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Breaking Bad Briefs

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To "break bad": "American Southwest slang phrase. . . meaning to challenge conventions, to defy authority and to skirt the edges of the law."
-Urban Dictionary

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A good legal brief, penned methodically and mindfully,[1] in quietude, word-by-word by a thoughtful legal writer can change minds. A bad legal brief, treated by the writer as a procedural formality, a perceived distraction from "real lawyering" in the conference room or the courtroom, is a problem—for the judge, opposing counsel, the parties, our system, and the brief-writer.

The public learns of a landmark Supreme Court decision that effects societal change. Yet such a remarkable culmination sparks with the unglamorous work of the brief-writer at the trial level. The docket of the pivotal decision of *Obergefell v. Hodges,*[2] legalizing same-sex marriage, tracks at least 256 filed briefs, including trial-level motions to dismiss and

1. As an initial matter, some law professors have questioned whether a senior law firm partner (or paying client) would ever encourage or condone "slow" writing in a profession already plagued by high legal bills. Others suggest that tailored or "bespoke" brief-drafting is inappropriate in the context of certain criminal law work, immigration cases, or other "routine" filings. As the cases in this article—and the words of judges therein—show, however, no matter what type of case (and indeed, including criminal law and immigration cases), lack of attention to quality in briefs can pose a detriment to a court's ability to adjudicate cases fairly and efficiently.

2. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

motions *in limine*, not even counting the district court dockets of several related cases. Writing an effective, or better yet an impactful, brief is a disciplined endeavor, even for a seemingly straightforward legal dispute. The author must hone the pressing legal issues down to their core. Identify the correct procedural vehicle at the pertinent stage in the case for conveying issues, arguments, and proposed actions to the court. Review the court's brief-submission rules for substantive mandates and technical constraints. Unearth statutes and cases on point. Read and synthesize cases in the proper jurisdiction. Extract rules of law. Cherry-pick the best, most appropriate cases to illustrate the governing rules. Organize arguments to persuade the readers—the judge and opposing counsel—of the just result. Relay the legal rules clearly through defined terms, elements, or factors, and tie each component to the client's facts. Craft logic frameworks. Structure paragraphs and sentences to balance language concision with completeness of analysis. Curate words and phrases to convey themes. Caulk cracks made by false assumptions about the reader's breadth of knowledge and ready command of the facts and law. Fine-tune iterative drafts to shore up arguments and polish the packaging. Whether the brief is a short "quickhitter" motion to compel a dilatory party's compliance with discovery rules or a lengthy multi-issue motion for summary judgment or appellate brief, this process mandates diligence and respect for the role of legal writing in our judicial system.

Outside of oral arguments and case status conferences, which are time-constrained and riddled with competing stimuli, a brief is the only chance for a lawyer to communicate directly with a judge about the legal issues in a client's case. The brief-writer has a prime opportunity "to educate and guide the court's decision," in a venue sheltered from the distractions of the live courtroom.[3] Therefore, "[a]ccuracy in *every* respect is an essential aspect of a helpful brief,"[4] including procedural references, standards of review, substantive rules, case facts, and citations to the record and legal authority. When lawyers on opposing sides of a litigation invest time in quality brief-writing and submit written work product compliant with court rules, a case can sail along. Judges can "forg[e] enlightened decisions" efficiently.[5] However, when lawyers on one side or multiple sides of a case punt brief-writing duties or ignore court rules governing written submissions, the system can falter. Unfortunately, based upon the number

3. *In re* Witt, 481 B.R. 468, 473 (N.D. Ind. Bankr. 2012); *see also* Litton Systems, Inc. v. Sundstrand Corp., 750 F.2d 952, 955 n.1 (Fed. Cir. 1984) (the purpose of a brief "is to aid the court in reaching a correct and just decision").

4. United States v. Price, 44 M.J. 430 n.1 (C.A.A.F. 1997).

5. As stated in Reyes-Garcia v. Rodriguez & Del Valle, Inc., 82 F.3d 11, 14 (1st Cir. 1996), procedural rules governing written court submissions "establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions."

of published and unpublished judicial opinions in which judges remonstrate the poor quality of the briefs submitted by counsel, bad briefing is all too common in federal and state courts. Judges, as "major consumer[s] of legal writing,"[6] provide an invaluable source of information about the role and quality of written attorney work within our profession, and how good and bad brief-writing directly affects the judicial process.

In a 2014 article,[7] I summarized trends in so-called "benchslaps"—admonitions by federal and state judges of attorneys who file briefs that: (1) include incomprehensible structural logic or language; (2) omit required substantive components; (3) mishandle case facts; (4) misuse the applicable law; (5) defy procedural and formatting rules; (6) contain rampant typographical, grammatical, general proofreading, and citation errors; (7) exhibit a disrespectful tone; and (8) are late.[8] To identify possible root causes of deficient written attorney work product (which I perceive as a *problem* within our system, but a fixable one), I considered how lawyers might submit sub-standard briefs, or flout court-imposed legal writing rules, out of "ignorance, apathy, arrogance, cost-benefit analysis, lack of respect for the system, and indifference to the effect of behavior on others."[9] I proposed solutions such as: (1) clarifying the context for law students and new lawyers about why quality legal writing is important for our judicial system to function well; (2) modifying court rules to include more overt criteria for briefs' substantive content and organization, and ramifications of non-compliance (e.g., sanctions); (3) reinforcing high legal writing standards as a criterion of professionalism (e.g., incorporating a commitment to quality writing into state bar oaths); and (4) adding a legal writing component to states' mandatory Continuing Legal Education (CLE) requirements, as numerous states have done for legal ethics courses.[10]

An updated review of judicial opinions issued in the past three years—since completion of the prior article—confirms that the rash of bad briefing in federal and state courts persists. This article focuses more narrowly on the practical effects of bad briefing on our legal process and suggests a holistic remedy: a system-wide commitment to striving to instill in law students and lawyers a respect for legal writing as, not only a fundamental competency of our chosen profession, but a talent that requires initial training, focused study, repeated practice, and conscious evolution *throughout* the arc of one's legal education and career. Effective brief-

6. Northon v. Rule, 494 F. Supp. 2d 1183, 1188 n.7 (D. Or. 2007).

7. Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers By Teaching and Reinforcing Context*, 11 J. OF LEGAL COMM. AND RHETORIC 109 (Fall 2014).

8. Brown, *supra* note 7.

9. *Id.* at 134.

10. *See* Brown, *supra* note 7.

writing is not as simple as a quick cut-and-paste job, a template download, or a stream-of-consciousness exercise, even for lawyers who repeatedly practice one type of case (as indicated by the concrete examples illustrated in the case law herein). Even the most rote type of brief-generation—in cases with repeatable legal rules and similar fact patterns—requires at least some case-by-case fact tailoring, editing, and proofreading. Moreover, for lawyers who handle complex, multi-issue cases pending in different jurisdictions, involving diverse bodies of law and distinct fact patterns, the efficient production of decent, let alone transformative, briefs in the various phases of each case is an art that takes hard work, commitment, care, persistent drilling, and conditioning. Indeed, some writers possess natural gifts and others do not. But lawyers cannot jettison the role of "writer" because they lack innate talent, do not enjoy it, or believe they have more important tasks to perform.

Part I of this article offers examples of judges' express appreciation of *good* brief-writing as a facilitator of judicial decision-making. Part II transitions to judges' critique of bad briefs, spotlighting cases in which judges reference the fundamental standards introduced to students in law school legal writing courses, and noting that certain attorneys' work product—paid for by clients—would merit a failing grade. Part III describes how a lawyer's treatment of brief-writing as a cut-and-paste, boilerplate download, or stream-of-consciousness exercise ignores the importance of clients' nuanced circumstances, court rules, and the role of a brief in the litigation process. Part IV illustrates how bad briefs improperly shift attorney workload to court personnel. Part V reports the views of some judges that poor legal writing shows a lack of respect for professional standards, clients, opposing counsel, and the court. Part VI summarizes federal and state court decisions within the past three years, in which judges have reprimanded lawyers for submitting shoddy written work product, accentuating tangible deficiencies. Part VII illuminates a gap between judges' frustration with bad briefing and the reality of palpable consequences to clients and counsel; many courts attempt to address the merits of each case anyway so as not to unfairly penalize clients for the errs of counsel, whereas other courts have sanctioned or disciplined the brief-writers.

Building upon the premise that bad briefing presents a fixable problem in our legal community, Part VIII renews the call for a holistic approach to improving the quality of brief-writing throughout our system. A first step is to foster intellectual humility in the 1L-student-as-writer, and then encourage the continuity of their writing practice throughout the 2L and 3L years of law school. During the law graduate's transition to bar membership, legal communities should incorporate a commitment to legal writing standards in updated bar admission oaths, and continue to

emphasize legal writing development throughout the arc of an attorney's career, through steadfast practice mentorship and writing-related CLE requirements. The article concludes with an example of how one court modeled collaboration, respect, and problem-solving while holding attorneys accountable for deficient briefing.

I. JUDGES ACKNOWLEDGE THE ROLE OF GOOD BRIEF-WRITING IN JUDICIAL DECISION-MAKING

Well-written briefs submitted in compliance with court rules enable judges to process legal substance efficiently and render reasoned decisions.[11] Vividly, judges have distinguished themselves from "haruspices"[12] ("they are unable to decide cases by reading goats' entrails")[13] and truffle pigs ("[j]udges are not like pigs, hunting for truffles buried in briefs.").[14] Instead, they "rely on lawyers and litigants to submit briefs that present suitably developed argumentation."[15] While, as noted below, judges often detour from addressing the merits of a case to rebuke lawyers who file substandard briefs, they also publicly applaud lawyers who submit excellent work product[16]—especially when the lawyer's writing is pivotal in helping the trial judge or an appellate panel adjudicate a challenging legal issue in a case.

For example, in *Frye v. Colvin*, a Delaware federal district court judge took the time to acknowledge that, "[i]n support of their motions, the parties submitted well-written *and helpful* briefs."[17] Further, in *Little Italy Oceanside Investments, LLC v. United States*, a Michigan federal district court judge complimented the authors of an amicus brief, stating "[t]he Court thanks the College for its excellent and timely work on this case. The thorough and well-written brief filed by the College *substantially aided* the Court in its consideration of the issues for decision."[18] Similarly, in *Kaz USA, Inc. v. E. Mishan & Sons, Inc.*, the court commended the parties "for

11. *Reyes-Garcia*, 82 F.3d at 14.

12. A haruspice is "a diviner in ancient Rome basing his predictions on inspection of the entrails of sacrificial animals." http://www.merriam-webster.com/dictionary/haruspex.

13. *Reyes-Garcia*, 82 F.3d at 12.

14. U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

15. *Reyes-Garcia*, 82 F.3d at 12.

16. McDonnell v. Colvin, No. CV-14-01707, 2015 WL 1755332, at *6 n.1 (D. Ariz. April 17, 2015) ("Both counsel are commended for very well-written briefs.").

17. Frye v. Colvin, No. 14-1022-GMS, 2016 WL 2758259, at *1 (D. Del. May 12, 2016) (emphasis added).

18. Little Italy Oceanside Inv., LLC v. United States, No. 14-CV-10217, 2015 WL 4878247, at *3 n.2 (E.D. Mich. Aug. 14, 2015) (emphasis added); *see also In re* the Mental Commitment of Helen E.F., 333 Wis. 2d 740, 750 n.5 (Wis. Ct. App. 2011) (the court expressed gratitude for helpful and well-written amicus briefs, "pertinent parts of which we track in this opinion").

their comprehensive, well written briefs, which, together with their oral argument, were *of great assistance* to the Court."[19]

Even when ruling against a party, courts praise good legal writing and creative analysis on the basis that such efforts aid the adjudicative process. For instance, in *In re Whitson*, a federal bankruptcy judge ruled against a debtor but nodded to "a creative argument in her well written brief."[20] Likewise, in *Kaz*, the court complimented one litigant's brief even though the party did not prevail on the motion at issue.[21] The *Kaz* court appreciated the numerous authorities cited and noted that the brief-writer "presented [the party's] legal arguments in the best possible light, given the paucity of facts in its favor."[22]

Courts emphasize that thorough legal research, well-organized arguments, and logical reasoning culminating in a well-written brief "permit the Court to efficiently resolve the questions presented without unnecessary detours to decipher unclear arguments or correct misstatements of case law."[23] Judges reiterate that good legal writing (paired with an articulate oral argument) "can make all the difference in the world in helping an appellate court to reach the correct result, especially in those cases where the record is unclear or the legal issues involved require a sophisticated analysis of many conflicting legal principles."[24]

II. JUDGES HAVE REFERENCED LAW SCHOOL LEGAL WRITING COURSE STANDARDS WHEN EVALUATING SUBPAR BRIEFS, CONTRACTS, AND JUDICIAL OPINIONS

Several judges specifically have alluded to the 1L legal writing course (a core component of standard 1L curricula) in their judicial opinions, noting that the written work of particular attorneys would not satisfy the grading standards of legal writing faculty. For example, in *Butler-Rance v. Providian Bancorp Services, Inc.*,[25] a defendant in a Fair Credit Reporting Act case filed a motion for summary judgment. The plaintiff's attorney filed an opposition brief which was merely two pages and lacked case citations and legal argument. The court remarked, "A first-year law student

19. Kaz USA, Inc. v. E. Mishan & Sons, Inc., No. 13-40037, 2014 WL 350 1366, at *4 n.9 (D. Mass. July 9, 2014).

20. *In re* Whitson, No. 12-15000, 2013 WL 5965745, at *2 (E.D. Tenn. Bankr. Nov. 7, 2013).

