

Law School Plagiarism v. Proper Attribution



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PLAGIARISM

Legal Writing Institute

INSTITUTIONALIZING THE FIGHT AGAINST PLAGIARISM

Problems throughout the nation's law schools prompted the Legal Writing Institute to appoint a committee to investigate plagiarism policies and, if necessary, to create and disseminate a suggested policy. They contacted all ABA schools, and more than 120 schools submitted their policies, with comments and anonymous case histories.

The committee discovered:

- many schools mention plagiarism only in a general Honor Code,
- plagiarism definitions are inconsistent and even contradictory from school to school, and
- plagiarism penalties are inconsistent and contradictory from school to school.

Thus, the committee created a policy brochure that schools can modify to suit their faculty and student needs.

A thorough discussion of the committee's findings and recommendations can be found in Terri LeClerc's *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. L. Ed. 236 (1999).

LAW SCHOOL PLAGIARISM

plagiarism (plá'j • riz' • m) n. Taking the literary property of another, passing it off as one's own without appropriate attribution, and reaping from its use any benefit from an academic institution.

Committing plagiarism is a serious violation of any law school's code of academic conduct. If a violation is proven, the committee or other body that oversees the code may impose severe sanctions—ones that could affect a grade or credit for the course or even require suspension or expulsion from school. In addition, the school may require the administration to report the incident to the bar of any jurisdiction to which the sanctioned student applies.

Possible Sanctions

- Academic
- Disciplinary
- Both

Types

- Failing grade
- Suspension
- Expulsion
- Temporary notation on student record
- Permanent notation on student record
- Public reprimand
- Private reprimand
- Denial of certification for moral fitness for sitting for the Bar
- Combinations of the above

CHANGING CONTEXTS, CHANGING EXPECTATIONS

Writers must be aware of the customs, conventions, and expectations of their audiences. The overriding constant should be a diligent and meticulous attention to detail; writers should err on the side of providing, rather than omitting, reference information.

Undergraduate School

“You must acknowledge all material quoted, paraphrased, or summarized from any published or unpublished work. Failing to cite a source, deliberately or accidentally, is plagiarism—representing as your own the words or ideas of another.” *Harbrace College Handbook* 412 (12th ed., 1994). Undergraduate professors accept “common knowledge” without citation, that is, facts most readers would already know, and facts available from a wide variety of sources, for instance, the date of D-Day or the name of the previous U.S. President. Common knowledge is distinguished from a unique set of words. *The New St. Martin’s Handbook* 495 (4th ed., 1999).

Law School

The expectation is that writers will rely, almost exclusively, on existing authority. Thus, citing existing authority adds credibility to the writer’s discussion. Common knowledge generally derives from case law or statute and must be cited.

Student Collaboration: Students may share work products only up to the point that their professor authorizes team work.

Legal Practice

The frame of reference and expectations shift outside the academic environment. In practice, legal writers liberally borrow language from other sources; frequently, they collaborate on a project. Some lawyers write under the name of their supervising partner, judge, or government official. Occasionally, lawyers may write law review articles or publish CLE materials; then they adjust to outside expectations, which may require

careful source attribution. Nevertheless, like law school writers, lawyers continue to depend on legal citations to provide authority.

RULES FOR WORKING WITH AUTHORITY

Avoiding allegations of plagiarism requires knowing when to cite. Here are important rules and suggestions to follow when working with authority:

1. Acknowledge direct use of someone else's words.
2. Acknowledge any paraphrase of someone else's words.
3. Acknowledge direct use of someone else's idea.

Careful scholarship, which is especially important in an academic setting, requires adhering to two additional rules:

4. Acknowledge a source when your own analysis or conclusion builds on that source.
5. Acknowledge a source when your idea about a legal opinion came from a source other than the opinion itself.

ELECTRONIC DATABASES

Material obtained through any source must be attributed, including material obtained from electronic databases such as LexisNexis®; Westlaw®; and the Internet. Review the *ALWD Citation Manual* Rules 38, 39, and 40, and *The Bluebook* 17.3 for the rules on properly citing electronic sources.

