., Briefs, law review articles, essays at websites) written by attorney(s). If the pro se litigant plagiarized from an attorney, then the attorney is innocent of any misconduct, unless the attorney personally

²⁹ See, e.g., *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) ("If a brief is prepared in any substantial part by a member of the bar, it must be signed by him."); *Barnett v. LeMaster*, 12 Fed.Appx. 774, 779 (10th Cir. 2001) ("Nevertheless, Rule 11(a) has long required that an attorney sign a pleading he or she has drafted."); *Johnson v. Bd. of County Comm'rs*, 868 F.Supp. 1226, 1231-32 (D.Colo. 1994) ("Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, Fed.R.Civ.P. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him."). *Johnson* is quoted with approval in *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 886 (D.Kan. 1997).

³⁰ On the other hand, because numerous courts have held that Rule 11 prohibits attorneys from ghostwriting for pro se clients, and anonymous ghostwriting is unethical for other reasons, attorneys should not rely on any alleged misinterpretation of Rule 11 to defend ghostwriting.

³¹ In 2005, I remarked that judges rarely sanction attorneys for *inadequate* legal research. See my essay, *Why do Legal Research?*, <http://www.rbs2.com/legres.pdf> (March 2005).

provided the paper to the litigant *and* the attorney *knew* that the litigant intended to plagiarize. There has been an epidemic of plagiarism in high schools, colleges, and universities in the USA since 1970.³² It is reasonable to expect graduates will continue to plagiarize, especially when a pro se litigant who never attended law school suddenly finds himself unprepared to frame legal issues, do legal research, distinguish conflicting opinions, and write articulate prose that will persuade a judge. Further discussion of the problem of pro se litigants plagiarizing from attorneys is beyond the scope of this essay.

my recommendations

I think the best approach would be to amend³³ the Federal Rules of Civil Procedure and the Rules of Professional Responsibility to explicitly prohibit both ghostwriting and plagiarism in any Brief (i.e., Memorandum of Law) submitted to a court.³⁴ Until the Rules of Civil Procedure are amended, I suggest that ghostwriting or plagiarism by attorneys should only be sanctioned as a violation of the Rules of Professional Responsibility.

Finally, note that the conventional form of a Brief submitted to a court has no place for acknowledgements to colleagues, consultants, associates, paralegals, etc. for good ideas, finding obscure cases in diligent legal research, or writing a few sentences that are copied into the Brief. Because of this limitation of conventional format and style, a conscientious attorney of record is *unable* to acknowledge contributions by others. Such acknowledgments are common in articles published in scientific, engineering, and medical journals.

³² See, e.g., Standler, Plagiarism in Colleges in the USA at <http://www.rbs2.com/plag.htm> (Feb 2000).

³³ *Ricotta v. State of Calif.*, 4 F.Supp.2d 961, 987-988 (S.D.Cal. 1998) (“This case illustrates the need for local courts and professional bar associations to directly address the issue of ghost-writing and delineate what behavior is and is not appropriate. The issue is not only interesting and complex, but surely touches and concerns all attorneys currently practicing law in this Country.”).

³⁴ Such a prohibition needs to be carefully written, because I believe plagiarism is acceptable in a Complaint, as explained above, beginning at page 11. The same applies to routine motions.

Judicial Plagiarism

A. judicial copying from Briefs

A lazy judge can simply do a cut-and-paste from Briefs to produce most of the judge's written opinion in the case. Naturally, most of the plagiarized text will come from the Brief submitted by the attorney who represents the winning party. That attorney is unlikely to complain about winning the case. And any complaint to the state or federal judicial conduct committee about judicial plagiarism would make it awkward for an attorney to appear again in any local court, after the attorneys's complaint damaged the reputation of a judicial colleague.

Judicial cut-and-paste from briefs is plagiarism, *not* ghostwriting. The attorney who wrote the brief did *not* agree to have his words used in a judicial opinion. Payment of the attorney is probably a minor concern in this kind of plagiarism, because the attorney was presumed well paid to write the brief. From the judge's perspective, this practice is close to misusing the attorney as a ghostwriter, because the briefs were submitted to the judge, not something that the judge found in a book in a library.

There are two particularly memorable phrases in Justice Scalia's opinion for the Court in *Dastar v. Twentieth Century Fox*, 539 U.S. 23 (2003): (1) "this search for the source of the Nile and all its tributaries" and (2) "species of mutant copyright law". Each of these two phrases is plagiarized from a brief written by David Nimmer and submitted to the U.S. Supreme Court in *Dastar*.³⁵ I refrain from commenting on the irony that a case involving failure to attribute authorship contains judicial plagiarization.

In an unusual example of candor for a judge, Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit wrote a footnote to his concurring opinion, admitting that he plagiarized part of his opinion from an amicus brief:

I am indebted to the brief of amici American Public Health Association et al. for its lucid and forceful analysis of this issue. Much of the discussion in the text is plagiarized from that brief. For ease of readability, I dispense with further attribution."
Conant v. Walters, 309 F.3d 629, 641, n. 3 (9th Cir. 2002) (Kozinski, J., concurring)

Earlier, another judge did the same.

To avoid plagiarizing, the writer acknowledges that this opinion is borrowed in large part, but with some important changes, from the briefs of counsel.
Schultz v. Instant Handling, Inc., 418 F.2d 1019, 1020, n. * (5th Cir. 1969) (Rives, J.).

³⁵ David Nimmer, "The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)," 54 DEPAUL LAW REVIEW 1, 59-60 (Fall 2004).

While such rare honesty is commendable,³⁶ I believe that quotations from Briefs *should* be identified with *both* the indicia of a quotation: (1) either indented, single-spaced text or words enclosed in quotation marks *and* (2) a citation to the original source, including page number.

Judges Kozinski and Rives asserted that plagiarism is all right if one admits it in the opinion. Such an assertion cries out for critical scrutiny. Suppose the judge is irritated by an appellate attorney, and the judge openly declares in the courtroom — recorded by the official court reporter — “Mr. Shyster, I am going to kill you.” then pulls out a pistol and shoots him dead. Is this open declaration by the judge a defense against the charge of murder? Of course not! (Actually, it is a confession of intent!) And an open declaration of plagiarism is no better as a defense against plagiarism. The rules that apply to a freshman college student should also apply to a judge: *both* (1) use either quotation marks or indented, single-spaced text *and* (2) cite a source for *every* quotation. That way the reader of the opinion can clearly identify the words of a party’s attorney — even if the words are endorsed by the judge — and clearly identify the words of the judge himself.

I have found a few other reported judicial opinions that mentions judicial plagiarization from a Brief. In 1992, the Mississippi Supreme Court quoted an opinion from the same court in the year 1930, and remarked in a footnote:

Legal lore has it that the Court plagiarized much of this passage from the brief of William Alexander Percy, long poet laureate of the Delta. See *Nelms v. Blum*, 159 Miss. [372] at 375, 131 So. 817 [(Miss. 1930)].

Williams v. Mississippi, 595 So.2d 1299, 1309, n.12 (Miss. 1992).

A more interesting case was brought by Parlak, a citizen of Turkey, who was granted asylum in the USA in 1991. Because Parlak allegedly made false statements on his 1994 application to become a permanent resident of the USA, and because he was allegedly a terrorist during 1985-88, the U.S. Government sought to deport Parlak. This is not the place to discuss this factually complicated case. What is relevant to this essay is that only one judge on the three-judge panel of the U.S. Court of Appeals was bothered by the fact that the immigration judge’s opinion was plagiarized from Briefs submitted by attorneys from the U.S. Department of Justice, who were prosecuting Parlak.

Then again, perhaps the IJ [immigration judge] cannot be faulted for such heavy reliance [on evidence induced by torture]: Most of her references to the torture evidence were apparently cut-and-pasted from the government’s pre-trial briefs, so maybe she simply had not read the underlying documents. See *Ayi v. Gonzales*, 460 F.3d 876, 884 (7th Cir. 2006) (“Troubling to us is the surprising lack of regard for the rich record in this case coupled with the fact that at least parts of the IJ’s opinion appear to be a ‘cut and paste’ job from previous opinions.”). The IJ’s opinion included the same errors as the government’s briefs,^{FN4} and

³⁶ Commendable in the sense that the judge openly admits his plagiarism, instead of the conventional practice of silently plagiarizing and pretending there is no plagiarism. As discussed below, judicial plagiarism from Briefs *ought* to be recognized as misconduct.

this plagiarism makes the IJ's remark that she had presided over a "long and difficult hearing" ring hollow: what went on during the hearing was apparently of little relevance to her ultimate ruling.[footnote omitted]

FN4. The most egregious example of this was the IJ's complete copying of the terrorism section of the government's pre-trial briefs. Anyone who has ever graded a paper can tell you that the repetition of errors is the surest sign of plagiarism: here, the IJ's opinion improperly cites the 2004 Security Court document (properly cited as Exhibit A), as "Trial Exhibit 2, Tab A," which was actually Parlak's asylum application. In each instance, the IJ's error duplicates the same error by the government. Compare, e.g., IJ at 51, J.A. 75, "Propaganda" with Gov't Pre-Trial Br. at 27, J.A. 1076.

Parlak v. Holder, 578 F.3d 457, 476-477 (6thCir. 2009) (Boyce F. Martin, Jr., dissenting). An *en banc* rehearing was denied on 24 Nov 2009. In my view, such judicial plagiarism from a Brief indicates a casual, perfunctory approach to judicial decision making. But, as explained later in this essay, due process of law does *not* require a judge to write his/her own opinions?

I believe that judicial plagiarism from Briefs is a type of corruption. It is well recognized that the integrity of the judicial system depends on having judges who are impartial and unbiased. When judges plagiarize from an attorney who represented a party in the case, the official judicial opinion contains biased words from a zealous advocate for one party. See the discussion of law, beginning at page 51, below.

B. cases

There are very few reported opinions from appellate courts regarding the ethics or legality of a judge using other people to prepare opinions. First, I discuss each of the cases that I have found in my legal research on plagiarism by judges, including general remarks about delegation of judicial duties to other people. Beginning at page 56, I discuss using a judge's law clerk to ghostwrite an opinion. Beginning at page ?, I discuss an attorney for a party either ghostwriting findings of facts or ghostwriting a judicial opinion.

Morgan v. U.S. (1936)

In 1936, Chief Justice Hughes wrote an opinion in a case involving administrative regulation of the maximum price of livestock at the Kansas City Stockyards. Plaintiffs alleged that the Secretary of Agriculture had not personally read the testimony at hearings before he issued his regulation. Instead, the Secretary had delegated hearing testimony, reading evidence, and preparing findings of facts to lesser bureaucrats in his office. The Court held that the person who heard the testimony must determine the facts, although the Secretary of Agriculture could rely on a memorandum prepared by a subordinate in making his regulation.

For the weight ascribed by the law to the findings-their conclusiveness when made within the sphere of the authority conferred — rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously

reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

Morgan v. United States, 298 U.S. 468, 481 (1936).

The terse little nugget in the final sentence in the above quotation could be extremely important, because a law clerk could read³⁷ voluminous appendices submitted by parties, summarize the appendices in a memo to the judge, and then the judge could write an opinion (e.g., in a summary judgment motion) without personally reading the appendices. Also a law clerk could read voluminous exhibits submitted during trial, summarize the evidence in a memo to the judge, and then the judge could write an opinion without personally reading all of the evidence. It is *not* clear whether such judicial delegation of fact-finding to a law clerk is legally permissible.

Interestingly, the U.S. Supreme Court in hearing a fourth appeal³⁸ of *Morgan* allegedly overruled its holding that a decision maker must hear or read testimony. *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144 (2dCir. 1974) (Friendly, J.), *cert. den.*, 419 U.S. 874 (1974); *Yaretsky v. Blum*, 629 F.2d 817, 822-823 (2dCir. 1980), *rev'd on other grounds*, 457 U.S. 991 (1982). However, in another case, Judge Friendly held that *Morgan* still applied to criminal cases.

A second answer is that in criminal cases Chief Justice Hughes' much cited statement, "The one who decides must hear," *Morgan v. United States*, 298 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L.Ed. 1288 (1936), applies in full force, without the qualifications that have been recognized for certain civil and administrative proceedings. Cf. *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129 (2 Cir.), *cert. denied*, 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967). Cases emphasizing the importance of demeanor as an aid to the determination of credibility are too numerous and well-known to require extended citation; Judge L. Hand's famous statement in *Dyer v. MacDougall*, 201 F.2d 265, 268-269 (2 Cir. 1952), will suffice.³⁹ Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of the facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand. *U. S. ex rel. Graham v. Mancusi*, 457 F.2d 463, 469 (2dCir. 1972) (Friendly, J.). See *U.S. v. Raddatz*, 592 F.2d 976, 985 (7thCir. 1979) (citing Judge Friendly for administrative decisions are distinguished from criminal cases), *rev'd on other grounds*, 447 U.S. 667, 677 (1980) (majority opinion cites respondent's reliance on *Morgan*, 298 U.S. 468 without mentioning

³⁷ The requirement in *Morgan* was extended to reading written testimony in *N.L.R.B. v. Botany Worsted Mills*, 106 F.2d 263, 265 (3dCir. 1939), which is quoted below.

³⁸ *Morgan v. U.S.*, 313 U.S. 409, 422 (1941).

³⁹ The quotation from Judge Learned Hand — which Judge Friendly omits — is: "It is true that the carriage, behavior, bearing, manner and appearance of a witness — in short, his 'demeanor' — is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness."

any overruling of *Morgan*, see also dissent by Justice Marshall at 696, 698); *Guerrero v. New Jersey*, 643 F.2d 148, 149 (3dCir. 1981). *Raddatz* is the only U.S. Supreme Court case to quote the phrase “one who decides must hear” since the original statement in *Morgan*.

So, it is *not* clear whether the maxim “one who decides must hear” is an empty slogan or a rule of law. It appears that the requirement is lower for administrative hearings than for judges who hear criminal cases. But, if the opinion drafted by a law clerk becomes the judge’s opinion, then judicial trials are converted into a kind of administrative proceeding, in which the opinion is written by a clerk who *neither* heard the testimony *nor* observed the demeanor of witnesses, and the judge who signs the opinion may not have read all of the voluminous exhibits.

N.L.R.B. v. Botany Worsted Mills (1939)

In 1937, the National Labor Relations Board (NLRB) found that an employee had been wrongfully discharged for union activities. The employer appealed and sought to have interrogatories served on the NLRB about how it made its decision. The U.S. Court of Appeals wrote:

It is both obvious and well settled by authority that the one who decides must hear or, in the case of written testimony, read, *Morgan v. United States*, 298 U.S. 468, [at 481-482], 56 S.Ct. 906, [at 911-912], 80 L.Ed. 1288, above cited [(1936)]. The United States Supreme Court does not seem to share the cynicism of a writer in the YALE LAW JOURNAL who said: “... No one has dared suggest that litigants may impeach the decision of judges of intermediate appellate courts on the ground that they had not read the record made before a lower court. No lawyer is naive enough to believe that judges actually read through the records in the cases before them”. Feller, Prospectus For The Further Study Of Federal Administrative Law, 47 YALE LAW JOURNAL 646 at 664.

N.L.R.B. v. Botany Worsted Mills, 106 F.2d 263, 265 (3dCir. 1939).

The maxim “one who decides must hear or, in the case of written testimony, read” was *not* been quoted in any U.S. Supreme Court case and was *not* been quoted in any other U.S. Court of Appeals case during the next seventy-years of jurisprudence.⁴⁰ This maxim may be obvious, but it is *not* “well-settled by authority”.

The U.S. Court of Appeals in *NLRB v. Botany Worsted* held that subordinates of the decision maker could prepare drafts of an opinion.

We feel that the inquiry into the mechanics of opinion-writing is ethical rather than legal. The standard that frowns upon plagiarism, or if commercialized, forbids it, applies to all writing and not only to the literary efforts of judicial officers. We have gone beyond the practice of ancient Rome where the copyright could be protected only by writing another poem.

⁴⁰ I searched Westlaw on 6 Jan 2010 for the query: one /s decide /s must /s hear /s read .

‘Fidentinus, by stealing my verse
As a poet you hope to be known?
That's the way Aegle thinks she has teeth,
Though her mouth's filled with iv'ry and bone‘.
Martial, Epigrams (Nixon's trans. 1911) 72.