21. *Kaz USA, Inc.*, 2014 WL 350 1366, at *4.

22. *Id.*

23. Carson v. Int'l Headquarters Pension and Beneficiaries Plan, No. 5:14-CV-11617, 2014 WL 4467701, at *4 n.6 (S.D.W.V. Sept. 9, 2014) (expressing "appreciation for the clear and well organized arguments, supported by excellent case research, presented by both parties in this case.").

24. Commonwealth v. Wilson, 444 Pa. 433, 435 (Pa. 1971).

25. Butler-Rance v. Providian Bancorp Services, Inc., No. 6:06-CV-332-Orl-31UAM, 2007 WL 2310114 (M.D. Fla. Aug. 9, 2007).

who submitted this 'response' for a legal writing class would likely be encouraged to rethink his or her choice of career. To receive such a grossly incompetent effort from a practicing attorney is appalling."[26] The court granted the defendant's motion for summary judgment.[27]

Another court critiqued written attorney work product in *Bank of New York v. First Millennium, Inc.*[28] Concentrating on interpreting a poorly drafted contract that formed the underlying basis of the parties' dispute (rather than bad briefs), the court described the parties' various written agreements as "convoluted and opaque."[29] The judge focused on the authors' lack of clarity, and asserted, "[w]ith all due respect (I emphasize the adjective), if those lawyers had been law students and submitted these documents as a final exercise in a Pass/Fail course on Clarity in Legal Writing, their grade would not begin with a 'P.'"[30] Because of the confusing nature of the underlying transactional documents, the court described the parties' briefing of the cross-referential contractual terms as "feats of gymnastic advocacy."[31]

Additionally, a California appellate court analogized to 1L legal writing course standards when criticizing another court's analysis of precedent: a rare "benchslap" of a bench. In *Sarti v. Salt Creek Ltd.*,[32] the California Court of Appeal for the Fourth Appellate District declined to follow a decision by the California Court of Appeal for the Second Appellate District in *Minder v. Cielito Lindo Restaurant*.[33] The Fourth District described the Second District's reasoning as "seriously flawed,"[34] focusing on its perceived incorrect treatment of an earlier decision. The Fourth District commented, "[t]hat is the sort of misreading of a case that usually gets a first semester law student a bad grade on a legal writing assignment. We will charitably assume that the *Minder* court was simply having a bad day."[35]

A lawyer's developmental arc as a legal writer begins with the quality standards introduced and reinforced in the 1L legal writing classroom, but

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26. *Butler-Rance*, 2007 WL 2310114 at *2.

27. *See also* ADI Motorsports, Inc. v. Hubman, No. 4:06CV00038, 2006 WL 3421819 (W.D. Va. Nov. 27, 2006) (noting that formatting and technical errors in a brief (which was suggested to have been ghostwritten by an attorney for a *pro se* party) would "not win high marks in a legal writing class").

28. Bank of N. Y. v. First Millennium, Inc., 598 F. Supp. 2d 550 (S.D.N.Y. 2009).

29. *Bank of N.Y.*, 598 F. Supp. 2d at 568.

30. *Id.*

31. *Id.*

32. Sarti v. Salt Creek Ltd., 167 Cal. App. 4th 1187, 1207 (Cal. Ct. App. 2009).

33. Minder v. Cielito Lindo Restaurant, 67 Cal. App. 3d 1003 (Cal. Ct. App. 1977).

34. *Sarti*, 167 Cal. App. 4th at 1195.

35. *Id.* at 1207. The Fourth District modeled a marked respect for good legal writing and for the reader, adding a Table of Contents to its own opinion in a footnote, stating, "[w]e apologize for a long opinion with many topics and subheadings. For the convenience of readers who might like an overview of this opinion, here is an organizational outline." *Id.* at 1190 n.1.

this critical foundation must be built upon with continual study, commitment, and practice throughout the legal writer's career.

III. JUDGES EMPHASIZE THAT GOOD BRIEF-WRITING INVOLVES MUCH MORE THAN BOILERPLATE, CUT-AND-PASTE, AND STREAM-OF-CONSCIOUSNESS

Attorneys inevitably submit bad briefs if they regard brief-writing as a plebeian exercise that merely requires stringing together boilerplate, cutting-and-pasting from prior submissions without proper tailoring to the client's case, or penning thoughts in a stream-of-consciousness manner. Certain circumstances such as inevitable time constraints, the pressure to be efficient in cases controlled by billable hour budgets, and particular categories of law practice representing clientele whose cases require repeat filings of standard pleadings and motions, might contribute toward (or others even might argue, *sanction*) such brief-drafting habits. Nonetheless, judges understandably bristle when lawyers file patchwork briefs, pulling from stock documents yet failing to shape written work product to the nuances of each distinct client matter. Further, freeform briefs—in which lawyers offer no discernable logic in presenting the issues, rules, and arguments critical to resolving the case—fall far short of acceptable standards.

A. *Boilerplate Briefs*

Black's Law Dictionary defines "boilerplate" as "ready-made or all-purpose language that will fit in a variety of documents."[36] Of course, some limited content in briefs, such as the legal standard to prevail on a Federal Rules of Civil Procedure (FRCP) 12(b)(6) motion to dismiss or a FRCP 56 summary judgment motion, or applicable standards of review in appellate briefs—if written well and supported with proper citations—can be re-used repeatedly as a form of boilerplate. Certainly, legal principles such as the elements of a particular cause of action or a defense (also with proper up-to-date citations) can be lifted from prior briefs and incorporated into a new draft. However, courts do not appreciate when such language included in a brief is either irrelevant to the case at issue or not fleshed out with appropriate analysis.

36. *Boilerplate*, BLACK'S LAW DICTIONARY (10th ed. 2014). In the contract-drafting context, boilerplate means "fixed or standardized contractual language that the proposing party often views as relatively nonnegotiable." *Id.*

For example, in an attorney disciplinary case, *In re DeMarco*,[37] the Committee on Admissions and Grievances for the United States District Court for the Second Circuit concluded that an attorney had submitted deficient briefs in immigration cases by "essentially reciting boilerplate" and failing to address issues that the Court specifically ordered to be briefed.[38] In another disciplinary matter, *In re Sobolevsky*,[39] an attorney filed briefs (also in immigration cases) of "shockingly poor quality," incorporating incorrect clients' names and irrelevant boilerplate.[40] Though refraining from imposing sanctions, in *Smith v. Commissioner of Social Security*,[41] the court strongly advised one party's attorney "to ensure that the briefs he files with this court in the future do not contain boilerplate recitations of statutes, regulations, and cases, but rather an appropriate discussion of pertinent legal authority and the application of that authority to the facts of the case at hand."[42] In an earlier case, the court critiqued the same lawyer for his "lamentable record of filing one-size-fits-all briefs" in social security cases, instead of "advanc[ing] properly supported arguments that rest upon (and cite to) the facts of a particular case."[43] Accordingly, while incorporating boilerplate recitations of legal standards and principles can be acceptable on a limited basis if performed correctly, judges still expect some degree of case-specific adaptation and proper legal analysis.

B. Cut-and-Pasted Briefs

Cut-and-pasted briefs lacking proper tailoring to the particular client's circumstances also have perturbed judges. In *Hernandez v. Wells Fargo Bank, N.A.*,[44] the court admonished an attorney whose brief contained "obvious 'copied and pasted' provisions from other cases"[45] because it referenced rules and statutes that were not at issue in the litigation.[46]

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37. *In re* DeMarco, 733 F.3d 457 (2d Cir. 2013).

38. *Id.* at 466, Appendix 1.

39. *In re* Sobolevsky, 96 A.D.3d 60 (N.Y. App. Div. 2012).

40. *Sobolevsky*, 96 A.D.3d. at 61.

41. Smith v. Commissioner of Social Security, No. 14-CV-10833, 2015 WL 1300040 (E.D. Mich. March 23, 2015).

42. *Smith*, 2015 WL 1300040 at *2.

43. Fielder v. Comm'r of Soc. Sec., No. 13–CV–10325, 2014 WL 1207865, at *1 n.1 (E.D. Mich. Mar. 24, 2014).

44. Hernandez v. Wells Fargo Bank, N.A., No. 10-43381, 2015 WL 6736698 (9th Cir. Bankr. Nov. 3, 2015).

45. *Hernandez*, 2015 WL 6736698 at *3. *See also* Brazier v. Maple Lane Apartments, 45 N.E.3d 442, 450 (Ind. Ct. App. 2016) (a brief's poor quality prompted the court to surmise that "arguments made in trial court filings may have been copied and pasted into the brief, leading to nonsensical statements").

46. *Hernandez*, No. 10-43381, 2015 WL 6736698.

Similarly, in *Naug v. Colvin,*[47] a brief exposed the author's drafting shortcuts through references to a stipulation and procedural steps that applied to other cases rather than the pending one.[48] The court scolded the attorney for wasting the court's time, chiding that the brief "was produced by the sloppy copy-and-paste method the court has come to expect from" this lawyer.[49] The court warned that this "carelessness undermines the image of competence and expertise that [the attorney] hopes to project. . . [He] must clean up his act."[50]

Some law professors have suggested that, like re-using boilerplate, cutting-and-pasting from stock briefs is appropriate in certain types of practice—but, while this may, in part, be true, professors and supervising attorneys should *clarify* and give context to such a message about brief drafting to law students and new lawyers. In criminal matters, current prosecutors with whom I consulted confirmed that they certainly re-use *excerpts* from prior briefs—but they emphasize that they continuously re-check and update their citations *and* modify the analysis section of each brief to apply to the specific facts of each case. Several judges whom I queried also concurred that cutting-and-pasting legal standards is fine (and they perform that activity as well when drafting their opinions), but they expect lawyers to augment cut-and-pasted excerpts with additional case law addressing facts similar to the pending case, and likewise tailor the legal analysis to the specific facts of the case at hand.

In fact, in *Disciplinary Counsel v. Milhoan,*[51] the Ohio Board of Commissioners on Grievances and Discipline charged an attorney with violations of the Disciplinary Rules of the Code of Professional Conduct and the Rules of Professional Conduct after he filed nearly identical briefs in thirty-one of thirty-five criminal appeals, making only slight "case-specific modifications such as names, dates, crimes, sentences, and potential mitigation."[52] The court described the lawyer's duplicative work product as "substandard representation" of his individual indigent clients;[53] each brief was ten pages long, repeated identical grammatical mistakes, raised the same assignment of error, failed to cite *any* case law in support of the alleged error, excluded standard information regarding the cost of

47. Naug v. Colvin, No. 14-CV-818-JDP, 2016 WL 1312166 (W.D. Wisc. April 4, 2016).

48. *Naug*, 2016 WL 1312166 at *3.

49. *Id.*

50. *Id. See also Fielder*, 2014 WL 1207865, at *1 n.1 (the court noted the attorney's "lamentable record of filing one-size-fits-all briefs" and warned of potential future sanctions and disciplinary action).

51. Disciplinary Counsel v. Milhoan, 142 Ohio St. 3d 230 (Ohio 2014).

52. *Milhoan*, 142 Ohio St. 3d at 231. *See also* Adobe Sys. Inc. v. Accoladian Resources, LLC, No. C14-00388-WHA, 2014 WL 3737979, at *7 (N.D. Cal. July 28, 2014) (rejecting an attorney's substantive argument and criticizing "sloppy copying from another brief").

53. *Milhoan*, 142 Ohio St. 3d at 232.

incarceration or why the appellant's sentence would burden the state's resources, and ultimately cited only one case (for the definition of clear and convincing evidence).[54]

Obviously, for efficiency purposes, lawyers appropriately might re-use excerpts or templates of prior briefs as a starting point in the brief-writing process; however, drafters must take care to delete irrelevant material—which wastes the court's time—and closely adapt the content and analysis to the specific facts of the client's case.

C. Stream-of-Consciousness Briefs

Psychologist William James introduced the concept of "stream-of-consciousness" in his book *Principles of Psychology* to capture the meandrous nature of the human thought process: "It is nothing jointed; [it] flows." Writers such as James Joyce and Virginia Woolf have implemented the stream-of-consciousness narrative technique to portray characters' internal monologues. While this free-flowing literary device, often employing punctuation in creative ways, can enable novelists and short story writers to artistically illustrate the randomness of a character's thoughts and feelings, such writing style—seemingly devoid of apparent structure or logic—has no place in the final submitted version of a legal brief. Brief-writers experiencing writer's block certainly might engage in stream-of-consciousness writing *initially* to work through a tough legal quandary and derive a logical solution, but transforming such a random flow of thoughts into a final brief worthy of a judge's review (and opposing counsel's response) demands significant sculpting, re-shaping, and tightening.

