


Fall 3-2-2004










































Discipline: An Academic Dean's Perspective on Dealing with Plagiarism

Kevin J. Worthen

Follow this and additional works at: <https://digitalcommons.law.byu.edu/elj>

 Part of the [Education Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Kevin J. Worthen,                                          

DISCIPLINE: AN ACADEMIC DEAN'S PERSPECTIVE ON DEALING WITH PLAGIARISM

*Kevin J. Worthen**

Three months after I was convinced by our very persuasive Dean that, contrary to my first thought, being an Associate Academic Dean was not such a dumb idea, I was confronted with a situation that reinforced my initial impression. On my desk sat a paper submitted by a student in a law school course. More than one-half of the paper was copied word for word without any attribution being given. Dozens of other lines contained material that should have been included in quotation marks, but was not. Some of the material quoted without attribution came from sources cited in other portions of the paper, some from sources that were never cited at all. Further investigation revealed a similar pattern in another paper written by the same student. It was in my view—to use the term that even by then had become *passé*—the mother of all plagiarism cases.¹

The faculty member who first discovered the problem was demanding immediate and severe punishment. Nothing short of a lifetime ban from the law school and the practice of law would suffice. On the other hand, other faculty members who knew the student well (including one who had a connection with the second paper) were insistent that the student was incapable of the kind of intentional deceit that the initial review of the paper seemed to suggest. It had to be, they insisted, merely a gross lack of understanding on the student's part—a failure of the educational process, not of the student's moral character. In between these factions was a student whose life had suddenly been turned completely upside down—instead of graduating from law school and taking the bar exam, the student now faced dismissal from the law school and a ban on practicing law. If the worst charges were true, the upheaval was not only completely self-inflicted, but fully deserved. Yet, as extreme as the case seemed to be, there were still some gray areas.

* Assoc. Dean for Academic Affairs and Prof. of Law, J. Reuben Clark Law Sch., Brigham Young U. This essay is based largely on remarks made at the Committee on Libraries and Technology session of the 2004 Association of American Law Schools Annual Meeting.

1. Since this is a paper on plagiarism, I suppose I should to cite Saddam, or whomever he was quoting.

This was not a case in which a student had simply copied an entire work and submitted it, claiming original authorship. There were indications that at least some of the problems with the papers were the result of incredible sloppiness rather than careful deceit, and some of the student's explanations rang true. Still, the problems were pervasive in both papers, and some of the student's explanations simply did not add up.

Unfortunately, over the years, I have come to conclude that such problems are not a once-in-a-tenure experience for academic deans and others who deal with plagiarism problems in law school. While this case is the most extreme case of plagiarism I have encountered in my nearly five years as Academic Dean, it is not the only one. Although each case is unique, all involve difficult questions because plagiarism is, as one scholar has observed, "an academic capital offense, punishable by academic death."² With so much on the line, how should Academic Deans proceed once it is clear that plagiarism has occurred?

I suggest that the first thing Academic Deans should do is remember that they are involved in this process as a representative of a particular kind of institution—a law school—and that law schools have, among other things, two functions: (1) to educate lawyers and leaders; and (2) to certify to the bar (and indirectly to the public) that their graduates possess the skills, abilities, and characteristics that qualify them to enter the legal profession. Given those functions, I believe that once plagiarism is discovered and confirmed,³ the Academic Dean's role is to "discipline" those who have plagiarized.

I use the term "discipline" rather than "punish" advisedly because discipline implies an educational function.⁴ Because Academic Deans represent educational institutions, their principal role should involve some education.⁵ But the education involved in discipline is different

2. K. R. St. Onge, *The Melancholy Anatomy of Plagiarism* 39 (Rowman & Littlefield 1988).

3. The discussion that follows assumes that plagiarism can occur without intent to mislead and that, accordingly, it is possible for the Academic Dean to become involved after an initial finding of plagiarism has been made but before there has been any conclusion as to the intent behind, or the consequences of, the plagiarism. Those assumptions require that plagiarism be defined in such a way that intent to mislead is not an element of the definition but, instead, a factor relevant at the sanction stage. See Teri LeClerq, *Failure to Teach: Due Process and Law School Plagiarism*, J. Leg. Educ. (June 1999).

4. The Oxford English Dictionary notes that "in earlier use," discipline meant "to instruct, educate, train; in later use, more especially, to train habits of order and subordination; to bring under control." *Oxford English Dictionary Online* <<http://dictionary.oed.com/entrance.dtl>> (accessed 2003).