EXERCISE

First skim the following materials, which are excerpted from primary and secondary sources. Then read the excerpted sample student memorandum that attempts to incorporate those sources. For each paragraph in the student memorandum, determine whether the student has avoided committing plagiarism and explain why or why not. Answers follow.

| Primary Source (as downloaded from Westlaw) | Sample Student Memorandum |
|--|---|
| <p data-bbox="235 562 730 646">Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 744 (Tex. App. 1995).</p> <p data-bbox="235 682 795 1522">The rationale behind the majority view is clear. The purpose of DR 2-108 is to protect the public's right to select the attorney of their choice. <i>Anderson</i>, 461 N.W.2d at 601; <i>Jacob</i>, 607 A.2d at 148; <i>Cohen</i>, 550 N.E.2d at 411; <i>Spiegel</i>, 811 S.W.2d at 530; see 2 Geoffrey C. Hazard, Jr. & W. William Hodes, <i>The Law of Lawyering</i> § 5.6:101 (1990); <i>Terry</i>, <i>supra</i>, at 1072; <i>Draper</i>, <i>supra</i>, at 163; <i>Penasack</i>, <i>supra</i>, at 901-03; <i>Tex. Comm. on Professional Ethics</i>, Op. 422, 48 <i>Tex.B.J.</i> 209 (1985). Indirect financial disincentives may interfere with this right just as much as direct covenants not to compete. A provision offering financial disincentives may force lawyers to give up their clients, thereby interfering with the client's freedom of choice. <i>Anderson</i>, 461 N.W.2d at 601; <i>Jacob</i>, 607 A.2d at 148; <i>Cohen</i>, 550 N.E.2d at 411; <i>Spiegel</i>, 811 S.W.2d at 530; <i>Hillman</i>, <i>supra</i>, § 2.3.3.2, at 32. This violates both the language and spirit of DR 2-108 by restricting the practice of law.</p> <p data-bbox="235 1558 795 1864">Whiteside directs us to a California Supreme Court opinion adopting the contrary position. See <i>Howard v. Babcock</i>, 6 Cal.4th 409, 25 Cal.Rptr.2d 80, 863 P.2d 150 (1993). In <i>Howard</i>, the court held that an agreement imposing a reasonable cost on departing partners who compete with the firm in a limited area is enforceable. <i>Id.</i> at 90, 863 P.2d at 160.</p> | <p data-bbox="824 640 1380 1039">¶1 Although agreements anticipating competition, like the one at issue, may ultimately prevent client grabbing, the courts often hold that the agreements are unenforceable. Kirstan Penasack, Student Author, <i>Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on Haight, Brown & Bonesteel v. Superior Court of Los Angeles County</i>, 5 <i>Geo. J. Leg. Ethics</i> 889, 892 (1992).</p> <p data-bbox="824 1045 1234 1081">Correct _____ Incorrect _____</p> <p data-bbox="824 1186 1380 1843">¶2 In holding these agreements unenforceable, the courts routinely rely on the legal profession's own per se ban on restrictive covenants of any form. The per se ban originated within the American Bar Association in 1961, was subsequently adopted in both the Model Code and the Model Rules, and has universally prevailed in state courts as well as bar ethics committees for three decades. Model Rule 5.6 and its Model Code counterpart DR 2-108, which forbid restrictions on the right of the lawyer to practice law, have been justified by the need for a lawyer's personal autonomy and the principle that clients should have an unfettered right to choose representation from the widest possible pool of lawyers.</p> <p data-bbox="824 1850 1234 1885">Correct _____ Incorrect _____</p> |

Secondary Sources (as downloaded from Westlaw)

Glen S. Draper, Student Author, *Enforcing Lawyers' Covenants Not to Compete*, 69 Wash. L. Rev. 161, 174-75 (1994).

The public interest in unfettered competition among attorneys is no greater than the public interest in unfettered competition in many professions. The public interest in freedom to choose one's attorney, for [*175 example], is surely no more significant than the public interest in choosing one's doctor. Attorneys' covenants not to compete are no more injurious to the public than those between other professionals. Therefore, courts should abandon the per se rule which applies solely to attorneys' covenants not to compete in favor of the reasonableness rule applicable to all other professions.

Kirstan Penasack, Student Author, *Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on Haight, Brown & Bonesteel v. Superior Court of Los Angeles County*, 5 Geo. J. Leg. Ethics 889, 892 (1992).