Because, however, a particular writer with or without acknowledgment adopts the exact or substantial phraseology of others, it does not follow that he has abdicated in favor of mental processes extrinsic to his own. The frequent affirmation by an appellate court on the opinion of the court below is an instance. That practice, though of possible annoyance to industrious counsel, Bruce, *THE AMERICAN JUDGE*, p. 76, has never, to our knowledge, been challenged on constitutional grounds. A writer in the *COLUMBIA LAW REVIEW* suggests another analogy in the adoption by a judge of material prepared by his law clerk, 38 *COLUMBIA LAW REVIEW* 1279, 1282 (note), above cited [(Nov 1938)]; cf. *United States v. Standard Oil Co. of California*, D.C., 20 F.Supp. 427, 450. A less pleasant illustration might be found in a comparison of the opinions of some courts with the briefs of counsel.⁴¹ We may add that the Labor Board has never made any mystery of the part taken by the attorneys in its ‘Review Division‘ in aiding it in writing its opinions, Gelhorn and Linfield, *Politics and Labor Relations*, 39 *COLUMBIA LAW REVIEW* 339 at pages 384, 385; Madden, *Administrative Procedure*; National Labor Relations Board, 45 *WEST VIRGINIA LAW QUARTERLY* 93, 96. *N.L.R.B. v. Botany Worsted Mills*, 106 F.2d at 266.

The Court of Appeals cited the traditional privacy accorded the deliberations of jurors and other triers of fact, and denied petitioner’s motion for interrogatories to the NLRB.

Dorsey v. Kingsland (1949)

In 1949, the U.S. Court of Appeals for the D.C. Circuit considered the case of a patent attorney who had been disbarred by the Patent Office for lack of candor in failing to mention that a publication he submitted as evidence was ghostwritten. The Court of Appeals reversed the disbarment. In passing, the Court of Appeals mentioned the prevalent practice of ghostwriting, and the custom of citing only the name of the person who delivered the speech or signed the judicial opinion.

An attorney who had occasion to quote from Washington's Farewell Address would be guilty of no breach of faith if he failed to mention the fact that it is generally believed that a considerable part of the actual penmanship was done by Alexander Hamilton. One who quotes from Andrew Jackson's majestic Nullification Proclamation is not to be criticized for fraud if he fails to set out the fact that while written from Jackson's notes the stately diction is actually the result of the penmanship of Edward Livingston. It is generally known that most Presidents and candidates for President employ assistants who not only engage themselves in preparing data and making suggestions for the speeches and state papers of their chiefs but frequently participate extensively in the actual draftsmanship. Yet seldom, if ever, in the delivery of the speech is attention called to the portions actually written by the deliverer and the portions supplied by the assistants. It is not wholly unknown that the judges of even the highest courts have law clerks and that these law clerks are engaged not only in research but

⁴¹ Note by Standler: This sentence seems to criticize judicial plagiarism from Briefs submitted by attorneys, without forbidding such plagiarism.

frequently make most valuable suggestions as to the preparation of opinions and not infrequently participate largely in the actual draftsmanship of the opinion. Yet when these opinions are handed down no specific mention is called to the paragraphs actually written by the judge rendering the opinion and those written by the law clerk or those inserted as a result of the suggestions of other judges who may or may not have sat in the case.

Dorsey v. Kingsland, 173 F.2d 405, 413 (D.C.Cir. 1949), *rev'd on other grounds*, 338 U.S. 318 (1949).

Justice Jackson (joined by Justice Frankfurter) wrote in dissent: “The worst that can be said of Dorsey is that he took advantage of this loose practice to use a trade journal article as evidence, without disclosing that it was ghost-written for the ostensible author.” 338 U.S. at 323. Then Justice Jackson said:

I should not like to be second to anyone on this Court in condemning the custom of putting up decoy authors to impress the guileless, a custom which as the court below cruelly pointed out flourishes even in official circles in Washington. Nor do I contend that Dorsey’s special adaptation of the prevailing custom comports with the highest candor. Ghost-writing has debased the intellectual currency in circulation here and is a type of counterfeiting which invites no defense. Perhaps this Court renders a public service in treating phantom authors and ghost-writers as legal frauds and disguised authorship as a deception. But has any man before Dorsey ever been disciplined or even reprimanded for it? And will any be hereafter? *Dorsey*, 338 U.S. at 324 (Jackson, J., dissenting).

The majority of the U.S. Supreme Court affirmed the disbarment of Dorsey. Note that Dorsey was *not* accused of either ghostwriting or plagiarism. He was disbarred for lack of candor, because he failed to disclose his knowledge of ghostwriting in an article he submitted as evidence. When compared to attorneys who are not even suspended from the practice of law — let alone permanently disbarred — for personally submitting a Brief containing many plagiarized paragraphs (see page 17, above), Dorsey’s disbarment was extraordinarily harsh.

Recently, courts have exposed the practice of drug companies to provide ghost-written articles for publication under the name of a prominent physician, to promote sales of the company’s product.⁴² Aside from the fraudulent authorship, the alleged author is essentially endorsing a product.

⁴² See, e.g., *In re Prempro Products Liability Litigation*, 554 F.Supp.2d 871, 889, 893, 897 (E.D.Ark. 2008), *rev'd on other grounds*, 586 F.3d 547, 557 (8thCir. 2009) (“Wyeth [drug company] also engaged in the lawful, though questionable, practice of commissioning ghost written articles.”).

Richard Posner's dissent (1984)

In 1984, the U.S. Court of Appeals for the Seventh Circuit decided that a magistrate judge could hear a trial of a civil case if both parties agreed. Judge Posner, in a dissent, explained that there were limits to delegation of judicial functions:

Although Article III, section 1 does not say in so many words that the judicial power of the United States shall be exercised by judges rather than by bailiffs, criers, and other court employees, the implication is unmistakable. The judges can have assistants who are not themselves judges, but cannot just hand over their authority to those assistants. If they do, the assistants become judges — judges whose conditions of employment violate Article III. A district judge cannot tell his law clerk, “You try this case — I am busy with other matters — and render judgment, and the losing party can if he wants appeal to the court of appeals.” The judge cannot do this even if the parties consent, and even though the statute authorizing federal district judges to appoint law clerks (28 U.S.C. § 752) does not specify the duties of law clerks. In my example the law clerk is acting as a judge, though not called a judge; and the authors of Article III could not have intended to guarantee federal judges life tenure and assured compensation only if they were called “judges.” Unless the word is read generically, Article III could be nullified by a change in title. Judges were called all sorts of things in 1787 besides “judge” — not only the familiar “justice” (not mentioned in the Constitution) but also “chancellor,” “recorder,” “commissioner,” “baron,” “president,” “assistant,” “delegate,” “lord keeper,” “master of the rolls,” and, yes, “magistrate.” What they are called is not important; what they do is important. If section 636(c) assigns judges' work to magistrates, who do not have the tenure and compensation guarantees in Article III, it violates Article III.

It is true that there have always been judicial adjuncts — officials, permanent or ad hoc, who assist judges but are not themselves judges protected by the guarantees of independence that Article III took over from English practice (described in 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 258 (1765)). For example, the eighteenth-century English court of equity — which like most modern American courts was terribly overloaded — had a bureaucratic organization that gave considerable discretion to subordinate officials, the masters in chancery, who were not full-fledged judges. But with limited independence went limited authority: the Lord Chancellor reviewed the masters' decrees de novo — that is, with none of the deference that appellate courts normally give a trial judge's factfindings. See 3 Blackstone, supra, at 453-54 (1768). There have always been in the federal system subordinate officials (such as U.S. Commissioners — the predecessors to federal magistrates — and the magistrates themselves, before the passage of section 636(c) in 1979) who exercise such ancillary judicial powers as determining whether there is probable cause to issue an arrest or search warrant, setting bail, and issuing a decision that is subject to de novo review by the district judge. There have always been ad hoc judicial auxiliaries as well, such as masters and auditors, see *In re Peterson*, 253 U.S. 300, 312-13, 40 S.Ct. 543, 547, 64 L.Ed. 919 (1920), and administrative officers such as clerks of court, bailiffs, criers, and marshals. And naturally as judicial workloads have grown the dividing line between judges' work and adjuncts' work has shifted, the ratio of adjuncts to judges has risen, and new kinds of judicial adjunct have emerged. For example, an eighteenth-century judge did not have drafts of his opinions prepared by a young assistant; the first American law clerk was not appointed till 1875. Oakley & Thompson, LAW CLERKS AND THE JUDICIAL PROCESS 11 (1980). No American judge today believes that a law clerk becomes a judge by preparing an opinion draft.

But there are limits to how far the line between nondelegable and delegable judicial work can be allowed to shift without making a mockery of Article III. The proper role of the judicial adjunct, who in the federal setting may be defined as anyone who helps with the work of Article III courts but whose conditions of employment are not as prescribed in Article III, is to advise and assist the real judge. It is not to be the real judge, only called something else. *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1046-1047 (7thCir. 1984) (Posner, J., dissenting). Later, Judge Posner says:

As a matter of logical implication from the text of the Constitution, I see no escape from the conclusion that section 636(c) is unconstitutional, especially as applied to diversity cases. But when logic points in one direction and the judges go in another, there usually is a better explanation for their action than the spirit of perversity. There is here. Since 1960, the caseload of the district courts has tripled and that of the courts of appeals has octupled, and there has not been a corresponding increase in the number of judges. The caseload has also become more varied and more difficult. The caseload crisis makes the idea of invalidating section 636(c) seem futile, unfair to the district courts, and ungrateful to Congress: in short, ill advised.

This reaction is understandable, and if I could find more play in the text and policies of Article III, section 1 than I have been able to find, I might be swayed by it. The crisis has caused federal judges to delegate more and more of their work to judicial adjuncts — to magistrates, to special masters, to law clerks, to staff attorneys (law clerks not assigned to specific judges), even to externs (law students who work for judges on a part-time basis, for course credit). One hopes it is just the delegable work that is delegated. But at a time of such extensive judicial delegation — of (not to put too fine a point on it) judicial bureaucracy — the line between a subordinate's advising and assisting the decision-maker, on the one hand, and the subordinate's actually deciding, on the other, can be a faint one, as this court noted recently in warning our district judges against overusing special masters. See *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 711-13 (7thCir. 1984), citing *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). But to conclude that because some judges may sometimes rubber-stamp the recommendations of their adjuncts we might as well eliminate the middleman, as it were, and allow magistrates to enter judgments directly, just as if they were the district judges and not merely the district judges' subordinates, would come close to saying that whatever is, is constitutional. We could no longer warn our district judges against the overuse of special masters or other adjuncts; realism would rule out any normative judgments regarding judicial delegation.

Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1049-1050 (7thCir. 1984) (Posner, J., dissenting). I believe that Judge Posner is correct.

Judge Brennan (1989)

Judge Thomas E. Brennan, Jr. plagiarized from two law review articles by other authors, and then submitted the plagiarized text to a law review, which was published at 4 COOLEY LAW REVIEW 493 (1987). The judge stipulated to those facts and consented to being publicly censured, which the Supreme Court of Michigan ordered. *Matter of Brennan*, 447 N.W.2d 712 (Mich. 1989). The Michigan Judicial Tenure Commission specifically found:

Respondent's act of plagiarism ... constitutes:

(a) Conduct clearly prejudicial to the administration of justice as defined by Michigan Constitution 1963, Article VI, Section 30, as amended, MCR 9.205, and the Rules of Professional Conduct;

(b) Failure to observe high standards of conduct that would promote public confidence in the integrity of the judiciary, as required by the Code of Judicial Conduct;

(c) Failure to avoid all impropriety and the appearance of impropriety which constitutes irresponsible and improper conduct that erodes public confidence in the judiciary, contrary to the Code of Judicial Conduct;

(d) Conduct involving misrepresentation reflecting adversely on his honesty, trustworthiness or fitness as a judge and a lawyer in violation of the Code of Judicial Conduct and Rules of Professional Conduct;

(e) Conduct in violation of the Rules of Professional Conduct, in that it:

(1) exposes the legal profession and courts to censure and reproach;

(2) is contrary to ethics, honesty and good morals.

Matter of Brennan, 447 N.W.2d 712, 714 (Mich. 1989) (finding Nr. 5).

Because the judge did not dispute the findings of the Judicial Tenure Commission, the Michigan Supreme Court made no discussion of its own in this case. The finding that plagiarism is "impropriety ... misrepresentation ... [and] contrary to ethics, honesty, and good morals" might also be applicable to judges who plagiarize from either a Brief submitted by a party or a draft prepared by a law clerk. Both judicial opinions and law review articles are: (1) published in books and appear in online databases; (2) contain citations to cases, statutes, and law review articles; and (3) appear with the name of the alleged author, so I don't see judicial opinions as distinguishable from law review articles, with one exception. A plagiarized (or ghostwritten) judicial opinion may be a violation of due process of law, while a law review article that contains plagiarized text is not a violation of due process of law.

Florida (2006)

Just for completeness, I note in passing there is one reported case that mentions alleged plagiarism by a judge. In 2006, the Florida Supreme Court heard a case involving alleged plagiarism by a judge in a paper submitted to the Air War College. The document purporting to have been submitted by the judge was apparently a fabrication. After a six-day hearing, the Florida Judicial Qualifications Commission voted unanimously to dismiss the charges. *In re Holder*, 945 So.2d 1130 (Fla. 2006) (per curiam).

Judge Tesmer (1998)

A trial judge in Wisconsin state court asked a friend of hers, who was a law professor, to draft opinions in at least 32 cases during three years. The Wisconsin Supreme Court found her guilty of judicial misconduct and gave her a reprimand, the least severe of four levels of punishment. The Court specifically held that it was improper for a judge to communicate about current cases with anyone outside the judicial system. *Matter of Judicial Disciplinary Proceedings Against Tesmer*, 580 N.W.2d 307, 309, ¶2, ¶4 (Wis. 1998). Ironically, it was acceptable for Judge Tesmer to use opinions prepared by her law clerk, although she was “dissatisfied with the quality of her law clerk’s memoranda.” *Ibid.* at 310, ¶10. There is no evidence that the professor had any conflict of interest, and he only wrote about law, *not* the facts of the case. *Ibid.* at 310-311, ¶11. The judge made the decisions and the professor only wrote to justify her decision. *Ibid.* at 311-312, ¶¶12-14, ¶20, also p. 318, ¶53. Moreover, there was no harm to any litigant. *Ibid.* at 309, ¶4. There should be no doubt that a tenured law professor is more qualified than a law clerk, although the Court ignored that point. The Wisconsin Supreme Court wrote:

The fundamental fairness to be zealously guarded and scrupulously adhered to implicates the basic principle of American justice cited by the dissenting panel member: “That the parties will present their case to the judge, who will decide their dispute under the law and on the facts of the case.” A corollary to that principle is that persons outside the judicial system have no place in a judge's decision making.

Matter of Judicial Disciplinary Proceedings Against Tesmer, 580 N.W.2d at 314, ¶34.

If a judge wants advice from an expert on the law, the judge must first notify both parties to the litigation and give them an opportunity to object. *Ibid.* at 314, ¶35. The rule in this case prohibits both the “potential for unfairness” and the appearance of unfairness. *Ibid.* at 315, ¶¶37-38.

We determine that on the facts and circumstances before us, Judge Tesmer’s judicial misconduct warrants the reprimand recommended by the panel majority. Her use of Professor McCormack to assist her in dealing with dispositive motions in pending cases created a serious threat to the fairness of those proceedings and to the integrity of the judicial process in general. She shared with someone unconnected with the judicial system confidential information and work product of her staff, discussed with that person her tentative decisions on dispositive motions and rationales to support them, and was influenced by him on the issues awaiting decision in pending cases. While the potential for harm to the court system, to the litigants in the cases she decided, and to the public’s perception of the fairness of the judicial system was great, Judge Tesmer’s insistence on retaining and exercising ultimate decision-making authority in those cases and her confidence in Professor McCormack’s disinterest and discretion in assisting her mitigate the severity of the disciplinary response to that misconduct. So, too, does her good faith belief, albeit unjustified, that having Professor McCormack assist her in disposing of pending motions was not prohibited by the Code of Judicial Ethics.

Matter of Judicial Disciplinary Proceedings Against Tesmer, 580 N.W.2d at 318, ¶54.

Note the Court’s concern about the “potential” or “appearance” of unfairness, when there was no evidence of actual unfairness to any litigant.

Two judges dissented, noting the lack of clear rules for who can draft an opinion for a judge.

The basic problem is the lack of any rules, regulations, or guidelines with respect to law clerks/interns. Without them, judges have been left largely adrift as to where the lines are drawn. Accordingly, I conclude that there is no standard that gave any degree of fair notice to Judge Tesmer that what she was doing was a violation. It is not Judge Tesmer who has failed the system; it is the system that has failed Judge Tesmer.

Matter of Judicial Disciplinary Proceedings Against Tesmer, 580 N.W.2d at 318-319, ¶57 (William A. Bablitch, J., dissenting). The dissenting judges suggested that the professor was, in effect, serving as a law clerk, and such service was not forbidden by any rule or regulation. *Ibid.* at 319, ¶¶60-67, also 320, ¶70. I think the dissent was better reasoned than the majority opinion, because due process requires clear notice of proscribed conduct, *not* vague statements. That having been said, I am not condoning the judge plagiarizing drafts prepared by the professor, an issue that the Wisconsin judicial system ignored.