In *Jiangmen Kinwai Furniture Decoration Co., Ltd. v. IHFC Properties*, LLC,[55] a judge reproached an attorney for filing briefs "with overbroad, ill-considered, stream-of-consciousness arguments unsupported by citation to the record or legal authority."[56] The court referred to the lawyer's work product as "kitchen-sink briefs supported only by stream-of-consciousness argument," much of which "border[ed] on incoherent."[57]

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54. *Id.* at 231.

55. Jiangmen Kinwai Furniture Decoration Co., Ltd. v. IHFC Properties, LLC, No. 1:14-CV-689, 2015 WL 5944278 (M.D.N.C. Oct. 13, 2015).

56. *Jiangmen*, 2015 WL 5944278 at *8.

57. Memorandum Opinion and Order Signed by Judge Catherine C. Eagles on 8/31/2015, Case Docket Entry No. 141, pp. 18-19. The court cited this example of a "stream-of-consciousness argument" devoid of citations: "For example, [the lawyer] makes the following argument, which the Court reproduces in full as it is unable to sensibly summarize it: Kinwai has now conducted IHFC's 30(b)(6) deposition for which an employee of IMC Manager, LLC was the only corporate witness. IMC Manager LLC actually appears to be the entity that is suing the plaintiff in the name of IHFC Properties, LLC but it has not provided any source of legal authority for such actions and the court has not required

Further, a lawyer in *Thomas v. Colvin*[58] submitted a stream-of-consciousness brief which the court discounted as "a mostly unsupported diatribe."[59] The brief contained no meaningful statement of the issues for review, no statement of facts distinct from the procedural history, no record citations to support any factual statements, and no argument section addressing each issue separately, as the applicable court rules required.[60]

Overextended attorneys juggling many competing obligations and deadlines may resort to boilerplate, cutting-and-pasting, or stream-of-consciousness—without case-specific adaptation or appropriate citations to the factual record and legal authority—not realizing the impact that this meager effort has on their reputation, their clients, and the courts. Such briefs shift attorney workload responsibilities to the court and opposing counsel, which some judges perceive as indicative of a lawyer's lack of respect for the legal institution and its participants.

IV. BAD BRIEFS IMPROPERLY SHIFT THE BURDEN OF ATTORNEY WORK TO COURT PERSONNEL

Endeavoring to clear docket congestion while battling unavoidable delays, courts routinely demarcate the distinct roles of attorneys and court personnel and reprimand lawyers whose shoddy written work product suggests a misplaced assumption that court clerks and judicial clerks will take on tasks that counsel is too preoccupied to perform.[61] The most common shortcomings in briefs that improperly shift the burden of attorney

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any authority. The plaintiff could not come in the court and sue on behalf of its neighbor without some proof it was attorney-in-fact for its neighbor. Plaintiff did not seek to pierce the corporate veil because there is ordinarily no veil when a company publishes on the public record on a federal government website that it owns and operates the [IHF Center] and that it 'aims to be a single integrated business.' Apparently IHFC has reserved the veil for use only during court appearances. The parent and its affiliates have direct liability and single enterprise liability, both of which plaintiff has pursued." *Id.* at p. 19, n.10.

58. Thomas v. Colvin, No. 15-3288(JLL), 2016 WL 676372 (D.N.J. February 16, 2016).

59. *Thomas*, 2016 WL 676372 at *3 n.3.

60. *Id.* at *3.

61. Addressing a complaint rather than a brief, in United States ex rel. Garst v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003), the court beautifully explained the workload burden-shift triggered when a lawyer submits a disorganized, "pestilential," inscrutable pleading: "[E]ven if it were possible to navigate through these papers to a few specific instances of fraud, why should the court be obliged to try? Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. Federal judges have better things to do, and the substantial subsidy of litigation (court costs do not begin to cover the expense of the judiciary) should be targeted on those litigants who take the preliminary steps to assemble a comprehensible claim." After generously allowing an attorney to file three amended complaints plus a "more definite statement," the trial court had finally dismissed the complaint with prejudice. On appeal, the appellate court asserted that the lawyer "received more judicial attention than his pleadings deserved." *Id.* at 379.

workload to court personnel (or to opposing counsel)[62] are lack of thorough legal research, thin legal analysis, poor citations to the factual record and legal authority, and disregard of express court rules regarding content and format.

For instance, in *Capri Sunshine, LLC v. E&C Fox Investments, LLC*,[63] the court cited an appellate procedural rule requiring brief-writers to state their arguments on the disputed issues with citations to the record, statutes, and case law. The court deemed the appellant's brief deficient in "reasoned analysis or supportive legal authority."[64] The court emphasized that, "[w]hile failure to cite the pertinent authority may not always render an issue inadequately briefed, it does so 'when the overall analysis of the issue is so lacking as to *shift the burden* of research and argument to the reviewing court.'"[65]

Likewise, in *Westfield Ins. Co. v. Enterprise 522, LLC*,[66] in ruling on cross-motions for summary judgment, the court denied one party's "poorly briefed request" for relief,[67] citing the United States Court of Appeals for the Sixth Circuit as stating, "it is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to. . . put the flesh on the bones."[68] Further, in *In re Tustaniwsky*,[69] the court found that a lawyer, among other lapses, had filed substantively deficient briefs in five cases, shifting the burden to the court to "scour the record, research any

62. *See, e.g., Brazier*, 45 N.E.3d at 451 n.4 (critiquing a deficient appellate brief filed by one party, the court credited the responding party's restraint from commenting on the quality of the brief, its endeavors to respond to the arguments therein, and its efforts to distill the issues, which enabled the court to address the merits of the discernable arguments).

63. Capri Sunshine, LLC v. E&C Fox Inv., LLC, 366 P.3d 1214 (Utah Ct. App. 2015).

64. *Capri Sunshine*, 366 P.3d at 1217.

65. *Id.* at 1219 (emphasis added), *citing* State v. Thomas, 961 P.2d 299, 305 (Utah 1998); *see also* Gorham v. Amusements of Rochester, Inc., No. 1:14-CV-386, 2015 WL 2454261, at *6 (M.D.N.C. May 22, 2015) ("It is not the Court's job to do counsel's legal research for them."); Hughes v. B/E Aerospace, Inc., No. 1:12CV717, 2014 WL 906220, at *1 (M.D.N.C. Mar. 7, 2014) (regarding a party's failure to cite to the record, the court noted, "[a] party should not expect a court to do the work that it elected not to do."); People v. Hood, 210 Ill. App. 3d 743, 746 (Ill. Ct. App. 1991) ("A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research.").

66. Westfield Ins. Co. v. Enterprise 522, LLC, 34 F. Supp. 3d 737 (E.D. Mich. 2014).

67. *Westfield*, 34 F. Supp. 3d at 747.

68. *Id., citing* United States v. Robinson, 390 F.3d 853, 886 (6th Cir. 2004). *See also* O'Callaghan v. Satherlie, 36 N.E.3d 999, 1005 (Ill. Ct. App. 2015) ("This court is not a depository into which litigants may dump the burden of research"); *In re* McKenzie, No. 325938, 2015 WL 5826875, at *2 n.4 (Mich. Ct. App. Oct. 6, 2015), *citing* People v. Kelly, 588 N.W.2d 480 (Mich. Ct. App. 1998) ("An appellant "may not merely announce his position and leave it to this Court to discover and rationalize the basis of his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

69. *In re* Tustaniwsky, 758 F.3d 179 (2d Cir. 2014).

legal theory that comes to mind, and serve generally as an advocate for appellant."[70] The court reiterated that such activities were outside its role.[71]

Further, many attorneys erroneously treat court-imposed briefing rules as optional or mere suggestions.[72] These system-focused rules serve three critical functions: (1) they communicate to lawyers the breadth and scope of the *substantive* material that judges need to render sensible decisions at specific points along the timeline of a case; (2) they level the *procedural* playing field for multiple litigants in a case (e.g., parity in the number of pages or words of arguments parties may communicate to judges, equal time to respond in writing to opposing arguments); and (3) they are designed to promote *administrative* efficiency in processing infinite filings in already clogged dockets.[73] When attorneys flout these rules, they abandon their work to others.

One court pointed out the tangible impact of a lawyer's failure to follow court rules in the context of a motion to compel discovery. In *Ooida Risk Retention Group, Inc. v. Bordeaux*,[74] a lawyer disregarded the local rule requiring discovery motions to include—within the body of the accompanying brief—pertinent excerpts from the text of the original document request and the opposing party's corresponding responses.[75] The court emphasized that its determination of whether a withholding party's discovery objections and responses are improper (and whether an order to compel the discovery is warranted) is more physically and substantively challenging if the lawyer fails to include the required discovery excerpts within the brief.[76] The court explained that this briefing deficiency "improperly shifts the burden to the Court to sift through [potentially voluminous discovery materials] and root for issues that should be clear on the face of a discovery motion."[77] The court remarked, "it is not the

70. *Id.* at 184 (citations omitted).

71. *Id.*

72. *See, e.g., In re* Estate of DeMarzo, 39 N.E.3d 255, 259 (Ill. Ct. App. 2015) (attorney submitted a deficient record on appeal, ignoring procedural rules requiring attachment of transcripts and underlying procedural documents, and an accurate table of contents; "We caution that the rules of procedure for appellate briefs must be obeyed; they are not convenient suggestions or annoyances to be neglected at will."); Bialik v. AXA Equitable Life Ins., 156898/13 (the Appellate Division, First Department, struck "an entire appellate brief after counsel allegedly 'permeated' the brief with information from outside the record in an insurance coverage dispute," in violation of appellate briefing rules).

73. *Reyes-Garcia*, 82 F.3d at 14.

74. Ooida Risk Retention Group, Inc. v. Bordeaux, No. 3:15-CV-00081, 2016 WL 427066 (D. Nev. Feb. 3, 2016).

75. *Ooida*, 2016 WL 427066 at *2.

76. *Id.*

77. *Id.* (internal citations omitted).

responsibility of the judiciary 'to sift through scattered papers in order to manufacture arguments for parties.'"[78]

Addressing an inadequate brief filed in an appeal of an administrative decision, in *Thomas*,[79] the court described the burden placed upon it by a lawyer who failed to comply with local appellate briefing rules. The court rules mandated inclusion of several substantive components: a meaningful summary abstract of the legal issues at play, a statement of facts, and an argument section separately addressing each issue.[80] The court characterized the brief as "inappropriately punting actual analysis" to the court with a "corresponding burden."[81] Further referring to the lawyer's failure to provide record citations for substantive and procedural facts, the court reiterated that it is not its "responsibility to comb through the Record to see if it can find such support."[82]

Similarly, in *Strychalski v. Baxter Healthcare Corp.*,[83] attorneys for both parties ignored local court rules governing summary judgment briefs. The rules required drafters of initial briefs to assert each distinct undisputed material fact in a separate numbered paragraph, supported by record citations.[84] The rules instructed authors of opposition briefs to use corresponding numbered paragraphs to respond directly to each fact asserted in the primary briefs, with record citations demonstrating each fact's undisputed or disputed nature.[85] Contravening the rule, the moving party combined numerous facts into multi-fact paragraphs; the responding party shoehorned multiple arguments and unrelated factual assertions into each corresponding response.[86] Objecting to this behavior, the court underscored the purpose of the local rules, explaining that statements of undisputed material facts are "road maps" in summary judgment motions; they help the court discern whether the FRCP 56 standard[87] is satisfied, and they "mak[e] the summary judgment process less burdensome on the court."[88] The court advised that the foregoing examples of "irresponsible

78. *Id.*
79. *Thomas*, 2016 WL 676372.
80. *Id.* at *3.
81. *Id.* at *3 n.3.
82. *Id.* at *3.
83. Strychalski v. Baxter Healthcare Corp., No. 11-C-747, 2014 WL 1154030 (N.D. Ill. Mar. 20, 2014).
84. *Strychalski*, 2014 WL 1154030 at *1.
85. *Id.*
86. *Id.* at *1.
87. FED. R. CIV. P. 56(a): "The court shall grant summary judgment *if the movant shows that there is no genuine dispute as to any material fact* and the movant is entitled to judgment as a matter of law." (emphasis added).
88. *Strychalski*, 2014 WL 1154030 at *2.

briefing"[89] render summary judgment motions and responses not "particularly helpful in determining whether there are any genuine disputes."[90] In fact, they augment the court's burden.[91] The court articulated that it is not its job to "sift through mounds of paper to ferret out the material facts at issue."[92] The adverse consequences do not stop there. The court pointed out that this type of bad briefing exacerbates the inefficiencies of "satellite litigation" among lawyers moving to strike one another's briefs.[93]

V. SOME JUDGES INTERPRET POORLY WRITTEN ATTORNEY WORK PRODUCT AS INDICATIVE OF THE BRIEF-WRITER'S LACK OF RESPECT FOR LEGAL WRITING STANDARDS, OPPOSING COUNSEL, AND THE COURT

In the view of some judges (and opposing counsel), lawyers who submit bad briefs and contravene court-imposed legal writing rules convey disrespect to the profession and its many players. The court in *Barrett v. Brian Bemis Auto World*[94] characterized the dearth of legal citations and pinpoint page references in a brief as a disregard for "basic legal writing standards" and indicative of "a lack of respect for the time and resources of Defendants and the Court."[95] Likewise, in *Sackman v. New Jersey Manufacturers Ins. Co.*,[96] the court critiqued appellate counsel for failing to "conduct even a modicum of research" which would have revealed a New Jersey Supreme Court decision directly on point.[97] The New Jersey judge described the attorney's brief as displaying "an utter indifference to the standards of professional competence a tribunal is entitled to expect from an attorney admitted to practice law in this State."[98] The lawyer exerted no effort to present, cite, and analyze the pertinent legal standard and relevant authority, or apply the law to the facts—the most fundamental steps of brief-writing.[99] Ultimately, the court noted that, "[b]y submitting a shoddy,

89. *Id., citing* Cleveland v. Prairie State College, 208 F. Supp. 2d 967, 973 (N.D. Ill. 2002) (Gettleman, J.).