*892 Agreements anticipating competition would serve to ameliorate the effects of grabbing, except that courts routinely invalidate these agreements between lawyers. Why? The courts rely heavily on decisions of the profession's own bar ethics committees, which invalidate these agreements as violations of self-promulgated ethical standards. The crux of the problem is the profession's powerful, yet little known, [FN14] per se ban on restrictive covenants of any form. The per se ban originated within the American Bar Association in 1961, was subsequently adopted in both the Model Code and the Model Rules, and has universally prevailed in state courts as well as bar ethics committees for three decades.

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¶3 Courts following the majority rule reason that the public has a right to choose their attorneys. *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 744 (Tex. App. 1995) (internal citations omitted). As such, disincentives, whether direct or indirect, may ultimately interfere with the public's right to choose because attorneys could be required to give up certain clients. **Correct _____ Incorrect _____**

¶4 This reasoning, however, is open to attack. Doctors, accountants, and other professionals routinely enter into non-competition agreements, and the courts just as routinely hold them enforceable if they are "reasonable." The public interest in choosing one's doctor is as important as the public interest in choosing one's attorney. **Correct _____ Incorrect _____**

¶5 Recently, however, at least one jurisdiction, California, has refused to follow the per se rule followed by the vast majority of courts. *See Penasack*, 5 Geo. J. Leg. Ethics at 892. **Correct _____ Incorrect _____**

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| <p><i>Continued from previous page.</i></p> <p>Model Rule 5.6 and its Model Code counterpart DR 2-108, which forbid restrictions on the right of a lawyer to practice law, have been justified by the need for lawyer personal autonomy and the principle that clients should have an unfettered right to choose representation from the widest pool of lawyers.</p> <p>The California Court of Appeal, in <i>Haight, Brown & Bonesteel v. Superior Court of Los Angeles Co.</i>, [FN15] recently rejected the per se rule that resulted in the invalidation of agreements anticipating competition. The court recognized the principle of client choice, the traditional justification for invalidating outright bans on competition, but refused to hold that this public policy “places lawyers in a class apart from other business and professional partnerships,” [FN16] in which reasonable covenants not to compete are upheld as a valid means of protecting firms’ legitimate interests. . . .</p> | <p><i>Continued from previous page.</i></p> <p>¶6 Plaintiff Morgan Haley will rely on <i>Howard v. Babcock</i>, 863 P.2d 150 (Cal. 1993). In that case, the court held that an agreement imposing a reasonable cost on departing partners who compete with the firm in a limited area is enforceable. Correct _____ Incorrect _____</p> |
|--|--|

ANSWER KEY

¶1 **Correct.** Here the writer paraphrased from the source and properly acknowledged that source in the citation as required by Rule 2.

¶2 **Incorrect.** This passage violates Rules 1 and 2. The first sentence should be followed by a citation to the Penasack article because it is a direct paraphrase from that source. The rest of the paragraph is a direct quote. To avoid an allegation of plagiarism, that passage should be block quoted. The quote must be properly attributed through the use of a citation.

This is how the passage should be punctuated and cited:

In holding these agreements unenforceable, the courts routinely rely on the legal profession's own per se ban on restrictive covenants of any form.

Id.

The per se ban originated within the American Bar Association in 1961, was subsequently adopted in both the Model Code and the Model Rules, and has universally prevailed in state courts as well as bar ethics committees for three decades. Model Rule 5.6 and its Model Code counterpart DR 2-108, which forbid restrictions on the right of the lawyer to practice law, have been justified by the need for lawyer personal autonomy and the principle that clients should have an unfettered right to choose representation from the widest possible pool of lawyers.

Id.

¶3 **Correct.** This passage properly attributes the analysis—the rationale of the majority rule—to the source, which is consistent with Rule 3. Note, also, that the passage is authoritative because it does provide a source.

¶4 **Incorrect.** This passage violates Rule 3 because it expresses the same idea as the Draper article. To avoid an allegation of plagiarism, there should be citation to the Draper article.

This is how the passage should be cited:

This reasoning, however, is open to attack. Doctors, accountants, and other professionals routinely enter into non-competition agreements, and the courts just as routinely hold them enforceable if they are “reasonable.” Glen S. Draper, Student Author, *Enforcing Lawyers’ Covenants Not to Compete*, 69 Wash. L. Rev. 161, 174-75 (1994). The public interest in choosing one’s doctor is as important as the public interest in choosing one’s attorney. *Id.*

¶5 **Correct.** Here, consistent with Rules 4 and 5, the writer acknowledged the idea and case that came from another source, which the writer will now build upon in the rest of analysis. Determining when and how to comply with Rules 4 and 5, as well as when and how to use signals, can be complex. These matters likely will be discussed in your legal writing course.

