

# UNORIGINAL SIN: The Problem of Judicial Plagiarism

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## INTRODUCTION

“Plagiarism” is the act of passing off the ideas or words of another as one’s own, or the act of offering as original to oneself another person’s words or ideas.<sup>1</sup> Although plagiarism is a recurring problem in some law-related contexts, few lawyers give it any thought when evaluating judicial performance. It seems virtually certain that a similarly small number of judges concern themselves with plagiarism when preparing opinions or orders. This inattention is unfortunate. Lawyers and judges should be more focused on the issue. Consider the following two examples.

In the first case, the parties had tried the insurance coverage action to the court for over a week, with the plaintiff claiming there was coverage for the judgment in the underlying case and the insurance company defending on the basis that an exclusion in its policy barred coverage for the loss.<sup>2</sup> At the close of the evidence, the judge took the matter under advisement and instructed the lawyers for both sides to promptly submit proposed findings of fact and conclusions of law, which they did. Two weeks later, the judge announced by conference call that she had decided in favor of the plaintiff. She then adopted the plaintiff’s lengthy findings of fact and conclusions of law as the court’s own and entered judgment on them. The findings of fact and conclusions of law were grossly inadequate. Numerous conclusions of law were incorrectly denominated as findings of fact;<sup>3</sup> the cases cited in the

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1. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1340 (4th ed. 2009); see also Karen M. Markin, *Plagiarism in Grant Proposals*, CHRON. HIGHER EDUC., Dec. 14, 2012, at A31 (“Government agencies generally define plagiarism as the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit. It is prohibited by federal regulations.”).

2. This example is based on an actual case.

3. This confusion is potentially consequential on appeal, where a trial court’s findings of fact are reviewed for clear error, but its legal conclusions are reviewed de novo. *Man Ferrostaal, Inc. v. M/V Akili*, 704 F.3d 77, 82 (2d Cir. 2012); *Town of Levant v. Taylor*, 19 A.3d 831, 833–34 (Me. 2011); *D.R. Horton, Inc. v. Bd. of Supervisors*, 737 S.E.2d 886, 888 (Va. 2013); *Bowers Oil & Gas, Inc. v. DCP Douglas, LLC*, 281 P.3d 734, 741 (Wyo. 2012) (citing *Piroshak v. Whelan*, 106 P.3d 887, 890 (Wyo. 2005)). Judges who include findings of fact and

conclusions of law certainly favored the plaintiff's theory of the case but were just as certainly inapposite; nowhere in the conclusions of law did the court apply the law to the facts or distinguish the cases that the defense lawyers understandably considered controlling; the findings of fact, while supporting the plaintiff's theory of the case, bore little resemblance to the evidence actually introduced at trial; and the document nowhere reflected that the court had weighed competing evidence on any point. In short, the judge signed the findings of fact and conclusions of law exactly as presented by the plaintiff's lawyers. If the defendant ever suspected that the judge was predisposed to rule against it, this outcome arguably provided foundation for that belief. The judge's conduct might have invited concern that she was an unreliable jurist who could not be trusted to correctly decide other cases. At a minimum the judge appeared to be lazy and inattentive.

Alternatively, think of an employment discrimination case in which the defendant moves for summary judgment and the plaintiff files a memorandum in opposition. Two or three months after briefing has closed, the district court grants the defendant's motion. The factual recitation in the court's opinion is obviously assembled from the statements of uncontroverted fact in the defendant's memorandum in support of its motion, and the court's legal reasoning is copied nearly verbatim from the well-written—almost scholarly—argument section of the defendant's memorandum. The very slight changes in the court's opinion involve punctuation, verb tense, and the like.

In fact, the practices illustrated here might well be labeled judicial plagiarism.<sup>4</sup> To be sure, in many respects the first example does not fit the common definition or understanding of plagiarism. For starters, the judge invited the lawyers to submit proposed findings of fact and conclusions of law, such that her adoption of them was done with the lawyers' full

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conclusions of law in orders or judgments often attempt to avoid such confusion by including in the order or judgment statements to the effect that any finding of fact that is actually a conclusion of law should be so considered or construed, and vice versa. *See, e.g.*, *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 304 n.10 (7th Cir. 1991) (noting that the district court had explicitly stated that any findings of fact that were actually conclusions of law should be so treated); *ExxonMobil Oil Corp. v. Gasprom Inc.*, No. CV-08-07259 PSG (EX), 2010 WL 1233579, at \*6–7 (C.D. Cal. Mar. 26, 2010) (employing this approach); *Creo Prods. Inc. v. Presstek, Inc.*, 166 F. Supp. 2d 944, 948 n.4 (D. Del. 2001) (explaining that “where a finding of fact is actually a conclusion of law, it shall be treated as such and vice versa”).

4. *See, e.g.*, Emir Aly Crowne-Mohammed, *The Copyright Issues Associated With Judicial Decision Making (Or, Hold On to Your Briefs: Are Judges Required to Cite Material Written by Lawyers?)*, 22 No. 4 INTELL. PROP. & TECH. L.J. 15, 15 (2010) (explaining this description); Siobhan Morrissey, *A Case of Judicial Plagiarism?*, 2 No. 30 ABA J. E-REPORT 1 (Aug. 1, 2003) (describing lawyers' accusations against Florida appellate judges whose opinion was a nearly verbatim replication of the opposing party's appellate briefs).

knowledge and permission. Such requests and subsequent adoption of the prevailing party's submission are widespread practices.<sup>5</sup> Courts' request that lawyers submit judgments and orders for judges' signature is similarly established.<sup>6</sup> Busy courts' adoption of parties' filings and reliance on lawyers to prepare orders and judgments promote the expeditious disposition of cases.<sup>7</sup> Courts consider lawyers' preparation of findings of fact and conclusions of law to be "a valuable aid to decision making."<sup>8</sup>

More fundamentally and certainly as displayed in the second example, lawyers want judges to copy their work. Scores of lawyers have been counseled by senior colleagues to write appellate briefs and trial court legal memoranda in a style that will tempt courts to replicate their work in the related decisions.<sup>9</sup> As one practitioner-turned-professor has explained, "I tell my first-year legal writing students truthfully that I knew I had written the best brief that I possibly could on a motion when the court's opinion announcing its decision was directly cut-and-pasted from my brief."<sup>10</sup>

On the other hand, the resulting opinion or order is not the court's work product and may not even reflect the court's independent judgment or reasoning. If an opinion or order cannot fairly be attributed to the court, describing the process of its production and adoption as judicial plagiarism is perfectly apt. Regardless, the wholesale incorporation of one party's findings of fact and legal conclusions in a judicial decision is troubling.<sup>11</sup> The practice "detracts from the appearance of a hardworking, independent judge."<sup>12</sup> It risks creating the appearance that the court has ceded its

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5. Jonathan Band & Matt Schruers, *Dastar, Attribution, and Plagiarism*, 33 AIPLA Q.J. 1, 14 (2005); Kristen Fjeldstad, Comment, *Just the Facts, Ma'am—A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of Law*, 44 ST. LOUIS U. L.J. 197, 197 (2000).

6. See, e.g., *Ruan Transp. Corp. v. Truck Rentals, Inc.*, 278 F. Supp. 692, 698 (D. Colo. 1968) ("It is requested that counsel prepare an appropriate judgment in line with the views expressed [in this opinion].").

7. Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 800–01 (2008).

8. *In re Las Colinas, Inc.*, 426 F.2d 1005, 1008 (1st Cir. 1970).

9. This approach resonates with an important audience—judicial law clerks. See, e.g., Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. APP. PRAC. & PROCESS 401, 411 (2010) ("As a clerk, I found the best briefs were the ones that were written almost like judicial opinions; the court could practically cut and paste the accurate, concise, and non-argumentative legal and factual discussions into the opinion.").

10. Peter Friedman, *What Is a Judicial Author?*, 62 MERCER L. REV. 519, 529–30 (2011).

11. See *Stone v. City of Kiowa*, 950 P.2d 1305, 1308 (Kan. 1997) (calling this practice "the sort of shorthand that would be susceptible to abuse").

12. John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding and Decision-Making*, 49 HASTINGS L.J. 1491, 1502 (1998).

authority to the prevailing party and, in the same vein, potentially gives rise to allegations of partiality. As the Seventh Circuit explained in *DiLeo v. Ernst & Young*:<sup>13</sup>

A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own.<sup>14</sup>

Further troublesome is the occasional trial court practice of having the prevailing party prepare an opinion or substantive order for the court. In some cases, this practice reflects an abdication of judicial responsibility that requires reversal.<sup>15</sup>

The practical problems that judicial plagiarism can create were brightly highlighted in a 2011 Canadian court opinion. In *Cojocar v. British Columbia Women's Hospital & Health Center*,<sup>16</sup> the British Columbia Court of Appeals vacated a trial court judgment because "the reasons for judgment" could "not be taken to represent the trial judge's analysis of the issues or the reasoning for his conclusions."<sup>17</sup> In a nutshell, the trial judge's 105-page decision included 84 pages of "wholesale, uncritical reproduction of the respondents' written submissions."<sup>18</sup> The trial court copied 321 of the 368 paragraphs stating the reasons for its opinion nearly verbatim from the respondents' final written submissions.<sup>19</sup> Of the 222 paragraphs focusing on liability, only 30 were in the judge's words and, of those, 20 were introductory, summarized the parties' submissions, or set forth

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13. 901 F.2d 624 (7th Cir. 1990).