90. *Strychalski*, 2014 WL 1154030, at * 2.

91. *Id.*

92. *Id. citing Cleveland*, 208 F. Supp. 2d at 973. *See also* N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997) ("In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence we have briefing rules.")

93. *Strychalski*, 2014 WL 1154030 at *1.

94. Barrett v. Brian Bemis Auto World, 408 F. Supp. 2d 539 (N.D. Ill. 2005).

95. *Barrett*, 408 F. Supp. 2d at 544 n.4.

96. Sackman v. N.J. Mfrs. Ins. Co., 137 A.3d 1204 (N.J. Super. Ct. Apr. 26, 2016).

97. *Sackman*, 137 A.3d at 1214.

98. *Id.* at 1215.

99. *Id.*

professionally unacceptable brief, plaintiff's appellate counsel displayed a disrespect for the work of this court and for the legal profession itself."[100]

Noting its role in reviewing hundreds of briefs per year, the *Sackman* court characterized the quality of legal analysis submitted by lawyers as ranging "from excellent to poor."[101] While acknowledging the reality "that facility of expression, advocacy skills, and intellectual abilities are not equally distributed," the court synopsized, "[w]hat we cannot accept, however, is a lack of effort"[102] and "indifference to the fundamental tenets of the legal profession displayed here."[103]

VI. JUDGES EXPLAIN WHAT MAKES A BAD BRIEF

Updating prior research in this area, a review of case law within the past three years reveals that judges in federal and state jurisdictions across the country have continued to characterize many attorneys' briefs as generally poor, sloppy, and unprofessional, not always pinpointing specific shortcomings.[104] However, when judicial opinions do comment on particulars, the critiques touch on ten categories: (1) thin argument with flimsy analysis; (2) erroneous or missing references to governing rules or standards; (3) misuse of precedent; (4) incomprehensible writing; (5) poor organization; (6) improper or absent citation to the factual record or legal authority; (7) rampant grammatical or punctuation errors and lack of proofreading; (8) over-reliance on block quotes; and (9) failure to comply with the court's briefing rules.

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100. *Id.* at 1217.

101. *Id.*

102. *Sackman*, 137 A.3d at 1217.

103. *Id.*

104. *See, e.g.*, Sears v. Bank of America, No. 2:15-CV-00753, 2015 WL 9481042, at *1 n.1 (E.D. Cal. Dec. 29, 2015) (the attorney's "briefing in both cases has been sloppy and disappointing"); Haltom v. Commissioner of Social Security, No. 2:13-CV-0227, 2015 WL 3609335, at *3 (E.D. Cal. June 8, 2015) ("[P]laintiff's counsel's 6-page opening brief in this case was of relatively poor quality."); Rogers v. Gibson, No. 13-0022, 2014 WL 292686, at *2 n.2 (U.S. Vet. App. June 30, 2014) (the court expressed "concern with the poor quality of the briefs filed by" counsel and directed him "to be more precise in drafting documents to be filed with the Court."); Yu v. Shinseki, No. 1-1519, 2014 WL 259845, at *1 (U.S. Vet. App. Jan. 24, 2014) (remarking on a "poorly written brief"); Morris v. Nuzzo, 718 F.3d 660, 668 (7th Cir. 2013) ("the briefs are, at best, unhelpful"); *In re* B.L., No. 14-0660, 2015 WL 3631681, at *2 (W.V. June 10, 2015) (the court noted "an increasing pattern of inadequate and untimely filings made by guardians ad litem"; the guardian ad litem apologized to the court for "having filed poor quality briefs.").

A. *Thin Argument*

Since the primary purpose of a brief is, as noted above, "to educate and guide the court's decision,"[105] judges have called out briefs that fall short in this function because of wafer-thin argument and analysis. In *Jones v. Colvin*,[106] a United States District Court judge for the District of New Jersey (who also scrutinized the deficient briefs in *Thomas v. Colvin*[107]) expressed displeasure with the plaintiff's brief which criticized an administrative decision without advancing concrete arguments to support an alternative result.[108] Further, in, *Sackman*,[109] a New Jersey state court case, an attorney's brief offered no analysis of how the applicable precedent applied to the facts of the case. The state court asserted its expectation that attorneys admitted to practice in New Jersey will know the factual record, research and analyze case law on point, and write briefs that reflect diligence and professionalism in executing these responsibilities.[110]

B. Erroneous or Missing References to Governing Rules or Standards

In *Capital Yacht Club v. Aviva*,[111] a lawyer submitted a brief relying on the wrong Federal Rule of Civil Procedure, and later, in a reply brief, reframed the motion under the correct rule.[112] Neither fooled nor impressed, the court noted, "[u]nfortunately, this legal oversight is emblematic of the quality of both counsels' legal submissions throughout this litigation."[113]

In another federal case, *Gorham v. Amusements of Rochester, Inc.*,[114] in briefs supporting joint motions seeking court approval of a personal injury settlement, neither party's attorney submitted appropriate legal authority on the applicable standard for evaluating the proposed compromise.[115] In supplemental briefing, one attorney stoked the court's escalating exasperation by again omitting the governing legal standard and procedural

105. *Witt*, 481 B.R. at 473; *see also Litton Systems*, 750 F.2d at 955 n.1 (the purpose of a brief "is to aid the court in reaching a correct and just decision").

106. Jones v. Colvin, No. 15-3873 (JLL), 2016 WL 901085 (D.N.J. Mar. 8, 2016).

107. *Thomas*, 2016 WL 676372.

108. *Jones*, 2016 WL 901085 at *3 n.2.

109. *Sackman*, 137 A.3d at 1204.

110. *Id.* at 1216-17.

111. Capital Yacht Club v. Aviva, No. 04-0357, 2006 WL 2792679 (D.D.C. Sept. 27, 2006).

112. *Capital Yacht Club*, 2006 WL 2792679 at *2 n.5.

113. *Id.*

114. *Gorham*, 2015 WL 2454261.

115. *See also Sackman*, 137 A.3d at 1216 (the court noted that the brief did not discuss or identify the relevant standard of review).

rule, and citing no cases on point.[116] Further, in *Spicer v. Shinseki*,[117] the court enumerated five instances in which the brief-writer referenced the wrong rule, and urged, "any further work product submitted by counsel to the Court [should] reflect the level of professionalism expected in a federal appellate court."[118]

C. Misuse of Precedent

In *Jiangmen*,[119] the court accredited the untapped potential of one lawyer's legal hypotheses, noting that she "had something that might have become, with some thought, a decent idea"; however, in the court's view, she "executed it badly and unsuccessfully, and responded to her own failure by submitting a terrible brief."[120] The brief was particularly bad because it misconstrued[121] and misparaphrased precedent.[122] The court highlighted the intellectual effort required for a writer to transform a raw legal theory into a quality brief, and conveyed the reality that a brief is operatively useless without a thoughtful merger of facts and law.[123] The court advised the attorney to submit future briefs grounded in more thorough research, meticulous analysis, factual focus, "and at least some editing."[124]

D. Incomprehensible Writing

Other courts have described attorneys' briefs as "incomprehensible" or "incoherent."[125] In *Stanard v. Nygren*,[126] an attorney's writing lapses began during the pleadings stage and persisted through his appellate briefs. After

116. *Gorham*, 2015 WL 2454261 at *6.

117. Spicer v. Shinseki, No. 12-2009, 2013 WL 2902798 (U.S. Vet. App. June 14, 2013).

118. *Spicer*, 2013 WL 2902798 at *1 n.1.

119. *Jiangmen*, 2015 WL 5944278.

120. *Id.* at *1.

121. *Id.* at *3.

122. *Id.* at *7.

123. *Id.* at *8 n.7 (the lawyer's "bad briefs occasionally have a kernel of a thought which would merit consideration if the thought was stated clearly and supported by legal or factual authority.").

124. *Jiangmen*, 2015 WL 5944278 at *8.

125. *In re* González, 795 F.3d 288, 290 (1st Cir. 2015) (the "brief is nearly incomprehensible"); Moghalu v. Bd. of Supervisors for the Univ. of La. Sys. for NW, No. 15–30559, 2016 WL 943619, at *4 n.7 (5th Cir. Mar. 11, 2016) ("we were wholly unaided by Defendant's elliptical (bordering on incomprehensible) brief"); Feld v. City of Orange Twp., No. L–2401–08, 2016 WL 3263232, at *2 (N.J. Super. Ct. App. Div. June 15, 2016) (in an appellate brief, "plaintiffs make a number of arguments, many of which are incomprehensible"); Eagle's View Prof'l Park Condo. Unit Owners Ass'n, Inc. v. EVPP, L.L.C., No. CA2014–06–134, 2015 WL 2452046, at *3 (Ohio Ct. App. May 18, 2015) ("the brief is incomprehensible"); Hoffman v. Wells Fargo Bank, N.A., No. 59929, 2013 WL 1305501, at *1 n.3 (Nev. March 29, 2013) (referencing "incoherent" arguments in a brief).

126. Stanard v. Nygren, 658 F.3d 792 (7th Cir. 2011).

the attorney filed "an unintelligible complaint," the court afforded him three opportunities to submit a pleading that complied with the Federal Rules of Civil Procedure.[127] However, "[e]ach iteration of the complaint was generally incomprehensible and riddled with errors, making it impossible for the defendants to know what wrongs they were accused of committing."[128] The lawyer's work product included "a staggering and incomprehensible 345–word sentence,"[129] "rampant grammatical, syntactical, and typographical errors" (including missing punctuation), nonexistent organization, overall "unintelligibility," and "a general 'kitchen sink' approach to pleading the case."[130] Because the attorney openly flouted court orders and explicit directives to remedy the deficiencies in the pleadings,[131] the court dismissed the complaint with prejudice.[132] On appeal of the dismissal, the lawyer further transgressed by submitting a brief that was so "woefully deficient," the court expressed concerns about his competence to continue practicing in the jurisdiction.[133] The court described the lawyer's initial brief as not even "reasonably coherent"[134] and the reply brief as failing to "meaningfully—or even comprehensibly—articulate an argument."[135] Overall, the court acknowledged "the unfortunate reality that poor writing occurs too often in our profession."[136]

E. Poor Organization

In *Quinones v. Univ. of Puerto Rico*,[137] in ruling on a motion to dismiss, the judge found both parties' briefs to be so repetitive and poorly organized, he ordered supplemental briefing.[138] Likewise, in *Faulkner v. Wausau Bus Inc. Co.*,[139] in reviewing a summary judgment on appeal, the

127. *Stanard*, 658 F.3d at 798.

128. *Id.* at 793.

129. *Id.* at 795.

130. *Id.* at 798.

131. *Id.* at 795. The court generously handed the lawyer a list of errors in the complaint to remedy, but on each occasion, the lawyer's remedial efforts were "haphazard at best." *Id.* The attorney even left "as is" some of the counts specifically tagged as deficient by the judge. *Id.*

132. *Stanard*, 658 F.3d at 796.

133. *Id.* at 793-794.

134. *Id.* at 801.

135. *Id.*

136. *Id.* at 798 n.7.

137. Quinones v. Univ. of P. R., No. 14-1331 JAG, 2015 WL 631327 (D.P.R. Feb. 13, 2015).

138. *Quinones*, 2015 WL 631327. at *2. *See also* Commonwealth v. Barnett, 121 A.3d 534, 542 (Pa. Super. Ct. 2015) (noting confusion resulting from the lawyer's "briefing method" that mislabeled and convoluted the order of arguments).