5. Courts have granted educational institutions extraordinary leeway in dealing with matters involving academic misconduct. This license is due in part to the need to preserve an atmosphere in which this educational function can occur. See e.g. *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (1984) (noting that the due process requirements in such cases should take into account "that the student's welfare is best served by a nonadversarial setting which emphasizes the educational functions of disciplinary proceedings").

from the kind of teaching we normally use in law school classrooms. As the Oxford English Dictionary explains,

etymologically, discipline, as pertaining to the disciple . . . is antithetical to doctrine, [which is] the property of the doctor or teacher; hence in the history of the words, doctrine is more concerned with abstract theory, and discipline with practice or exercise.⁶

Thus, while the principal (though not exclusive) role of an Academic Dean dealing with plagiarism is an educational role rather than a punitive one, the education is of a particular type—it is designed to shape practical habits (such as being precise, attentive to details, thorough, and honest) that the students will need in order to excel in the legal profession. Despite all the benefits of a stern lecture in this regard, the mere conveyance of abstract information is usually inadequate. Often, the best way to provide this kind of practical education is through the imposition of consequences that both help the student understand the specific shortcomings that caused the problem and also provide incentives and other assistance for the student to correct those shortcomings.

Accordingly, once it has been determined that plagiarism occurred, the first step for the Academic Dean is to determine what particular shortcoming led to the plagiarism. The student might have been lazy, sloppy, ignorant, or dishonest (to pick four of the most common causes). In making that determination, the Academic Dean should keep two things in mind. First, most, if not all, of the possible root causes of the problem (including the four most common causes noted above) rest on shortcomings that can be fatal to a legal career and harmful to clients who are victims of the shortcomings. Second, while each of the possible causes might call for a different form of discipline, none renders the conduct something other than plagiarism under what I believe is the best definition for law school purposes—a definition in which intent to deceive is not an element of the basic offense.⁷

With respect to this second point, the educational process should begin immediately—in the first meeting with the student after plagiarism is discovered. It is critical that the Academic Dean eliminate at the outset the most common student misunderstanding about plagiarism: that it is solely an “academic” crime that has no relevant counterpart outside the law school context. Some students believe that plagiarism is a problem caused by failure to understand citation conventions. Others assert, “In my summer clerkship, lawyers ‘borrowed’ phrases, sentences, forms,

6. *Id.*

7. See Terri LeClerq, *supra* n. 3.

entire sections of briefs from one another without attribution all the time. Why all the fuss? Isn't this something that will be a non-issue the day I graduate?" This very common misperception (which is shared by many lawyers and, I am afraid, by a few law professors) should be unequivocally corrected early in the process. In my view, what makes plagiarism so unacceptable in law school is that, regardless of the extent or the intent, it has the potential to mislead someone in a way that will result in unearned benefit to the plagiarizer.

Plagiarism is such a serious offense in law school, therefore, not because we are so picky about a unique citation system or because we are academics rather than "real lawyers," but because at its core plagiarism creates the potential for deception, and deception, whether deliberate or inadvertent, cannot be countenanced in the practice of law. A student who submits plagiarized work (whether intentionally or not) creates the risk (deliberately or inadvertently) that he or she will receive a benefit (a higher grade, publication in a journal, an award, etc.) solely by creating the mistaken belief that the student has done more work or been more creative than is actually the case. The problem is not that the student is careless about something that is akin to punctuation (the comparison that some students use for inadvertent plagiarism), but that he or she is careless about something that can seriously mislead the reader in ways that redound to the benefit of the student.

Thus, the proper analogy to the practice of law is not how a judge would react to finding out that there should have been quotation marks in several places in the brief or that a citation was missing from a sentence, but rather how the judge would react to discovering that counsel had (either deliberately or inadvertently) failed to disclose a critical fact (e.g., that a key decision had been overruled or that a key element was missing from the statement of facts) when that critical fact might have caused the judge to rule against the attorney. In both instances, the key wrong is that the actor does something (either intentionally or not) that could mislead someone into granting the actor a benefit that might not be deserved or just.

