

Fall 2014

Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context

Heidi K. Brown

Brooklyn Law School, heidi.brown@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Legal Writing and Research Commons](#), and the [Other Law Commons](#)

Recommended Citation

11 Legal Comm. & Rhetoric: JALWD 109 (2014)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Converting Benchslaps to Backslaps

Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context

Heidi K. Brown*

A search in published and unpublished court decisions for derivations of phrases like “poorly written brief” or “failure to follow court rules” yields an alarming multitude of case opinions in which judges admonish lawyers of all levels of experience for shoddy briefs or for flouting non-negotiable substantive and procedural rules. Legal bloggers have affectionately dubbed these public reprimands “benchslaps.”¹ Law-firm hiring partners often remark that many new lawyers do not yet know how to write well. However, it is not only novice attorneys who are being “benchslapped” by courts; experienced litigators are often the regrettable recipients of judges’ rebukes.

Still, despite access to professors’ comprehensive instruction, one-on-one writing conferences, and detailed grading rubrics, some law students submit written work product that lacks key substantive components and violates clear procedural and formatting requirements. Benchslap opinions demonstrate that, for many lawyers, a laissez-faire approach toward legal writing can unfortunately continue beyond law-school graduation. As the case law reveals, attorneys who have been practicing law for decades represent some of the more egregious offenders. This problem goes beyond fundamental writing ability; it signifies at least some level of

* Heidi K. Brown is an Associate Professor of Law at New York Law School where she teaches Evidence, Legal Practice, and Deposition Skills. Professor Brown graduated from the University of Virginia School of Law, and subsequently practiced commercial litigation and arbitration of complex construction disputes for over fifteen years in Washington, D.C., and New York. She is the author of six editions of *Fundamentals of Federal Litigation*, a litigation manual for new lawyers based upon the Federal Rules of Civil Procedure and selected Federal Rules of Evidence, published by Thomson-West. This article was funded by a summer research grant generously provided by New York Law School.

¹ According to the Urban Dictionary, the term “benchslap” was popularized by David Lat of *Above the Law* (<http://www.abovethelaw.com>) when he was blogging for *Underneath Their Robes*. See Article III Groupie, *Underneath Their Robes*, *Bench-Slapped! Reinhardt v. O’Scannlain*, http://underneaththeirrobes.blogspot.com/main/2004/06/greetings_welco.html (June 24, 2004, 1:07 p.m.); see also Josh Blackman, Josh Blackman’s Blog, *The 8 Best Benchslaps of 2012*, <http://joshblackman.com/blog/2012/12/18/the-8-best-benchslaps-of-2012/> (Dec. 18, 2012).

disregard for court-imposed instructions and guidelines—an interesting phenomenon in a profession swathed in rules.

Of course, a notable percentage of law students graduates with a portfolio of “law-firm quality” memoranda and briefs, and has the writing aptitude necessary to represent a client well. However, this article focuses on strategies for reaching the cadre of law students and new lawyers who unfortunately are not embracing the challenge of legal writing in a way that will produce quality work product for legal employers and clients.

This article considers the threshold possibility that law students and new lawyers fall short in their written communications and periodically ignore substantive, procedural, and formatting mandates (from professors, supervising attorneys, or courts) because they do not understand the *context* of why these conventions matter. Ideally, if new lawyers and law students comprehend more fully *why* their legal communications need to be written a certain way, they will be more motivated to fulfill, if not exceed, their intended audience’s expectations. Novice writers need to learn that an author’s adherence to a particular structural logic increases the likelihood of the reader’s understanding of complex legal analysis. Likewise, while procedural and formatting rules might seem overly pesky, they facilitate the information’s transportation to the reader’s hands in a medium he or she expects. If new legal writers grasp the bigger picture of how a standalone writing assignment fits into a client’s case—and the legal system—as a whole, they might take greater ownership in how their written word can serve as an advocacy tool, rather than treating a writing project as just another activity to cross off a “to do” list.

Section I of this article provides a contextual background that professors and practitioners can share with rookie legal writers, using judicial opinions to demonstrate the eight most-common ways that attorney work product falls short of judges’ expectations and, more importantly, how those deficiencies detrimentally affect the legal process and client advocacy. On a positive note, this section also provides examples of judges’ appreciation for good legal writing that facilitates the court’s understanding and evaluation of a case.

Section II briefly considers several philosophical reasons why individuals ignore or flout rules in general, even intelligent, accomplished individuals like ambitious law students and seasoned legal practitioners. This section is designed to provide law professors and supervising attorneys with context as to why new practitioners might behave a certain way, so that we can inspire change.

Section III suggests practical ways for professors and practitioners to communicate and reinforce to law students and new attorneys why substantive–structural and procedural–formatting rules of legal writing

are important. With the goal of inspiring and cultivating better-written work product across the profession, this article concludes with proposals for broad-scale legal communities (such as civil-procedure rule-makers and state bar associations) and small-scale legal communities (like law offices) to motivate new lawyers to invest more care into the written word. These considerations include whether (a) civil-procedural rules should include more-express language concerning the quality of legal writing in court submissions and clarify the ramifications of not following substantive mandates and procedural rules; (b) the oaths that new attorneys take in the fifty state bars across the country should incorporate a commitment to quality legal writing and rule compliance as an overt covenant of professionalism; and (c) state bar Continuing Legal Education (CLE) requirements should be modified to integrate an annual legal writing component, just as many states impose an annual ethics or professionalism requirement.