The majority should have explained how a less qualified law clerk (with whom the judge was “dissatisfied”) would do better work than an experienced law professor. The quality of the work should matter as much as the fairness of the process.

Switzer v. Coan (2001)

A pro se plaintiff in Colorado, did something few professional litigators would dare do. This pro se plaintiff filed litigation in federal court that alleged “... Orders and Opinions issued by the defendant Article III judges are actually authored by the defendant staff attorneys and law clerks and signed by the defendant Article III judges who have not bothered to read what their clerks and staff attorneys have written.” Unfortunately, the Plaintiff was an expert on neither constitutional law nor judicial conduct, so he alleged defective causes of action (i.e., “fraud on the court” and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) statute). The trial judge dismissed his case, because “the complaint failed to state a claim upon which relief could be granted.” Plaintiff then appealed to the U.S. Court of Appeals, which issued an opinion that almost addressed the substance of the complaint:

Rather than focusing on the more nebulous aspects of a claim asserting fraud on the court, the district court held that the pleadings lacked a specific and essential allegation of intent. Relying upon the *Robinson* opinion [56 F.3d 1259 (10thCir. 1995)], the district court stated that plaintiff’s allegations “are simply too conclusory and vague to support such a claim.” Dist. Ct. Order at 4. In *Robinson*, this court clarified that “ ‘fraud on the court,’ whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud[, i.e.,] ... a showing of conscious wrongdoing-what can properly be characterized as a deliberate scheme to defraud-before relief from a final judgment is appropriate under the *Hazel-Atlas* [footnote to 322 U.S. 238 (1944)] standard.” 56 F.3d at 1267. The district court properly resolved that the complaint fails to allege the fraudulent intent necessary to support a Rule 60(b) action.[footnote omitted] The district court thus did not abuse its discretion in dismissing the claim.

B. Futility of Amendment

The district court went on to reject the possibility of curative amendment, saying:

The Court will take judicial notice of the fact that the district court and circuit judges of the Tenth Circuit first review, approve and sign all Orders and Rulings before they are entered in their respective cases, including matters brought by pro se litigants.

Accordingly, any effort to show that the federal courts of the Tenth Circuit have improperly delegated all of their judicial authority to their clerks would be futile.

Therefore, permitting Plaintiff to amend his Complaint would be pointless.

Dist. Ct. Order at 5. While we certainly would not gainsay this observation regarding judicial practice in the Tenth Circuit, we also do not rely on it as a conclusive fact in this case.

Plaintiff asserts that judges in this circuit have issued decisions which they have not read. While the district judge may personally know this allegation is false, such knowledge is not a proper basis for judicial notice. *United States v. Lewis*, 833 F.2d 1380, 1385-86 (9thCir. 1987); *United States v. Sorrells*, 714 F.2d 1522, 1527 n. 6 (11thCir. 1983); *Virgin Islands v. Gereau*, 523 F.2d 140, 147-48 (3dCir. 1975). “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Fed.R.Evid. 201(b). The confidential, internal workings of the federal judiciary do not seem to fall into either category: they are inherently outside the realm of general knowledge and there are no ready sources for incontestable confirmation of the facts in question here.[FN8]

FN8 Contestability and disputation are critical considerations here. We do not mean to suggest that a court could never take judicial notice of its own internal procedures. The problem is that the procedures in question here entail the central allegation of impropriety in the case, and the judicial officers accused of that impropriety would be both the conduit and source of the confidential information vindicating those procedures.

Plaintiff, however, has never challenged the district court's futility of amendment analysis, nor does he argue even now that he could have corrected the deficiency in his pleadings by amendment. This is not a mere technical default. If the plaintiff is unable or unwilling to hazard the allegation that the defendants acted with fraudulent intent, particularly after the district court identified this missing element, then he stands on his initial pleading, which is deficient. Indeed, even if plaintiff were to now argue that he should have been allowed to amend his complaint to correct its deficiencies, such a contention would be properly rejected because “it was incumbent upon [him] to seek leave from the district court to make the attempt” after dismissal of his action below. By not doing so, he has “elected to appeal the case as it stood.” *Dahn v. United States*, 127 F.3d 1249, 1252 (10thCir. 1997); see also *Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1185-87 (10thCir. 1999) (reaffirming holding in *Glenn v. First Nat'l Bank*, 868 F.2d 368, 369-71 (10thCir. 1989), that party cannot object on appeal to lack of opportunity to cure defective pleading when curative amendment was not properly sought in district court).

Switzer v. Coan, 261 F.3d 985, 989-990 (10thCir. 2001).

So the pro se Plaintiff lost, not on merits of his claim, but on his numerous procedural defects and also on his failure to properly plead substantive law. See also *Stewart v. Thomas*, 2002 WL 32144764 (W.D.N.C. 2002) (Pro se plaintiff requested “ghostwriting of judicial

opinions be declared unconstitutional”. District Court dismissed complaint as frivolous and without merit.), *aff’d*, 50 Fed.Appx. 184 (4thCir. 2002) (per curiam).

In my view, the proper way to address plagiarism by judges is for judges to amend their rules (e.g., the Code of Conduct for Federal Judges) to explicitly prohibit plagiarism in judicial opinions and to clarify how much, and to whom, a judge can delegate opinion drafting to other people. Filing litigation against individual judge(s) confuses a genuine effort for reform with an attack on integrity of an individual judge. Plagiarism *ought* to be explicitly prohibited *before* an individual judge is sanctioned for plagiarism.

C. Law Requires Impartial Decisionmaker

In May 2009, when I was chronicling the history of the nomination of Justice Sotomayor to replace retiring Justice Souter on the U.S. Supreme Court, I wrote a description of the legal requirements of a federal judge or justice, which I posted at <http://www.rbs0.com/sotomayor.pdf> (2009). I have copied that material to here and then made various editorial changes.⁴³

Judicial Oath of Office

Each judge in U.S. District Court or U.S. Court of Appeals, and each Justice on the U.S. Supreme Court, takes the following oath of office, as prescribed by federal statute:

I, [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [name of judicial office] under the Constitution and laws of the United States. So help me God.
28 U.S.C. § 453 (first enacted 1789, amended 1990, still current Mar 2011).

This oath requires two things:

1. impartiality (“administer justice without respect to persons, and do equal right to the poor and to the rich”, and — in case the person misunderstood those words — the oath also specifically says “*impartially* discharge and perform all the duties ...”)
2. “faithfully” follow “the Constitution and laws of the United States”

⁴³ Writing essays on plagiarism makes one *very* aware of the need to cite sources, even when copying material that one has personally written, to avoid even self-plagiarization.

Conflict of Interest Statute

A federal statute clearly states the obligation of *all* judges in federal courts to avoid any conflict of interest.

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
 - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
- (c)
- (d)
- (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Section 455(a) specifically mentions “impartiality”. Section 455(b) *requires* recusal of a judge when at least one of the following five conflict(s) of interest are present, in order to preserve impartiality. The quotation of § 455 shows the seriousness which judges — and lawyers in general — take conflict of interest, which conflict prevents impartiality by a judge. Note that under subsections b(2), (b)(5)(ii), and (e), a judge’s relationship to a lawyer in the case is a mandatory ground for recusal, which is *not* waivable by consent of the parties.

Due Process

Impartiality is not just in the oath for judges and 28 U.S.C. § 455, it is *also* a constitutional requirement, as explained in the following opinions of the U.S. Supreme Court:

- *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (Mayor of town was *not* an impartial judge for hearing criminal offenses: “But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.”);
- *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972) (Mayor of town was *not* a disinterested, impartial judge for hearing traffic offenses. Violation of due process clause in Fourteenth Amendment.);
- *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (“As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. E.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980).”);
- *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”);
- *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (“We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*.”);
- *Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997) (“But the floor established by the Due Process Clause clearly requires a ‘fair trial in a fair tribunal,’ *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. See, e.g., *Aetna*, [475 U.S.] at 821-822, 106 S.Ct., at 1585-1586; *Tumey*, [273 U.S.] at 523, 47 S.Ct., at 441.”).

In a case involving a state restriction on speech for judicial candidates, the U.S. Supreme Court held that the regulation violated the First Amendment.

One meaning of “impartiality” in the judicial context — and of course its root meaning — is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed. 1950) (defining “impartial” as “[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just”). It is also the sense in which it is used in the cases cited by respondents and amici for the proposition that an impartial judge is essential to due process. *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133, 137-139, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted). *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-776 (2002).

These cases stand for the proposition that an impartial judge is a constitutional requirement, under the Due Process clause. A constitutional requirement is more fundamental than a federal statute or The Code of Conduct for U.S. Judges.

Judicial Code of Conduct

The Code of Conduct for U.S. Judges (i.e., in U.S. District Courts and U.S. Courts of Appeals) is posted on the Internet at <http://www.uscourts.gov/>. The new judicial code of conduct that is effective on 1 July 2009 mentions the words *impartial* or *impartiality* 16 times in the rules and commentary. This repetition makes clear the importance of these words amongst judges.

Note that Canon 3C of the Code of Conduct for U.S. Judges, corresponds to 28 U.S.C. § 455, the conflict of interest statute, quoted above.

my comments

The judicial oath, conflict of interest statute, constitutional requirement of due process of law, and the code of judicial conduct *each* establish a legal requirement for impartiality. One could easily argue that impartiality is the most important requirement for a judge.

When a judge plagiarizes from a brief written by a law clerk or other judicial staff member — or worse, when the judge asks a law clerk to ghostwrite the judicial opinion — the resulting opinion purports to be written by the judge, but is not. However, if the law clerk or other judicial staff member has no conflict of interest, such plagiarism or ghostwriting *may* satisfy minimum standards of due process, because the law clerk or other judicial staff member is “impartial”. I say *may* because, in March 2011, there are few opinions in the U.S. Court of Appeals⁴⁴ — and no opinions of the U.S. Supreme Court — that discuss the acceptability of such plagiarism or ghostwriting. Indeed, such plagiarism or ghostwriting appears to be common practice amongst many judges and justices, which is an implied endorsement.

When a judge plagiarizes from a brief written by an attorney for a party — or worse, when the judge asks the attorney for a party to ghostwrite the judicial opinion — the resulting opinion contains text written by a zealous advocate for a party but appears as the opinion of an impartial judge. Such plagiarization or ghostwriting comes close to being a violation of the conflict of interest statute, 28 U.S.C. § 455(b), but that statute is focused on a judge’s obligation to recuse him/herself, not on conflict of interest in the preparation of a judicial opinion. I believe such plagiarization or ghostwriting corrupts the judicial opinion, and should be forbidden by the judicial code of conduct. Those biased words from plagiarization or ghostwriting could be precedent for future cases, and therefore act to corrupt the integrity of the judicial system. (To be clear, I see nothing wrong with a judge quoting a Brief written by a party or amicus, provided the quotation is attributed to that attorney, and *not* asserted as the view of an impartial judge.)

If judicial opinions are written by someone other than the judge, then that someone should be required to have the same impartiality as a judge. One can go farther: if judicial opinions are written by someone other than the judge, then arguably that someone’s credentials should receive public scrutiny, similar to the confirmation of federal judges by the U.S. Senate. That is why I would prefer that judges write their own opinions, with staff members to assist with legal research, editing, finding citations in voluminous exhibits, etc.

⁴⁴ See, e.g., *In re Colony Square Co.*, 819 F2d 272, 276-277 (11thCir. 1987) (Bankruptcy orders ghostwritten by attorney for prevailing party were not a denial of due process.). Obviously, opinions prepared by a judge’s law clerk is more acceptable than opinions ghostwritten by the attorney for a party.

Law Clerk Ghostwriting Judicial Opinion

It is well known amongst attorneys that a judge's law clerk prepares a draft of most judicial opinions.⁴⁵

The justification for this practice is simply that the so-called "litigation explosion" that began in the early 1960s has made it allegedly impossible for judges — especially in the U.S. Courts of Appeals — to write all of the opinions on cases that they decide.⁴⁶ I do not doubt that judges are both overworked and underpaid. But the proper remedy for the too heavy workload is to hire more judges, not to allow judges to copy. I argue below that if judges copy from drafts prepared by law clerks, then such copying should be openly acknowledged with a footnote containing the name(s) of the law clerks who wrote the opinion.

The truth is that law clerks are anonymous creatures, like elves who work all night making shoes in the fairy tale. Anonymous law clerks are exploited by judges, but after a year, the judge will reward the clerk with a good letter of recommendation that will start the young lawyer's career as an assistant professor of law or as an associate in a prestigious law firm. One can cynically, but truthfully, say that exploitation of junior professionals is part of their rite of passage through the system. Former law clerks are not likely to complain, because their work is confidential,⁴⁷ and because their reputation "is tied to the status of their judge."⁴⁸

I can think of two reasons why law clerks generally deserve to be anonymous. First, only the judge's opinion matters. The judge has the legal experience and took the judicial oath, so arguably only the judge's name should appear on judicial opinions. In this system, there is no place for co-authorship of judicial opinions by law clerks, amicus curiae, a special master, etc. Second, the law clerk's work could be seen in copyright law as "a work made for hire", as a condition to

⁴⁵ See, e.g., J. Daniel Mahoney, "Law Clerks: For Better or For Worse?," 54 BROOKLYN LAW REVIEW 321, 333, 327, 338-339 (1988); Lisa G. Lerman, "Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship," 42 SOUTH TEXAS LAW REVIEW 467, 468-469 (Spring 2001); Jeffrey O. Cooper & Douglas A. Berman, "Passive Virtues and Casual Vices in the Federal Courts of Appeals," 66 BROOKLYN LAW REVIEW 685, 697, n.30 (2001) (citing five sources); Stephen J. Choi & Mitu Gulati, "Which Judges Write Their Opinions (And Should We Care)?" 32 FLORIDA STATE UNIV. LAW REVIEW 1077, 1078, n.3 (Summer 2005) (citing 16 sources).

⁴⁶ See, e.g., J. Daniel Mahoney, "Law Clerks: For Better or For Worse?," 54 BROOKLYN LAW REVIEW 321, 326, 337, 340, 342 (1988).

⁴⁷ CODE OF CONDUCT FOR LAW CLERKS, Canon 3(c) (Judicial Conference of the U.S., 1981).

⁴⁸ Stephen J. Choi & Mitu Gulati, "Which Judges Write Their Opinions (And Should We Care)?" 32 FLORIDA STATE UNIV. LAW REVIEW 1077, 1094, also see 1081 (Summer 2005).

his/her employment by the judge. However, the fact that the government owns the copyright in the law clerk's work does *not* imply that the clerk should be denied credit for his/her work.

Judge Posner, who writes his own opinions, mentions that opinions written by law clerks have less authority than opinions written by judges.⁴⁹ Given that the clerk's name appears nowhere in the opinion, could we politely *pretend* that the judge wrote the opinion? Yes, but that would be dishonest, when the judge actually plagiarized from a draft written by the law clerk. The judicial opinion is more than the resolution of a case, it is an explanation of *why* the judge made the decision, which helps avoid bias, prejudice, and other improper influences. And an opinion also serves to teach attorneys and other readers about the law. A lesson prepared by a 26 y old clerk who graduated from law school last year does not have the same prestige as a lesson prepared by a judge, who typically has *at least* ten years of experience as an attorney.

rare judicial thanks to law clerk

In scientific, engineering, and medical literature it is common and routine to include an acknowledgements section where the authors thank people for ideas, resources, critical comments on a draft, etc., which assistance did not merit co-authorship, but was nonetheless useful. However, this is *not* the tradition in judicial opinions. My search of Westlaw on 14 Dec 2009 of all state and federal cases in the USA found only 11 occurrences of "law clerk" and "thank" in the same sentence. My search of Westlaw on 25 Dec 2009 of all state and federal cases in the USA found 112 cases in which "law clerk" and "acknowledg..." appear in the same sentence, but *most* of those cases refer to (1) acknowledgment of typical fees for law clerks hired by an attorney in a billing dispute, (2) an "inmate law clerk" in prison,⁵⁰ or (3) acknowledgment that some act was performed by a law clerk. I also found some additional cases as a result of my further searches of Westlaw or my reading of cases or law review articles. The following list is a sample of these judicial acknowledgements to law clerks:

- *United States Fidelity & Guaranty Co. v. Slifkin*, 200 F.Supp. 563, 582, n.1 (N.D.Ala. 1961) (Lynne, J.) ("Credit is due William G. Somerville, Jr., Law Clerk to the Court, for the preparation of this opinion.");
- *Ideal Structures Corp. v. Levine Huntsville Development Corp.*, 251 F.Supp. 3, 12, n.12 (N.D.Ala. 1966) (Lynne, J.) ("Credit is due William L. Hinds, Jr., Law Clerk to the Court, for the preparation of this opinion.");

⁴⁹ Richard A. Posner, *THE FEDERAL COURTS: CRISIS AND REFORM*, at page 110 (1985).