139. Faulkner v. Wausau Bus Inc. Co., 571 F. App'x 566 (9th Cir. 2014).

court described the briefing as poor,[140] and the evidentiary record as disorganized and "scattershot."[141]

F. Sloppy Citation to the Record or Legal Authority

On numerous occasions, in reviewing briefs that contained arguments with little, no, or flawed citation to factual documents, rules, statutes, or case law, courts had to remind lawyers of their professional obligation to cite properly to the documentary record and legal authority. In *Logan v. Air Products and Chemicals,*[142] an attorney filed a brief in opposition to a motion for summary judgment, relying on over twenty pages of interrogatories, affidavits, and a product catalog as factual support, yet failed to cite to specific pages therein.[143] In response, the court emphasized that it "is not required to scour the record to find support for a party's factual assertions."[144]

A federal district judge in *Capital Yacht Club*[145] expressed similar frustration toward both parties' lawyers' disregard for universally recognized legal writing and Bluebook citation standards:

> It is almost as if the parties' counsel have together devised an entirely new legal writing style, complete with a rule favoring citation to bad law in place of citation to good law, and a wholesale rejection of the Bluebook in favor of their own not-so-uniform system of citation. Although the court finds this parallel universe of legal advocacy entertaining, it now longs for the traditional methods of representation: citations to good law and utilization of the ubiquitous Bluebook.[146]

Also vexed by the paucity of citation to the record and the law in a brief in *Bedi-Hetlin v. Hetlin,*[147] a child custody appeal, the court noted the brief-writer's "poor effort" in citing only two cases and asserting legal conclusions with no citation support.[148] The court reminded the attorney that judges adjudicate "cases based on the law, not on emotions. As such,

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140. *Faulkner*, 571 F. App'x at 568.
141. *Id.* at 569.
142. Logan v. Air Prod. and Chem., No. 1:12-CV-1353, 2014 WL 5808725 (M.D.N.C. Nov. 7, 2014).
143. *Logan*, 2014 WL 5808725 at *3.
144. *Id* at *3 n.9.
145. *Capital Yacht Club*, 2006 WL 2792679.
146. *Id.* at *2 n.5.
147. Bedi-Hetlin v. Hetlin, No. 13-14-08, 2014 WL 5803045 (Ohio Ct. App. Nov. 10, 2014).
148. *Bedi-Hetlin,* 2014 WL 5803045 at *5.

we need appellants, as well as appellees, to support their arguments with the relevant case law, statutes, and citations to the record."[149]

G. Grammar and Spelling Errors, and General Lack of Proofreading

In *Gandy v. Lynx Credit*,[150] a federal district court judge described an attorney's "slipshod" brief as "devoid of clarity and rife with spelling errors, grammatical miscues, poor formatting, and questionable quotations."[151] The court reiterated that such unprofessional writing performs a disservice to clients and the court.[152] Another federal district judge, referencing the poor quality of a brief in *Colyer v. Speedway, LLC*,[153] urged counsel to "at least make a pretense of having proofread his documents before filing them in federal court."[154]

H. Over-Reliance on Block Quotes

In *Temples v. McDonald*,[155] the court critiqued an attorney's appellate brief because the argument section contained "approximately seven full pages of block quotes—just short of two-fifths of the total."[156] Similarly, the court in *United States v. Alaniz*[157] characterized an attorney's appellate brief as "remarkably poor," pointing out that, among other deficiencies, the

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149. *Id.* Similarly, in People v. Rooks, No. 313934, 2014 WL 1510141 (Mich. Ct. App. April 15, 2014), the court reacted to a "poorly written" brief in which the lawyer advanced legal arguments without citation to authority, stating, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Id.* at *3, citing *People v. Kelly*, 588 N.W.2d 480, 488 (Mich. Ct. App. 1998). *See also O'Callaghan*, 36 N.E.3d 999, 1005-07 (Ill. App. Ct. 2015) (noting innumerable briefing deficiencies, including the author's failure to cite to the factual record, lack of proper (or in some cases, any) pinpoint page cites, a citation to a case which did not contain the quote for which it was cited, failure to cite law supporting various legal premises, and an absence of legal authority to support the "fantasy practice" of reserving the right to respond to opposing arguments in supplemental briefs); *Hoffman*, 2013 WL 1305501, at *1 n.3 ("[n]umerous portions of the briefs are either unsupported by citations to legal authority or devoid of explanation as to why the inclusions are relevant to the case presently before this court").

150. Gandy v. Lynx Credit, No. 3:14-CV-0369-B, 2014 WL 6805501 (N.D. Tex. Dec. 3, 2014).

151. *Gandy*, 2014 WL 6805501 at *1 n.2.

152. *Id.*

153. Colyer v. Speedway, LLC, 981 F. Supp. 2d 634 (E.D. Ky. 2013).

154. *Colyer*, 981 F. Supp. 2d at 641 n.5. *See also* Commonwealth v. Kozlowski, No. 1168 WDA 21012, 2013 WL 11253778, at *2 (Pa. Super. Ct. Sept. 16, 2013) (noting that the argument section of a "poor quality" brief was "replete with spelling and grammatical errors").

155. Temples v. McDonald, 2015 WL 4169190 (Vet. App. July 10, 2015).

156. *Temples*, 2015 WL 4169190 at *2. Also pointing to language and accusations within the brief that lacked "civility," the Court stated that "the work product proffered by counsel for the appellant in this appeal lack[ed] the thoroughness, preparation, and professionalism expected of an attorney practicing before this Court . . . The Court trusts that any further work product submitted by counsel to this Court will reflect the level of professionalism expected in a federal appellate court."

157. United States v. Alaniz, 569 F. App'x 219 (5th Cir. 2014).

argument section of the brief entailed chunks of large block quotations and transcript excerpts cut-and-pasted into the brief without even removing the margin line numbers.[158]

I. *Failure to Comply with Court Rules*

Judges repeatedly are compelled to reprimand lawyers for ignoring or failing to heed substantive and procedural rules governing court filings. In *Pi-Net Int'l, Inc. v. JPMorgan Chase & Co.*,[159] an appellant's attorney violated the 14,000-word limit of federal appellate briefs by fashioning new vocabulary, "squeezing various words together and deleting the spaces that should appear between the words."[160] The court struck the brief and dismissed the appeal.[161]

Judges emphasize that they "depend on counsel to help bring issues into sharp focus"; thus, briefing rules are designed to facilitate the transmission of necessary information from counsel to the court, enabling judges "to set the issues in context and pass upon them."[162] In *Rodriguez-Machado v. Shinseki,* the First Circuit dismissed an appeal with prejudice because the appellant's "lackluster" brief violated procedural rules by failing to cite to the record and providing no case law or reasoned analysis.[163] The court emphasized that "doing [the lawyer's] work for her is not an option, since that would divert precious judge-time from other litigants who could have their cases resolved thoughtfully and expeditiously because they followed the rules."[164]

In *Hill v. Bloomberg, L.P.*,[165] a lawyer submitted a brief in opposition to a motion for summary judgment that, in disregard of Rule 56 of the

158. *Alaniz*, 569 F. App'x at 221. *See also* Marshall v. Colvin, No. 13-CV-11860, 2014 WL 6861965, at *15 (E.D. Mich. Dec. 3, 2014); Beardsley v. Comm'r of Soc. Sec., No. 13-CV-12954, 2014 WL 3125128, at *9 (E.D. Mich. July 8, 2014) (in both cases, a magistrate judge critiqued the same lawyer for submitting a brief with "skeletal" arguments and "large swaths of block quotes").

159. Pi-Net Int'l, Inc. v. JPMorgan Chase & Co., 600 F. App'x 774 (Fed. Cir. 2015).

160. *Pi-Net*, 600 F. App'x at 774.

161. *Id.* at 775. *See also* Martinez-Gonzalez v. Lynch, No. 13–72445, 2016 WL 1380907 (9th Cir. Apr. 7, 2016) ("Although we tolerate minor breaches of briefing rules, when numerous violations exist, we strike an appellant's brief and dismiss the appeal"; the brief failed to state the required statutory basis of the court's jurisdiction, identify the applicable standards of review, apply the review standard to the facts, append the challenged court orders, provide a thorough table of authorities, and incorporate proper record cites.).

162. Rodriguez-Machado v. Shinseki, 700 F.3d 48, 49 (1st Cir. 2012).

163. *Rodriguez-Machado*, 700 F.3d at 49-50.

164. *Id.* at 50. *See also* González–Ríos v. Hewlett Packard PR Co., 749 F.3d 15, 16 (1st Cir. 2014) (dismissing an appeal based on an attorney's "numerous procedural errors, thwarting intelligent review"; the attorney's incoherent and unintelligible briefs violated the rules of appellate procedure in myriad ways).

165. Hill v. Bloomberg, L.P., No. 14-CV-9809, 2016 WL 1665599 (S.D.N.Y. Apr. 20, 2016).

FRCP and its local counterpart,[166] failed to respond to the alleged undisputed facts asserted in the moving party's brief. Instead, the brief-writer directed the court to an affidavit, a tactic which not only directly violated the court rule, but rendered the brief ineffective in helping the court apply the Rule 56 standard.[167] Accordingly, the court deemed admitted all factual assertions made by the moving party to which the opposing party did not respond.[168]

In *Hernandez,*[169] a federal bankruptcy action, the court characterized an attorney's brief as "poorly written and largely nonsensical,"[170] highlighting its non-compliance with the Federal Rules of Bankruptcy Procedure. The brief lacked the requisite jurisdictional statement, the applicable standards of review, a succinct synopsis of the facts and procedural history, and correct citations to the record, pertinent rules, and legal authority.[171] The court explained, not only was the non-compliant brief "irritating," it thwarted the court's ability to grasp the party's arguments "with any degree of certainty," necessitating speculation.[172] The court acknowledged the potentially "harsh result" to the client of striking the brief and dismissing the appeal, yet determined that its exercise of such discretion was warranted.[173]

Further, in *Brazier*, a party appealed a judgment in a bench trial.[174] In a transparent attempt to skirt the page number limits[175] imposed by the appellate briefing rules, the party's attorney manipulated the brief's tables of contents and authorities, cramming inappropriate, lengthy substantive argument into both. Additionally, ignoring the appellate rules requiring the argument section of the brief to include contentions supported by "cogent reasoning" organized by headings,[176] the brief contained no headings or comprehensible reasoning, and instead intermixed issues.[177] The court noted that the attorney's defiance of simple briefing rules impeded its review of the case.[178]

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166. U.S. DIST. CT. S.D.N.Y. CIV. R. 56.1.
167. *Hill*, 2016 WL 1665599 at *2.
168. *Id.*
169. *Hernandez*, No. 10-43381, 2015 WL 6736698.
170. *Id.* at *3.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Brazier*, 45 N.E.3d at 442.
175. *Id.* at 449-50.
176. *Id.* at 450.
177. *Id.* at 451.
178. *Id.* at 451, n.4. *See also Kozlowski*, 2013 WL 11253778 at *2 (the poor quality of an appellate brief and the attorney's disregard of the briefing rules impeded the court's meaningful review; required substantive components were either missing or out of the order directed by the court, and the brief-writer improperly enmeshed arguments within the required Statement of the Questions Involved).

VII. DESPITE BAD BRIEFING, JUDGES OFTEN RULE ON THE MERITS OF CASES ANYWAY TO AVOID UNFAIRLY PENALIZING CLIENTS

In many of the foregoing cases, though the judges found the briefs to be unprofessional, incomprehensible, or noncompliant with the rules, the courts adjudicated the merits of the cases anyway to avoid unfairly punishing the parties for attorney failings.[179] In fact, in many instances, the lawyers who submitted subpar briefs prevailed in their cases.[180]

In *Ooida* described above,[181] even though the lawyer violated the express court rule requiring briefs in support of motions to compel discovery to extract and quote the text of the particular discovery requests and responses at issue, the court addressed the substance of the motion. The court explained that "[p]olicy weighs in favor of addressing motions on the merits, and it is within the court's discretion to proceed despite procedural deficiencies."[182] The *Ooida* court determined that, despite the bad briefing, it had sufficient information to resolve the discovery conflict.[183] Similarly, in *Kozlowski,*[184] the court rebuked a lawyer for submitting a late and substandard brief, but chose not to punish the client for the faults of his counsel, and considered the merits of the case. In *DeMarzo*,[185] even though an appellate brief violated the briefing rules and offered a deficient factual and procedural record, the court chose not to dismiss the appeal or strike the brief, indicating that this would be a "bitter sanction for a represented party because it harshly penalizes the client for his or her lawyer's noncompliance."[186]

Further, in *Strychalski,*[187] despite both parties' significantly flawed briefs in support of and in opposition to a summary judgment motion, including statements of undisputed material facts and responses thereto that violated the civil procedure rules, the court attempted—independently—to

179. *Bedi-Hetlin,* 2014 WL 5803045 at *5 (despite a deficient brief reflecting "poor effort" by the attorney, "this court is still required to decide the case on the merits of the assignments of error").

180. *Yu*, 2014 WL 259845 at *1 (despite a "poorly written brief," the brief-writer still prevailed in his appeal).

181. *Ooida*, 2016 WL 427066.

182. *Id.* at *2.

183. *Id.*

184. *Kozlowski,* 2013 WL 11253778 at *2.

185. *DeMarzo*, 39 N.E.3d at 255.

186. *Id.* at 259. *See also Capital Yacht Club*, 2006 WL 2792679 at *2 n.5 (even though the lawyer submitted a brief relying on the wrong Federal Rule of Civil Procedure, and then, in her reply brief, re-characterized the party's motion under the correct rule—which the court deemed "sloppy"—the court considered the parties' arguments); *O'Callaghan*, 36 N.E.3d at 1005 (the court acknowledged that a lawyer's failure to comply with court rules requiring citations to the record and references to case law "warrants disregarding an appellant's contentions," yet addressed the merits of the case anyway because it understood those contentions).