Conveying this understanding to the students is, in my view, one of the critical educational components of the discipline process.⁸ Equally

8. The definition of plagiarism adopted by the BYU Law School attempts to convey this critical point.

Plagiarism is the failure to give sufficient attribution to the words, ideas, or data of others that have been incorporated into a work which an author submits for academic credit or other benefit. Attribution is sufficient if it adequately informs and, therefore, does not materially mislead a reasonable reader as to the source of the words, ideas, or data. Attribution (or the lack thereof) is materially misleading *if it could cause a reasonable reader to be mistaken as to the source of the words, ideas, or data in a way that could benefit the author submitting the work.* (Emphasis added).

important is that students fully comprehend that, given human nature, once someone is misled in a way that could lead to a student's receiving an undeserved benefit, the person who is misled will be suspicious as to that student's intent, even if it was entirely honorable. This skepticism is understandable, and it might be inevitable because it is very difficult to determine the true nature of the student's intent after the fact. Thus, regardless of intent, students who plagiarize place themselves in a situation in which they will have to convince someone who has been misled that, even though the student stood to gain from the misrepresentation, it was not intentional. In the competitive environments of law school and the practice of law, students need to understand that this is not a good position to be in.

One of the best ways to help students understand the need to avoid being in such an unenviable position is to allow them to experience the full consequences of being in that position. Thus, I believe it is best to leave the initial decision as to the course-related sanction for plagiarism to the professor who was potentially (or actually) misled by the plagiarism. Moreover, in making the final decision as to whether the plagiarism is intentional (and therefore potentially deserving of sanctions that go beyond the particular course), our law school requires the student to meet with an ad hoc committee consisting of the Academic Dean and two faculty members chosen at random. Thus, students who plagiarize experience the unpleasant task of trying to convince the faculty member who was potentially misled, as well as three other faculty members, that the plagiarism—though potentially beneficial to the student—was unintentional.⁹

Having that kind of experience might be the best way for students to come to a full understanding of the need to do whatever it takes (giving extra care to details, spending extra time, etc.) to avoid misleading others. Once they have had that experience, they are likely to view a failing grade on the particular assignment (the most common sanction imposed by the individual faculty member) as entirely just, and, provided that the plagiarism was unintentional, there might be no need for any further

9. This is not to imply that the burden of proof on the intent issue is on the student. At BYU, a finding that the plagiarism is intentional will be made only when there is clear and convincing evidence of that fact. (The determination as to whether plagiarism occurred at all is made under a preponderance of the evidence standard). However, the initial burden of proof (as opposed to the burden of persuasion) is typically on the student because once it has been determined that plagiarism has occurred, it is typically up to the student to explain how the problem occurred. In any event, I am confident that most students feel that they have to convince the faculty members of their lack of intent, and it is that subjective perception and the discomfort, if not terror, that usually accompanies it that produces a significant portion of the learning that can occur in this part of the "discipline" process.

sanction or discipline.¹⁰

The discipline process obviously becomes more involved if the plagiarism is determined to be intentional; that is, if the student intended to mislead the professor as to the true source of the work. Because it involves subjective intent, and because the consequences are so great, a finding of intentionality is not easy to make. After my initial experience making this decision alone, our law school changed its policy to provide for an ad hoc committee (consisting of the Academic Dean and two faculty members chosen at random) to consider that issue in every plagiarism case. I think that was a wise procedural change for both the Academic Dean and the student. Still, except for the rare case involving a full confession or the equally unusual situation in which an entire paper is plagiarized from one or two sources without any attribution, the determination of intent is not easy, even for three people.

There are, however, four main factors that provide helpful focus in making the determination.¹¹ None of these factors is determinative by itself. Yet, when considered together, they shed important light on the decision. The first factor is the nature of the plagiarism. If the source is cited but quotation marks are not used to set off a direct quote, the plagiarism seems less likely to be intentional because the amount of potential gain is somewhat small¹² and the chance of detection relatively great.¹³ On the other hand, word-for-word copying without any attribution is more likely to be intentional.

The second factor is the amount of plagiarism. Where a student has plagiarized a single line in an otherwise original and lengthy paper, the plagiarism is not likely to be intentional, again because the amount of potential unearned benefit is relatively small.

The third factor is the materiality of the plagiarism—how much did the student stand to gain if the professor thought the work was the student's rather than someone else's? In this respect, plagiarism of the analytical portions of the paper is, in my view, more likely to be

10. Depending on the root cause of the plagiarism, however, there might need to be additional follow-up or sanctions in order to truly "discipline" the student completely. For example, we required one student who did not understand the research process to take an undergraduate research course. Following that, the student was required to turn in a draft of his next paper, along with a research list and research notes to the ad hoc committee. He was then required to submit the final paper to the committee.