⁵⁰ "[I]t is 'indisputable' that inmate law clerks 'are sometimes a menace to prison discipline' and that prisoners have an 'acknowledged propensity to abuse both the giving and the seeking of [legal] assistance.'" *Shaw*, 532 U.S. 223, 231 (2001) (quoting *Johnson v. Avery*, 393 U.S. 483, 488 (1969)).

- *Zanders v. Louisiana State Board of Education*, 281 F.Supp. 747, 773, n.60 (W.D.La. 1968) (Ben C. Dawkins, J.) (“We acknowledge, with much gratitude, the able and extensive research done by our Law Clerk, Mr. Robert A. Seale, Jr., B.A., ‘64, J.D., ‘67, Louisiana State University.”);
- *Terry v. Elmwood Cemetery*, 307 F.Supp. 369, 377, n.46 (N.D.Ala. 1969) (Lynne, J.) (“Credit is due Robert L. Potts, Law Clerk to the Court, for the preparation of this opinion.”);
- *Hodgson v. Mauldin*, 344 F.Supp. 302, 314, n.32 (N.D.Ala. 1972) (Lynne, J.) (“The foregoing opinion was originally prepared as a memorandum for the Court by Kirby Sevier, Law Clerk, who was present at the evidentiary hearing. Since its excellence in form and content could not be improved upon, it has been reproduced in its entirety as the considered opinion of the Court.”);
- *Tyler v. Insurance Co. of North America, Inc.*, 381 F.Supp. 1356, 1362, n.6 (N.D.Ala. 1974) (Lynne, J.) (“The foregoing opinion was originally prepared as a memorandum for the Court by E. Mabry Rogers, Law Clerk, who was present at the oral arguments of counsel on the cross-motions for summary judgment. It has been reproduced in its entirety as the considered opinion of the Court.”);
- *Foster v. Sparks*, 506 F.2d 805, 813, n.3 (5thCir. 1975) (in Appendix) (“The Subcommittee [Circuit Judges Gewin, Heaney and District Judge Corcoran] acknowledges with grateful appreciation the excellent assistance of Jay H. Bernstein, law clerk to Judge Gewin, in the preparation of this analysis.”);
- *Long v. U. S. Fidelity & Guaranty Co.*, 396 F.Supp. 966, 970, n.11 (N.D.Ala. 1975) (Lynne, J.) (“This opinion substantially reproduces the memorandum prepared for the Court by E. Mabry Rogers, the Court's Law Clerk.”);
- *Southeastern Financial Corp. v. Smith*, 397 F.Supp. 649, 655, n.4 (N.D.Ala. 1975) (Lynne, J.) (“This opinion reproduces the memorandum prepared for the Court by its law clerk, E. Mabry Rogers.”);
- *Fuller v. Daniel*, 438 F.Supp. 928, 930, n.4 (N.D.Ala. 1977) (Lynne, J.) (“Credit is due to Larry B. Childs, Law Clerk, for the preparation of this opinion in collaboration with the Court.”);
- *Jacklitch v. Redstone Federal Credit Union*, 463 F.Supp. 1134, 1136, n.* (N.D.Ala. 1979) (Lynne, J.) (“This opinion in major part was drafted by Jay Guin, Law Clerk, which the Court is quick to acknowledge.”);
- *Allen v. Schwab Rehabilitation Hospital*, 509 F.Supp. 151, 155, n.5 (N.D.Ill. 1981) (Shadur, J.) (“Even apart from Schwab's frivolous argument under Section 5(e), very little of the charting of the wilderness reflected in this opinion may be ascribed to the submissions of the parties. Left to their devices, the Court would still be lost in the outer reaches of an extraordinarily complex (and opaque) statutory and regulatory scheme. Special thanks are due to the map-making efforts of student extern Carlos Saavedra and this Court's law clerk William Von Hoene.”);

- *Bounds v. Illinois Prisoner Review Bd.*, 556 F.Supp. 675, 676, n.4 (N.D.Ill. 1983) (Shadur, J.) (“For that this Court thanks its own law clerk, Richard Levy, who both found *Garrett* [a Seventh Circuit case in 1980 that was cited by neither party] and then strove valiantly to generate an analysis that would escape it.”);
- *Willoughby Roofing & Supply Co., Inc. v. Kajima Intern., Inc.*, 598 F.Supp. 353, 354, n.* (N.D.Ala. 1984) (Lynne, J.) (“The Court acknowledges the exceptional contribution of Michael R. Pennington, Law Clerk, to the preparation of this opinion.”);
- *Justice v. Bankers Trust Co., Inc.*, 607 F.Supp. 527, n.* (N.D.Ala. 1985) (Lynne, J.) (“The Court acknowledges the exceptional contribution of Michael R. Pennington, Law Clerk, to the preparation of this opinion.”);
- *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694, n.* (N.D.Ala. 1985) (Lynne, J.) (“This opinion was prepared by Michael R. Pennington, Law Clerk. Its excellence is self-evident. It accurately reflects the considered judgment of the Court as to each issue discussed therein.”);
- *U.S. v. Stanley*, 616 F.Supp. 1567, 1568, n.2 (N.D.Ill. 1985) (Shadur, J.) (“Special thanks are due this Court's law clerk, Ann Marchaterre, for her work in that respect.” [i.e., “... gone beyond counsel's and Stanley's submissions in an effort to search out a source of possible relief.”]);
- *Cone v. The Florida Bar*, 626 F.Supp. 132, 137, n.* (M.D.Fla. 1985) (Lynne, J.) (“This opinion is the product of exhaustive research and careful analysis by Luther M. Dorr, Jr., Law Clerk.”);
- *American Floral Services, Inc. v. Florists' Transworld Delivery Ass'n*, 633 F.Supp. 201, 203, n.1 (N.D.Ill. 1986) (Shadur, J.) (“It is appropriate at the opening gun to express special thanks to this Court's law clerk C. Steven Tomashefsky, Esq. for his efforts on this opinion. Of course judges, not law clerks, write opinions. One of the rules this Court has lived by since being appointed is that every sentence in every opinion is (for better or worse) the product of this Court's drafting or redrafting — or in the rare situation in which there has been no change in a sentence from a law clerk's draft, that absence of change reflects this Court's deliberate judgment that the draft says precisely what this Court intends in precisely the way this Court intends. Having said all that, though, it is worth adding that in this case the Herculean job of distilling a manageable first draft of an opinion from nearly 400 pages of briefs ... — and all this after wading through an 18-inch-thick pile of evidentiary submissions — was Mr. Tomashefsky's. Moreover, AFS' briefing gave a highly misleading portrayal of the evidence (or claimed evidence) and an inaccurate characterization of the applicable law, while both FTD's and Teleflora's briefing somewhat oversanitized both the facts and the law to favor their positions. Even though all the presentations thus reflected the to-be-expected operation of the adversary process (each side overstating its position, with the truth somewhere in between), they certainly made the production of a coherent treatment of the issues that much harder. But Mr. Tomashefsky did indeed furnish a coherent treatment to this Court as grist for its mill, and to the extent this opinion does not meet that benchmark the fault is this Court's, not Mr. Tomashefsky's.”);

- *Boyter v. Shreveport Bank & Trust*, 65 B.R. 944, 949, n.4 (W.D.La. 1986) (Stagg, C.J.) (“I wish to acknowledge, with thanks, the research and translation by senior law clerk Marie Breaux Stroud. My stumbling, junior college French would never survive publication. I trust that hers will.”);
- *Acceptance Ins. Co. v. Schafner*, 651 F.Supp. 776, 778, n.* (N.D.Ala. 1986) (Lynne, J.) (“This Memorandum of Opinion was prepared by William G. Somerville, III, Law Clerk, in which the Court fully concurs.”);
- *Wolkoff v. Church of St. Rita*, 505 N.Y.S.2d 327, 334 (N.Y.Sup. 1986) (Charles A. Kuffner, Jr., J.) (“The hard work, thorough research and scholarship of Edward Larsen, New York Law School Intern participating in the Richmond County Bar Association Summer Intern Program, is gratefully acknowledged and in large measure credited in the formation of this opinion. Mr. Larsen has the sincere thanks of this Court.”);
- *Williams v. McAdams*, 2 Oklahoma Tribal Court Reports 282, 1991 WL 733415, n.1 (Wichita Ct. Ind. App. 1991) (Mikkanen, Mag.) (“The judges of the Court of Indian Appeals wish to thank John Baker, law clerk for the court, for his work and assistance in preparing this opinion.”);
- *Transco Products Inc. v. Performance Contracting, Inc.*, 813 F.Supp. 613, 627, n.25 (N.D.Ill. 1993) (Shadur, J.) (“This opinion cannot conclude without an expression of special thanks to this Court’s law clerk, Susan Pacholski, whose extensive draft provided the major input (more than that of the combatants) that has ultimately led to this Court’s conclusions. Despite the handicap of her having to start from scratch in delving into the arcane mysteries of patent law, Ms. Pacholski perceived issues that had not been addressed (or had not been fully addressed) by the able and experienced counsel for the parties, and that in material part formed the basis for this Court’s further exploration and exposition in this opinion. It should of course be emphasized that the ultimate responsibility for what is said here (including the crafting of the opinion and the reading and analysis of every cited case) is borne, and has been carried out, by this Court — so that if any errors were to be perceived here, they would in no way be ascribable to Ms. Pacholski.”);
- *Gwinnett County v. Yates*, 458 S.E.2d 791, 795, n.8 (Ga. 1995) (Hunt, C.J.) (“With this opinion I conclude 24 happy years of service in the state judiciary. Following the precedent set by two of my predecessors, Justices Hall and Weltner, see *Grantham v. State*, 244 Ga. 775, 776, 262 S.E.2d 777 (1979) (Hall, J., concurring); *Davis v. City of Macon*, 262 Ga. 407, 421 S.E.2d 278 (1992) (Weltner, C.J., concurring), I take this opportunity to thank my long suffering law clerks, ... for their service to the state and for making my work so pleasant.”);
- *U.S. v. BCCI Holdings, Luxembourg, S.A.*, 69 F.Supp.2d 36, 63 (D.D.C. 1999) (Joyce Hens Green, J.) (“Finally, four of this Court’s law clerks who were assigned to this case during its eight-year pendency deserve special thanks from the Court for their remarkable and inspiring contributions; they are: Frank E. Kulbaski, Michael J. Francese, Mark J. Yost, and Michael W. Carroll.”);

- *Agere Systems, Inc. v. Broadcom Corp.*, Not Reported in F.Supp.2d, 2004 WL 1658530, at *47, n.75(E.D.Pa. 2004) (Schiller, J.) (“I also wish to thank my law clerks who worked on this case. We were all faced with the difficult task of comprehending complex technology, and they were invaluable to me.”);
- *Kienutske v. Barnhart*, 375 F.Supp.2d 556, 557, n.1 (E.D.Mich. 2004) (Whalen, Magistrate Judge) (“The Court acknowledges the substantial contributions of Law Clerk Amy J. Humphreys to the preparation of this Report and Recommendation.”);
- *Seales v. Macomb County*, 226 F.R.D. 572, 574, n.1 (E.D.Mich. 2005) (Whalen, Magistrate Judge) (“The Court acknowledges the significant contributions of Law Clerk Amy J. Humphreys to the preparation of this Opinion and Order.”);
- *New York v. Fisher*, 9 Misc.3d 1121(A), 2005 WL 2780686, n.3 (N.Y.City Ct. 2005) (Thomas Rainbow Morse, J.) (“The holding herein is faithful to the court's original finding [on 10 Mar 2005], however, the analysis is expanded to account for a number of recent cases decided in New York and other states. In that regard, I thank my Law Clerk Gene Crimi for his up to the minute research.”).
- *Johnson v. Sadzewicz*, 426 F.Supp.2d 635, 638, n.1 (E.D.Mich. 2006) (Whalen, Magistrate Judge) (“The Court acknowledges the substantial contributions of Law Clerk Amy J. Humphreys to this Report and Recommendation.”);
- *Lohr v. Commissioner of Social Sec.*, 559 F.Supp.2d 784, 786, n.1 (E.D.Mich. 2008) (R. Steven Whalen, Magistrate Judge) (“The Court acknowledges the substantial contributions of Law Clerk Amy J. Humphreys to the preparation of this Report and Recommendation.”);
- *Patino v. Astrue*, 574 F.Supp.2d 862, 874, n.10 (N.D.Ill. 2008) (Milton I. Shadur, J.) (“Once again this Court opts for publishing this opinion in what might be thought of (other than by the litigants, of course) as an otherwise pedestrian case. That election has been made to provide this Court with the opportunity for public acknowledgment of the outstanding work that has always been done by its outgoing law clerk Georgia Alexakis during the year now ending. Some better appreciation of the extraordinary quality of Georgia’s work can be gained by reading this Court’s majority opinion for the panel in *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767 (9th Cir. 2008) and its opinion in *Whiting v. Harley-Davidson Fin. Servs.*, 534 F.Supp.2d 823 (N.D.Ill. 2008), in each of which cases (as always) her research and analysis provided substantial value beyond that furnished by the counsel in the case. This Court hastens to add (as it invariably does when it is appropriate to pay such a tribute to one of its exemplary law clerks) that it has carefully reworked each sentence in this and other draft opinions produced by Georgia, as well as having read each cited case, so that each end product is this Court's own. If then any errors have found their way into any final version, the sole responsibility must be laid at this Court’s doorstep and not Georgia’s.):

While the above list of 33 thanks to law clerks may *seem* like a long list, keep in mind that the above list was extracted from more than 18,600 volumes⁵¹ of U.S. REPORTS, West's FEDERAL Reporter, West's FEDERAL SUPPLEMENT, and the seven West regional reporters, plus unreported judicial opinions in Westlaw. If we estimate that there have been 220 opinions that thanked a law clerk, that would be an average of one thank you for every 84 volumes of opinions — making acknowledgments to law clerks a very rare event.

The above list of cases would be even fewer, except for Judge Shadur of the U.S. District Court in Illinois, who wrote 6 opinions cited above thanking his law clerk;⁵² except for Judge Lynne of the U.S. District Court in Alabama, who wrote 14 published opinions cited above thanking his law clerk;⁵³ and except for U.S. Magistrate Judge Whalen in Michigan, who wrote 4 published opinions thanking one law clerk. It appears that most of the judicial acknowledgements to law clerks were written by these three judges.

Note that the U.S. Supreme Court and the U.S. Courts of Appeals *never* acknowledge the role of their law clerks in drafting their judicial opinions. The one apparent exception in the above list — *Foster v. Sparks*, 506 F.2d 805 — is actually an acknowledgement of a law clerk who wrote a report that is included as an appendix to an opinion. That report could easily have been a law review article.

While I think it may be acceptable⁵⁴ for a judge to copy from a draft submitted by a law clerk, let me also say I believe it would be appropriate for the judicial code of conduct — or some other mandatory regulation — to require *all* judges to routinely acknowledge copying from their clerk(s) in a footnote at either the beginning or end of the opinion, which footnote should mention the name of the law clerk(s) who contributed substantial text to the opinion. Such public acknowledgment would not only properly give credit to the law clerk, but also might discourage judges from copying from their clerks.

⁵¹ There were that many published volumes in Dec 2009.

⁵² My 25 Dec 2009 Westlaw search for the query `ju(shadur) & (law +2 clerk)` found 189 cases. That was too many for me to read, so I acknowledge that the above list of cases is missing many opinions by Judge Shadur.

⁵³ My Dec 2009 Westlaw search for the query `ju(lynne) & (law +2 clerk)` returned twenty cases, of which I chose to quote 14 in the above list.

⁵⁴ I say *acceptable*, in the sense of not punishing judges for such copying. However, it is *not* good practice for a judge to copy from a law clerk. The process is somewhat better if the judge extensively reviews and edits the clerk's draft.

Parker v. Connors Steel (1988)

An extraordinarily rare discussion of law clerks who have a possible conflict of interest is given in a U.S. Court of Appeals case in Alabama. Buried in the opinion is a terse paragraph that appears to condemn judges who issue an opinion that was actually written by a law clerk. In this case, the clerk, William G. Somerville, III, is the son of a partner in the law firm representing the defendant in litigation before the trial judge. The father of the clerk did *not* participate in the case, but there is still concern about conflict of interest and impartiality. The opinion of the trial court is not in Westlaw, but the U.S. Court of Appeals said:

The memorandum opinion issued by the district court contained a footnote that reads in relevant part:

For the formulation of this opinion, the Court is indebted to its Law Clerk, William G. Somerville, III, for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue. FN8

FN8. We note that this is not an isolated case.⁵⁵ The district judge has regularly included such footnotes in published opinions as far back as 1961. See, e.g., *Willoughby Roofing & Supply Co., Inc. v. Kajima Intern., Inc.*, 598 F.Supp. 353, 354 (N.D.Ala. 1984), *aff'd*, 776 F.2d 269 (11thCir. 1985) (per curiam); *United States Fidelity & Guaranty Co. v. Slifkin*, 200 F.Supp. 563, 582 (N.D.Ala. 1961).