14. *Id.* at 626.

15. *See, e.g.*, *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3d Cir. 2004) ("Judicial opinions are the core work-product of judges. . . . When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions."); *Prowell v. State*, 741 N.E.2d 704, 712, 718 (Ind. 2001) (reversing the appellant's conviction and stating that "[a]lthough we sympathize with the usefulness of recycling language [from the State's reply brief], it is not appropriate to use form language where those statements are not an accurate reflection of the testimony and evidence").

16. CA037090 & CA037107, 2011 B.C.C. LEXIS 674 (Can. B.C. Ct. App. Apr. 14, 2011).

17. *Id.* at \*69.

18. *Id.* at \*70.

19. *Id.* at \*19–20 (Smith, J.A., dissenting) (noting that the only changes that the trial judge made were inconsequential, "such as replacing phrases like 'it is submitted' with phrases like 'I have concluded'").

uncontroverted facts.<sup>20</sup> None of the liability-related paragraphs that the trial judge authored required independent reasoning.<sup>21</sup>

Although the Supreme Court of Canada recently set aside some of the British Columbia Court of Appeals' findings and, in so doing, concluded that the trial judge's wholesale copying was not sufficient to overcome the presumption of judicial integrity and impartiality,<sup>22</sup> the case remains troubling. The Supreme Court of Canada articulated a reasonable standard for deciding cases such as this, that is, a judgment should be set aside "only if the [judge's] copying is of such a character that a reasonable person apprised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision,"<sup>23</sup> but then appeared to decide the case in a fashion unduly protective of judges. How, on these facts, the court could find that a reasonable person would not conclude the trial judge had declined to "put [his] mind to the evidence" is a mystery, unless "a reasonable person apprised of the circumstances" really means only a fellow judge. As well-intentioned as the court surely was, its reasoning in support of the trial judge's wholesale copying was at best superficial. The opinion provoked immediate criticism from journalists, who complained that the court had not explained why judges should not be held to "normal standard[s] of intellectual honesty."<sup>24</sup>

*Cojocar* aside, judicial plagiarism has been on courts' radar for decades.<sup>25</sup> Nonetheless, the practice has seldom sounded judicial ethics alarms. Whether it should do so is another story entirely. For example, both Canon 1 and Rule 1.2 of the Model Code of Judicial Conduct<sup>26</sup> obligate judges to uphold and promote the integrity and impartiality of the judiciary,

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20. *Id.* at \*70.

21. *Id.*

22. *Cojocar v. B.C. Women's Hosp. & Health Ctr.*, No. 34304, 2013 SCC 30 (Can. May 24, 2013), available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/13072/index.do>.

23. *Id.*

24. Ian Mulgrew, *Supreme Court OK with B.C. Judge Who Copied One Side's Submissions in Ruling*, VANCOUVER SUN, May 24, 2013, <http://www.vancouversun.com/health/Supreme+Court+with+judge+copies+side+sumission+ruling/8430439/story.html>.

25. See, e.g., *Chicopee Mfg. Co. v. Kendall Co.*, 288 F.2d 719, 724–25 (4th Cir. 1961) (criticizing a district court's adoption of an opinion prepared by the prevailing party as "the failure of the trial judge to perform his judicial function"); *B.E.T., Inc. v. Bd. of Adjustment of Sussex Cnty.*, 499 A.2d 811, 811–12 (Del. 1985) (stating that Delaware judges must understand "that the legal requirement of supplying reasons [for their decisions] is a matter of judicial ethics as well as a matter of law" and vacating a judgment where the lower court merely adopted the prevailing party's brief as the court's opinion).

26. MODEL CODE OF JUDICIAL CONDUCT (2011).

and to avoid the appearance of impropriety.<sup>27</sup> Canon 2 requires judges to perform their duties diligently and impartially,<sup>28</sup> while Rule 2.2 expresses judges' duty to be fair and impartial.<sup>29</sup> Rule 2.5(A) requires judges to perform their duties competently and diligently.<sup>30</sup> Although there is ample room for debate, judicial plagiarism at least superficially implicates all of those duties.

This Article analyzes whether judicial plagiarism constitutes judicial misconduct for which offending judges may be disciplined, or is instead something less—even if it may require reversal on appeal or other procedural correction in extreme cases.<sup>31</sup> The analysis begins in Part II with a comparison of lawyers' plagiarism in litigation, which courts generally consider to be unethical, and judicial plagiarism. Part III discusses judicial plagiarism as a basis for special scrutiny on appellate review and, further, reversal on appeal. Although cases on these issues do not discuss judicial plagiarism as such or frame it as a judicial misconduct concern, they are in many ways instructive. Part IV looks at what appears to be the sole reported decision on judicial plagiarism as judicial misconduct. Although the court in that case appears to have reached the correct result, the opinion is imperfectly reasoned, and it is too short and factually lacking to provide meaningful guidance to other courts or interested observers. Finally, Part V analyzes judicial plagiarism specifically as judicial misconduct. It concludes that judicial plagiarism rises to the level of judicial misconduct when it can be shown that the plagiarized findings of fact, conclusions of law, opinion, or order do not reflect the court's independent judgment. Such cases implicate the judge's bias or partiality, as well as the judge's competence and diligence. Importantly, Part V identifies key factors that courts should weigh in deciding whether judicial plagiarism constitutes misconduct under the Model Code of Judicial Conduct.

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27. *Id.* at Canon 1 (“A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety.”); *id.* at R. 1.2 (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

28. *Id.* at Canon 2 (“A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.”).

29. *Id.* at R. 2.2 (providing that a judge “shall perform all duties of judicial office fairly and impartially”).

30. *Id.* at R. 2.5(A).

31. This article does not consider plagiarism by judges when writing in extrajudicial roles. It is misconduct for judges to commit plagiarism when writing articles, books or chapters, CLE materials, and the like. *See, e.g., In re Brennan*, 447 N.W.2d 712, 714 (Mich. 1989) (censuring a judge for plagiarism in a law review article).

## I. COMPARING PLAGIARISM BY LAWYERS WITH JUDICIAL PLAGIARISM

Plagiarism is seemingly common in litigation practice.<sup>32</sup> There are numerous examples of trial and appellate lawyers committing plagiarism in briefs, pleadings, and other court documents.<sup>33</sup> Courts criticize all forms of plagiarism by lawyers,<sup>34</sup> and lawyers who are found guilty of it risk

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32. DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 477 (2011) (“There are numerous examples of practicing lawyers engaging in plagiarism.”).

33. See, e.g., *United States v. Bowen*, 194 F. App’x 393, 402 n.3 (6th Cir. 2006) (branding a lawyer’s act of copying verbatim nearly 20 pages of a district court decision “outright plagiarism” and “completely unacceptable”); *United States v. Lavanture*, 74 F. App’x 221, 223 n.2 (3d Cir. 2003) (criticizing a lawyer for cutting and pasting a Sixth Circuit opinion in his client’s brief without attribution and expressing the court’s “strong disfavor of the practice”); *Consol. Paving, Inc. v. Cnty. of Peoria, Ill.*, No. 10-CIV-1045, 2013 WL 916212, at \*5–6 (C.D. Ill. Mar. 8, 2013) (reducing a lawyer’s fee award because the lawyer plagiarized a Seventh Circuit opinion in a fee application); *Lohan v. Perez*, 944 F. Supp. 2d 447, 459–60 (E.D.N.Y. 2013) (fining a lawyer for plagiarism in a trial court memorandum); *A.L. v. Chi. Pub. Sch. Dist. No. 299*, No. 10 C 494, 2012 WL 3028337, at \*6 (N.D. Ill. July 24, 2012) (reducing a lawyer’s fee award by 90% for copying verbatim large portions of his briefs directly from judicial opinions without attribution); *State Farm Fire & Cas. Co. v. Harris*, No. 3:11-cv-36-DCR, 2012 WL 896253, at \*1 n.3 (E.D. Ky. Mar. 15, 2012) (noting that plaintiff’s argument was “easily summarized” because all but six sentences (out of seven pages) were lifted without attribution from the court’s prior order and branding this plagiarism completely unacceptable under Sixth Circuit authority); *United States v. Sypher*, No. 3:09-CR-00085, 2011 WL 579156, at \*3 n.4 (W.D. Ky. Feb. 9, 2011) (reminding a lawyer who cobbled together from Wikipedia most of his legal argument in a post trial motion that such unattributed copying constituted plagiarism and likely violated Kentucky Rule of Professional Conduct 8.4(c)); *Venesevich v. Leonard*, No. 1:07-CV-2118, 2008 WL 5340162, at \*2 n.2 (M.D. Pa. Dec. 19, 2008) (criticizing lawyer’s plagiarism in brief opposing a motion to dismiss and collecting cases); *In re Burghoff*, 374 B.R. 681, 683–84 (Bankr. N.D. Iowa 2007) (involving plagiarism in brief supporting motion; copying of article and string cites); *Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (involving plagiarism in summary judgment response; roughly half of response was copied from treatise); *In re White*, 18 Cal. Rptr. 3d 444, 468 (Ct. App. 2004) (discussing lawyer’s plagiarism of another lawyer’s brief in his brief accompanying petition for writ as part of basis for sanctions); *In re Ayeni*, 822 A.2d 420, 421 (D.C. 2003) (plagiarizing codefendant’s brief in appellate brief); *Frith v. State*, 325 N.E.2d 186, 188 (Ind. 1975) (noting that appellant copied ten ALR pages in brief “without quotation marks, indentation or citation,” and without listing ALR in table of citations or in any other identification of authority in brief); *Iowa Sup. Ct. Att’y Disciplinary Bd. v. Cannon*, 789 N.W.2d 756, 757–59 (Iowa 2010) (violating rule against conduct involving dishonesty, fraud, deceit or misrepresentation through plagiarism in brief filed in bankruptcy court); *Premier Ins. Co. v. Commonwealth Dep’t of Labor*, No. 2011-SCC-0032-CIV., 2012 WL 6589404, at \*4 n.7 (N. Mar. I. Dec. 18, 2012) (accusing government lawyers of plagiarizing trial court’s order in the government’s brief and stating that plagiarism violates Model Rule of Professional Conduct 8.4(c)); *Columbus Bar Ass’n v. Farmer*, 855 N.E.2d 462, 465, 468–69 (Ohio 2006) (plagiarizing predecessor lawyer’s appellate brief in second brief filed on client’s behalf).

