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IF YOU DON'T PUBLISH YOU'LL PERISH BUT TO PLAGIARIZE IS ALSO TO PERISH - By Justin Cotton, Kim Lovegrove and Candice Cham

The old adage is that "speed kills", and in our busy professional lives, sometimes the pressures of time leads lawyers to cut corners with their published work. This can lead to a failure to provide due acknowledgement to original works.

The cases on point suggest that such failure is rarely by design, rather it is inadvertent or by accident. An author may simply forget to acknowledge a citation because at the time the material was perused, the quote was not immediately and contemporaneously noted. It could have been a situation where a passage was read, then another and another and the writer by way of recollection, synthesized or synopsised material that was substantially the same as that attributable to another author, thus crystallizing the inadvertent vice. Further the writer may have with the passage of time mixed up his or her original thinking with that of another. Very human failings indeed, but failings that can have dire ramifications in a world where IP is carefully guarded in an environment of academic and writer assumption of accurate and honest attribution.

What must be hammered home is that plagiarism, or the failure to properly attribute a source of information, is dangerous territory and can destroy the reputation and credibility of a lawyer, or any other professional for that matter.

In the academic fraternity, there is an old saying "publish or perish", but maybe there should be a proviso i.e. if you publish and you don't attribute then you may also perish.

Producing publications is one of the central fabrics of marketing for any profession as it assists in conveying the expertise of a person or a firm to a vast audience. The production and dissemination of written work assists in building up the brand of a company as well as the credibility and reputation of the people associated with that company.

The media has demonstrated how quickly the credibility and expertise of a person in any industry can be destroyed once it is uncovered that written work produced by that person was misappropriated. Such a misappropriation can occur through insufficient attribution to sources of

published information.

When publishing articles and seminar papers, legal practitioners need to be on guard to ensure they adequately acknowledge any source material they use. There does not need to be an intention to wrongfully appropriate someone else's creation, it may simply be a situation where a new publication inadvertently fails to sufficiently acknowledge earlier material. An example of this is where the same references are made that have been obtained 'second hand' from another source (i.e. an intermediary source) but without properly acknowledging the intermediary source.

If an allegation of plagiarism is made against a solicitor, then if that allegation is substantiated or whilst it remains unresolved it may be a relevant matter for consideration as to whether a person is a fit and proper person to practise as a solicitor. If there is any doubt as to whether a matter should be disclosed to the Legal Services Board, then one should err on the side of caution and decide to disclose, because anything less than a full and frank disclosure may itself amount to professional misconduct.

The Rigour

If one is intent on publishing or writing books, articles or columns one must embrace a meticulous proper attribution rigour. There is no vice in being pedantic when it comes time for publication, nor is there any vice in being 'anally retentive'; indeed such predilections in the realm of publication would be better characterised as virtues.

Whenever a writer references other material, then he or she should quote the passage verbatim along with the correct citation with an overwhelming sense of immediacy: "cite it, quote it and reference it forthwith" should be the mantra. The danger is to defer the citation whereupon one could forget to attribute, albeit on account of work pressures or for being lackadaisical.

If one applies the rigour one will never slip up or transgress.



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The Fit and Proper Person test

Section 2.4.4 of the *Legal Profession Act 2004* (Vic) sets out the matters that the Board may take into account in considering whether or not the person is, or is no longer, a fit and proper person to hold a local practicing certificate.

Issues involving plagiarism have been dealt with by the courts. In *Re H [2007] QSC 34*, the facts involved an Applicant for admission as a legal practitioner. The applicant had faced allegations of plagiarism as a result of insufficient attribution to an article ("the Article") which he had relied upon in preparing a trade law paper, prior to his admission. The Supreme Court of Queensland had to determine whether or not the applicant had engaged in plagiarism.

It was noted there were several sentences in the Applicant's paper which were simply copied from the Article but were footnoted. The Applicant also referred to sources which the Article referred to and, rather than attribute the information to the author of the Article, attributed the information to the sources.