Parker v. Connors Steel Co., 855 F.2d 1510, 1523 (11thCir. 1988), *cert. den.*, 490 U.S. 1066 (1989).

Furthermore, the father of the trial judge's current clerk had been a clerk for the trial judge some 26 years earlier. *United States Fidelity & Guaranty Co. v. Slifkin*, 200 F.Supp. 563, 582, n.1 (N.D.Ala. 1961); *Parker v. Connors Steel Co.*, 855 F.2d at 1523, n.9. The plaintiffs argued that the trial judge should have recused himself. The U.S. Court of Appeals discussed the facts of this case:

We now turn to the objective facts that might reasonably cause an objective observer to question Judge Lynne's impartiality. First, the close familial relationship between Judge Lynne's law clerk and a senior partner [William G. Somerville, Jr.] in the firm representing Connors and H.K. Porter might lead an objective observer, especially a lay observer, FN12 to believe that Connors and H.K. Porter will receive favorable treatment from the district judge. This is compounded by the observation that William G. Somerville, Jr., is a former law clerk to Judge Lynne. FN13

FN12. Generally, those trained in the law understand that a judge, or even an advocate, is able to maintain social contacts with other members in the profession without allowing these friendships to have any impact whatsoever on his/her professional obligations.

⁵⁵ Note by Standler: Is the U.S. Court of Appeals criticizing the trial judge here?

FN13. We recognize, however, that ordinarily disqualification of an entire law firm is not required “when the propriety of a former law clerk's participation in a case is drawn in question.” *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 569 F.2d 251, 255 (5th Cir.), cert. denied, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978). William G. Somerville, Jr., did not actually participate in the instant case, but his relationship with Judge Lynne's law clerk and the fact that he is a former law clerk to Judge Lynne contribute to the appearance of impropriety.

Judge Lynne's practice of giving credit to his law clerk in a footnote may erroneously lead some to believe that the law clerk decided the case. While it has not been suggested that the decision in this case was made by Judge Lynne's law clerk and we have no reason to believe that it was, it is not unreasonable to believe that the public may come to this conclusion. See, e.g., *Acceptance Ins. Co. v. Schafner*, 651 F.Supp. 776, 778 (N.D. Ala. 1986) (“This Memorandum of Opinion was prepared by William G. Somerville, III, Law Clerk, in which the Court fully concurs.”) (emphasis added); *Cone v. The Florida Bar*, 626 F.Supp. 132, 137 (M.D. Fla. 1985) (Judge Lynne, sitting by designation) (“This opinion is the product of exhaustive research and careful analysis by Luther M. Dorr, Jr., Law Clerk.”). **It goes without saying that it would be improper for a judge to delegate the adjudicative function of his office to one that was neither appointed by the President nor confirmed by the Senate.**⁵⁶

....

We believe that these facts might cast doubt in the public's mind on Judge Lynne's ability to remain impartial and at a minimum these facts raise the appearance of impropriety. It has been stated on numerous occasions that when a judge harbors any doubts concerning whether his disqualification is required he should resolve the doubt in favor of disqualification. [citations to two cases omitted]

⁵⁶ Boldface added by Standler. Does this sentence forbid a judge to prepare his/her opinion by copying from his/her law clerk's draft? This was *not* the issue in the case at bar, but Judge Lynne had written footnotes in many other cases that indicated that his opinion was prepared by a law clerk. See the two cases cited by the Court of Appeals earlier in this paragraph, also see *United States Fidelity & Guaranty Co. v. Slifkin*, 200 F.Supp. 563, 582, n.1 (D. Ala. 1961) (Lynne, J.) (“Credit is due William G. Somerville, Jr., Law Clerk to the Court, for the preparation of this opinion.”); *Ideal Structures Corp. v. Levine Huntsville Development Corp.*, 251 F.Supp. 3, 12, n.12 (N.D. Ala. 1966) (Lynne, J.) (“Credit is due William L. Hinds, Jr., Law Clerk to the Court, for the preparation of this opinion.”); *Terry v. Elmwood Cemetery*, 307 F.Supp. 369, 377, n.46 (N.D. Ala. 1969) (Lynne, J.) (“Credit is due Robert L. Potts, Law Clerk to the Court, for the preparation of this opinion.”); *Hodgson v. Mauldin*, 344 F.Supp. 302, 314, n.32 (N.D. Ala. 1972) (Lynne, J.) (“The foregoing opinion was originally prepared as a memorandum for the Court by Kirby Sevier, Law Clerk, Since its excellence in form and content could not be improved upon, it has been reproduced in its entirety as the considered opinion of the Court.”); *Tyler v. Insurance Co. of North America, Inc.*, 381 F.Supp. 1356, 1362, n.6 (N.D. Ala. 1974) (Lynne, J.) (“The foregoing opinion was originally prepared as a memorandum for the Court by E. Mabry Rogers, Law Clerk, It has been reproduced in its entirety as the considered opinion of the Court.”); *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694, n.* (N.D. Ala. 1985) (Lynne, J.) (“This opinion was prepared by Michael R. Pennington, Law Clerk. Its excellence is self-evident. It accurately reflects the considered judgment of the Court as to each issue discussed therein.”).

We express no opinion on whether any of the above facts standing alone would rise to the level of a [28 U.S.C.] § 455(a) violation. We merely conclude that all of these facts taken together raise the appearance of impropriety and may cause one to reasonably question Judge Lynne's impartiality.

....

... when a judge's law clerk has a possible conflict of interest or knows of other disqualifying factors it is the clerk, not the judge, who must be disqualified. [citation omitted] This problem might have been avoided if Judge Lynne would have taken steps to isolate Somerville from this case.

A law clerk, as well as a judge, should stay informed of circumstances that may raise the appearance of impartiality or impropriety. And when such circumstances are present appropriate actions should be taken. In the instant case either Judge Lynne or his law clerk must have known of the grounds for disqualification and either of them should have raised the issue. If the issue had been raised and fully disclosed the [plaintiffs] may have waived the grounds for disqualification. [footnote omitted]

Parker v. Connors Steel Co., 855 F.2d at 1524-1525.

The U.S. Court of Appeals then held that the trial judge's failure to recuse himself was "harmless error". *Ibid.* at 1526-27.

The reason that this apparent conflict of interest came to light was that the trial judge included an acknowledgment to the law clerk for analysis of discovery materials and application of law to the undisputed facts of the case. *Parker v. Connors Steel Co.*, 855 F.2d at 1525, n.16 As explained earlier in this essay, such acknowledgments are extraordinarily rare in judicial opinions. Aside from issues of intellectual honesty, routinely including such acknowledgments would alert parties to possible conflicts of interest.

One wonders if part of the motivation for the U.S. Court of Appeals decision in this case was irritation that Judge Lynne had repeatedly publicly disclosed that his law clerks were writing opinions for him to issue. While most federal judges have their law clerk draft an opinion, such practice is *not* publicly disclosed by federal judges⁵⁷ and is rarely discussed in public. Such silence gives the lay public the illusion that judges write their own opinions. The U.S. Court of Appeals may have been concerned that Judge Lynne's public acknowledgement to his clerks was tarnishing the image of federal judges, by exposing a judicial secret.

Judge Lynne had been a federal judge since 1946. He assumed senior status in Jan 1973, but continued to hear cases, including *Parker v. Connors Steel*. During 1961-86, Judge Lynne issued twenty opinions in Westlaw that included a footnote thanking his law clerk.⁵⁸ After the U.S. Court

⁵⁷ There are a *few* exceptions, some of which are mentioned above in the list beginning at page 57. Judges Shadur and Lynne are the most frequent exceptions to the judicial silence.

⁵⁸ My Dec 2009 Westlaw search for the query `ju(lynne) & (law +2 clerk) & da(bef 9/1988)` returned twenty cases.

of Appeals decided *Parker* in Sep 1988, Judge Lynne issued nine opinions that are in Westlaw, but none of those opinions mentioned his law clerk. Apparently, the lesson that Judge Lynne learned from *Parker* was not to mention a law clerk in his opinion. I believe that was the wrong lesson, but it did put Judge Lynne in the mainstream of judges in the USA. Judge Lynne's last opinion in Westlaw was issued in March 1997 and he died in Sep 2000.

Attorney Ghostwriting Judicial Opinion

As explained below, the rule of law is simple: a judicial opinion or order becomes official when the judge signs it, no matter whether it was written by an attorney for a party in the case, the judge's law clerk, or the judge himself. That having been said, in the following cases, federal appellate judges have expressed their distaste for judicial opinions and orders that are drafted by an attorney for a party in the case. I have divided the cases into two groups: (1) ghostwriting findings of fact and (2) ghostwriting entire opinions. A third section considers a few cases from state courts.

A. federal court: ghostwritten findings of facts *Crescent Amusement* (U.S. 1944)

In 1944, the U.S. Supreme Court wrote the following terse paragraph in an anti-trust case:

The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See *United States v. Forness*, 2 Cir., 125 F.2d 928, 942, 943. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they were.

U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-185 (1944).

The U.S. Supreme Court decision in *Crescent Amusement* is rarely cited for its remark about verbatim copying of findings of fact prepared by an attorney for one party. The most important of these few citations is in a U.S. Supreme Court case, twenty years after *Crescent Amusement*, which is quoted at page 68, below.

Forness, cited by the U.S. Supreme Court, is a Second Circuit case from January 1942 that emphasizes the importance of fact-finding, then concludes:

When a federal trial judge sits without a jury, that responsibility [of ascertaining the facts] is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous', no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.

U.S. v. Forness, 125 F.2d 928, 943 (2d Cir. 1942), cert. denied sub nom. *City of Salamanca v. United States*, 316 U.S. 694 (1942).

Forness cites to a case without any findings of facts by the trial court:

We agree fully with the spirit and the terms of the resolution passed by majority vote of the judges at our Judicial Conference of last June recommending “that the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion.” This puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters, and also upon a finding made as a part of the judge’s opinion and decision, rather than the delayed, argumentative, overdetailed documents prepared by winning counsel after the event which often appear in appellate records, though they are not effective aids to adjudication.

Matton Oil Transfer Corporation v. The Dynamic, 123 F.2d 999, 1001 (2dCir. 1941).

Louis Dreyfus (1962)

The defendant submitted 17 findings of fact, and the trial judge included 16 of them verbatim in the judge’s opinion. The plaintiff appealed and “urges that the district court decision is not entitled to the full credit usually extended to the findings made by the trier of facts since the trial judge uncritically adopted, virtually verbatim, the proposed findings submitted by counsel for the [opposing party].” *Louis Dreyfus et Cie. v. Panama Canal Co.*, 298 F.2d 733, 737 (5thCir. 1962). The U.S. Court of Appeals said: “We disapprove of the practice of a trial judge’s uncritically accepting proposed findings, but this unfortunate practice does not erase the ‘clearly erroneous’ rule.” *Ibid.* The U.S. Court of Appeals explained why findings of fact drafted by an attorney for a party might be more accurate than findings drafted by the judge:

In analyzing the significance that should be attached to the adoption by the trial judge of findings drafted by one of the litigants, common sense may be a better guide than ideal decision-making. As an ideal matter it would be desirable for the trial judge to draft his own findings in every case. This would supply insurance, for the benefit of the appellate court, that the trial judge did indeed consider all the factual that each word in and would guarantee that each word in the finding is impartially chosen. In the workaday world, however, it may often be necessary for a hard-pressed district court to take assistance from counsel in articulating his decision.^{FN5} This assistance may be especially helpful in a case involving complex and technical subject matter, as in patent cases, where the aid of a specialist may be but a shade short of indispensable. In such cases it must be assumed that the trial judge considered the case from all angles and reached his decision independently before placing reliance on the proposed findings. The ultimate question that the judge must face is whether to enter judgment for plaintiff or defendant, and he must decide this question on his own before deciding which proposed findings to accept. Since his mind must range over the same questions to make this decision that it would to write the findings the result will be the same, and his factual determinations should, as in any other case, be set aside only if clearly erroneous.

FN5. In *Dearborn Nat. Casualty Co. v. Consumers Petroleum Co.*, 7 Cir., 1947, 164 F.2d 332, 333 the Court stated, ‘While the burden and responsibility to make findings of fact and state conclusions of law thereon are primarily upon the trial court, certainly counsel for the parties, especially the prevailing party, have an obligation to a busy court to assist it in the performance of its duty in this regard.’

Louis Dreyfus, 298 F.2d 733, 738 (5thCir. 1962).

The U.S. Court of Appeals concluded: “The evidence on these other matters is certainly not so contrary to the findings as to suggest that the trial judge failed to perform his function conscientiously or entirely misunderstood the case, and his adoption of findings proposed by one of the parties will not create an inference to that effect.” The appellate court affirmed the trial court. *Louis Dreyfus*, 298 F.2d at 739.

El Paso (U.S. 1964)

In 1964, the U.S. Supreme Court reaffirmed the rule in *Crescent Amusement*:

There was a trial, and after oral argument the judge announced from the bench [footnote quoting transcript omitted] that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees ‘Prepare the findings and conclusions and judgment. They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185, 65 S.Ct. 254, 89 L.Ed. 160. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.FN4 See 2B Barron and Holtzoff, FEDERAL PRACTICE AND PROCEDURE (Wright ed. 1961), § 1124. Moreover, these detailed findings were ‘mechanically adopted,’ to use the phrase of the late Judge Frank in *United States v. Forness*, 2 Cir., 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case.

FN4. Judge J. Skelly Wright of the Court of Appeals for the District of Columbia recently said: ‘Who shall prepare the findings? Rule 52 says the court shall prepare the findings. ‘The court shall find the facts specially and state separately its conclusions of law.’ We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52-the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit. ‘I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.’ Seminars for Newly Appointed United States District Judges (1963), p. 166.

U. S. v. El Paso Natural Gas Co., 376 U.S. 651, 656-657 (1964).

“highly technical issues” (1965-73)

In a patent infringement case in Massachusetts in 1965, the U.S. Court of Appeals wrote:

Counsel are certainly entitled to file proposed findings of fact on their own initiative and we see nothing whatever in any way irregular for a court to ask them to do so, particularly in a highly technical and complicated case like the present. Nor is there any reason why counsel should not cast their requests in a form which if approved could be adopted by the court as its findings. *Hazeltine Research, Inc., v. Admiral Corp.*, 183 F.2d 953 (C.A. 7, 1950), *cert. denied*, 340 U.S. 896, 71 S.Ct. 239, 95 L.Ed. 650. Ordinarily we think it the better practice for the trial court to prepare its own findings with such help as it may derive from counsels' requests. But this is no ordinary case. In a case of this difficulty we think the court below was fully justified in avoiding the risk of slipping inadvertently into serious scientific error by relying heavily upon counsel for technical findings based upon highly technical evidence. The question is whether the findings are supported by the evidence. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185, 65 S.Ct. 254, 89 L.Ed. 160 (1944).

Nyyssonen v. Bendix Corp., 342 F.2d 531, 532-533 (1stCir. 1965) (patent infringement case), *cert. den.*, 382 U.S. 847 (1965).

In 1970, the First Circuit took the unusual step of suggesting that judges prepare their own findings of fact, except in “extraordinary cases where the subject matter is of a highly technical nature requiring expertise which the court does not possess.”

In *Nyyssonen v. Bendix Corporation*, 342 F.2d 531, 532 (1st Cir.), *cert. denied*, 382 U.S. 847, 86 S.Ct. 63, 15 L.Ed.2d 86 (1965), this court considered the contention that, by adopting a portion of defendant's draft findings of fact verbatim, the district court denied plaintiffs due process of law. Although we rejected that contention, we expressed the view that ‘ordinarily we think it the better practice for the trial court to prepare its own findings with such help as it may derive from counsels' requests.’ We were emphatic that *Nyyssonen*, a complex patent litigation, was not an ordinary case. The district judge, while candidly recognizing his own limitations in the area, left no doubt that to the best of his ability he had made an independent study of the record. Under the circumstances, we thought him justified in adopting the proposed findings in order to avoid the risks of scientific and technological error. See *Radio Corporation of America v. Philco Corporation*, 275 F.Supp. 172, 210 (D.N.J. 1967).

The issues confronting the court in the instant case do not resemble those in *Nyyssonen*, and we reiterate that we think the practice of adopting proposed findings verbatim should be limited to extraordinary cases where the subject matter is of a highly technical nature requiring expertise which the court does not possess.

Nevertheless, the Supreme Court, in an antitrust action, has held that ‘findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.’ *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 1047, 12 L.Ed.2d 12 (1964).

In re Las Colinas, Inc., 426 F.2d 1005, 1009-1010 (1stCir. 1970).

The U.S. Supreme Court holding in *El Paso Natural Gas* must prevail, instead of the First Circuit’s desire to restrict a judge from verbatim adopting findings of facts prepared by the prevailing party's attorney. See, e.g., *U.S. v. Marin*, 651 F.2d 24, 28, n.10 (1stCir. 1981).