187. *Strychalski*, 2014 WL 1154030.

wade through the factual record to determine whether to grant summary judgment.[188] Ultimately, however, because the record was so incomplete, the court had no choice but to strike the motion.[189]

As a by-product of this policy of shielding clients from harsh consequences for their attorneys' inferior briefing, many lawyers have gotten away with lazy legal writing with no ramifications. This can be frustrating for opposing counsel who follow the rules and produce quality briefs. Nonetheless, citing procedural due process considerations, judges have explained the necessity to be sensitive toward not penalizing a client for a lawyer's lack of competence, further indicating that a non-prevailing party will "more readily accept a defeat if he feels he was heard."[190] Certain courts, however, have chosen to sanction or otherwise discipline bad brief-writers.

A. Some Courts Have Monetarily Sanctioned Attorneys for Filing Bad Briefs

Though some courts are reluctant to penalize clients for the poor briefing of their counsel, some judges indeed have imposed monetary sanctions directly against the attorneys (and sometimes jointly and severally against the client) for submitting bad briefs. However, in these circumstances, the poor quality of the legal writing often is intertwined with ethical violations related to frivolous arguments. In *Carmon v. Lubrizol Corp.*,[191] the court bemoaned the waste of time and resources caused by a lawyer's five-page "slap-dash" excuse for an appellate brief; the attorney's work product misstated and failed "to raise even one colorable challenge" to the lower court's decision and contained only cryptic record citations.[192] The court branded the brief and the meritless appeal as "inexcusable," assessing double costs under Federal Rule of Appellate Procedure (FRAP) 38 (for frivolous appeals) and 28 U.S.C. § 1927 (counsel's liability for excessive costs) jointly and severally against the client and counsel.[193]

In *Sackman,* the court called one lawyer's brief "shoddy" and "professionally unacceptable" for failing to cite and discuss the pertinent legal standard and relevant authority and apply the law to the facts, yet imposed a fine of *only $200.*[194] A concurring judge disagreed that the brief

188. *Id.* at *2.
189. *Id.*
190. Judges confidentially shared these explanations with the author.
191. Carmon v. Lubrizol Corp., 17 F.3d 791 (5th Cir. 1994).
192. *Carmon*, 17 F.3d at 795.
193. *Id.*
194. *Sackman*, 137 A.3d at 1217.

was "so lacking in thought and preparation as to manifest a disrespect to professional standards."[195] In *Servantes v. Commissioner of Social Security*,[196] the court agreed with a magistrate judge's findings that a brief in support of a motion for summary judgment was "woefully inadequate" and was based on "conclusory, undeveloped legal and factual arguments."[197] However, the federal district court judge deemed the magistrate judge's proposed sanction of $7,500 to be excessive, and reduced the amount to $2,500.[198]

Further, in a debtor-creditor bankruptcy appeal, *In re Neff*, the court took to task an attorney who, in representing himself and debtors, submitted "substantively deficient" and "incomprehensible" appellate briefs.[199] The court chastised the lawyer for: advancing allegations without citation to the record or relevant legal authority; copying-and-pasting excerpts from a bankruptcy treatise into the brief without analysis; raising previously unasserted arguments in his reply brief; and attaching irrelevant documents.[200] Emphasizing that the lawyer was also a party to the action, and was employing improper litigation tactics to increase the opposing party's financial outlay, the court imposed sanctions in the amount of $10,000 payable to the opposing party for attorneys' fees and expenses incurred in defending against the appeal.[201]

Again, for an opposing counsel who follows the rules and invests the time to research, write, and submit quality briefs, the lack of consistency in assessment of sanctions against violators of briefing standards can be frustrating. However, judges have shared that while they absolutely agree that good legal writing is "hard work" and "it counts," they are tasked with deciphering whether an attorney who submits a bad brief is "just not smart" (and therefore, a monetary sanction will accomplish nothing of value), or whether the attorney has acted out of laziness or bad faith (for which a sanction might jolt him or her into a mindset of improvement).[202] The court in *Jiangmen* explored this distinction, finding that a lawyer who had misconstrued and misparaphrased precedent violated Rule 11 of the FRCP, but refraining from imposing any further sanction.[203] The court explained its contention "that this finding is a sufficient deterrent" given "the

195. *Id.* (Gilson, J., concurring).

196. Servantes v. Comm'r of Soc. Sec., No. 14–CV–10250, 2015 WL 870255 (E.D. Mich. Feb. 27, 2015).

197. *Servantes*, 2015 WL 870255 at *1.

198. *Id.*

199. *In re* Neff, No. CC–12–1412, 2013 WL 1897019 (9th Cir. May 7, 2013).

200. *Id.* at *9.

201. *Id.*

202. Judges confidentially shared these opinions with the author. These quotes serve to illustrate judicial scrutiny of bad briefing.

203. *Jiangmen*, 2015 WL 5944278.

possibility that incompetence, rather than bad faith, was behind the specific violation."[204]

B. Some Courts Have Deemed Poor Writing Worthy of Attorney Discipline

Beyond monetarily sanctioning an attorney *within* the adjudication of a case, courts have warned[205] some attorneys of, or charged them with, violations of rules of professional conduct related to delinquent legal writing. In *Stanard*,[206] mentioned above, the lawyer missed deadlines, flouted express court directives to remedy his defectively-written pleadings, and submitted an appellate brief containing irrelevant cases and incoherent arguments.[207] The court ordered him to show cause why he should not be suspended from the bar or otherwise disciplined under FRAP Rule 46 (governing attorney suspension and discipline).[208]

In *Milhoan*,[209] the attorney who filed virtually identical (and deficient) briefs in thirty-one of thirty-five criminal appeals was suspended from the practice of law for two years; however, the court stayed the suspension on the conditions that he engage in no further misconduct, remain in compliance with a contract with the Ohio Lawyers Assistance Program, and pay restitution to the Ohio Public Defender's Office.[210] In *Sobolevsky*, the attorney who filed briefs of "shockingly poor quality," containing, *inter alia,* incorrect clients' names, irrelevant boilerplate, references to evidence never submitted, and unintelligible passages, was suspended from the practice of law for two years.[211] However, this attorney also had allowed his paralegal to write some of his briefs, filed the paralegal's work without reviewing it (enabling the unauthorized practice of law), and submitted petitions in the wrong circuit.[212]

In *In re Tustaniwsky*,[213] the Second Circuit's Committee on Admissions and Grievances found that a lawyer, among other things, had submitted poorly written briefs in five cases.[214] The court suspended the attorney from practice for one year, emphasizing that his substantive

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204. *Id.* at *8.

205. *See Fielder*, 2014 WL 1207865 at *1, n.1 (the court noted the attorney's "lamentable record of filing one-size-fits-all briefs" and warned of potential future sanctions and disciplinary action).

206. *Stanard*, 658 F.3d at 792.

207. *Id.* at 801.

208. *Id.* at 802.

209. *Milhoan*, 142 Ohio St. 3d at 230.

210. *Id.* at 235.

211. *Sobolevsky*, 96 A.D. 3d at 60.

212. *Id.* at 62.

213. *Tustaniwsky*, 758 F.3d at 179.

214. *Id.* at 184 (citations omitted).

briefing deficiencies were "not a mere inconvenience to the Court," but also constituted "a serious disservice to his clients, whose claims for relief were not even considered by the Court due to [his] failure to properly present them."[215]

Some courts have stopped short of suspension and opted instead for public reprimand. In *In re Vialet*,[216] the court publicly censured an attorney who failed to comply with court scheduling orders and submitted deficient and untimely briefs—violations of the Code of Professional Responsibility and the Rules of Professional Conduct.[217] Additionally, in *In re Hsu*,[218] the court publicly reprimanded an immigration attorney for deficient briefing. For the next two years, the court prohibited the lawyer from filing briefs unless they were co-signed by a fellow member of the bar.[219] The court further mandated the lawyer to disclose the disciplinary action to his clients and all bar memberships, and directed the clerk to post the public reprimand on the court website.[220]

In 2014, the American Bar Association's Center for Professional Responsibility's Standing Committee on Professional Discipline published a Survey on Lawyer Discipline Systems which shows the range of possible disciplinary repercussions for attorney misdeeds.[221] The survey reported a total of 1,235,298 lawyers in the United States with an active bar license, and 88,930 complaints received by the disciplinary agencies who responded to the survey.[222] While many of the reported complaints were dismissed or screened out, others resulted in referral to an Alternatives to Discipline Program (also called Diversion), or in public or private sanctions. Some of the Alternatives to Discipline Programs include CLE programs[223]; not every state offered this type of program.[224] The range of *private* sanctions encompassed admonitions, private reprimands, and letters of warning or caution, while involuntary or consensual disbarment, suspension, admonition, reprimand, censure, orders to pay restitution, and

215. *Id.*

216. *In re* Vialet, 120 A.D.3d 91 (N.Y. App. Div. 2014).

217. *Vialet*, 120 A.D.3d at 95. *See also DeMarco*, 733 F.3d at 465 (The Committee on Admissions and Grievances found that the attorney, among other things, had "submitted deficient briefs," warranting public reprimand).

218. *In re* Hsu, 451 F. App'x 37 (2d Cir. 2012).

219. *Id.* at 39.

220. *Id.* at 39-40. A New York state court imposed reciprocal discipline in *In re* Hsu, 104 A.D.3d 138 (N.Y. App. Div. 2013).

221. Am. Bar Ass'n, *Survey on Lawyer Discipline Systems* (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_sold_final_results.authcheckdam.pdf.

222. *Id.* at 5.

223. *Id.* at 39.

224. *Id.* at 10-12.

orders to pay costs comprised the various types of *public* sanctions.[225] Martin Cole, former Director of the Office of Lawyers Professional Responsibility in Minnesota (and currently an Adjunct Professor at the University of Minnesota Law School) notes a particular "difficulty in fashioning the appropriate discipline in situations involving a 'recidivist' attorney, especially where there are gaps. . . in the pattern. The violations may be unrelated, or not exceptionally serious when viewed individually."[226] Professor Cole suggests that "[e]arly recognition and intervention" can help eliminate bad attorney behavior,[227] including—as part of a disciplinary response—providing supervisors or mentors for inexperienced attorneys who lack "know-how" or "someone to consult with before acting."[228]

As the foregoing cases demonstrate, some courts have deemed poor brief-writing worthy of attorney discipline in the form of suspension, restitution, and public reprimand. However, before briefing deficiencies rise to that level, heeding Professor Cole's recommendation, early identification (by supervising attorneys and judges) and intervention (through practice mentorship and mandatory additional training) could help set deficient legal writers onto a better path.

VIII. SOLUTIONS

Bad briefing: (1) unfairly impacts the workload of opposing counsel who honor legal writing standards and comply with court rules; (2) shifts the burden of factual and legal research to opposing counsel and court personnel; (3) can slow the court's evaluative process; and (4) can be perceived as disrespectful to the judicial system and its players. The judges in the foregoing cases took the time to identify why bad briefing, at least in their views, poses a problem in their courts. This problem, however, is a fixable one—if we honor and reinforce the principles introduced in 1L legal writing curricula across the country through a holistic continuum after the first year of law school, into each subsequent academic year, graduation, bar admission, and daily law practice.

Great legal writing is not a facility that lawyers must be born with, and it is also not usually achievable without an investment of time. This is especially true in a profession in which knotty and murky rules and concepts comprise the writer's raw material. In *Whipple v. Taylor*

225. *Id.* at 13-15.

226. Martin Cole, *Disciplinary Recidivism*, 70-Aug. BENCH & BAR OF MINNESOTA 10, 11 (August 2013).

227. *Id.*

228. *Id.*

University, the court noted how brief-writers faced a particularly daunting challenge in trying to produce quality briefs when analyzing a complex burden-shifting legal standard in a discrimination case.[229] The court emphasized:

> [The complexity of the rule governing the parties' case] does not serve as an excuse for lawyers to file briefs in federal court that contain improper citation form, careless grammatical errors, unnecessary and visually obnoxious typographical tricks, or illogical or irrelevant arguments; but it does help explain why parties often file such poorly written briefs.[230]

Wide-scale simplification of our complex laws is not likely to happen, but increased frequency of opportunities for students and new lawyers to practice writing about legal intricacies easily can.

Athletes, musicians, and artists with *natural* gifts invest substantial time training, learning from coaches, and refining their talent to move beyond their personal status quo; naturally gifted legal writers need similar tutelage, mentoring, and practice. Indeed, law students and lawyers *without* natural writing aptitude (or affinity toward the task) need even more infrastructural support and personal commitment to developing as writers. Otherwise, they inevitably will foment future "benchslaps," which can be professionally embarrassing and detrimental to our legal system. As prolific author Linda Formichelli wrote in a blog post entitled, *Is Writing Talent Inborn or Learned*, "[y]ou don't need innate talent to succeed at writing, but you do need plenty of ass-in-chair. You need to hone your grammar, read constantly (when you're not writing, that is), study great writers, and write, write, write."[231] Building on principles discussed in Geoff Colvin's book, *Talent is Overrated*, blogger Chris Jones talks about a writer's need for "deliberative practice."[232] Author Jeff Goins also stresses that "[r]eal writers practice. . .I'm not talking about rehearsal. I'm talking about doing what musicians and boxers and lion tamers all do in order to get ready for their work. To become awesome at their crafts."[233] Good legal

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229. Whipple v. Taylor University, No. 3:13-CV-1177, 2016 WL 525251 (N.D. Ind. Feb. 10, 2016).