34. See, e.g., *DeWilde v. Guy Gannett Publ’g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (“Plagiarism is unacceptable in any grammar school, college, or law school, and even in politics. It is wholly intolerable in the practice of law.”); *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Lane*, 642 N.W.2d 296, 300 (Iowa 2002) (“Plagiarism itself is unethical.”).

professional discipline or sanctions.<sup>35</sup> Lawyers who plagiarize almost certainly violate Model Rule of Professional Conduct 8.4(c), which broadly prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation,<sup>36</sup> as well as Model Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice.<sup>37</sup> Importantly, “plagiarism” for professional responsibility purposes is often held to include the unattributed quotation of judicial opinions and orders,<sup>38</sup> as well as the unattributed quotation of briefs or pleadings written by lawyers in other firms or organizations without those lawyers’ consent,<sup>39</sup> although this latter position is not unanimous.<sup>40</sup>

The concern when lawyers plagiarize in briefs, pleadings, and other court documents is fundamentally one of misrepresentation to the court.<sup>41</sup> But while that is a legitimate concern where, for example, a lawyer replicates without attribution portions of a treatise or law review article in a brief, it should be less of a worry in other situations. Courts should not cry plagiarism when lawyers attempt to achieve efficiency by adapting written work from other cases, so long as the lawyers whose work is being modeled do not object. For instance, the adaptation of an argument from a brief

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35. RICHMOND ET AL., *supra* note 32, at 477.

36. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2013).

37. *Id.* R. 8.4(d).

38. *See, e.g., Bowen*, 194 F. App’x at 402 n.3 (describing a lawyer’s act of copying nearly 20 pages of a district court decision as “outright plagiarism” and “completely unacceptable”); *Lavanture*, 74 F. App’x at 223 n.2 (criticizing a lawyer for cutting and pasting a Sixth Circuit opinion into his client’s brief without attribution); *Consol. Paving, Inc.*, 2013 WL 916212, at \*5–6 (plagiarizing a Seventh Circuit opinion); *A.L.*, 2012 WL 3028337, at \*6 (reducing a lawyer’s fee award for copying verbatim large portions of his briefs directly from judicial opinions without attribution); *Harris*, 2012 WL 896253, at \*1 n.3 (quoting *Bowen*); *Swoope v. Gary Cmty. Sch. Corp.*, No. 2:10 cv 423, 2012 WL 2064602, at \*1 n.1 (N.D. Ind. June 7, 2012) (noting that the plaintiff lifted a good cause standard for issuing subpoenas verbatim from the court’s prior opinions and orders without attribution and quoting *Black’s Law Dictionary* to indicate that this copying constituted plagiarism); *Venesevich*, 2008 WL 5340162, at \*2 n.2 (criticizing lawyer’s plagiarism in brief opposing a motion to dismiss and collecting cases); *Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001) (noting that two-thirds of a plaintiff’s memorandum in opposition to summary judgment were copied without attribution or citation from another district court’s decision and calling the responsible lawyer’s conduct “reprehensible” and “intolerable”).

39. *See, e.g., In re Ayeni*, 822 A.2d 420, 421 (D.C. 2003) (plagiarizing codefendant’s brief in appellate brief); *Columbus Bar Ass’n v. Farmer*, 855 N.E.2d 462, 465, 468–69 (Ohio 2006) (plagiarizing predecessor lawyer’s appellate brief in second brief filed on client’s behalf).

40. *See, e.g., N.C. Ethics Op. 14* (2008), 2009 WL 435074, at \*1 (opining that it is not professional misconduct for a lawyer to use several pages of another lawyer’s brief without the second lawyer’s permission even though the lawyers do not practice together because “[u]pon filing with a court, a brief enters the public domain”).

41. *See Iowa Sup. Ct. Att’y Disciplinary Bd. v. Cannon*, 789 N.W.2d 756, 759 (Iowa 2010) (discussing conduct by a lawyer who copied at length from a scholarly article).



prepared by another lawyer in a different case with the other lawyer's knowledge should not be considered plagiarism.<sup>42</sup> Copying from a document prepared by another lawyer in the same firm or office, submitting under one's name a brief or legal memorandum prepared by a colleague working on the same case, or copying a model pleading in a formbook, are not acts of plagiarism justifying professional discipline.<sup>43</sup>

Judicial defenders thus might argue by analogy that judges who adopt verbatim findings of fact and conclusions of law prepared by parties, or who cut and paste portions of parties' briefs into their decisions, should not be accused of plagiarism. There is nothing dishonest about copying findings of fact and conclusions of law when they are expressly requested to facilitate the court's disposition of the case. There is no misrepresentation; the parties know the source of the court's findings and conclusions. Nor should judges who cut-and-paste their decisions from parties' briefs be criticized for plagiarism, since court rules often require parties to submit their briefs in electronic as well as print format,<sup>44</sup> and the submission of a brief in electronic format necessarily functions as consent to adoption by the court. Any lawyer who submits a brief or other document in electronic format surely knows that the requirement of such a submission potentially eases the court's preparation of an opinion. Finally, much like formbook authors want practitioners to copy their work,<sup>45</sup> prevailing lawyers hope that courts will copy their findings of fact, conclusions of law, legal memoranda, and briefs because that practice serves their clients.<sup>46</sup>

Unfortunately, these analogies are unhelpful because they miss the relevant issues when the focus is judicial plagiarism. First, bias and partiality are not concerns in lawyer plagiarism cases. Lawyers are advocates for their clients and should articulate the best possible arguments the facts and law reasonably support.<sup>47</sup> Judges, on the other hand, are

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42. See, e.g., *In re Mundie*, 453 F. App'x 9, 18 (2d Cir. 2011) ("Since . . . Mundie intended to adapt the *Chen* Brief to the facts of his case . . . his use of the *Chen* Brief as an initial model does not amount to plagiarism.").

43. RICHMOND ET AL., *supra* note 32, at 480; Cooper J. Strickland, *The Dark Side of Unattributed Copying and the Ethical Implications of Plagiarism in the Legal Profession*, 90 N.C. L. REV. 920, 937 (2012).

44. See, e.g., MO. SUP. CT. R. 84.06(g) (stating that with respect to appellate briefs, "an electronic copy, in a commonly used medium, such as a diskette or CD-ROM, in a format that can be read by most commonly used word processing programs, such as Word for Windows or Word Perfect 5.x or higher, shall be filed").

45. RICHMOND ET AL., *supra* note 32, at 480.

46. Bast & Samuels, *supra* note 7, at 803.

47. See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 901 (2012) (stating that "advocates are entitled to make any non-frivolous argument in support of their objectives"); Christine D. Petruzzell, *Brief Thoughts on Effective*

expected to strive to reach the correct result, which may require them to accept some aspects of a party's argument but reject others, or to weigh facts differently than a party urges. Even if a judge intends to rule in a party's favor, she may decide the case on grounds different than those the party advanced. A court's use of proposed findings of fact and conclusions of law "makes it too convenient for the judge to choose between two scenarios rather than devote the time necessary to do what the law requires: fashion a third scenario based upon those portions of the testimony [she] believed."<sup>48</sup> Copying a party's brief, legal memorandum, or other submission verbatim potentially signals that the court did not independently assess the case as a matter of fact or law, and may create the appearance of bias.<sup>49</sup> Indeed, judges who uncritically accept parties' submissions gamble with the correctness of their rulings.<sup>50</sup>

The fact that prevailing lawyers want courts to uncritically adopt their proposed findings of fact and conclusions of law or copy the legal arguments and accordingly consent to these acts is irrelevant. Judicial bias and partiality do not vanish as concerns simply because the party that allegedly benefits from those factors or influences is pleased by the outcome. It is no answer to say that the losing lawyers cannot complain about judicial plagiarism because they shared the prevailing lawyers' aspirations with respect to the court's adoption of their positions. There are at least three reasons for this. First, this argument rests on the uncertain premise that the losing lawyers expected the court to simply adopt one side's work or the other's rather than using the parties' proposed findings

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*Brief Writing*, N.J. LAW., Apr. 2009, at 13, 15 ("Every first-year associate in a law firm litigation department hears the same lecture: You are writing a brief as an advocate for your client, not a law review article providing a neutral assessment of the law and an intellectual discussion of legal principles. This is advice that must be taken to heart."); James L. Robertson, *Reality on Appeal*, in APPELLATE PRACTICE MANUAL 119, 119 (Priscilla A. Schwab ed., 1992) ("The job of counsel is candid and competent advocacy, within limits.").