In 1970, a U.S. Court of Appeals in California agreed:

Some courts have indicated that it is not impermissible for the District Court to adopt, verbatim, proposed findings [of fact] and conclusions [of law] in a case involving highly technical issues, such as may be involved in patent cases and complex scientific problems. See *Nyssonen v. Bendix Corp.*, 342 F.2d 531 (1st Cir. 1965). But such is not the case with antitrust,

Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1339-1340 (9th Cir. 1970) (ghostwritten judicial opinion by attorney for one party in antitrust case). The U.S. Court of Appeals also explained why the attorney was blameless for providing ghostwritten material requested by the trial judge:

In the present case, the conclusions of the District Court are interlaced with an inordinate amount of invective, scorn, and unnecessary criticism.[FN3]

[FN3] This may, of course, have reflected the true attitude of appellee's attorneys, who authored the comments. We do not criticize these attorneys, recognizing that they were placed in a position of inherent conflict. They were requested to submit an opinion and findings and conclusions which, if adopted by the court, would reflect impartiality and restrained, objective judicial attitude. On the other hand, their duty, as advocates, was to present all their contentions in the light most favorable to their clients.

Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1340 (9th Cir. 1970).

This is not a thorough analysis of a problem in both professional ethics and attorney professional responsibility — e.g., the attorney's duty as officers of the court is missing, and their "invective, scorn" is unprofessional — but it is clear that an attorney is a partisan advocate, and *not* an impartial person decision maker. That is why attorneys should not be writing judicial opinions, and why judges should be skeptical of findings of facts drafted by attorneys.

In 1973, a U.S. Court of Appeals in California wrote:

The district court decision was embodied in a conclusionary memorandum of decision and in lengthy findings of fact and conclusions of law drafted by counsel for Burgess and adopted by the court. The court did not write an opinion. While it may be permissible for a judge to adopt findings proposed by counsel in complex patent cases, *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970), an appellate court will scrutinize them more carefully than findings which are the product of the judge's own independent thought and research. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

Burgess & Associates, Inc. v. Klingensmith, 487 F.2d 321, 324-325 (9th Cir. 1973).

See also:

- *Reese v. Elkhart Welding & Boiler Works*, 447 F.2d 517, 520 (7th Cir. 1971) (patent infringement);
- *Photo Electronics Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978) (patent infringement);
- *Mayview Corp. v. Rodstein*, 620 F.2d 1347, 1352 (9th Cir. 1980) ("This is just such a case 'involving highly technical issues' for which this practice is permissible.");

- *Caplan v. Vokes*, 649 F.2d 1336, 1344, n.14 (9thCir. 1981) (“The instant case is not the sort of highly technical or scientific matter, such as a patent dispute, which escapes this Court’s disfavor toward wholesale adoption of findings prepared by the prevailing party.”);
- *Continuous Curve Contact Lenses, Inc. v. Rynco Scientific Corp.*, 680 F.2d 605, 607 (9thCir. 1982) (dictum) (“In a highly technical case the court obviously can call upon counsel for assistance in drafting findings. Such findings, without argumentative language, presumably will deal with the complicated technical terms in a clear and accurate manner.”);
- *L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc.*, 880 F.2d 219, 222 (9thCir. 1989);
- *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Intern. Association of Machinists and Aerospace Workers*, 886 F.2d 1200, 1204, n.5 (9thCir. 1989) (“two-page order prepared by [Plaintiff’s] counsel”).

Note that some of these cases (e.g., *Industrial Bldg.* and *Stead Motors*) mixed ghostwriting findings of fact with ghostwriting entire judicial opinions, which I think are distinguishable.

Marine Bancorp (U.S. 1974)

A U.S. District Judge adopted findings of fact prepared by the counsel for the prevailing party, without any changes by the judge. The U.S. Supreme Court chastised the judge, but affirmed his decision.

In adopting, verbatim, proposed findings of fact in a complicated § 7 antitrust action, the District Court failed to heed this Court's admonition voiced a decade ago. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, 84 S.Ct. 1044, 1047, 1048, 12 L.Ed.2d 12 (1964). This has added considerably to our burden of reviewing the extensive record developed in this case. We have also been hampered by the absence of transcript citations in support of the District Court's findings. It is to be remembered that in a direct-appeal case like this one, we must apply the ‘clearly erroneous’ standard of Fed.Rule Civ.Proc. 52(a), *U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615, n.13 (1974).

Keystone Plastics (1975)

In 1975, the Fifth Circuit heard *Keystone Plastics*, which had similar issues to its earlier opinion in *Louis Dreyfus*. The U.S. Court of Appeals wrote in *Keystone Plastics*:

This Court has consistently expressed its disapproval of the practice of unconditionally adopting findings submitted by one of the parties to the litigation. The reason should be self-evident. The reviewing court deserves the assurance that the trial court has come to grips with apparently irreconcilable conflicts in the evidence, such as appear in the case sub judice, and has distilled therefrom true facts in the crucible of his conscience.

Of course, in areas of highly specialized litigation the typical trial judge is apt to be unfamiliar with the nomenclature common to the art or science involved. In such cases he needs help in reducing his ultimate decision to accurate and understandable words.

Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960, 962 (5thCir. 1975).

The judge then quoted part of the paragraph quoted above from *Louis Dreyfus*. The U.S. Court of Appeals suggested that the trial judge ask

counsel for the party who is due to prevail in the tentative opinion of the court ... to submit proposed findings of fact and conclusions of law to the court and simultaneously to serve a copy thereof upon adverse counsel. Thereafter, at a hearing attended by counsel for all interested parties, the court will proceed to enter findings and conclusions as proposed or as appropriately modified.

Keystone Plastics, 506 F.2d at 962. But, even if the judge “uncritically accepted findings proposed by one of the parties”, the appellate court will reject those findings only if they are clearly erroneous. *Ibid*.

Holsey v. Armour & Co. (1982)

In a racial discrimination case, a U.S. District Court in North Carolina asked the attorney for the prevailing party to ghostwrite findings of fact and conclusions of law. The U.S. Court of Appeals rejected those findings:

The uncertainty surrounding the allocation of the burden of proof in this case is enhanced by the nature of the district court's findings and conclusions. Following the trial, the district court issued a Memorandum of Decision which set forth general reasons for sustaining the plaintiffs' claims and directed the plaintiffs' attorneys to prepare findings of fact and conclusions of law. Thereafter, plaintiffs' counsel filed an extensive document which, over the objections of the defendant, was adopted by the district court with immaterial changes.

In the past we have cautioned against the practice of adopting in this manner the prevailing party's proposed findings and conclusions. *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1082-83 (4th Cir. 1977); *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719, 724-25 (4th Cir. 1961). The adversarial tone of such findings accords them less “weight and dignity (than) ... the unfettered and independent judgment of the trial judge.” *The SEVERANCE*, 152 F.2d 916, 918 (4th Cir. 1945). Moreover, in this case the practice increased the ambiguity surrounding the district court's allocation of the burden of proof.

Because we are unable to properly assess the district court's findings, we vacate the judgment of the district court and remand the case for further proceedings. On remand, the district court should reconsider the case in light of the principles announced in *Burdine*, *White*, *Chicopee*, and *The SEVERANCE*.

Holsey v. Armour & Co., 683 F.2d 864, 866 (4th Cir. 1982) (per curiam).

This case is mentioned here because it was cited by a Minnesota state court, see page 80, below.

EEOC v. Federal Reserve Bank Richmond (1983)

In a racial discrimination case, a U.S. District Court adopted findings of fact and conclusions of law that were ghostwritten by the attorney for the prevailing party.⁵⁹ The U.S. Court of Appeals wrote an unusually lengthy discussion of the ghostwriting, with a large number of citations to cases:

We, along with other courts, have on a number of occasions — one as recently as a few months ago in *Holsey v. Armour & Company*, 683 F.2d 864 (4thCir. 1982) — expressed our disapproval of a trial court's practice of announcing its decision and then requesting the prevailing party to prepare findings of fact and conclusions of law which the court adopts almost word-for-word in support of its previously announced decision. The reason for such disapproval is inherent in Rule 52(a), Fed.R.Civ.P., a fair compliance with which “requires the trial court to find the facts on every material issue, including relevant subsidiary issues, and to ‘state separately’ its conclusions thereon with clarity.” *Kruger v. Purcell*, 300 F.2d 830, 831 (3dCir. 1962); *De Medina v. Reinhardt*, 686 F.2d 997, 1011 (D.C.Cir. 1982). **FN3** As the Court in *Sims v. Greene*, 161 F.2d 87, 89 (3dCir. 1947), said in language quoted and approved by us in *Consolidation Coal Co. v. Disabled Miners of So.W.Va.*, 442 F.2d 1261, 1269 (4thCir.), *cert. denied*, 404 U.S. 911, 92 S.Ct. 228, 30 L.Ed.2d 184 (1971), “[t]he conclusion is inescapable that since a district court is required by the rule [Rule 52(a)] to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence,” or, as the Court in the same opinion repeated, “[f]inding facts [under Rule 52(a)] requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both.” [footnote: Quoted with approval in *Hershey-Creamery Co. v. Hershey Chocolate Corp.*, 269 F.Supp. 45, 48 (S.D.N.Y. 1967)] See to the same effect: *McManus v. Midland Valley Lumber Co.*, 348 F.2d 898, 900 (4thCir. 1962) (“... must necessarily consider all available evidence bearing upon the issue”); *Burgess v. Farrell Lines, Inc.*, 335 F.2d 885, 889 (4thCir. 1964); *Sligh v. Columbia, Newberry and Laurens Railroad Co.*, 250 F.Supp. 490, 491 (D.S.C. 1966), *aff'd*, 370 F.2d 979 (4thCir.), *cert. denied*, 386 U.S. 1007, 87 S.Ct. 1349, 18 L.Ed.2d 434.

FN3. In *De Medina*, the court said: (p. 1011)

It is established that the requirement of fact findings cannot be met by a ‘statement of ultimate fact without the subordinate factual foundations for it which must be the subject of specific findings.’ *O’Neill v. United States*, 411 F.2d 139, 146 (3dCir. 1969). Further, the fact findings must touch all material issues. ‘For this court to exercise adequately its power of review, the district court must make specific findings about the nature and truth of [plaintiffs’] allegations.’ *Borrell v. ICA*, 682 F.2d 981 at 992 (D.C.Cir. 1982).

This application of Rule 52(a), it is true, does not require the trial court to deal with every piece of evidence in the record or every argument made during the proceedings, whatever their value, but it does mean that “[t]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with

⁵⁹ *E.E.O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 639 and n.2 (4thCir. 1983) (“these findings and conclusions were prepared by plaintiffs’ counsel at the direction of the District Court”).

apparently irreconcilable conflicts in the evidence ... and has distilled therefrom true facts in the crucible of his conscience.” *Golf City, Inc. v. Sporting Goods Co., Inc.*, 555 F.2d 426, 435 (5thCir. 1977).

All these considerations prompted the Supreme Court in *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 184-85, 65 S.Ct. 254, 259-260, 89 L.Ed. 160 (1944) to comment that the adoption of “findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of this function of the trial court,” under the Rules. This is so because an appellate court will “ ‘feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered’ when factual findings were not the product of personal analysis and determination by the trial judge.” *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314, n.1 (5thCir.), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978).⁶⁰ Nor is that disquiet, prompted by the trial court's adoption of one party's findings and conclusions, relieved by any statement in such findings and conclusions that the trial court had “ ‘individually considered’ them and adopted them because it ‘believed them to be factually and legally correct’; [even though] a cursory reading of the district court's memorandum leaves one with the impression that it was indeed written by the prevailing party to a bitter dispute.” *Amstar Corp. v. Domino's Pizza, Inc.*, *supra*, 615 F.2d at 258.

The adoption by the District Court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause per se nor does it mean that the “ ‘clearly erroneous’ ” rule of Rule 52(a) will not be applied at all, simply because the findings and conclusions were developed by one of the parties and adopted in course by the judge. As the Court in *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7thCir. 1977), after observing that “the district court [had] adopted [in that case] without change findings of fact and conclusions of law prepared by the defendant,” said: “[a] critical view of a challenged finding is appropriate where, as here, the findings of fact and conclusions of law of which it is a part were not the original product of a disinterested mind.” Again, in *Photo Electronics Corp. v. England*, 581 F.2d 772, 777 (9thCir. 1978), the Ninth Circuit expressed itself similarly, declaring that, while “the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal ... it does raise the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves. These concerns have caused us to call for more careful scrutiny of adopted findings.” See also, *United States v. State of Wash.*, 641 F.2d 1368, 1371 (9thCir. 1981), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294, (“Verbatim adoption of proposed findings of fact by the district court ... calls for close scrutiny by an appellate court”); and *Shlensky v. Dorsey*, 574 F.2d 131, 149 (3dCir. 1978) (such adoption requires the appellate court to “examine them more narrowly”).

When the findings of fact and conclusions of law adopted by the District Court have been given that “careful scrutiny” by the appellate court that is required under such circumstances and have been “more narrowly” examined than findings and conclusions which, because developed independently by the trial judge, provide assurance that the District Judge making the findings and conclusions “did indeed consider all the factual questions thoroughly and ... guarantee[s] that each word in the finding [was] impartially chosen,” *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5thCir. 1962, Wisdom, J.), and when, the reviewing court, on the entire record, “is left [after such review] with the definite and firm conviction that a mistake has been committed,” *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), or it is convinced that “the result in a particular case does not

⁶⁰ Note by Standler: The original source is *Louis Dreyfus*, 298 F.2d 733, 738 (5thCir. 1962). This sentence is easier to understand in the original source.

reflect the truth and right of the case,” *Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 501 (5th Cir. 1979), *cert. denied*, 444 U.S. 932, 100 S.Ct. 277, 62 L.Ed.2d 190, it is the duty of the appellate court to reverse the findings and conclusions as clearly erroneous. *E.E.O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 640-642 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984).

This case was cited by a Minnesota state court, see page 80, below.

Anderson (U.S. 1985)

In 1985, the U.S. Supreme Court criticized the practice of a trial judge verbatim copying findings of fact prepared by one party. However, once the trial judge adopts findings of facts, an appellate court can reverse only if the findings are clearly erroneous. The U.S. Supreme Court wrote:

We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, 84 S.Ct. 1044, 1047-1048, 12 L.Ed.2d 12 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n. 13, 94 S.Ct. 2856, 2866, n. 13, 41 L.Ed.2d 978 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See J. Wright, *The Nonjury Trial-Preparing Findings of Fact, Conclusions of Law, and Opinions*, Seminars for Newly Appointed United States District Judges 159, 166 (1962). Nonetheless, our previous discussions of the subject suggest that **even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.**⁶¹ *United States v. Marine Bancorporation*, *supra*, at 615, n. 13, 94 S.Ct., at 2866, n. 13; *United States v. El Paso Natural Gas Co.*, *supra*, 376 U.S., at 656-657, 84 S.Ct., at 1047-1048.

In any event, the District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued — and particularly the crucial findings regarding petitioner's qualifications, the questioning to which petitioner was subjected, and bias on the part of the committeemen — vary considerably in organization and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 572-573 (1985).

⁶¹ Boldface added by Standler.

B. federal court: ghostwritten opinions

Chicopee Mfg. (1961)

- *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-725 (4thCir. 1961) (“The manner in which the opinion of the District Judge was prepared in this case cannot be approved. But there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function and when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process.”), *cert. den.*, 368 U.S. 825 (1961).

Wisconsin Steel (1985)

- *In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D.Ill. 1985) (Bankruptcy court judge and counsel for the debtors were prohibited from further participation in this proceeding, because two judicial opinions allegedly written by the judge were ghostwritten by counsel for the debtor, without the knowledge of counsel for the creditors. At 766: “... it will be necessary to expunge Judge McCormick's orders of November 18, 1982, and January 7, 1985. They are not what they purport to be, and they cannot be allowed to stand.”)⁶²

Colony Square (1987)

Three times in one bankruptcy case, a bankruptcy judge made ex parte contract with a lawyer for one party and asked that lawyer to draft a judicial opinion, which the judge signed. *In re Colony Square*, 819 F.2d 272, 274 (11thCir. 1987), *cert. den.*, 485 U.S. 977 (1988). The U.S. Court of Appeals explained why such ghostwriting was objectionable:

The dangers inherent in litigants ghostwriting opinions are readily apparent. When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. The proposed order or opinion serves as an additional opportunity for a party to brief and argue its case and thus is unfair to the party not accorded an opportunity to respond. The quality of judicial decision making suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings. In addition, the ex parte communications occasioned by this practice create an obvious potential for abuse.