¶6 **Incorrect.** Most of the second sentence (*the court held that an agreement imposing a reasonable cost on departing partners who compete with the firm in a limited area is enforceable*) is a direct quote from *Whiteside*. To avoid an allegation of plagiarism, that text should be punctuated with quotation marks, followed by a citation to *Whiteside*. Better yet, when discussing the facts, reasoning, and holding of a case, use your own words, followed by a proper citation. Moreover, in this situation, the *Howard* case is the better source to cite.

Sometimes, even when you are paraphrasing the facts and reasoning from a case, you may want to quote specific, important words. In this example, the term “reasonable cost” could be put in quotation marks.

HYPOTHETICALS FOR CLASS DISCUSSION

1. A second-year student submits a draft of a seminar paper that contains information attributed to several different A.L.R. annotations. In commenting on the paper draft, the teacher tells the student that A.L.R. annotations generally should not be cited as support for legal propositions. For the final version of the paper, the student takes out the citations to the A.L.R. but leaves the information taken from the annotations in the paper unattributed. Is the student guilty of plagiarism?

Guilty _____ Not guilty _____
Explain why:

2. In a research memorandum written for class, a first-year student places a citation to authority at the end of every sentence containing information taken from outside sources. However, the student fails to include quotation marks around specific words taken from some sources. Is the student guilty of plagiarism? How many words must the student take directly from a source before the student needs to indicate them as a direct quotation?

Guilty _____ Not guilty _____
Explain why:

3. Two first-year students talk about different arguments they are considering using in drafting a research memorandum. The assignment instructions allow students to discuss the case law involved in the memorandum but require that students draft the memorandum on their own. One student includes without attribution an argument that the other student discovered concerning a case. Is the student guilty of plagiarism? Does it matter whether the student phrases the argument in a

similar manner to the other student or in her own words? Does it matter if the first student found out about the argument in reviewing a draft of the second student's memorandum instead of finding out about the argument from just discussing the memorandum?

Guilty _____ *Not guilty* _____
Explain why:

4. A professor requires five drafts for a seminar paper, each due on a specified day, and each receiving a check or minus as part of the final grade. On a first draft, the professor recognizes major ideas that have not been attributed and discovers sloppy quotations that are missing the beginning or ending quotation marks. When questioned, the student admits that he typed the paper early that morning and did not take time to review his attribution or even spell check. He wanted to turn in something to avoid receiving a minus. Even though this was only a draft of the paper, and not the final product, the teacher charges him with plagiarism because the student attempted to receive academic credit: a check rather than a minus. Is this student guilty of academic plagiarism? If yes, should he be expelled?

Expel yes _____ *Expel no* _____
Explain why:

5. A third-year student hands in a seminar paper that she had written for an earlier class. Can a student plagiarize herself?

Guilty _____ *Not guilty* _____
Explain why:

6. A first-year student downloads a course outline from a national resource. Allowed to take anything into the final exam, he brings this professional outline. Is he guilty of plagiarism if he takes copies of it into the exam and uses language from it?

Guilty _____ *Not guilty* _____
Explain why:

7. An L.L.M. student whose first language is not English submits a thesis full of plagiarized material. In the student's home culture, unacknowledged use of published work is accepted and proper. Can the student be punished for plagiarism? Should the student be punished for plagiarism?

Can be punished. Yes _____ No _____ Should be punished. Yes _____ No _____
Explain why:

8. A law review note contains three major ideas taken from a non-identified Internet source. The student insists that the material is public knowledge and does not have to be attributed. If she has no record of the database, is there a proper method for attribution? If not, is she plagiarizing if she publishes the article without any attribution?

Guilty _____ Not guilty _____
Explain why:

9. For an open-book exam, a law professor allows students to bring any materials into the room: commercial outlines, class notes, study guides, case book, etc. If students repeat information from these sources, without identifying the sources, are they guilty of plagiarism?

Guilty _____ Not guilty _____
Explain why:

STUDENT ACKNOWLEDGEMENT FORM

Date: _____
[month, date, year]

I, _____,
[print name]

have read the plagiarism definition and reviewed correct techniques for attribution.

[signature]

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