11. These same factors can also aid in determining the exact nature of the problem and the need for any additional follow-up beyond the sanction imposed by the faculty member in the course.

12. This is especially true in law school papers, which are usually graded more on content, clarity, analysis, and thoroughness rather than linguistic style.

13. It is certainly possible that either the thrill of cheating or some deep psychological need to be caught can cause some to intentionally try to mislead while leaving such obvious clues, but my guess is that such cases are rare.

intentional than plagiarism of the "facts" section.

Finally, as a lesser though still important matter, the believability of the explanation offered by the student should be considered. Where a student's explanation is plausible and consistent, it is much easier to conclude that the plagiarism was unintentional than where the explanation is contrived and internally inconsistent. For example, one student claimed to misunderstand the need to use quotation marks with articles as opposed to cases. This claim was easy to believe, given that her paper consistently omitted quotation marks in citations to articles, but consistently included them in citations to cases. Had she tried to offer different and contradictory explanations for each of the several instances of plagiarism in the paper, it would have been much more difficult to believe her.

The finding on the issue of intent is critical to the determination of the appropriate sanction. If the plagiarism is unintentional, there might be a wide variety of appropriate sanctions. As mentioned earlier, often a grade penalty is most appropriate. In some minor cases, reworking the assignment might be sufficient. In others, submission of further assignments might be necessary. In one case in which it became clear that the student did not know how to make and keep research notes, the student was required to attend an undergraduate class on the subject and then to submit drafts of his next law school paper, along with a bibliography and research notes, to the ad hoc committee that considered his case. The key, again, is to help the student recognize and correct the deficiencies that led to the problem. This is the ultimate goal of the discipline process.

On the other hand, if the plagiarism is intentional, the most severe sanctions of dismissal or suspension must be given serious consideration. It is in this respect that the law school's certification function begins to assume more importance. Even though individual state bar associations are ultimately responsible for determining the fitness of individuals to practice law, the law school has a critical role to play as well. In my opinion, the law school must be certain that students to whom it grants degrees are, as far as can be known, fully qualified to practice in a profession in which people's hopes, dreams, fortunes, rights, and sometimes very lives depend on the trustworthiness of those in the profession. If a law student has intentionally attempted to mislead a professor or others, the law school has an obligation both to itself and to the general public to help the student understand the unacceptability of such conduct and make the necessary life changes to ensure that it will not happen again, even under extreme pressure. The ability to be truthful under pressure is crucial to the successful practice of law, and a

finding of intentional plagiarism casts serious and substantial doubts on a student's ability to practice successfully. Once that kind of doubt exists, the burden shifts to the student.

It is neither easy nor helpful to attempt to detail in advance how a student who is found to have intentionally plagiarized overcomes that burden. In the one instance when I was involved in making such a finding, the student was dismissed from the law school with the proviso that the student could apply for readmission after a waiting period. I determined that the student should not be given specific steps that had to be completed before readmission would be granted. Instead, the student was informed that readmission would be granted only if the student convinced at least four of the five members of an ad hoc faculty committee (none of whom was involved in the dismissal decision) by clear and convincing evidence that the student had fully understood and accepted responsibility for the wrongful conduct and that there had been changes in the student's life to illustrate that the student was now capable of being fully truthful in all areas of life, especially in difficult and stressful situations. The specific actions the student was to take and the kinds of evidence that would suffice were intentionally left vague in order to require the student to struggle with the need to fully evaluate which weaknesses had led to the problem, how those weaknesses could be overcome, and what things could be presented as evidence that changes had taken place. I believe that the kinds of changes that are required to "redeem" a student who has intentionally plagiarized occur only as a result of sincere internal restructuring, which might sometimes require professional help. That process is not an easy or superficial one, and it is not likely to occur if the students view their task as completing a checklist of specific activities.

I believe that many of those who engage in intentional plagiarism are capable of experiencing the kind of character changes that will allow them to become lawyers in whom others can place their full confidence and trust. If they cannot make the necessary changes, they should not be allowed to graduate or practice law. On the other hand, if they can, they should be allowed to do so. A proper disciplinary process can assist those who are willing to make the extraordinary effort to make that change, just as it can assist in the more minor changes needed in less egregious cases. Positive change is the ultimate goal of all proper education, particularly the kind of disciplinary education that plagiarism cases require.