48. Brunetti, *supra* note 12, at 1502.

49. See Crowne-Mohammed, *supra* note 4, at 16 ("A case is to be won on its merits; copying verbatim extracts from one side's brief . . . or memorandum gives the appearance of bias. It also gives the appearance that a judge has not independently made an assessment of the fair outcome of the case.").

50. See *Parlak v. Holder*, 578 F.3d 457, 476 (6th Cir. 2009) (Martin, J., dissenting) (criticizing an Immigration Judge's reliance on tainted evidence concerning torture and sarcastically stating that perhaps the judge could not be faulted for her reliance because: "[M]ost 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. . . . The IJ's opinion included the same errors as the government's briefs, and 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.") (footnotes omitted).

and conclusions simply as a guide for its independent analysis of the evidence and legal authorities. The lawyers surely want evidence of the court's analysis where the issues are close or the ruling will guide or influence subsequent conduct or strategy. Second, and returning to the initial example in the Introduction, this argument assumes that the lawyers for both sides were scrupulous in preparing their relevant submissions. If the prevailing lawyers have engaged in the sort of poor practice related in that example, any bargain to which the losing lawyers might be said to have agreed is off. Third, even assuming that all the lawyers expect the court to adopt one side's work product as its own, parties are generally unaware of this practice.<sup>51</sup> Their expectations count as much or more than the lawyers'.

In the end, courts' treatment of plagiarism by lawyers is not instructive when evaluating the ethical dimensions of judicial plagiarism. The considerations are not the same.

## II. APPELLATE CASE LAW ON JUDICIAL PLAGIARISM

Unlike plagiarism by lawyers, courts' periodic concern over alleged judicial plagiarism generally has not included an ethics aspect or component. Rather, appellate courts have tended to treat alleged judicial plagiarism as a standard of review issue.<sup>52</sup> This is particularly true in the federal system. To explain, under Federal Rule of Civil Procedure 52(a)(6), when a district court tries a case without a jury, the court's findings of fact "must not be set aside unless clearly erroneous."<sup>53</sup> This is a deferential standard of review.<sup>54</sup> In cases in which district courts have adopted the

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51. See Bast & Samuels, *supra* note 7, at 801 ("Although practicing attorneys are aware that it is a common practice for judges to borrow from the writing of attorneys . . . the general public is mostly unaware of this practice.").

52. In *State v. McDermott*, 810 N.W.2d 237 (Wis. Ct. App. 2012), the court criticized the trial court for its wholesale adoption of the State's brief as its decision on the basis that the trial court had failed to demonstrate its independent analysis of the issues and further failed to explain its rationale to the parties and the public, but concluded that these failures were not grounds for reversal given its de novo review of the trial court's decision. *Id.* at 240 n.2. Similarly, in *Stone v. City of Kiowa*, 950 P.2d 1305 (Kan. 1997), the Kansas Supreme Court observed that while "a trial court's adopt[ion] [of] a party's findings and conclusions in their entirety" was "the sort of shorthand that would be susceptible to abuse" and was "not a practice to be encouraged," it did not violate a Kansas statute or supreme court rule regarding courts' preparation of findings and conclusions in summary judgments, judgments following bench trials, or judgments entered in cases tried to advisory juries. *Id.* at 1308.

53. FED. R. CIV. P. 52(a)(6).

54. See, e.g., *United Food & Commercial Workers Union & Participating Food Indus. Emp'rs Tri-State Health & Welfare Fund v. Super Fresh Food Mkts., Inc.*, 352 F. App'x 721, 725 (3d Cir. 2009) ("When reviewing for clear error, findings of fact may only be overturned if they are 'completely devoid of a credible evidentiary basis or bear[] no rational relationship to

prevailing party's findings of fact verbatim, however, some appellate courts have subjected such findings to special scrutiny,<sup>55</sup> afforded them less deference than if the district court had prepared them independently,<sup>56</sup> or blended these two approaches.<sup>57</sup> The Supreme Court rejected alternative standards of review of district court findings of fact more than two decades ago in *Anderson v. City of Bessemer City*,<sup>58</sup> while nonetheless disapproving of courts' verbatim adoption of findings of fact prepared by prevailing parties.<sup>59</sup>

In *Anderson*, the district court held that Bessemer City had unlawfully discriminated when it declined to hire Phyllis Anderson as its recreation

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the supporting data.”) (quoting *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 230 (3d Cir. 2007)); *Smith v. United States*, 293 F.3d 984, 987 (7th Cir. 2002) (“In order to constitute clear error, the district court’s findings must be implausible.”). Review for clear error is also a deferential standard in state courts. *See, e.g., Gov’t Emps. Ins. Co. v. United Servs. Auto. Ass’n*, 708 S.E.2d 877, 882 (Va. 2011) (explaining the clearly erroneous standard).

55. *See, e.g., Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n.3 (9th Cir. 1984) (“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.”) (quoting *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 637 (9th Cir. 1982)); *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978) (“[T]he fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal. But 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.”) (footnote omitted).

56. *See, e.g., Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 459 (4th Cir. 1983) (“Although findings of fact should not be set aside unless clearly erroneous, where, as here, plaintiffs’ counsel has prepared the findings and the district court has adopted them verbatim, we accord the findings less ‘weight and dignity [than] . . . the unfettered and independent judgment of the trial judge.”) (quoting *The Severance v. Peoples Savings Bank & Trust Co.*, 152 F.2d 916, 918 (4th Cir. 1945)); *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 640–42 (4th Cir. 1983) (discussing this practice and the lesser weight that should be afforded such findings), *rev’d on other grounds*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Hosley v. Armour & Co.*, 683 F.2d 864, 866 (4th Cir. 1982) (cautioning against adopting verbatim the prevailing party’s findings of fact, stating that such findings are afforded less deference than findings made by a district court independently, and remanding the case to the trial court).

57. *See, e.g., Roberts v. Ross*, 344 F.2d 747, 752 (3d Cir. 1965) (explaining that a district court’s adopted findings will be reviewed “more narrowly and given less weight on review than if they are the work product of the judge himself or at least bear evidence that he has given them careful study and revision”), *abrogated by Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

58. 470 U.S. 564 (1985).

59. *See id.* at 572 (“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 . . . . We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when . . . informed that the judge has decided in their favor.”).

director.<sup>60</sup> The district court issued a short memorandum decision to that effect, and asked the plaintiff's lawyer to submit proposed findings of fact and conclusions of law elaborating on the rationale for the court's decision stated in the memorandum.<sup>61</sup> The district court adopted the plaintiff's proposed findings and conclusions as its own, with some edits and modifications.<sup>62</sup> The Fourth Circuit reversed on the basis that three of the district court's crucial findings of fact were clearly erroneous.<sup>63</sup> In doing so, the Fourth Circuit closely scrutinized the record because of the district court's adoption of the plaintiff's proposed findings of fact and conclusions of law.<sup>64</sup> The Fourth Circuit rejected Anderson's argument that the district judge had acted properly by giving the City an opportunity to object to the proposed findings and by not adopting her proposed findings verbatim.<sup>65</sup> According to the Fourth Circuit, the mistake in the district court's procedure lay in its "solicitation of findings after it had already announced its decision and in the court's adoption of the 'substance' of [the] proposed findings."<sup>66</sup> The Supreme Court disagreed.

The Court explained that while it had criticized courts for verbatim adoption of findings of fact prepared by prevailing parties, and it was further aware of the potential for exaggeration and overreaching by lawyers preparing findings of fact after learning that the judge has found in their clients' favor, even the adoption of proposed findings of fact verbatim does not change the standard of review on appeal.<sup>67</sup> Findings that are adopted verbatim nonetheless remain "those of the court and may be reversed only if clearly erroneous."<sup>68</sup> Moreover, in this case, the district court did not appear to have uncritically accepted the findings prepared by Anderson's lawyer.<sup>69</sup> The crucial findings of fact differed significantly from those proposed by the plaintiff's lawyer.<sup>70</sup> Accordingly, the Court saw no reason to doubt that the district court's findings reflected its own careful conclusions, nor did it find a basis to subject the findings to a more stringent standard of appellate review.<sup>71</sup>

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60. *Id.* at 568.

61. *Id.*

62. *Id.* at 571

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 572.

67. *Id.*

68. *Id.* (citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n.13 (1974) and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656–57 (1964)).

69. *Id.*

70. *Id.* at 572–73.

71. *Id.* at 573.

Since *Anderson* was decided, courts have occasionally confronted judicial plagiarism in the form of adopted findings of fact and conclusions of law and reversed under traditional clear error review.<sup>72</sup> But judicial plagiarism has attracted unfavorable attention from courts in other contexts, as *Bright v. Westmoreland County*<sup>73</sup> nicely illustrates.