230. *Whipple*, 2016 WL 525251 at *22.

231. Linda Formichelli, *Is Writing Talent Inborn or Learned*, http://www.therenegadewriter.com/2009/03/16/is-writing-talent-inborn-or-learned/.

232. Chris Jones, *How Deliberate Practice Improves your Writing*, MEDIUM (Aug. 5, 2015). https://medium.com/@chrisjonesink/how-deliberate-practice-improves-your-writing-6dfceb6c7fd7#.thabjiwnm.

233. Jeff Goins, *Practice Doesn't Make Perfect*, GOINS WRITER (last visited Feb. 7, 2017). http://goinswriter.com/practice-perfect/.

writing practice starts in the first year of law school and should continue throughout every phase of a lawyer's career.

A. Instilling Intellectual Humility in 1L Legal Writers

While honoring Chief Justice Warren E. Burger, the Honorable Kenneth F. Ripple, a judge for the United States Court of Appeals for the Seventh Circuit and former clerk of Justice Burger, illustrated how the Chief Justice used his legal writing practice as a vehicle for critical thinking and problem-solving:

> For the Chief Justice, writing was not just a means of communication. It was a necessary tool for thinking through the most difficult problems. For him, tough analytical thought and precise legal reasoning were not the product of oral disputation. Rather, the fundamental intellectual process of lawyering and judging occurred when the validity of an initial hunch or intuitive flash was tested by pen meeting legal pad. As the pen met paper, private musings and oral dialogue were transformed into solid analysis or discarded as useless as he searched for the appropriate outline of the opinion, the "best" phrase, the "right" words to convey a thought. After reading briefs, studying cases, and listening to oral arguments, he would often say, "Let's see how it writes out."[234]

Starting in the 1L year of law school, we should introduce law students to the concept of "intellectual humility" in establishing their identity as lawyer-writer. We can validate that no lawyer—not even a Supreme Court Justice as illustrated above—immediately knows the answer to every legal dilemma. Instead, mindful lawyers turn to the blank page to crunch through legal rules, experiment with logic, and vet creative solutions.

According to Socrates, we cannot be intellectual without intellectual humility.[235] Former justice of the Supreme Court of Wisconsin, William A. Bablitch, characterized intellectual humility as "an awareness of what we do not know, and an awareness that what we think we know might well be incorrect. This is particularly important when it comes to the law. The law has a funny way of jumping up and biting you right where it hurts at the

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234. The Honorable Kenneth F. Ripple, *Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special "Classroom,"* 74 NOTRE DAME L. REV. 925, 926 (March 1999).

235. Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in which Winnie-the-Pooh Meets Mrs. Palsgraf,* 34 CAL. W. L. REV. 351, 366 (1998).

most unexpected times."[236] Legal scholars posit that the most effective judges model intellectual humility.[237] Supreme Court Justice Felix Frankfurter stated, "[T]he indispensable judicial requisite is intellectual humility."[238] Others suggest that intellectual humility is a necessary ingredient to cultivate a global legal community,[239] as "[t]he essence of humility is treating other things—especially other people—as if they really matter."[240]

Intellectual humility is essential to critical thinking. Attorney Phillip Miller asserts that "[c]ritical thinking without fair-mindedness, humility, or empathy is flawed, and while it may seem brilliant to you or me, it may be no more than intellectual manipulation or trickery to jurors."[241] As Judge Ripple noted, "the writing process requires a certain humility of mind and spirit. There must be an openness to the possibility that something 'won't write out' because it does not make sense and that a substantive course adjustment is necessary."[242] Judge Ripple encourages law professors "to spend more time making the students conscious of the intimate relationship between legal reasoning and legal writing."[243] He emphasizes the importance of honoring the correlation between thinking and writing, and fostering an awareness "that good legal writing—because it is also good legal thinking—takes time."[244]

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236. William A. Bablitch, *Reflection on The Art and Craft of Judging*, 42 No. 4 JUDGES' J. 7, 8 (2003).

237. Aharon Barak, *Judging as a Way of Life,* LEGAL AFF., June 2002 at 28 ("A judge should show intellectual humility. The strength of his judgments is displayed in his ability to admit errors."); Aharon Barak, *The Role of a Judge in a Democracy*, 88 Judicature 199, 200 (March-April 2005) ("The strength of our judgment lies in our ability to be self-critical and to admit our errors in the appropriate circumstances. Law has not started with us. It will not end with us."); Wayne D. Brazil, Jordan Eth, Thelton E. Anderson, *In Memory of Chief Judge Robert F. Peckham*, 44 HASTINGS L.J. 973, 977 (1993) (In a memoriam to a Chief Judge of the U.S. District Court for The Northern District of California: "Perhaps because of this fundamental intellectual humility, he could hear others without a trace of that defensiveness that can impede real access to other people's suggestions or insights.").

238. *American Federation of Labor v. Am. Sash & Door Co.,* 335 U.S. 538, 557 (1949) (Frankfurter J., concurring).

239. John Sexton, *Structuring Global Law Schools*, 18 DICK. J. INT'L L. 451, 452 (Spring 2000) ("[A]n essential feature of the defining perspective embraced by the global law school is intellectual humility. It is understanding that there is wisdom outside of our narrow world – and being delighted in being asked the question that you would [have] never asked inside your own thought system."); John Sexton, *"Out of the Box" Thinking About the Training of Lawyers in the Next Millennium*, 33 U. TOL. L. REV. 189, 198-199 (2002) ("[P]erhaps the most profound impact of globalization on the enterprise of legal education can be captured in the word 'humility.' Discovering a premise that unconsciously shaped one's thinking is a dramatic moment intellectually, and the repetition of such discoveries should instill intellectual humility and a reluctance to assume that there is a single right answer.").

240. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 162 (1998).

241. Phillip H. Miller, *Critical Thinking in Litigation*, 2013 ANNUAL AAJ-PAPERS 35 (2013).

242. Ripple, *supra* note 234, at 929.

243. *Id.* at 928.

244. *Id.* at 929.

The 1L legal writing classroom already provides robust opportunities for students to experiment with their lawyer-writer voices, make mistakes, receive one-on-one feedback, edit, revise, fine-tune, and grow both in humility and in confidence. Legal writing professors devote time, energy, and creativity to legal writing pedagogy, collaborating across the academy through scholarship and conferences to magnify the connection in students' minds between their lawyer-personas and writer-personas. Outside the legal writing classroom, other 1L teachers can reinforce the concept that "writing is thinking," using writing as a method of problem-solving, perhaps for example, when students falter in a Socratic dialogue. When students appear stumped by a query, professors might stop for a few minutes and say, "let's write it out." Teachers can validate the experience of being flummoxed by a challenging legal question, and use the vehicle of "rough writing" to work out an answer: first, by modeling vulnerability in not immediately knowing the response to every question; then by demonstrating how the act of writing can ignite fresh ideas or logic connections; and eventually by simulating how to convert a messy piece of writing into a polished one (providing students with short examples of several iterations of drafts—from initial pen-to-paper scribbles (or laptop musings) to clean, clear, tightened-up end products). For instance, teachers might allot students 5-10 minutes in class to write out a rough answer to the Socratic question posed, invite the "stumped" student or other classmates to share their written thoughts, and use the writing as a catalyst for continued dialogue. Professors also could perform a "write-aloud," narrating his or her internal dialogue while writing out his or her own answer to the Socratic question, either while typing in real-time on the screen or writing first by hand and later projecting the written text on the screen. In subsequent classes or through follow-up emails, professors can transmit iterative edited examples of the initial drafts to illustrate the process of revision. This type of spontaneous writing, with ensuing adjustment and refinement, might help reinforce the notion that writing goes hand-in-hand with lawyers' in-the-moment analytical and problem-solving processes, and does not need to be saved up for midterms or final exams (where editing and revising are not typically possible).

B. Increasing Legal Writing Opportunities and Reinforcing Legal Writing Standards Throughout Law School

Once law students leave the 1L legal writing classroom, even with an upper-level writing requirement for graduation, many law students do not consistently put enough pen-to-paper to develop as writers—not only in aptitude but in awareness of and enthusiasm for the necessary work involved. Within the 1L legal writing course, students engage in continuous

and continual writing practice, one-on-one analytical feedback, and developmental mentoring with their legal writing professors. However, between the capstone of the 1L course and graduation two or three years later, many schools (due to multiple competing learning objectives) historically have obliged students to produce just a single paper (a seminar paper; a law review note; a moot court brief; or an advanced legal writing course memorandum, brief, or transactional document—or combination of shorter practice-oriented writing assignments) to satisfy the graduation writing requirement. Outside of curricular adjustments, law school mentors (including legal writing professors, faculty advisors, career counselors, and academic support directors) can reinforce the importance of continuity in exercising the legal writing proficiencies gained in the 1L year course. Together, we should encourage students to hold themselves accountable to engage in recurrent writing practice in each subsequent year leading up to graduation. Law schools should nurture a professional ethic in students to seek out plentiful and rigorous upper-level legal writing opportunities in each consecutive year (or ideally, semester) of law school, not just to satisfy the graduation requirement but to develop their professional identities as lawyer-writers.

C. Heightening Commitment to Legal Writing Standards During the Transition to Practice

Many state bar examiners already added a Performance Test component to the traditional bar exam, in which test-takers perform realistic legal writing assignments designed to assess a bar candidate's writing and analytical competence in a law practice setting rather than in an academic setting.[245] The Performance Test comprises 20% of the Uniform Bar Exam Grade (and includes two writing exercises of 90-minutes each).[246] While only twenty-six jurisdictions have adopted the Uniform Bar Exam, forty-three jurisdictions appear to have implemented some form of a Performance Test, demonstrating bar examiners' recognition of the importance of future attorneys' writing and critical analysis skills.

Once a law graduate passes the exam, state bars can bolster the profession's commitment to quality legal writing by making legal writing standards an explicit criteria of professionalism and bar membership. My prior article proposed that the oaths that new attorneys swear in the fifty state bars nationwide should incorporate a pledge to legal writing quality as an overt covenant of professionalism[247]; some scholars indicate that the

245. Jurisdictions Administering the MPT, http://www.ncbex.org/exams/mpt/.

246. *Id.*

247. Brown, *supra* note 7 at 145-149.

concrete act of signing one's name to a document or verbalizing a vow or pledge in the presence of others may solidify an otherwise ethereal concept into a tangible moral obligation."[248] As I reported in that article, only Arkansas, Florida, Louisiana, and South Carolina expressly reference the attorney's act of *writing* in their oaths: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all *written* and oral communications."[249] Since 2014, Texas added a reference to legal communications in its bar admission oath: "I will conduct myself with integrity and civility in dealing and *communicating* with the court and all parties."[250] Many lawyers recall their swearing-in ceremonies but not necessarily the language of the oaths. Perhaps, as a legal community, we should revisit the phrasing of our bar admission oaths, consider incorporating the act of legal writing into the oath language, and then remind ourselves of these oaths each time we renew our bar memberships in each jurisdiction.

D. Including Legal Writing as an Overt Criterion of Professional Competence in State Bar CLE Requirements and Law Office Mentoring

Most state bars require practicing attorneys to attend CLE programs on an annual, biennial, or triennial basis. The Statement of Purpose of the New York State Bar's CLE Program reinforces the notion that legal education does not end at law school graduation: "It is of utmost importance to members of the Bar and to the public that attorneys maintain their professional competence by continuing their legal education throughout the period of their active practice of law."[251] My prior article evaluated CLE

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248. *Id.* at 146.

249. *See In re* Attorney Oath of Admission, 2012 Ark. 82 (Ark. Feb. 23, 2012); *In re* Rule 402, 2003 S.C. Lexis 198 (Aug. 13, 2003); Oath of Admission to The Florida Bar (last updated Sept. 12, 2011), https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/1D5588454EA8A1DD85257D38006527ED/$FILE/oath_of_admission_to_the_florida_bar_ada.pdf?OpenElement; Louisiana Supreme Court Committee on Bar Admissions, Lawyer's Oath (last visited Feb. 7, 2017), https://www.lascba.org/Admissions.aspx?tab=oath. *See* Supreme Court of Arkansas, *In re* Attorney Oath of Admission, http://opinions.aoc.arkansas.gov/WebLink8/0/doc/274119/Electronic.aspx; https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/1D5588454EA8A1DD85257D38006527ED/$FILE/oath_of_admission_to_the_florida_bar_ada.pdf?OpenElement; The Louisiana Supreme Court Committee on Bar Admissions, Lawyer's Oath, http://www.lascba.org/lawyers_ oath.asp; Supreme Court of South Carolina, Order RE: Amendment to Rule 402, SCACR, http:// www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03 (emphasis added).

