

2005

Legal Briefs: Helpful But Also Hazardous

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LEGAL BRIEFS: HELPFUL BUT ALSO HAZARDOUS

BY BRIAN CRAIG

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With more courts requiring electronic filing of court documents, legal briefs are now more accessible than ever. On the one hand, this increased availability of legal briefs saves time and money for attorneys in researching and drafting their own briefs. On the other hand, as attorneys and law students increasingly rely on legal briefs written by others, issues arise with respect to professional responsibility, academic honesty, and infringement of intellectual property rights.

Prior to electronic or digital filing, many law libraries maintained bound volumes of U.S. Supreme Court briefs with the earliest collections beginning with coverage from 1854.² Courts and other law libraries also maintained collections of briefs but few contained large collections for multiple jurisdictions. More recently, law firms have started to maintain document management systems to store and later access their own briefs. Obtaining copies of legal briefs used to be burdensome and time-consuming. With technological advances, briefs are now just a few clicks away for anyone with access to the Internet.

Courts, government agencies, law firms, public interest groups, trade associations, and business entities often make legal briefs publicly available on their organizations' Web sites. Briefs can be found on the federal government Web sites for the Federal Trade Commission, U.S. Equal Employment Opportunity Commission, Securities and Exchange Commission, and the U.S.

Department of Justice. For example, the Office of the Solicitor General of the U.S. Department of Justice makes publicly available all briefs filed by the office since July 1998 and selected coverage of briefs filed from 1982–1996.³ Florida, Kentucky, North Dakota, Texas, and Wisconsin have also provided public access to state supreme courts briefs.⁴ Briefs are also available from the U.S. courts of appeals for the Seventh and Eighth Circuits.⁵ Likewise, many organizations that routinely submit merit and amicus curiae briefs with courts, such as the American Civil Liberties Union, make their briefs available to the public on their Web sites. Legal practitioners can also access briefs from fee-based Internet legal research services such as Westlaw®, LexisNexis®, and BriefServe and free Internet portals such as FindLaw®. Obtaining briefs used to be a cumbersome and time-consuming task. Now, legal briefs are much more accessible and will continue to become even more accessible in the future.

With this increased access to legal briefs, legal practitioners can use legal briefs in a number of beneficial ways. The importance of writing effective legal briefs has increased in recent years. To promote judicial economy, state and federal appellate courts have increased the frequency of deciding cases on the basis of briefs without oral argument. Since 1979, Rule 34(a) of the Federal Rules of Appellate Procedure authorizes federal courts of appeals to decide cases on the basis of the briefs alone without oral arguments. The Federal Rules of Civil Procedure also allow district courts to provide by local rule that, in absence of a

³ Available at <www.usdoj.gov/osg/briefs/search.html> (last visited November 17, 2004).

⁴ Florida: <www.floridasupremecourt.org/pub_info/index.shtml#summaries> (last visited November 17, 2004). Kentucky: <www.nku.edu/~chase/library/kysctbriefs.htm> (last visited November 17, 2004). North Dakota: <www.court.state.nd.us> (last visited November 17, 2004). Texas: <www.supreme.courts.state.tx.us/ebriefs> (last visited November 17, 2004). Wisconsin: <library.law.wisc.edu/electresources/databases/wb> (last visited November 17, 2004).

⁵ Seventh Circuit: <www.ca7.uscourts.gov/briefs.htm> (last visited November 17, 2004). Eighth Circuit: <www.ca8.uscourts.gov/brfs/brFrame.html> (last visited November 17, 2004).

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² R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 Am. J. Legal Hist. 482, 485 (1994).

request for oral argument, motions for summary judgment may be decided on briefs alone.⁶ To achieve success in today's legal climate, attorneys must learn how to write persuasive and effective legal briefs.

Benefits of Using Legal Briefs

Using briefs written by other attorneys can help brief writers in a number of ways. Attorneys and law students can improve their own writing skills by seeing how more experienced and seasoned attorneys construct and frame legal arguments. Unlike case law, where judges tend to use more objective language, attorneys use persuasive legal arguments and language in their legal briefs.

Reading briefs written by others can also help less experienced practitioners learn the proper brief contents and citation formats for particular courts. By downloading previously filed briefs, attorneys can save considerable time and money in creating the skeletal format of a brief pursuant to local court rules. As a caveat, practitioners should always remember to check their local court rules since the brief relied upon may be outdated or may be filled with errors.

Many courts, especially the U.S. courts of appeals, have stringent and varied local rules for brief contents. For example, briefs filed in the Eleventh Circuit must include a cover page, certificate of interested persons and corporate disclosure statement, statement regarding oral argument, table of contents, table of citations, statement regarding adoption of briefs of other parties, statement of jurisdiction, statement of the issues, statement of the case, summary of the argument, argument and citations of authority, conclusion, certificate of compliance, and certificate of service.⁷ By downloading a previously filed brief from the Eleventh Circuit, a less experienced attorney can save considerable time

instead of starting from scratch in drafting his or her original brief.

When attorneys and law students need to find legal precedent to support their arguments, legal briefs can be another legal research source in addition to traditional resources such as case law, statutes, regulations, treatises, bar journals, and law reviews. One commentator has observed that legal briefs "provide an excellent starting point for legal research because they enable a practitioner to get up to speed on an issue or topic without starting from scratch."⁸ Indeed, there are many advantages to using legal briefs in legal research and writing.

Although legal briefs are an excellent resource for attorneys, there are potential hazards when legal professionals rely too extensively on previously filed briefs.