*Bright* began as a straightforward civil rights action in a Pennsylvania federal court arising out of the death of John Bright's daughter.<sup>74</sup> The defendants moved to dismiss the case, and, during a preliminary case conference held before Bright's response to their motions was due, the district court indicated that it intended to dismiss Bright's case based on an unpublished district court decision.<sup>75</sup> The district court also asked the defense lawyers to submit a proposed opinion and order, which they did.<sup>76</sup> The district court adopted the defendants' proposed opinion and order practically verbatim.<sup>77</sup> Bright appealed to the Third Circuit on several grounds, but in a footnote in his brief he asserted that he was appealing from an order supported by an opinion that was "ghostwritten" by lawyers for his adversaries.<sup>78</sup> From the Third Circuit's perspective, Bright had raised a substantial "procedural impropriety" that undermined the legitimacy of the district court's order.<sup>79</sup>

The *Bright* court obtained from the defense lawyers a copy of the proposed opinion and order that they had submitted to the district court.<sup>80</sup> The proposed order and opinion were nearly identical to the opinion that the

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72. See, e.g., *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1290–91 (10th Cir. 2008) (reversing partial class action settlement where district court's order simply stated agreement with party's position and did not reflect independent analysis or reasoning); *Silver v. Exec. Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006) (applying the clearly erroneous standard while noting that "the wholesale and verbatim adoption of one party's findings requires us to review the record and the district court's opinion more thoroughly."); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 300–02 (3d Cir. 2005) (rejecting a proposed class action settlement where, among factors potentially suggesting that the district court did not reach its decision independently, the court had "asked the settling parties to submit the proposed findings of fact and conclusions of law, which it 'would adopt basically'").

73. 380 F.3d 729 (3d Cir. 2004).

74. *Id.* at 733 (reproducing the proposed district court memorandum opinion and order).

75. *Id.* at 730.

76. *Id.* at 731.

77. *Id.*

78. *Id.*

79. *Id.* at 730.

80. *Id.* at 731. This request was apparently necessary because the proposed opinion and order were not included in the record on appeal; only the opinion and order signed by the district judge were part of the record. The district court's docket sheet did not indicate whether the proposed opinion and order were filed with the court and these documents did not otherwise appear in any public filing. *Id.* at 731 n.2.

district court entered.<sup>81</sup> Other than minor edits for grammar and style, the district court made only two substantive changes: (1) in the analysis section of the opinion it eliminated a single sentence from the proposed opinion; and (2) it added a section dismissing Bright's claims against one defendant for lack of jurisdiction.<sup>82</sup> Significantly, the district court did not modify the section in the proposed opinion that dismissed Bright's state law claims based on the Pennsylvania Political Subdivision Tort Claims Act.<sup>83</sup> This was important because the defendants had not argued in their motions to dismiss that the Act barred Bright's claims.<sup>84</sup> In other words, the defense lawyers had slipped a new argument past the district court nearly undetected.<sup>85</sup> Apparently inflamed by the defendants' insertion of a previously dormant affirmative defense in the opinion, Bright complained that it was "hard to reconcile this evident overreaching with [his] reasonable expectations as a litigant for a fair and independent judicial review of his claim."<sup>86</sup> The Third Circuit agreed for reasons to be explained.

Initially, the *Bright* court distinguished this case from one in which a district court adopts the prevailing party's findings of fact verbatim, which, while disapproved, provides no basis for reversal if the district judge exercised independent judgment in adopting the findings.<sup>87</sup> The court reasoned that there was no authority to support the preparation of an opinion by a party; that practice reflects a district court's failure to perform its judicial function.<sup>88</sup> Elaborating, the court stated:

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

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81. *Id.* at 731.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* (noting that the district did make "minor stylistic changes" to the defendants' new argument when preparing its opinion).

86. *Id.* (quoting Bright's brief).

87. *Id.* at 731–32 (quoting *Pa. Env'tl. Def. Found. v. Canon-McMillian Sch. Dist.*, 152 F.3d 228, 233 (3d Cir. 1998)).

88. *See id.* at 732 (quoting *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 725 (4th Cir. 1961)).

opinions. We, therefore, cannot condone the practice used by the District Court in this case.<sup>89</sup>

Beyond this fatal procedural flaw, there was no evidence in the record that the district court had independently reviewed the facts that the defense lawyers offered in support of the reasoning in the opinion.<sup>90</sup> Nor was there any evidence in the record on which to conclude that the opinion was the product of the district court's independent judgment.<sup>91</sup> The court in *Bright* therefore held that the district court's adoption of the defendants' proposed opinion and order and the procedure used to solicit them were improper, and reversed and remanded the case to the district court to reevaluate the defendants' motion to dismiss in a manner consistent with the opinion.<sup>92</sup>

A somewhat similar scenario unfolded in *United States v. Jenkins*.<sup>93</sup> In that case, Navy quartermaster Troy Jenkins was court-martialed and convicted of three sex crimes.<sup>94</sup> The Navy-Marine Corps Court of Criminal Appeals ("CCA") affirmed Jenkins' conviction on two counts. He appealed to the Court of Appeals for the Armed Forces ("CAAF"), arguing that the CCA had not afforded him the independent review of his convictions which he was due under Article 66(c) of the Uniform Code of Military Justice.<sup>95</sup> Jenkins contended that the CCA's replication of large portions of the government's answer brief was an abuse of discretion, negated any appearance of judicial impartiality, and undermined the integrity of its opinion.<sup>96</sup> He had a point:

The CCA opinion . . . [was] 15 pages in length. It consist[ed] of 45 paragraphs, not including record excerpts. Thirty-one of these paragraphs [were] taken virtually or wholly verbatim from 29 of the 33 paragraphs in the Government's nineteen-page Answer [brief] before the CCA. This [was] done without attribution. These paragraphs include[d] the statement of facts, legal analysis, and conclusions of law.<sup>97</sup>

The CCA wrote in its opinion that it had carefully reviewed the court-martial record and the parties' briefs.<sup>98</sup> Based on this statement, the

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89. *Id.*

90. *Id.*

91. *Id.* ("In fact, the procedure used by the District Court casts doubt on the possibility of such a conclusion.")

92. *Id.*

93. 60 M.J. 27 (C.A.A.F. 2004).

94. *Id.*

95. *Id.* at 28; *see also id.* at 29 (quoting Article 66(c)).

96. *Id.* at 28.

97. *Id.*

98. *Id.*



government argued that the CCA had not erred, that there was no appearance of partiality by the CCA, and that to evaluate the independence of the CCA's review would be imprudent.<sup>99</sup> Although acknowledging that the CCA opinion contained several indicators of independent review, the CAAF questioned whether Jenkins had received the review of his convictions to which he was entitled.<sup>100</sup> The slices of the government's brief that were incorporated in the CCA included contested factual matters and legal issues to the point that the nature and substance of the CCA's independent analysis, if any, were disguised.<sup>101</sup> As the court observed, "neither we nor the parties can be sure where and perhaps whether the Government's argument ends and the lower court's independent analysis begins."<sup>102</sup> The court did not need to make any sort of "mathematical calculation" of the lower court's replication of the government's brief to reach this conclusion; it was facially apparent that substantial portions of the CCA opinion were derived wholly or virtually verbatim from the government's brief.<sup>103</sup>

The CCA's vast replication of the government's brief in its opinion prevented the CAAF from determining whether Jenkins had received the probing review of his convictions to which he was entitled under Article 66(c).<sup>104</sup> As a result, the CAAF set aside the lower court's decision and remanded the case for a new review before a different panel of judges.<sup>105</sup>

The *Bright* and *Jenkins* courts seem to have reached correct results. In both cases, the appellants made strong arguments that the lower courts had improperly delegated their judicial responsibilities to the victors. In *Bright*, the district court's embrace of a new argument slipped in by the defendants was especially damning.<sup>106</sup> If the lower courts in *Bright* and *Jenkins* did not in fact cede their judicial responsibilities to the prevailing parties, they invited reversal by not suitably describing or demonstrating their exercise of independent judgment. In contrast, a trial court's instruction or request that the parties prepare draft orders for its consideration that contain no advocacy and which it may or may not adopt based on its independent

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99. *Id.*

100. *Id.* at 29.

101. *Id.*

102. *Id.*

103. *Id.* at 29–30 (explaining further that its use of the term "substantial" in this context conveyed "both qualitative and quantitative meaning").

104. *Id.* at 30.

105. *Id.*

106. *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 731 (3d Cir. 2004).

analysis of the issues, is benign.<sup>107</sup> A court's adoption of a party's proposed findings of fact is not clear error—and thus is no basis for reversal—if it can be shown that the court conducted an independent review of the case before embracing those findings.<sup>108</sup> The same is necessarily true for a court's adoption of a party's proposed conclusions of law.

Despite the lower courts' troubling practices in *Bright* and *Jenkins*, however, neither case discusses whether judicial plagiarism constitutes judicial misconduct. If the courts were concerned about potential judicial ethics violations by the lower courts, they either addressed those concerns privately or, more likely, saw no need to analyze those issues because the cases did not come to them as judicial misconduct matters. Even so, the cases are instructive. They clearly indicate that a court's verbatim adoption of a prevailing party's findings of fact and conclusions of law, or replication of a party's brief in an opinion, are improper where the court's practice reflects a lack of independent judgment or suggests the court's abdication of its judicial function. Such conduct violates judicial ethics rules as well as requiring appellate correction. Still, as we are about to see, there appears to be only one reported judicial misconduct case focused on judicial plagiarism.