250. STATE BAR OF TEXAS, OATH FORM, https://www.texasbar.com/AM/Template.cfm?Section=New_Lawyer_Forms_and_Fees1&Template=/CM/ContentDisplay.cfm&ContentID=29062.

251. NY CLS RULES, CONTINUING LEGAL EDUCATION § 1500.21, https://www.nycourts.gov/attorneys/cle/programrules.pdfhttps://www.nycourts.gov/attorneys/cle/programrules.pdf.

standards across all fifty states, reporting that numerous jurisdictions require attorneys to complete ethics-related CLEs during each reporting cycle and some states require new attorneys to pursue "professionalism" and "skills" courses.[252] Some jurisdictions, like the Commonwealth of Virginia, mandate that attorneys attend four of the annually required twelve hours in a "live conference" instead of online—to curb attendance "manipulation." Other jurisdictions require CLEs on mental health and substance abuse issues.[253] Thus, such jurisdictions clearly have recognized CLEs as a valuable forum for reinforcing important topics within our profession such as ethics, professionalism, and mental health and substance abuse. Notably, while CLEs on legal writing certainly are *offered*, not a single state (as of the 2013-2014 research results) *mandated* attorneys to participate in annual CLEs devoted exclusively or expressly to legal writing.[254]

Presently, some states like Idaho give CLE *credit* for legal writing publication.[255] For example, Idaho grants, but does not require, up to 6 hours of CLE credit for "published legal writing" of a minimum of one thousand words that "[c]ontributes to the attorney's legal education," "[i]s intended for an attorney audience," and "[i]s an original writing that is published, in print or electronically, in a professional legal journal or publication."[256] Washington also grants, but does not require, credit for legal research resulting in a written work of a minimum of ten pages (as of January 1, 2016).[257] The writing must be "for the purpose of lawyer education" and "published by a recognized publisher of legal works as a book, law review or scholarly journal article of at least 10 pages."[258]

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252. Brown, *supra* note 7 at 149-150.

253. *See, e.g.*, The State Bar of California, *MCLE Requirements* (last updated 2016), http://mcle.calbar.ca.gov /Attorneys/Requirements.aspx (Competence Issues (formerly known as Prevention, Detection and Treatment of Substance Abuse or Mental Illness): 1 required hour); http://www.nvcleboard.org/FAQ/tabid/57/Default.aspx (mandatory one (1) CLE hour once every three years on substance abuse, addictive disorders and or mental health issue); http://www.nccle.org/for-lawyers/requirements/renewing-lawyers/("At least once every three calendar years, each lawyer must complete an additional hour of professional responsibility devoted exclusively to instruction in substance abuse awareness or debilitating mental conditions, and a lawyer's professional responsibilities."); http://www.commcle.org/faqs.html#5 ("at least once every three (3) annual reporting years, attorneys and judges must complete one (1) hour of instruction devoted exclusively to substance abuse or mental health issues").

254. A survey of all fifty states' CLE requirements is on file with the author.

255. IDAHO BAR COMMISSION RULES 404(c) (last visited Feb. 7, 2017), https://isb.idaho.gov/pdf/rules/ibcr.pdf.

256. *Id.*

257. Washington State Bar Association, New MCLE Rules take effect January 1, 2016 (last visited Feb. 7, 2017).

258. Washington State Bar Association, Rule 11 MANDATORY CONTINUING LEGAL EDUCATION. (Jan 1, 2016).

Since 2014, one state has added an overt reference to writing in its mandatory CLE requirements. Effective January 1, 2016, Delaware requires any attorney admitted to the bar after December 1, 2015 to attend seven "fundamental" courses within four years, including "Fundamentals of Will Drafting."[259]

As at least some form of legal writing is a key aspect of most lawyers' professional competence, state bars should require at least one CLE hour per reporting cycle specifically focused on legal writing standards, with options for litigation, transaction-based, or other legal writing genres relevant to attorneys' individual types of practice. Beyond mandatory CLE requirements in the various jurisdictions, individual law offices can require, or strongly encourage, all attorneys to continue their legal writing development through office-sponsored or bar-association-sponsored programs, and can recognize legal writing excellence in employment evaluations.

E. Deterrence

While opposing counsel should, when appropriate, be reimbursed for attorneys' fees and costs reasonably incurred in responding to bad briefs, ramping up courts' imposition of monetary sanctions might simply spur some lawyers to conduct a cost-benefit analysis when crunched for time in drafting, editing, and finalizing briefs. Under certain circumstances, some lawyers may deem such financial penalties a mere cost of doing business. Plus, as some judges have relayed, if a lawyer's poor brief-writing is the result of a lack of skill or competence, monetary sanctions will not address the underlying problem.

Instead, when feasible and proper, perhaps judges could continue to specifically recognize the helpful aspects of good briefing and point out particular deficiencies in bad briefing—in the body of their judicial opinions, like the ones described in this article. Further, possibly more judges could encourage, or require if allowed, attorneys who submit bad briefs to undertake additional training and writing practice. Numerous judges have intimated the likely benefits of continued legal writing education. For example, in *Garcia v. Newtown Township*,[260] in critiquing a lawyer's briefs and other written submissions which were "replete with typographical errors and other incomprehensible sentences," the court "strongly recommend[ed] that Plaintiff's counsel henceforth spend most, if

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http://www.wsba.org/~/media/Files/Licensing_Lawyer%20Conduct/MCLE/MCLE%20Comparison%20Chart.ashx.

259. Delaware State Bar Association, THE DELAWARE RULES FOR CONTINUING LEGAL EDUCATION (JAN. 1, 2016), http://courts.delaware.gov/rules/pdf/CLE-RULES-Effective-JAN012016.pdf.

260. Garcia v. Newtown Township, 819 F. Supp. 2d 416 (E.D. Pa. 2011).

not all, of his [required 12 hours of] CLE time in courses focusing on legal writing."[261] Similarly, in response to an attorney's FRCP Rule 11 ethical violations in *McGough v. Wells Fargo Bank, N.A.*,[262] the court ordered the offending lawyer to log 20 additional CLE hours, including "a minimum of eight hours in complaint-drafting or other legal writing."[263] Further, in two attorney discipline cases, deficient brief-writers were either required[264] or "strongly encouraged"[265] to attend legal writing CLE courses. Finally, the judge in *Brazier*[266] wanted to order an attorney to attend appellate brief-writing CLEs, stating, "[w]ere it within our purview to do so, we would order. . . counsel to verify to this court her attendance at a continuing legal education program regarding appellate practice before submitting any further briefs to this court. . .. Nonetheless, we admonish counsel in the strongest possible terms to carefully review the appellate rules and fully conform her briefs to their requirements in the future."[267]

In the more egregious scenarios, or circumstances in which judges believe an example must be made (and they have the time to devote to constructing a holistic resolution), the manner in which an Illinois federal court handled deficient brief-writing by attorneys employed by the prominent firm of Skadden, Arps, Slate, Meagher & Flom, LLP offers an interesting and positive approach. In *Thul v. OneWest Bank*,[268] a trial team of three Skadden lawyers filed briefs in support of a motion to dismiss, yet failed to cite a controlling Seventh Circuit decision outright rejecting their client's argument.[269] The federal district court ordered the three attorneys to

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261. *Garcia*, 819 F. Supp. 2d at 432 n.11.

262. McGough v. Wells Fargo Bank, N.A., No. C12–0050 TEH, 2012 WL 6019108 (N.D. Cal. Dec. 3, 2012).

263. *McGough*, 2012 WL 6019108. at *6.

264. *Sobolevsky*, 96 A.D. 3d at 62 (In an attorney discipline case, both the Committee on Admissions and Grievances and the United States Court of Appeals for the Second Circuit recommended—and the court ultimately imposed—a two-year suspension and, for reinstatement, required evidence of the attorney's attendance at CLE classes in brief-writing and law office management), citing *In re Sobolevsky*, 430 F. App'x 9, 10, 22 (2d Cir. 2011); *In re* Vialet, 460 F. App'x 30 (2d Cir. 2012) (ordering an attorney to complete "at least six hours of live in-class CLE instruction in appellate-level advocacy and/or appellate brief-writing, focusing on immigration law to the extent possible"); *Hsu*, 451 F. App'x at 39 (ordering the attorney to "attend, within one year of the filing date of this order, CLE programs on (i) immigration law, (ii) federal appellate practice, and (iii) appellate brief writing.").

265. *In re* Liu, 113 A.D.3d 85 (N.Y. App. Div. 2013) (In holding that public censure was appropriate reciprocal discipline for an attorney's filing of deficient and untimely briefs in support of petitions for review in immigration cases, the court noted that the Second Circuit had "strongly encouraged [the attorney] to attend CLE courses in appellate practice, legal writing, and immigration law if he continued to file appeals or to practice immigration law.").

266. *Brazier*, 45 N.E.3d at 442.

267. *Id.* at 451 n.4.

268. *Thul*, No. 12C6380, 2013 WL 24599 (N.D. Ill. Jan. 2, 2013), *vacated in part in* 2013 WL 212926 (N.D. Ill. Jan. 18, 2013).

269. *Thul*, 2013 WL 24599 at *2.

show cause in writing—i.e., draft and submit another brief—explaining why they should not receive some form of sanction, such as payment of the opposing party's attorneys' fees and costs incurred in addressing the deficient briefs, a written and/or oral reprimand, or some other proper penalty.[270] In a thoughtfully written opinion, the court explained the curative result after the attorneys submitted a brief and appeared in court for the show cause hearing. First, the court vacated the show cause order as to one of the three lawyers, an associate who was junior to the two primary brief drafters and played no role in their research and writing process.[271] Next, without shaming the attorneys, the court explained the flaws in the attorneys' contention that the uncited case was distinguishable.[272] Ultimately, the court declined to impose a further sanction, reasoning that: (1) the prior ruling—publicly available—already impacted the lawyers' reputation; (2) the lawyers accepted responsibility, expressed contrition, and absolved their colleague; and (3) the lawyers compensated the opposing party and counsel for the excess briefing costs through the law firm's contribution to the case settlement amount.[273]

The foregoing remedy honored the role of legal writing itself in problem-solving, requiring the offenders to use the vehicle of a brief to explain themselves. Further, the court's resolution balanced civility *and* accountability: among the judge and the lawyers, the law firm colleagues, and the opposing parties and counsel. The law firm's settlement contribution addressed the opposing party's tangible costs associated with the deficient briefing. While this approach still burdened the court with additional time and costs in reviewing the supplementary brief, conducting a hearing, and drafting an opinion—which raises the issue of scalability[274]—overall it contributes a compelling example of the system's players working together collaboratively to right a legal writing wrong.

IX. CONCLUSION

Author and historian, David McCullough, said, "Writing is thinking. To write well is to think clearly. That's why it's so hard."[275] Professor Carol Berkenkotter reiterated that "[a] writer is a problem solver of a

270. *Id.* at *3.

271. *Thul,* 2013 WL 212926 at *1.

272. *Id.* at *2.

273. *Id.* at *3.

274. One federal judge I consulted about the realistic scalability of the *Thul* court's approach indicated that she would be choosy about which circumstances would warrant inviting extra briefing and an additional hearing. She shared that, unfortunately, she is accustomed to bad briefing, and in many cases, it would be "pointless" to take time away from the case to address it.

275. *Interview with NEH chairman Bruce Cole, Humanities,* July/Aug. 2002, Vol. 23/No. 4 *available at* https://www.neh.gov/about/awards/jefferson-lecture/david-mccullough-interview.

particular kind."[276] Legal writing, and brief-writing in particular, offers a rich opportunity for law students and lawyers to think through challenging legal conflicts and solve legal problems by converting abstract thoughts and theories into concrete logic frameworks, vetting and testing ideas during the crafting, re-organizing, editing, and fine-tuning stages. As the cases described in this article show, too many lawyers give this criterion of professional competence short shrift, detrimentally impacting the efficiency of judges' work, increasing costs, and undermining respect for our legal institutions and their participants, including clients. Becoming an effective legal writer starts with intellectual humility, accepting that writing necessitates hard work and commitment, and merits continuous—arguably daily—practice. The legal profession can enrich the quality of legal writing by honoring its role as a vehicle of analytical thinking, starting in the first year of law school, across the curriculum, not just in legal writing courses. We must reinforce and bolster this notion each subsequent year of law school through graduation, transition to bar admission, and—as a community—throughout a lifetime of legal practice. Legal writing is a powerful medium for communicating logic, passionate advocacy, and sound ethics. There is no shame in acknowledging that it is hard work. As Ernest Hemingway said, "It's none of their business that you have to learn how to write."[277]

276. https://pdfs.semanticscholar.org/ecfa/9411d4efc6039c5e45bb54ee9eaa74e5ed2b.pdf.

277. ARNOLD SAMUELSON, WITH HEMINGWAY: A YEAR IN KEY WEST AND CUBA (Random House 1984). The second half of Hemingway's quote is: "Let them think you were born that way." I prefer the theme of the first half of the quote. Great legal writers are not "born that way"; there is no shame in recognizing, and even championing, the fact that we have to learn how to be impactful legal writers. Like great athletes, musicians, or artists, the strength and honor comes from the lifelong work and dedication to being the best we can be at what we choose to do.