Professional Responsibility and Ethical Issues

When an attorney borrows extensively from another attorney's legal brief and presents those original ideas as his or her own, questions of professional responsibility and ethics arise. *Black's Law Dictionary*⁹ defines plagiarism as the "deliberate and knowing presentation of another person's original ideas or creative expressions as one's own. Generally, plagiarism is immoral but not illegal."⁹

Attorneys and law students should exercise caution when borrowing from the text of another attorney's brief. The Supreme Court of Iowa held that an attorney's plagiarism of 18 pages from a treatise, and request for attorney fees for 80 hours of work preparing the brief, warranted suspension of his license for six months.¹⁰ The Supreme Court of Illinois held that an attorney who plagiarized published works in his LL.M. thesis warranted censure.¹¹ The Indiana Supreme Court similarly held that it was improper for an attorney to paste

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⁶ *Yamaha Corp. of America v. Stonecipher's Baldwin Pianos & Organs, Inc.*, 975 F.2d 300 (6th Cir. 1992). See also Beth Bates, Annotation, *Necessity of Oral Argument on Motion for Summary Judgment or Judgment on Pleadings in Federal Court*, 105 A.L.R. Fed. 755, 761 (1991).

⁷ 11th Cir. R. 28-1.

⁸ Thomas Keefe, *Finding Briefs Online*, 92 Ill. B.J. 373 (July 2004).

⁹ *Black's Law Dictionary* 1187 (8th ed. 2004).

¹⁰ Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Lane, 642 N.W.2d 296, 302 (Iowa 2002).

¹¹ *In re Lamberis*, 443 N.E.2d 549, 553 (Ill. 1982).

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more than 10 pages from an *American Law Reports* annotation directly into his brief.¹² Although there is no bright-line test for what constitutes plagiarism and what will merit attorney discipline, extensively borrowing from another attorney’s brief and submitting the brief to the court as one’s own work certainly raise ethical concerns that attorneys should consider when relying on briefs written by others.

Academic Honesty Issues

With legal briefs so accessible, law students may have a greater tendency to borrow extensively from briefs written by other attorneys and submit the work as their own. The Internet has increased concerns by academic officials for many academic programs. According to one commentator, “With Internet and cellular phone technology, and some amazing ingenuity, it’s easier than it once was to cheat on tests or plagiarize term papers on the collegiate level.”¹³

All educational institutions have an honor code or some policy with respect to academic honesty. For example, the University of Minnesota Law School Honor Code states, “It is a violation of this Honor Code . . . to submit as one’s own any written assignment partially or totally written by another unless specifically permitted to do so by the written instructions governing the assignment.”¹⁴ Other law schools have similar policies. Legal research and writing instructors should remind students about their institution’s academic honesty policies when giving out assignments for legal briefs and moot court competitions. Law schools and moot court competition coordinators may consider reviewing and possibly revising their honor codes and policies to specifically address the extent to which law students can use and rely on legal briefs written by other attorneys. Law students should

also be apprised of the possible ramifications of academic dishonesty when seeking admission to practice law after graduation from law school.

Copyright Issues

Besides ethical and academic honesty concerns, many law students and attorneys may not be aware that borrowing from another attorney’s legal brief may constitute copyright infringement. Whether or not intellectual property rights exist with respect to legal briefs filed with courts remains a somewhat unsettled question. There appears to be little case law directly addressing the issue of whether legal briefs and other court documents receive copyright protection although some commentators have expressed opinions on the topic. According to one author, “Filed legal documents become public records, and traditionally have not been considered privately owned intellectual property.”¹⁵ Another commentator has suggested that “court documents such as legal briefs cannot be copyrighted.”¹⁶ Conversely, another author suggests that “[l]ike other litigation materials, legal briefs are copyrightable.”¹⁷

In *WPOW, Inc. v. MRLJ Enterprises*,¹⁸ the U.S. District Court for the District of Columbia held that the defendant infringed the plaintiff’s copyright when the defendant copied the portion of an exhibit to the plaintiff’s earlier license application with the Federal Communications Commission. “By analogy, a law firm or client could be found liable for unauthorized copying of portions of another firm’s legal brief even though the brief was filed and subject to public review.”¹⁹ Works of the federal government and federal government employees receive no copyright

¹² K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32-MAY Colo. Law. 53 (2003).

¹⁶ Steven J. Melamut, *Pursuing Fair Use, Law Libraries, and Electronic Reserves*, 92 Law Libr. J. 157, 173 (2000).

¹⁷ Jonathan S. Jennings, *Copyright Pitfalls for Law Firms*, 44-MAY Fed. Law. 52, 53 (1997).

¹⁸ 584 F. Supp. 132 (D.D.C. 1984).

¹⁹ Jennings, *supra* note 17, at 53.

¹² Frith v. State, 325 N.E.2d 186, 188–189 (Ind. 1975).

¹³ Steve Koehler, *College Cheaters Getting Craftier*, Springfield News-Leader, Oct. 31, 2003, at 1.

¹⁴ University of Minnesota Law Honor Code 3.02.

protection²⁰ but legal briefs written by state and local governments as well as private parties may receive some copyright protection.²¹

Law firms should establish policies to safeguard and protect their firm's intellectual property in legal briefs and to set policies when attorneys rely on briefs written by other attorneys. Additionally, law school research and writing instructors should carefully advise law students about the potential liability of relying extensively on legal briefs written by other attorneys.

Conclusion

When relying on legal briefs, attorneys and law students should exercise reasonable discretion. Obviously citing to the same cases as another brief would not pose any problems but pasting several pages of text verbatim from another brief would certainly raise some red flags. By following reasonable judgment in relying on briefs written by others, brief writers can write more persuasive and effective legal briefs themselves.

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²⁰ 17 U.S.C.A. § 105.

²¹ See generally Carolyn Elefant, *Are Legal Briefs Copyrightable: Yes or No and Why It Matters*, available at <www.his.com/~israel/loce/press.html>.