Colony Square, 819 F.2d at 275-276 [citations and footnotes omitted here]. The U.S. Court of Appeals concluded:

The bankruptcy judge's actions in preparing these orders have little to commend them. Nevertheless, since the judge had already reached firm, final decisions and since these decisions were determined to be correct as a matter of law by the district court and appellate

⁶² But see *In re Colony Square Co.*, 819 F.2d 272, 277, n.17 (11thCir. 1987) (“To the extent that *In re Wisconsin Steel Corp.* implies that ghostwritten opinions are per se invalid or mandate disqualification of the offending judge and lawyers, we disagree.”).

courts, we conclude that the process by which the orders were prepared did not prejudice the appellant and was not fundamentally unfair.

Colony Square, 819 F.2d at 277. Note the U.S. Court of Appeals concluded there was no denial of due process, (1) because the bankruptcy judge had “already reached a firm decision before asking [the lawyer] to draft the proposed orders” and (2) because the judge “directed the lawyers to draft orders which reached a particular result and discussed specific points.” 819 F.2d at 276.

In *Colony Square*, a more extreme position would be to vacate the bankruptcy judge’s orders, refer the bankruptcy judge to the Judicial Council of the U.S. Court of Appeals for the Eleventh Circuit because of his repeated ex parte contacts with prevailing party, and assign the case to a different judge on remand. However, *Colony Square* was a very complicated case with multiple appeals,⁶³ and assigning the case to a different judge would have greatly delayed the conclusion of this complicated case.

Dixie Broadcasting (1989)

- *In re Dixie Broadcasting Inc.*, 871 F.2d 1023, 1029-1030 (11thCir. 1989) (“This Circuit and other appellate courts have condemned the ghostwriting of judicial orders by litigants. *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987); *cert. denied*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988); *Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5thCir. 1975); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8thCir. 1967).”);

Bilzerian v. Shinwa (1995)

- *Bilzerian v. Shinwa Co. Ltd.*, 184 B.R. 389, 392 (M.D.Fla. 1995) (“The Eleventh Circuit Court of Appeals states the prevailing view of the federal courts when it condemns ‘ghost writing’. *In re Dixie Broadcasting Inc.*, 871 F.2d 1023 (11thCir. 1989), *In re Colony Square*, 819 F.2d 272 (11thCir. 1987). ‘Ghost writing’ applies to an ex parte order which is not the product of personal analysis and determination by the judge, but the overreaching and exaggeration of the attorney who drafted it. *In re Colony*, at 275 (citing *Louis Dreyfus et Cie. v. Panama Canal Co.*, 298 F.2d 733 (5thCir. 1962)). Due process is denied a party when a judge adopts a party’s order verbatim, without previously conclusively ruling on the matters in it. Thus, a party is denied opportunity to confront the ruling contained in such an ex parte drafting.”);

⁶³ Bankruptcy proceedings began in the year 1975 in Georgia. 819 F.2d at 273. The U.S. Supreme Court declined to hear the case 13 years later. 485 U.S. 977 (1988).

Bright (2004)

A U.S. District Court judge in Pennsylvania asked the prevailing party to ghostwrite a judicial opinion. “This proposed opinion is nearly identical to the opinion filed by the District Court. Other than minor grammatical and stylistic edits, the District Court made only two substantive changes.” *Bright v. Westmoreland County*, 380 F.3d 729, 731 (3dCir. 2004). The U.S. Court of Appeals wrote:

Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions. We, therefore, cannot condone the practice used by the District Court in this case.

There is, however, an additional reason why a reversal and remand is the appropriate remedy in this case. We have made it clear that the linchpin in using findings of fact, even when they are verbatim adoptions of the parties' proposals, is evidence that they are the product of the trial court's independent judgment. [*Pennsylvania Environmental Defense Foundation v. Canon-McMillan School Dist.*, 152 F.3d 228], at 233. In this case, there is no record evidence which would allow us to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment. In fact, the procedure used by the District Court casts doubt on the possibility of such a conclusion. *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3dCir. 2004). The U.S. Court of Appeals reversed the U.S. District Court.

Living Designs v. Dupont (2005)

A judge in a U.S. District Court asked attorneys for one party to ghostwrite a summary judgment order that was published at *Matsuura v. E.I. Dupont de Nemours and Co.*, 330 F.Supp.2d 1101 (D.Hawaii 2004). The U.S. Court of Appeals reversed on the merits, assigned the case to a different judge on remand, and wrote the following:

Although we do not question the impartiality of the visiting district judge, there are some unusual factors that indicate to us that a reassignment is advisable to preserve the appearance of justice. The visiting district judge adopted the 64 page proposed summary judgment order tendered by DuPont with only a few minor changes. Those changes consisted of additional language complaining about the volume of material involved.

The judge then directed that the ghost-written order be published. Although adopting findings or an order drafted by the parties is not prohibited, we have criticized district courts that “engaged in the ‘regrettable practice’ of adopting the findings drafted by the prevailing party wholesale.” *Maljack Productions, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9thCir. 1996) (quoting *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n. 3 (9thCir. 1984)).”

Living Designs, Inc. v. E.I. Dupont de Nemours and Co., 431 F.3d 353, 373 (9thCir. 2005).

Footnote 3 in *Sealy* — cited in *Living Designs* — says: “Because the district court engaged in the ‘regrettable practice’ of adopting the findings drafted by the prevailing party wholesale, we review its findings with special scrutiny. *Cher v. Forum Intern. Ltd.*, 692 F.2d 634, 637 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120, 103 S.Ct. 3089, 77 L.Ed.2d 1350 (1983).” In *Sealy* and *Cher*, the issues was findings of fact that were drafted by one party, so *Living Designs* mixed (1) ghostwriting of a long, published opinion with (2) a judge copying findings of fact.

Walker (2008)

- *In re Walker*, 532 F.3d 1304, 1311 (11th Cir. 2008) (“Although we have ‘repeatedly condemned the ghostwriting of judicial orders by litigants,’ *In re Colony Square Co.*, 819 F.2d 272, 274, 277 (11th Cir. 1987), ‘such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair,’ *id.* at 276.”).

C. state courts

I have the impression — perhaps not accurate — that there are more federal cases that discuss ghostwritten findings of fact than state cases. In the few state appellate court cases I have found about attorneys ghostwriting findings of fact for a judge, the state courts — like the federal courts — tolerate the practice if the ghostwritten facts are supported by the record:

Iowa

In 1984, the Iowa Supreme Court wrote an unusually detailed discussion of the practice of the attorney for the prevailing party drafting findings of facts, which are then verbatim adopted by the trial judge.

Many courts have sharply criticized the practice, however, suggesting that if the trial court adopts verbatim the findings prepared by winning counsel it may appear that the court has abdicated its role of fact-finder as well as decision-maker. See, e.g., *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.) *cert. denied*, 449 U.S. 899, 101 S.Ct. 268, 66 L.Ed.2d 129 (1980); *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir.) *cert. denied*, 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 29 (1961) (counsel's preparation of opinion, without notice to opposing party, may amount to denial of due process). The United States Supreme Court itself criticized findings of fact which had been submitted by counsel and adopted verbatim by the trial court. The Court held that the findings were formally the court's and would stand if supported by evidence, but it clearly stated its preference for those “drawn with the insight of a disinterested mind” which thereby “reveal the discerning line for decision of the basic issue in the case.” *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57, 84 S.Ct. 1044, 1047, 12 L.Ed.2d 12, 17 (1964) (dictum). “All courts agree that finding the facts is an important part of the judicial function and that the judge cannot surrender this function to counsel.” 9 Wright & Miller, § 2578, at 705.

Detailed written decisions are often required by court rule, particularly when a judge tries an issue of fact without a jury. See, e.g., Fed.R.Civ.P. 52(a); Iowa R.Civ.P. 179(a); Mass.R.Civ.P. 52(a). The purpose of such rules is threefold: (1) the quality of the judge's decision-making process is enhanced by requiring simultaneous articulation of the judge's underlying reasoning; (2) the parties receive assurance that their contentions have been fully and fairly considered; and (3) appellate courts can readily ascertain the specific factual and legal bases for the court's decision. See *Roberts v. Ross*, 344 F.2d 747, 751-52 (3dCir. 1965); *Cormier v. Carty*, 381 Mass. 234, 236, 408 N.E.2d 860, 862-63 (1980). These purposes may not adequately be served to the extent that the trial court delegates to counsel its own responsibility to scrutinize the record, select apt principles of law, and fully articulate the bases for a sound, fair decision.

We believe the better practice is that spelled out in *Bradley v. Maryland Casualty Co.*:

We venture to suggest that if, because of prevailing custom, or pressure of work, or a case's technical nature, or for other reasons, counsel must be asked to assist in the preparation of findings and conclusions, it is better practice to make this request at or soon after the submission of the case and prior to decision and to make it of both sides. 5 MOORE'S FEDERAL PRACTICE (2d ed. 1966), par. 52.06[3], p. 2665. Then the court may pick and choose and temper and select those portions which better fit its own concept of the case.

382 F.2d 415, 423-24 (8thCir. 1967) (Blackmun, J.) (dictum). We further emphasize that in fairness all parties should be given the same opportunity to submit proposed findings and to comment on findings proposed by others. [citing Iowa Code of Judicial Conduct that prohibits a judge from initiating ex parte contact with a litigant]

Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 435 (Iowa 1984).

Cited with approval in *NevadaCare, Inc. v. Department of Human Services*, 783 N.W.2d 459, 465 (Iowa 2010); *Rubes v. Mega Life And Health Ins. Co., Inc.*, 642 N.W.2d 263, 266 (Iowa 2002).

Minnesota

In a gender discrimination case in Minnesota state court, the losing plaintiff appealed because the findings of fact and conclusions of law in the judicial opinion were copied verbatim from text supplied by the defendant's attorney.

A complicating factor in our review of this case is the trial court's verbatim adoption of Isanti County's proposed findings and conclusions of law. Federal cases have uniformly disapproved of this practice as a dereliction of the trial court's function under Federal Rules of Civil Procedure 52(a), identical in substance to Minnesota Rules of Civil Procedure 52.01. See, e.g., *Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 640 (4thCir. 1983), *reversed on other grounds by Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984); *Hosley v. Armour & Co.*, 683 F.2d 864, 866 (4thCir. 1982).

Although federal courts have firmly disapproved of this practice, no decision to our knowledge has held that verbatim adoption of a party's proposed findings and conclusions is reversible error per se. Rather, the "clearly erroneous" standard remains the proper standard of review.

Sigurdson v. Isanti County, 408 N.W.2d 654, 657 (Minn.App. 1987).

Sigurdson says that U.S. Courts of Appeals have “disapproved” of the practice, but does not make any conclusion for Minnesota state courts.⁶⁴ After *Sigurdson*, the state courts in Minnesota will follow the federal practice of accepting findings of fact and conclusions of law that were ghostwritten by a party, provided they are “not clearly erroneous”.

In a child support trial in Minnesota state court in April 1994, the trial judge’s copied findings of fact and conclusions of law from counsel for the prevailing party. The intermediate appellate court, in an unreported opinion, said:

Appellant [father] objects to the trial court’s adoption verbatim of respondent’s [attorney for mother] findings and conclusions. Appellant states:

Perhaps nothing indicts the arguably illusory notion of judicial integrity so much as the rote, wholesale and unthinking adoption by a district court of an attorney’s prefabricated, artificial and inherently suspect own proposed findings of fact and conclusions. A judge ceases to be seen as a fair and impartial finder of fact and is instead reduced to a minion of the ‘prevailing’ attorney whose submission is instantaneously transmuted from base workproduct to sanctified judicial order.

* * * [T]he district court should find a better ghostwriter if it is going to insist on limping along the margins of plagiarism and passing it off as jurisprudence.

Appellant overstates his argument. We agree that the verbatim adoption of findings of fact and conclusions of law is troublesome, but neither by rule nor by decision has a doctrine been established that makes the use of such findings and conclusions per se error. [*Sigurdson*, 408 N.W.2d 654, 657 (Minn.App. 1987)] The adopted findings and conclusions are not clearly erroneous and were well supported by the record.

Babekuhl v. Heiner, Not Reported in N.W.2d, 1995 WL 1499 at *3 (Minn.App. 1995).

So while copying the findings and conclusions were “troublesome”, it is acceptable if they “are not clearly erroneous and were well supported by the record.”

other

See also the following cases on an attorney for one party writing the findings of fact for a judge:

- *Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission*, 387 N.E.2d 181, 186, n.19 (Mass.App. 1979) (“... in all of these cases, the findings were viewed in the context of the clearly erroneous standard imposed by Rule 52(a), irrespective of their source.”);
- *Cormier v. Carty*, 394 N.E.2d 1003, 1004, n.1 (Mass.App. 1979) (“... the trial judge wrote to the defendant’s counsel sometime after the close of the hearing asking, ‘(P)lease prepare for my consideration Suggested Findings of Fact, Conclusions of Law and a Judgment. . . .’ ” The appellate court tersely dismisses this issue in a footnote, with no analysis.);

⁶⁴ Actually, the opinion says “uniformly disapproved”, but then only cites two cases, both in North Carolina. I suspect some Circuits have not disapproved of the practice, which makes it *nonuniform*.

- *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 402 N.E.2d 76, 80-82 (Mass.App. 1980) (“That the judge's findings were taken principally (although, as will be seen, not entirely) from those prepared by plaintiff's counsel does not make the ‘clearly erroneous’ standard of rule 52(a) inapplicable.”), *abrogated on other grounds by Cleary v. Cleary*, 692 N.E.2d 955, 959 (Mass. 1998);
- *City of Billings v. Public Service Commission of Montana*, 631 P.2d 1295, 1301 (Mont. 1981) (“We conclude that the findings are supported by the evidence and that the District Court committed no error in adopting the proposed findings of the District, particularly in view of the complexity of this case.”);
- *Grayson v. Grayson*, 494 A.2d 576, 581 (Conn.App. 1985) (“Although we do not approve of this practice [judge adopting the plaintiff's requested findings of fact verbatim], we cannot find that it resulted in less than a fair trial.”), *appeal dismissed*, 520 A.2d 225, 226 (Conn. 1987) (“We are in agreement with the views expressed by the Appellate Court in its opinion, and it would serve no useful purpose to repeat that court's discussion here.”);
- *Massachusetts v. DeMinico*, 557 N.E.2d 744, 748-749 (Mass. 1990) (“The defendant claims that we should reject the lower court's findings because the judge adopted verbatim many of the Commonwealth's proposed findings of fact. Although we have criticized this practice, we nevertheless do not reject or set aside such findings if supported by evidence.” [citations omitted]);
- *Whitear v. Labor Commission*, 973 P.2d 982, 986-988 (Utah App. 1998) (Two-judge majority: “The law is well settled that a trial court may ask counsel — typically the prevailing counsel — to submit findings to aid the court in making these necessary determinations [findings of fact and conclusions of law]. The ALJ or judge retains the obligation to carefully consider the proposed documents, and to revise them as needed to accurately reflect the decision. However, having so done, nothing significant is gained by insisting that the judge or ALJ personally draft each word.” Judge Orme dissented: “While it is true that custom, workload, and lack of staff have combined to make delegation to counsel more the norm in the district courts of this state, this approach is more a necessary evil than a model to be emulated.”).

ghostwritten judicial opinion in state court

I have found one case in state court, this one from the Georgia Supreme Court, that involves a ghostwritten judicial opinion:

- *Jefferson v. Zant*, 431 S.E.2d 110, 112 (Ga. 1993) (Prison inmate appealed denial of his habeas petition, because state prosecutors had ghostwritten judge's 45-page final order. “The 45-page order in this case is well supported by citations to the record and was adopted by the habeas judge as his own. We decline Jefferson's invitation to accord the order less deference than mandated by [Georgia Statutes] § 9-11-52.”).

D. my view
ghostwriting findings of facts

The rule enunciated by the U.S. Supreme Court — in *Crescent Amusement*, 323 U.S. 173 (1944); *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); and *Anderson*, 470 U.S. 564 (1985) — is that ghostwriting findings of fact is bad practice, but it is good enough for government work, unless the copied text is “clearly erroneous”.

Both *Louis Dreyfus* and *Keystone Plastics* are ambivalent. The appellate judges want to condemn ghostwritten findings of facts, but they also recognize that the trial judge probably needs assistance with technical matters in the facts. However, an attorney for the prevailing party will not necessarily understand the facts better than the judge, as few attorneys have an education in science, engineering, medicine, or other technical areas. There is no easy answer here, except to suggest that the trial judge ask attorneys for *both* parties to submit draft findings of fact and also to submit a short list of citations to trial transcript or exhibits to support their suggested findings. An alternative is for the judge to ask either a court-appointed expert witness or a special master for assistance in preparing findings of facts.

When the judge adopts verbatim the findings of fact from the attorney for one party, that causes concern about whether the judge is doing his/her job. There are two obvious concerns: (1) impartiality and (2) determination of credibility of witnesses.