### III. JUDICIAL PLAGIARISM AS ALLEGED JUDICIAL MISCONDUCT

The lack of case law on judicial plagiarism as a form of judicial misconduct is surely a product of factors beyond the posture of the cases in which the subject has been raised. One factor at the core must be lawyers' general reluctance to report perceived misconduct by judges to judicial conduct commissions or to courts' judicial councils for fear of retaliation.<sup>109</sup>

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107. See, e.g., *Farmers Ins. Co. v. Snowden*, 233 S.W.3d 664, 668 (Ark. 2006) (finding that trial court did not err by accepting appellee's proposed order where the court independently reviewed the issues before making a final judgment).

108. See, e.g., *McClam-Brown v. Boeing Co.*, 142 F. App'x 75, 76 n.1 (3d Cir. 2005) ("Here, unlike in *Bright*, we are convinced that the district court conducted an independent review of the case. The findings of fact are replete with citations to the record, and the court heard argument from the parties before issuing its opinion."); *Safar v. Wells Fargo Bank, N.A.*, 254 P.3d 1112, 1119 n.15 (Alaska 2011) (crediting the trial court's fact-finding and stating that "[i]t is not clearly erroneous per se for a trial court to adopt one party's proposed findings of fact."); *Indus. Indem. Co. v. Wick*, 680 P.2d 1100, 1108 (Alaska 1984) (permitting trial courts to adopt findings of fact and conclusions of law prepared by lawyers "so long as they reflect the court's independent view of the weight of the evidence").

109. See *Bast & Samuels*, *supra* note 7, at 803 (stating that lawyers who think that a judge has engaged in plagiarism are unlikely to complain about the practice "for fear of raising the judge's ire, knowing that [they are] likely to appear before the judge in a future case"); David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L.

In any event, there appears to be only one reported disciplinary case on judicial plagiarism, *In re Complaint of Doe*,<sup>110</sup> which was decided by the chief judge of the Eighth Circuit in 2011.

*Doe* involved several claims of judicial misconduct by a civil litigant against the district judge who dismissed his lawsuit, one being judicial plagiarism. The complainant estimated that the district judge plagiarized approximately 55 percent of the defendant's brief when drafting the order dismissing his lawsuit, or 65 percent if the recitation of the facts was omitted.<sup>111</sup> The *Doe* court succinctly dismissed the allegations because they went directly to the merits of the district judge's ruling and therefore were not properly the subject of a judicial conduct complaint.<sup>112</sup> If the misconduct allegations were not merits-related, the complainant's claim warranted dismissal as being groundless, as the court explained:

Complainant accurately identifies many similarities between the defendants' briefs and the district judge's order. Lawyers craft briefs for the express purpose of aiding the judge in making her decision, and the district judge is entitled to borrow from those briefs as she may see fit. Judges must be granted considerable leeway in the drafting of orders.

The subject judge apparently treated the parties' briefs as proposed findings of fact and conclusions of law. In doing so, a district judge reflects the historic practice of a judge asking the prevailing party to prepare proposed findings of fact and conclusions of law and even the order itself.<sup>113</sup>

Continuing, the court explained that the district judge had not asked the defense lawyers *ex parte* to draft the order granting their motion.<sup>114</sup> Rather, she relied on the defendants' briefs in fashioning her opinion, "albeit often

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REV. 909, 934 (2009) ("'Suicidal' is the adjective that comes to mind when thinking about an attorney's report of judicial misconduct. While that term is certainly hyperbolic . . . the consequences of filing complaints against judges could well threaten an attorney's career."); Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the "Cash-for-Kids" Scheme*, 36 J. LEGAL PROF. 139, 153 (2011) (quoting professional regulators on lawyers' reluctance to report misconduct by judges even when required by ethics rules to do so); Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 346 (2012) (stating that one reasons lawyers are reluctant to report judicial misconduct is fear of retaliation by judges before whom they regularly appear); Heather Cole, *The "Nuclear Option"*, MO. LAW. WKLY., Dec. 12, 2011, at 15 (discussing lawyers' extreme reluctance to report judicial misconduct for fear of retaliation or of becoming pariahs).

110. 640 F.3d 869 (8th Cir. 2011).

111. *Id.* at 872.

112. *Id.*

113. *Id.*

114. *Id.* at 873.

in verbatim fashion and without attribution.”<sup>115</sup> Contrary to the plaintiff’s allegations, “[s]uch judicial appropriation [was] not judicial misconduct.”<sup>116</sup> The district judge’s order was balanced, careful, and thorough.<sup>117</sup> As a result, the plaintiff’s judicial plagiarism claim “lack[ed] sufficient evidence to raise an inference of misconduct.”<sup>118</sup>

At first glance the *Doe* court appears to have gotten the decision right given the status of the law at which the court might have been expected to look in analyzing the allegations against the district judge. If the district judge independently analyzed the facts and the law before reaching her decision and simply copied the defendants’ brief because it was “careful, thorough, and balanced in tone,”<sup>119</sup> then her actions likely would have passed muster even if reviewed by the skeptical courts in *Bright*<sup>120</sup> and *Jenkins*.<sup>121</sup> At the same time, the fact that the complainant’s allegations went to the merits of the district judge’s ruling should not have been dispositive since a plagiarized decision *is not* or *should not be* the accused court’s ruling on the merits; that’s the point. Moreover, it is difficult to evaluate the extent, quality, or even existence of the district judge’s independent review given the facts in the opinion. And without those facts it is difficult to see how this was not another case, like *Jenkins*, in which no one could “be sure where and perhaps whether the [prevailing party’s] argument ends and the lower court’s independent analysis begins.”<sup>122</sup> Finally, the *Doe* court seems to have accepted without question the practice of courts copying a prevailing party’s submissions verbatim so long as the court does not communicate *ex parte* with the prevailing party about the decision.<sup>123</sup> But while the existence of *ex parte* communications would be powerful evidence of bias or partiality as well as a separate judicial ethics violation,<sup>124</sup> the absence of such communications does not foreclose the possibility that

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* (quoting 28 U.S.C. § 352(b)(1)(A)(iii)).

119. *Id.*

120. *Bright v. Westmoreland Cnty.*, 380 F.3d 729 (3d Cir. 2004); *see supra* notes 73–92 and accompanying text.

121. *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004); *see supra* notes 93–105 and the accompanying text.

122. *Jenkins*, 60 M.J. at 29.

123. *See Doe*, 640 F.3d at 872–73 (explaining the court’s rejection of the complainant’s plagiarism claim).

124. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2011) (“A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except [in specified circumstances.]”).

the district court's opinion was tainted by bias or partiality. Nor does the absence of ex parte communications necessarily resolve concerns about the appearance of fairness, or refute claims of judicial incompetence or lack of diligence.

#### IV. ANALYSIS

Ultimately, the question of whether judicial plagiarism constitutes misconduct is not easily answered. The practice cannot be justified as casually as the *Doe* court apparently would like. Some of the reasons offered to defend the practice do not withstand scrutiny. For example, some scholars contend that judges cannot commit plagiarism when writing in their judicial role because judges' writing is not expected to be original.<sup>125</sup> The originality point may be true, but plagiarism is generally understood to encompass the misappropriation of ideas in addition to the copying of someone's words.<sup>126</sup> More fundamentally, the focus in judicial plagiarism cases is not judges' writing but their reasoning and decisions; their borrowed writing is relevant because it may indicate bias, partiality, or incompetence. Thus, judges' supposed freedom to adopt parties' written work as their own without violating any norms does not end the inquiry.

A better argument is that judges' reasoning does not have to be original so long as they reach correct results, meaning that it is impossible for them to plagiarize by misappropriating ideas.<sup>127</sup> But that argument is not good enough, because it ignores the requirement that courts' decisions be independent. Even if a judge finds for a party on a theory the party urged, that must be because the judge concluded that the theory was correct on the facts—not because the judge unthinkingly adopted the party's position.<sup>128</sup>

Consider, for example, the trial court's conduct in *Trieschmann v. Trieschmann*.<sup>129</sup> The trial court announced its decision in a letter to the parties in a divorce action in which it wrote that “the only just solution” to

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125. Bast & Samuels, *supra* note 7, at 803; *see also* Morrissey, *supra* note 4 (quoting a law professor as saying that it would be acceptable for a judge to lift every word of an opinion from a party's brief if the party's arguments were good because judges owe “no duty of originality”).

126. *See supra* text accompanying note 1.

127. *See* Charles Geyh, *The Prudent Jurist*, LEGAL AFFAIRS, Nov./Dec. 2003, at 17, 17 (“In an adversarial system of justice . . . judges are expected to crib from the arguments, ideas, and research of the adversaries. . . . The point is for judges to get it right, not for them to get there on their own intellectual steam.”).

128. *See* B.E.T., Inc. v. Bd. of Adjustment of Sussex Cnty., 499 A.2d 811, 811–12 (Del. 1985) (explaining why judges must give reasons for their decisions and vacating the judgment where the trial court simply adopted the prevailing party's brief as its opinion).