The Court held that the applicant had only engaged in "poor work"^[i], but not plagiarism. The Court stated that it was "*unlikely that the applicant was intending to pass off some of this work as his own*" because the applicant had at least directed the examiner in several places to that work.^[ii] Therefore, the plagiarism allegations would not be a barrier, in this case, to the applicant's admission as a solicitor, because plagiarism was not established.

Regardless of the finding in this case, there is still an obligation on legal practitioners to disclose matters which might reasonably be regarded as touching on the question of the practitioner's fitness to practice. And of course a failure to disclose would be regarded seriously if the original issues ever came to light. The old adage of the covering of one's tracks being worse than the original offence comes to mind.

Failure to Disclose

Failure to make a full and frank disclosure can have serious ramifications. In another case, allegations of misconduct while studying for a university degree led to a practitioner being 'struck off'. In *Re Legal Profession Act 2004; re OG, a lawyer [2007] VSC 520*, the lawyer OG

was struck off the roll for not fully disclosing an academic penalty he had incurred. The penalty was for alleged collusion during university study. These problems were compounded as OG had filed a false affidavit relating to the misconduct.

In another decision, again concerning prior academic misconduct, the Tasmanian Supreme Court eventually dismissed the Law Society's arguments against both the applicant for admission (R) and R's parents. The case was *Law Society of Tasmania v R. [2003] TASSC 9*, wherein the Law Society of Tasmania had commenced proceedings against the solicitor for failing, prior to admission, to reveal that the University of Tasmania had made a finding of academic misconduct. In addition, the Law Society also commenced proceedings against the parents (both lawyers) for not disclosing the determination of the University of Tasmania when they moved R's admission.

Although the applications by the Supreme Court of Tasmania were eventually dismissed, the case still demonstrates the seriousness of failing to disclose matters which may touch on whether a person is a fit and proper person to hold a practising certificate. Further the perceived dishonesty that has troubled the courts may not benefit the practitioner personally but may be done to assist another. Nevertheless, anything less than full candour may suggest unfitness to practice on the part of the legal practitioner.

Issues in Co-Authorship

The obligation to ensure that material is adequately sourced and acknowledged is not discharged when an article is written by two or more authors, particularly when the article or book is authored in such a way that it is impossible to distinguish one party's input from the other. Co-authors must ensure that material presented by their fellow co-author also has adequate attribution, as failing to do so could expose both authors to accusations of plagiarism.

Co-authors can avoid this risk by setting out what sections of the article or book have come from each co-author. It would also be worthwhile for co-authors and legal practitioners who are keen on publishing to investigate available computer programs which automatically check for plagiarism.



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Conclusion

It is imperative that legal practitioners, when preparing papers or articles for publication, are cautious to the point of being pedantic in providing due acknowledgement for material obtained from elsewhere. It is important to develop a painstaking rigour by footnoting contemporaneously when sourcing material. This is for the protection of the practitioner themselves, but also because morally it is the right thing to do. This also extends to the practice of an undergraduate who will at some future point need to apply for admission as a legal practitioner.

Care and diligence needs to be deployed in inserting quotation marks, footnotes, and ensuring that any intermediary source be referenced, as well as the original source.

If there has been any incurrance of an academic penalty or any other allegation of misconduct involving plagiarism or “collusion”, then the wisest course is full and frank disclosure at the time of application for admission or renewal of a practising certificate. Again, this is the morally correct course but will also prevent the problem escalating and becoming an accusation of failing to disclose.

Should there be any doubt as to your obligations in this realm, or any possible exposure, you should seek prompt legal advice from an informed and impartial source.

^[i][2007] QSC 34 at 18.

^[ii][2007] QSC 34 at 26.

Both Justin Cotton and Kim Lovegrove have for many years been practitioner advocates. Justin heads the Practitioner Advocacy area of the firm and has represented solicitors, building practitioners, and other professionals in disciplinary hearings. Candice Cham is a lawyer of Lovegrove & Lord and has practiced in practitioner advocacy.

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