First, attorneys are zealous advocates for their clients — attorneys are both partial and biased — while a judge is required to be both impartial and *unbiased*. Having an attorney for one party write the findings of facts gives a one-sided, *unfair* view of the trial.

Second, if the case is appealed, the appellate judges will accept the trial court's findings of fact, unless those facts are "clearly erroneous".⁶⁵ The clearly erroneous standard is very deferential to the trial court. The principal reason for appellate deference to the trial court's findings of facts is that the trial judge supposedly determined the credibility of witnesses, by observing their demeanor during the trial.⁶⁶ Having findings of fact that were ghostwritten by an attorney for one party destroys the reason for appellate deference to trial court's findings of fact, which would logically force appellate courts to review facts de novo (i.e., no deference to the trial court). But the appellate court can *not* determine facts de novo, because the appellate judges did *not* observe the demeanor of witnesses during the trial. Because an appellate court can not determine facts de novo, the appellate court *should* automatically vacate *any* ghostwritten findings of fact, and insist that the trial judge write his/her own findings of fact.

A third problem is a nagging concern over *Morgan v. United States*, 298 U.S. 468, 481 (1936) ("The one who decides must hear."), discussed above, beginning at page 40. We ought to require that judicial opinions be written by someone who is not only impartial, but also who personally heard the testimony and personally evaluated the credibility of the witnesses. Similarly, in the case of exhibits, the person writing the findings of fact should have personally read all of the exhibits.

⁶⁵ Federal Rules of Civil Procedure 52(a)(6) (adopted 1937, last amended 2009, current April 2011) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

⁶⁶ *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See *Wainwright v. Witt*, 469 U.S. 412, [428 and n.9] (1985)."); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-500 (1984) ("Moreover, [Federal] Rule [of Civil Procedure] 52(a) commands that 'due regard' shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due. Indeed, as we previously observed, the Court of Appeals in this case expressly declined to second-guess the District Judge on the credibility of the witnesses."); *U.S. v. General Motors Corp.*, 384 U.S. 127, 141, n.16 (1966) ("Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a)"); *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 646-647 (1957) ("The issue of credibility is of great importance. The District Judge had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand. Thus, this case is a proper one for the application of the principle embodied in Rule 52(a) of the Federal Rules of Civil Procedure: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' [citing two cases]").

Note that concern about ghostwritten findings of fact apparently began around the year 1944 with the U.S. Supreme Court decision in *Crescent Amusement*, but then the issue was nearly dormant until the *Louis Dreyfus* case in 1962. Despite the fact that concern by appellate courts is now fifty years old, the rules have not been amended to either forbid ghostwriting or regulate ghostwriting.

ghostwriting conclusions of law

Trial judges sometimes asks the attorney for the prevailing party to submit both findings of facts and conclusions of law. Similarly, appellate courts often consider the ghostwriting of findings of facts and ghostwriting of conclusions of law to involve the same legal issues. However, I think these two items are distinguishable for at least one reason.

Findings of fact are reversed by an appellate court only if the findings are “clearly erroneous”, which is a very difficult standard of review for an appellant to meet.⁶⁷ However, conclusions of law are reviewed by an appellate court under a de novo standard of review, which is not deferential to the trial court. Because it is easier to correct a mistake in conclusions of law, one might be more tolerant of ghostwriting in conclusions of law than in findings of fact.

ghostwriting entire opinion

The U.S. Courts of Appeals have applied the same rule in ghostwriting findings of fact (or ghostwriting conclusions of law) to cases involving a trial court that adopts a ghostwritten judicial opinion, despite the fact that a judge copying findings of fact is a different issue from a judge asking an attorney to ghostwrite an entire judicial opinion.

Asking an attorney for one party in litigation to ghostwrite a judicial opinion is even worse than a judge plagiarizing from the Brief of one party. When a judge plagiarizes from a Brief, the judge adopts the zealous advocacy of one party as an impartial judicial holding, and the judge denies recognition to the true author for any eloquence or unusual scholarship, but at least some (most?) of the opinion is the product of the judge’s independent thought. But a ghostwritten opinion is entirely composed of zealous advocacy of one party, without any moderation inserted by the judge.

⁶⁷ *Federal Refinance Co., Inc. v. Klock*, 352 F.3d 16, 26-27 (1stCir. 2003) (“A party who challenges a district court’s findings of fact, arrived at after a bench trial, faces a steep uphill climb.”); *Aventis Pharma S.A. v. Amphastar Pharmaceuticals, Inc.*, 525 F.3d 1334, 1351 (Fed.Cir. 2008) (“We are cognizant of the high standard of review. To overturn a discretionary ruling of a district court, the appellant must establish that the ruling is based upon clearly erroneous findings of fact....”).

I agree with the opinions in *Chicopee Mfg.* and *Wisconsin Steel* that opinions ghostwritten by an attorney for one party are inherently defective and a denial of due process of law, because the opinion was actually written by someone who is partial and biased (i.e., not satisfying the judicial criteria, beginning on page 51).

Currently, neither plagiarism from Briefs nor asking an attorney for one party to ghostwrite a judicial opinion is prohibited under the rules of judicial conduct. These rules need to be amended to explicitly prohibit such practices. It would also be good to amend the rules of appellate procedure to mandate vacating opinions of lower courts that were ghostwritten by an attorney for one party, or which contain substantial plagiarism from a Brief by one party.

Note that concern about ghostwritten judicial opinions apparently began in 1961 with *Chicopee Mfg.* Despite the fact that concern by federal appellate courts is now fifty years old, the rules have not been amended to either forbid ghostwriting or regulate ghostwriting. State courts have apparently been less concerned about plagiarism and ghostwriting than federal courts.

Conclusion

summary of issues

This essay covers a number of different examples of plagiarization or ghostwriting by attorneys and judges.

Attorneys:

1. Plagiarism in contracts and complaints is rarely discussed. I think it is acceptable, as explained above, beginning at page 7.
2. Plagiarism in a Brief is *not* acceptable, according to judges who condemn it. I agree. See the discussion beginning at page 16.
3. An attorney ghostwriting a Brief for a pro se litigant is *not* acceptable, according to judges who condemn it. I agree, but I explain why I think the judges have confused the reasoning, see the discussion beginning at page 22.

Judges:

4. Judges plagiarizing from a Brief in their opinions may be common, but is rarely discussed. I argue that such plagiarization is not acceptable. See the discussion beginning at page 38.
5. Law clerks ghostwriting opinions for judges is widespread, but the practice is rarely discussed in public. I argue that it is bad practice, but *may* be acceptable (i.e., “good enough for government work”) after open discussion and consensus. See the discussion beginning at page 56.

6. Judges asking a prevailing party to write findings of fact, which the judge adopts verbatim. Such ghostwriting is condemned by the U.S. Courts of Appeals and the U.S. Supreme Court as a bad practice, but seems good enough for government work, because the appellate courts do not automatically vacate those findings of facts. I think ghostwriting of findings of facts needs careful regulation. See the discussion beginning at page 66 (and page 79 for state courts).
7. Judge asking an attorney for a party to ghostwrite an opinion for a judge. The rule of law is simple: if the judge signs it, then it is his opinion. I think such ghostwriting should be forbidden. See the discussion beginning at page 76.

general lack of discussion

Plagiarization is routinely condemned by both academics and judges. However, attorneys routinely plagiarize in preparing Contracts, Complaints, and other legal documents. And ghostwriting — a close relative of plagiarization⁶⁸ — is commonly used by prominent politicians and judges.

Strangely, given its prevalence, there has been little discussion of ghostwriting in the legal profession. There are two exceptions:

1. judges have condemned licensed attorneys who ghostwrite briefs for pro se litigants (discussed above, beginning at page 22), and
2. a few federal judges have criticized judicial opinions that were ghostwritten by an attorney for a party in the case (discussed above, beginning at page 76).

I suggest that the absence of condemnation of plagiarization and ghostwriting is due to their pervasiveness in the legal and judicial professions. Senior attorneys and senior judges have tens of years of experience in the culture of widespread plagiarization and ghostwriting, and when these senior professionals write rules of conduct for their colleagues, they do not condemn what is customarily done and accepted. They may even assume that someone, long ago, considered the ethics of ghostwriting and decided it was acceptable.

⁶⁸ In both plagiarization and ghostwriting, the alleged author takes credit for expression that was actually written by someone else. The distinction is that a ghostwriter gives permission to have his expression copied, while a plagiarist copies expression without permission. See the definitions at page 4, above.

There are few published judicial opinions that mention plagiarization by judges. A few courageous law professors and litigators have written articles in legal periodicals⁶⁹ that briefly discuss plagiarization by judges. Nowhere in judicial codes of ethics is plagiarization mentioned. It is easier to understand the silence, when one realizes that (1) a litigator who complained about plagiarization from a Brief would be *persona non grata* in courtrooms, (2) former law clerks can not complain about plagiarization from their memos or drafts, because of a clerk's legal duty of confidentiality, and (3) the U.S. Supreme Court is *not* likely to rescind its long-standing policy of having opinions of the Court drafted by law clerks, which puts the fox in charge of the chickens. For all of the sanctimonious discussion of judicial ethics and integrity, few people dare mention plagiarization by many judges or judicial use of ghostwriters.

plagiarization by lawyers

I do not see any problem with copying or paraphrasing without attribution to the original source in Contracts or Complaints. Such plagiarism is accepted practice amongst attorneys, as shown by the absence of citations in all Contracts and all Complaints. Thus, it is conventionally understood that Contracts and Complaints are not necessarily original work by the attorneys who prepared them. Furthermore, the name of the attorneys who prepared a Contract generally does not appear on the Contract, and the Contract is not a publicly available document (i.e., *not* published). While Complaints are publicly available and do have the name of the attorney at the end, Complaints are almost never cited as the source of novel legal ideas.

On the other hand, either verbatim copying or paraphrasing in a Brief *must* have a citation to the original source. Briefs are used by judges in preparing published opinions. And, in all federal courts, and increasingly in state appellate courts, Briefs are publicly displayed in online databases. As shown by the list of cases on page 17, judges have repeatedly humiliated lawyers who plagiarized in their Briefs, so it is absolutely clear that lawyers must not plagiarize in a Brief.

Above, beginning at page 37, I suggest that Rule 11 be revised to specifically prohibit both ghostwriting and plagiarism in a Brief submitted to a court. In addition, the Rules of Civil Procedure need to be amended to permit acknowledging co-authors of a Brief who are not attorneys of record in the case, and who do not sign the Brief under pain of Rule 11.

⁶⁹ See bibliography, beginning at page 92, below.

plagiarization by judges

Appellate courts have been amazingly tolerant of plagiarization by judges in the preparation of judicial opinions, as shown above, beginning at page 38. In fact, plagiarization by judges is very rarely discussed in appellate opinions.

While I believe that plagiarization in judicial opinions from a Brief corrupts the law, plagiarization in judicial opinions from a draft by a law clerk (also called ghostwriting) may⁷⁰ be acceptable. The distinction is that a Brief is written by an advocate for one party in a case, while the law clerk is probably a neutral observer. If judge copies from a draft prepared by a clerk, I believe it would be appropriate for the judge to make a public acknowledgement in a footnote that contains the name(s) of the clerk(s), to give credit to the true author.

I believe it is clearly permissible for a judge to quote from a Brief, but the judge should include both (1) either quotation marks or indented single-spaced text and (2) a citation to the source of the quotation (e.g., name of the author of the Brief).

As with any plagiarist, a judge gets an undeservedly good reputation for eloquence, erudition, and scholarship, when the judge is actually plagiarizing work of competent attorneys, either attorneys who wrote Briefs or law clerk(s). Such good reputation is acquired dishonestly — even fraudulently — by a plagiarist.

Both judicial opinions and law review articles are: (1) published in books and appear in online databases; (2) routinely contain citations to many cases, statutes, and law review articles; and (3) appear with the name of the alleged author. I think plagiarization in a judicial opinion is *not* distinguishable from plagiarization in a law review article. The Michigan Judicial Tenure Commission in *Brennan* (see page 46 above) found that plagiarization by a judge in a law review article was “impropriety ... misrepresentation ... [and] contrary to ethics, honesty, and good morals”. In my view, consistency requires that plagiarization by a judge in an opinion also be condemned.

⁷⁰ I say *may* because copying from a draft prepared by a clerk may be an improper or inappropriate delegation of judicial responsibility. This routine practice has *not* been carefully examined by the judiciary.

attorney ghostwriting judicial opinion

It is probably permissible for attorneys to draft findings of fact and conclusions of law for a judge, especially when attorneys for both parties are invited to submit drafts. But allowing an attorney for a party to ghostwrite the text of an opinion is at least as bad as judicial plagiarization from a Brief of a party — in both situations biased words of an advocate become words of an impartial judge. Federal appellate courts have commonly condemned the practice of a judge asking an attorney for a party to ghostwrite a judicial opinion, but only a few courts have vacated ghostwritten opinions, as shown above, beginning at page 76.

my suggestions for judicial codes of conduct

I suggest the following improvements to judicial codes of conduct:

1. Explicitly forbid plagiarization from any public source in a judicial opinion. Public sources include judicial opinions (including those previously written by the judge hearing the instant case), law review articles (including those previously written by the judge hearing the instant case), Briefs written by a party, and any other publicly available material. Public sources are distinguished from internal sources, such as unpublished text written by law clerk(s) or court staff that is for use only by the judge in the instant case.
2. Explicitly require one footnote identifying the name(s) of law clerks or other court staff who wrote text that is included in a judicial opinion. This should be either the first or last footnote in the opinion.
3. Clarify delegation of judicial work:
 - A. Does the judge personally need to decide facts when there is no jury? May the judge ask the prevailing party to submit findings of fact?
 - B. Does the judge personally need to make conclusions of law? May the judge ask the prevailing party to submit conclusions of law?
 - C. Must the judge personally read *all* briefs, memoranda, appendices, and exhibits submitted by parties, *before* the judge decides either facts or law?
 - D. Must the judge personally make a judicial decision *before* any reading any memoranda or draft opinions prepared by law clerks or other court staff?⁷¹
 - E. A judge may delegate legal research to law clerks.
4. Explicitly forbid asking an attorney for a party in the case either to ghostwrite a judicial opinion, or to prepare a draft of a judicial opinion. One might more broadly prohibit anyone (except those who are both employed by the court and directly supervised by the judge) from ghostwriting an opinion for that judge.
5. It is permissible for an attorney to prepare a terse (maximum of two pages) judicial order, when the attorney files a motion that can be resolved without hearing witnesses.

⁷¹ My concern is that such non-judges on the court staff could influence the outcome of the case through their persuasive writing.

I suggest also amending the rules of appellate procedure to mandate vacating opinions of lower courts that were either (1) ghostwritten by an attorney for one party or (2) which contain substantial plagiarism from a Brief by one party. “Substantial” plagiarism can mean a short paragraph that provides the justification for any holding that affects the outcome of the case. “Substantial” plagiarism can also mean a lengthy discussion of the law on any issue in the case.

I emphasize that I am *not* attacking the personal integrity of any individual judge, instead I am suggesting improvements in judicial codes of conduct. Judges, like anyone else, are entitled to a clear statement of what is prohibited, *before* they are criticized for alleged misconduct. So, please, criticize the judicial codes of conduct, *not* the judicial profession. More importantly, suggest specific improvements in the judicial codes of conduct, instead of simply complaining.

rules are different for students

Law students should *not* be confused by customary plagiarism by practicing attorneys and judges, in contrast with the absolute prohibition against plagiarism in law school.

No one expects Contracts and Complaints to be completely original and no one expects to see citations there. As explained above, beginning at page 17, attorneys who plagiarize in a Brief are sometimes humiliated by a judge.

The fact that some practicing attorneys — and some judges — plagiarize is *not* an excuse for a student to plagiarize in a term paper, thesis, or dissertation. First, professors have traditionally had the highest revulsion for plagiarists, while other some groups of people are tolerant of plagiarism — the reality is that standards for conduct vary among different groups of people.⁷² Second, misconduct by other people is no justification for one’s personal misconduct — the fact that murders are common in big cities in the USA does *not* excuse any murderer. Third, law students are personally graded on the work that they submit, which means that plagiarism is properly forbidden in law schools. This essay is *not* a justification for plagiarism by law students.

If law students are bothered by the hypocrisy of having higher standards for law students than for practicing lawyers or judges, then the idealistic students can vow that they will never plagiarize after they are admitted to the Bar. There is no doubt that the integrity of the legal profession would benefit from less plagiarization in Briefs and judicial opinions.

⁷² Professor Frances Ansley of the University of Tennessee at Knoxville School of Law says “a surgeon might care deeply about the handwashing habits of members of her surgical team, while an airline pilot may not care at all about handwashing.” Quoted in Marilyn V. Yarbrough “Do As I Say, Not As I Do: Mixed Messages for Law Students,” 100 *DICKINSON. LAW REVIEW* 677, 681 (Spring 1996).

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