129. 504 N.W.2d 433 (Wis. Ct. App. 1993).

the parties' dispute over maintenance and the division of marital property was "accurately reflected in the proposed findings of fact and conclusions of law of the [wife] as contained in the [wife's] memorandum."<sup>130</sup> The trial court directed the wife to prepare findings of fact, conclusions of law, and a judgment consistent with her memorandum.<sup>131</sup> On appeal, the husband argued that the trial court abused its discretion because it "failed to examine the relevant facts and law and demonstrate a rational decision making process in reaching its conclusions."<sup>132</sup> The Wisconsin Court of Appeals agreed, observing that it could not determine whether the trial court's decision was the product of its own reasoning or that of the wife's lawyer.<sup>133</sup> In fact, the wife's memorandum that the trial court adopted was "devoid of any explanation or reasoning" as to why views on the disputed facts and law were superior to her husband's positions.<sup>134</sup> The *Trieschmann* court accordingly reversed the judgment below and remanded the case to the trial court with instructions to consider all of the relevant facts and law in reaching its decision, and to state the factors it relied upon in doing so.<sup>135</sup>

Comparisons to plagiarism in scholarship also fail as a basis for defending judicial plagiarism. For example, one reason that plagiarism in scholarly writing is condemned is that the plagiarist wrongly gets credit for the work or idea of another, while the true author or thinker is denied credit for her work or idea. Judges do not care about receiving credit for the quality of their opinions the same way, say, an academic author does. Lawyers whose written work judges adopt do not care about receiving credit for their work beyond winning. Moreover, when judges adopt lawyers' work, the lawyers not only get credit for winning but they can proudly tell clients that their work was so good that the court adopted it verbatim or wholesale.

Again, this argument misses the mark. The issue in judicial plagiarism is the fairness and independence of the court's judgment. It may be that a court that simply adopts the prevailing party's findings of fact and conclusions of law, or that pastes portions of a party's brief into its opinion with no changes, has thoroughly analyzed the issues, reached its own conclusions, and determined that it cannot say what needs to be said better

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130. *Id.* at 434.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 435. The court was careful to explain that it was "not hold[ing] that a trial court may never accept the rationale and conclusions contained in one party's brief to the court. If the court chooses to do so, however, it must indicate the factors which it relied on in making its decision and state those on the record." *Id.*

than the prevailing party. That is certainly possible.<sup>136</sup> On the other hand, there are cases like *Bright v. Westmoreland County*,<sup>137</sup> where the defense lawyers pulled a fast one on the inattentive judge, and slipped into the decision they prepared for him a legal theory they never before raised.<sup>138</sup> In addition, “[t]he adversarial zeal of counsel for the prevailing party too often infects what should be disinterested findings [of fact] to entrust their preparation to the successful attorney.”<sup>139</sup> In short, even lawyers who would never attempt the tactics of the defense lawyers in *Bright* may not be able to resist subtly slanting findings of fact in their clients’ favor.

Judge Richard Posner essentially argues against the concept of judicial plagiarism first by defining plagiarism as having a reliance element: “The reader has to *care* about being deceived about authorial identity in order for the deceit to . . . constitute plagiarism. More precisely, he has to care enough that had he known he would have acted differently.”<sup>140</sup> Then, as an example of the “innumerable intellectual deceits that do little or no harm because they engender little or no reliance . . . and so . . . escape the plagiarism label,” he offers the practice of judges having clerks and others write their opinions for them.<sup>141</sup> Indeed, he continues, judges “sometimes insert into their opinions, without attribution, verbatim passages from lawyers’ briefs; and many orders, findings of fact, and other documents signed by judges are actually prepared entirely by the parties’ lawyers, again without attribution.”<sup>142</sup> Yet, because judges do not financially profit from this practice, lawyers are aware of it, and judges are not concerned with originality in their opinions, he reasons that it cannot be called plagiarism.<sup>143</sup>

This argument has four notable flaws.<sup>144</sup> First, the argument assumes that judges who copy lawyers’ work have independently made the findings or reached the conclusions stated in that work. Of course, judicial plagiarism allegations are premised on the belief that the accused judges acted otherwise. Second, it ignores the potential appearance of impropriety that

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136. See, e.g., *In re Doe*, 640 F.3d 869, 873 (8th Cir. 2011) (noting that the court’s decision, which was adopted verbatim from the defendants’ briefs, was “detailed, careful, thorough, and balanced in tone”).

137. 380 F.3d 729 (3d Cir. 2004).

138. *Id.* at 731.

139. *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 459 (4th Cir. 1983).

140. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 20 (2007).

141. *Id.*

142. *Id.* at 21.

143. See *id.* at 21–22.

144. Judge Posner’s example of clerks preparing opinions for judges merits no substantial discussion because there is nothing about that practice that reasonably calls into question the judge’s potential bias or partiality.

judicial plagiarism creates. Third, most lawyers who thought that judges would not fairly and impartially decide cases as potentially evidenced by the verbatim copying of opponents' findings of fact, conclusions of law, legal memoranda, or briefs would, when permitted, act on that concern by seeking a change of judge.<sup>145</sup> Fourth, the fact that plagiarism in academia and print journalism sometimes involves a profit motive does not mean that greed is an essential element of the charge. In summary, Judge Posner's preemptive discount or dismissal of judicial plagiarism as a concept is ineffective.

Although the key arguments offered in defense of judicial plagiarism are unpersuasive, it does not follow that judicial plagiarism necessarily constitutes misconduct. Courts often carry heavy caseloads and many judges do not have law clerks to assist them.<sup>146</sup> Litigants' need for judicial efficiency should accommodate some level of borrowing by judges from the work of lawyers who appear before them.<sup>147</sup> Trial and appellate lawyers generally understand this and should be able to explain as much to their clients. What matters most is that judges decide issues correctly; how they explain or express their correct decisions is secondary.<sup>148</sup> As the *In re Complaint of Doe*<sup>149</sup> court observed, judges require some leeway when preparing opinions and orders.<sup>150</sup> In addition, the argument that judicial plagiarism is misconduct because it reflects bias or partiality by the accused judge is a difficult one to make given the principle that bias or prejudice normally must be rooted in an extrajudicial source to require a judge's disqualification or recusal.<sup>151</sup> Reason suggests that the general rule should not apply to allegations of judicial plagiarism because, while a judge's adverse ruling typically does not evidence bias or prejudice, in the typical case it also does not appear that the judge's decision is actually the decision of an adversary. Still, the traditional approach represents a hurdle that those

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145. See generally MO. SUP. CT. R. 51.05(a) ("A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party.").

146. *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001). See generally John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18 (discussing the severe stresses placed on state courts by repeated reductions in states' judicial budgets).

147. Geyh, *supra* note 127, at 17.

148. But see Jaime S. Dursht, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1289 (1996) (discussing the importance of well-written opinions in light of their use as precedent and the need to ensure certainty in the law).

149. 640 F.3d 869 (8th Cir. 2011).

150. *Id.* at 872.

151. See JAMES J. ALFINI ET AL., JUDICIAL CONDUCT & ETHICS § 4.05A, at 4-17 (4th ed. 2007) ("Traditionally, bias or prejudice that is caused by occurrences in the context of a court proceeding is not grounds for disqualification. To require recusal, bias or prejudice normally must be rooted in an extrajudicial source.") (footnotes omitted).



who would challenge judicial plagiarism in a disciplinary context must overcome.

In the end, these practical realities support the conclusion that judicial plagiarism is not unethical *per se*.<sup>152</sup> The determination of whether judicial plagiarism constitutes judicial misconduct must begin with an analysis of whether the judge's opinion or order, even if copied verbatim or nearly so from a party's submissions, represents the court's independent judgment. If it does, allegations that the judge is biased, partial, or incompetent should fail. In determining whether a court exercised independent judgment, a reviewing court should consider (1) the time between the submission of the document adopted or copied and the issuance of the offending opinion, order, conclusions of law, or findings of fact, with a longer time generally suggesting that the judge independently analyzed the issues;<sup>153</sup> (2) the extent of the judge's adoption or copying, with no mathematical formula or quota for evaluating replication required;<sup>154</sup> (3) whether the challenged text is supported by appropriate citations to the record or appropriate legal authority;<sup>155</sup> (4) the accuracy of any proposed findings of fact when compared to the record; (5) whether cited legal authority is apposite; (6) whether competing cases are cited, discussed, or distinguished; (7) whether the court heard arguments before ruling;<sup>156</sup> (9) the tenor of the challenged opinion or order, i.e., whether it reads like an advocacy piece or whether it appears to be balanced;<sup>157</sup> (10) whether the challenged opinion or order contains errors or misstatements found in the document from which the judge copied or which the judge adopted, with the replication of errors or misstatements indicating a lack of independent review;<sup>158</sup> (11) whether the

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152. *See, e.g.*, Fjeldstad, *supra* note 5, at 218 (referring to judges' verbatim adoption of findings of fact and conclusions of law as "not unethical *per se*").

153. *See, e.g.*, Farmers Ins. Co. v. Snowden, 233 S.W.3d 664, 668 (Ark. 2006) (noting that the judge "took several months to issue a final decision").

154. *See, e.g.*, United States v. Jenkins, 60 M.J. 27, 29–30 (C.A.A.F. 2004) (commenting on the court's "substantial" adoption of the government's brief, explaining that "'substantial' conveys both qualitative and quantitative meaning," and stating that such conclusions need not be "based on a mathematical calculation of replication").

155. *See, e.g.*, McClam-Brown v. Boeing Co., 142 F. App'x 75, 76 n.1 (3d Cir. 2005) (rejecting the plaintiff's judicial plagiarism claim based in part on the fact the district court's independent judgment was reflected in its numerous citations to the record in its findings of fact).

156. *See, e.g., id.* (rejecting the plaintiff's judicial plagiarism claim based in part on the fact that the district court heard argument before issuing its opinion).

157. *See, e.g.*, *In re Doe*, 640 F.3d 869, 873 (8th Cir. 2011) (rejecting misconduct allegations where the judge's order was "careful, thorough, and balanced in tone").

158. *See, e.g.*, Andre v. Bendix Corp., 774 F.2d 786, 800 (7th Cir. 1985) (reversing a district court for clear error where, among other problems, the district court "adopted verbatim

case involves difficult scientific concepts or issues of a highly technical nature, such that the court might reasonably be expected to need the parties' assistance in describing or explaining them in its decision or findings;<sup>159</sup> (12) whether both parties were invited to submit proposed findings of fact and conclusions of law or orders; and (13) any other factor that either reasonably indicates the court's exercise of independent judgment or that reasonably negates that conclusion or materially diminishes its likelihood.<sup>160</sup>

Misconduct determinations will depend on the facts of the particular case. The extent of the judge's copying will be the primary focus in most cases, but it is only a starting point. Beyond that, not all factors will be material or relevant in all cases, and they may be assigned varying weights in different cases depending on the facts. Returning to the initial example in the Introduction, the fact that the judge heard arguments and received evidence before adopting verbatim the prevailing party's findings of fact and conclusions of law should not alone negate allegations of judicial plagiarism, even though the fact that she did so is one important factor to consider. After all, if the judge allegedly favored the prevailing party for illegitimate reasons, the trial may have been nothing more than an elaborate ceremony.

Another factor worth considering but difficult to evaluate is the existence of qualifying statements by the judge before the challenged order or opinion is entered, or contained in the opinion or order itself.<sup>161</sup> Statements to the

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approximately 54 out of 55 pages of [the plaintiff's] post-trial brief as its findings of fact," including "spelling and typographical errors").

159. *See, e.g.,* Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 616 F.2d 464, 468 n.6 (10th Cir. 1980) (suggesting that a court might be justified in adopting verbatim a party's findings of fact where they are "of the inherently complex, technical sort"); Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F.2d 960, 962 (5th Cir. 1975) ("[I]n 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.").

160. *See, e.g.,* Stevens v. State, 770 N.E.2d 739, 762 (Ind. 2002) (concluding that court's edits and additions to findings of fact and conclusions of law prepared by the State established that the court "carefully considered and purposefully used" the findings, and copying therefore provided no basis for reversal).

161. *See, e.g.,* Estique Inc. USA v. Xpamed LLC, No. 0:11-CIV-61740, 2011 WL 4102340, at \*1 n.1 (S.D. Fla. Sept. 15, 2011) (stating in the opinion that the court was incorporating verbatim findings of fact proposed by both the plaintiff and the defendants after "ma[king] an independent judgment" that they were correct); Wotring v. Price Heneveld Cooper DeWitt & Litton, LLP, No. 1:08-cv-00477, 2011 WL 1150584, at \*1 (W.D. Mich. Mar. 28, 2011) ("The court also largely adopts portions of the defendants' analysis as consistent with its own."); Cont'l Grp. v. KW Prop. Mgmt., LLC, 622 F. Supp. 2d 1357, 1362 n.2 (S.D. Fla. 2009) ("Due to the detailed nature of the evidence in support of the . . . motion, the Court does incorporate verbatim certain portions of Plaintiff's Proposed Findings, though this Court has made an independent judgment that these findings are correct.").

effect that the court fully considered the issues and reached an independent decision may not be sufficient to overcome bias or partiality concerns in a case in which other factors indicate a lack of judicial independence.<sup>162</sup> On the other hand, a court's comments to the parties about the findings of fact or order it expects them to prepare for its consideration may, together with other factors, suggest that the challenged findings, opinion, or order, while superficially a cut-and-paste job, reflect the judge's independent reasoning and conclusions.<sup>163</sup> Rarely will a court's declaration of its own independence, standing alone, alleviate bias, fairness, or partiality concerns in the face of contrary evidence.

If a judge's opinion, order, or findings of fact do not represent the judge's independent decision, there are several unfortunate possibilities beyond reversal on appeal and, presumably, attendant embarrassment. First, the judge did not decide the case fairly and impartially, which is generally considered to be judicial misconduct.<sup>164</sup> Second, the judge was neither biased against the losing party nor partial toward the winner, but instead lacked the legal knowledge, skill, or thoroughness required to perform her duties and can thus be characterized as incompetent.<sup>165</sup> Incompetence also constitutes judicial misconduct.<sup>166</sup> Incompetence will be established where,

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162. See, e.g., *United States v. Jenkins*, 60 M.J. 27, 29–30 (C.A.A.F. 2004) (finding that lower court's statements about the care taken in its review of the record and parties' submissions were "indicia within the opinion of independent review," but concluding that they were trumped by other factors).

163. See, e.g., *Farmers Ins. Co. v. Snowden*, 233 S.W.3d 664, 668 (Ark. 2006) (crediting a judge who, when asking the parties to submit an order, directed that their submissions should "pass muster with the appellate court," and further stated that he "may or may not use any or all or part of [the submitted order], but [would] like to have it").

164. See generally MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *id.* R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *id.* Canon 2 ("A judge shall perform the duties of judicial office impartially, competently, and diligently."); *id.* R. 2.2 ("A judge . . . shall perform all duties of judicial office fairly and impartially.").

165. See *id.* R. 2.5 cmt. 1 ("Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.").

166. *Id.* R. 2.5 ("A judge shall perform judicial and administrative duties competently and diligently."). At least one court has implied that a finding of incompetence requires multiple offenses. See, e.g., *In re Baber*, 847 S.W.2d 800, 803 (Mo. 1993) (describing the test for judicial incompetence as whether a judge "lacks the requisite ability, knowledge, judgment, or diligence to consistently and capably discharge the duties of the office") (emphasis added). The Model Code of Judicial Conduct, however, imposes no such requirement. See *supra* note 165 and accompanying text.

for example, an appellate court reverses as clearly erroneous a trial court's findings of fact adopted verbatim from a party's proposed findings.<sup>167</sup> Third, the judge adopted the prevailing party's findings or argument verbatim because the judge did not have time to do anything else, or simply because that was the easiest route to a decision. Either way, the judge's conduct, even if not incompetent, reflects a lack of diligence, and judges' failure to perform their judicial duties diligently is misconduct.<sup>168</sup>

Of course, courts must be concerned not just with actual bias, prejudice, or partiality, but also the appearance of those influences.<sup>169</sup> Judges are required to disqualify themselves in cases in which their impartiality might reasonably be questioned.<sup>170</sup> In evaluating the appearance of partiality, judges' conduct is measured against an objective standard.<sup>171</sup> Thus, the question is whether "an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial."<sup>172</sup> In most cases, the same factors that may be used to determine whether judicial plagiarism constitutes misconduct will suffice to decide whether a judge's decision appears to be improper. In cases in which appearances are at issue, however, it may be reasonable to assign greater weight to the court's statements regarding the parties' submission of proposed findings or orders, or its adoption of portions of a party's brief or memorandum.

As for any discipline that might be imposed, that will surely depend on the facts of the particular case. A judge that adopts a party's findings of fact verbatim or copies wholesale from a party's brief because of bias, prejudice, or partiality must be treated differently from a judge who is deemed to be

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167. As a general rule, the mere fact that a court's decision is reversed on appeal does not establish that the court was incompetent. *See generally* ALFINI ET AL., *supra* note 151, § 2.02, at 2-4, 2-5 (distinguishing between legal errors by judges that should be remedied on appeal and judicial misconduct). Eminently capable judges may err. Reversal based on judicial plagiarism, however, is a different story. It reflects the rare instance in which judicial conduct creating the need for disciplinary action arises out of the same conduct creating the need for appellate review. *See generally* Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1246 (2004) (quoting *In re Laster*, 274 N.W.2d 742, 745 (Mich. 1979)) ("[W]hile mere legal error does not constitute misconduct, '[j]udicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review . . . .").

168. MODEL CODE OF JUDICIAL CONDUCT R. 2.5 (2011) ("A judge shall perform judicial and administrative duties competently and diligently.").

169. *Id.* Canon 1; *id.* R 1.2. The Model Code defines "impropriety" to include "conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." *Id.* Terminology.

170. *Id.* R. 2.11(A).

171. ALFINI ET AL., *supra* note 151, § 4.04, at 4-11.

172. *Id.* (footnote omitted).

incompetent or who is found to lack diligence. The former conduct is much more serious, even if the effect on the losing party is the same. Biased or prejudiced judges are intolerable in our adversarial system and thus deserve significant discipline. In cases in which the judge is determined to be short on competence or lacking diligence, on the other hand, medicinal discipline in the form of judicial education or assistance with docket management may be in order.

## V. CONCLUSION

Litigants reasonably expect the judges who hear their cases to be fair, impartial, and engaged. Lawyers expect the same things of the judges before whom they appear. Judicial plagiarism either defeats or diminishes all of these expectations. Although it is true that many courts are stretched thin and the need for judicial efficiency may occasionally accommodate the practices criticized here, those cases should be rare. Deciding cases and writing opinions are central judicial responsibilities. Courts that abdicate their responsibilities or do not take them sufficiently seriously disserve the parties and diminish respect for the judicial system as a whole. When all of the issues are tallied up, judicial plagiarism cannot be justified. In some cases it may rise to the level of judicial misconduct. Whether it constitutes misconduct in a given case should be evaluated in light of the factors identified in this Article.