I. Benchslap Fodder: Work Product that Flouts Courts’ Substantive, Procedural, and Formatting Rules

Litigators often transmit client e-mails riddled with writing errors and submit briefs to the court that opposing counsel, the judge, or his or her clerks, first need to decipher before taking responsive action. Some law students challenge their legal writing professors’ critiques about clarity, structure, or rampant proofreading errors, a few even asserting, “No one minded when I turned in papers like this in college, and professors gave me A’s.” This approach toward one of the most effective and powerful modes of advocacy can be disturbing to those who take pride in their written word.² However, simply telling these writers that good legal writing is important is obviously not effective enough to motivate change. Until they experience negative professional repercussions, and still even then, they might not realize or understand exactly how terrible writing and rule-flouting negatively affect the legal system and their clients. This article suggests that, through learning a richer context earlier—and seeing examples from real cases about the broader effect of sub-par written work on various aspects of, and players in, the legal system—new legal writers

.....

² Lawyers who fail to take pride in their written work product can truly rile a court. For example, in *Negrón-Santiago v. San Cristobal Hospital*, 764 F. Supp. 2d 366, 373 (D.P.R. 2011), the court criticized an attorney for filing “bad, even bordering on terrible” pleadings. The lawyer had “cut and pasted” parts of the complaint from prior cases pending before the same judge, failing to remove the names of unrelated co-defendants. *Id.* The court called this behavior “the opening salvo in a barrage of incompetence.” *Id.*

hopefully will envision their important role in the legal process on a broader scale.

Judges in state and federal courts provide a wealth of insights as to how and why poor legal writing affects the efficiency and efficacy of the legal system. The next section of this article extracts excerpts from cases to explain the disadvantageous impacts of (a) unclear structural logic and hazy phrasing in written work product submitted to courts; (b) missing substantive components in pleadings and briefs; (c) poor handling of the case facts, including slack citation to the factual record; (d) faulty treatment of the applicable law, including imprecise citation to legal sources; (e) express defiance of procedural and formatting rules, including page or word limits, line spacing, margins, and font size; (f) rampant typographical, grammatical, or general proofreading errors; (g) a disrespectful tone directed toward the court, opposing counsel, or other parties; and (h) late filings.

Two themes permeate this survey of judicial opinions: First, good substantive legal writing enables courts to process complex intellectual material efficiently, so judges can “forge enlightened decisions.”³ Second, written work product submitted in compliance with court procedural rules ensures “fairness and orderliness” in the judicial process.⁴ Conversely, poor legal writing hampers judges’ ability to understand parties’ claims and render fair decisions; written work product that defies procedural rules detrimentally affects courts’ functional ability to process substance, adding to court-staff workload, and prejudicing opposing counsel who follow the rules. As explained further in section III, we can invite discussion and raise awareness with new legal writers about these issues by sharing some or all of the judicial opinions explained here.

A. Lack of Clarity in Written Work Product Can Force Judges to Read Pleadings and Briefs Multiple Times, Inviting Unfavorable Rulings.

Although a courtroom judge might grant counsel a bit of creative leeway if a closing argument takes a meandering road to get to a point, a judge forced to hunt for substance in a written brief like an elusive

.....

³ As the United States Court of Appeals for the First Circuit explained so succinctly in *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 14 (1st Cir. 1996), “rules establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions.” The court also noted that deficiencies in legal writing “frustrate any reasonable attempt to understand [a party’s] legal theories.” *Id.* Further, “[s]ince appellate judges are not haruspices, they are unable to decide cases by reading goats’ entrails. They instead must rely on lawyers and litigants to submit briefs that present suitably developed argumentation.” *Id.* at 12.

⁴ *Id.* at 14. Courts’ procedural rules “ensure fairness by providing litigants with a level playing field. They ensure orderliness by providing courts with a means for the efficient administration of crowded dockets.” *Id.*

“truffle”⁵ will not likely be as generous. Unclear legal writing forces judges to read pleadings and briefs multiple times and can result in adverse rulings if the court—as the decisionmaker—cannot understand the attorney’s claims.

For example, in *Ochoa v. Cook County Sheriff*, a plaintiff’s attorney submitted a particularly “poorly written and virtually unintelligible” brief in response to a defendant’s motion to dismiss.⁶ Even after reading the plaintiff’s complaint and opposition brief multiple times, the court still was unclear about what causes of action plaintiff’s counsel was attempting to set forth.⁷ Ultimately, the court granted the defendant’s motion to dismiss.

Interestingly, on the same day as the *Ochoa* case, in *Sambrano v. Mabus*,⁸ Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit referred to a lawyer’s brief as “almost unintelligible,”⁹ and parts of it as “wretched.”¹⁰ Among other unclear passages, the attorney’s statement of appellate jurisdiction was “incoherent.”¹¹ The court ordered the attorney to show cause why he should not be subject to monetary sanctions and why he should not be “censured, suspended, or disbarred.”¹² The court emphasized, “Judges are better able than clients to separate competent from bungling attorneys, and we have a duty to ensure the maintenance of professional standards by members of our bar.”¹³

Further, in *Donnelly v. Chicago Park District*, a defendant submitted both a brief in support of a motion for summary judgment and a reply brief; the court described both as “inadequate and disappointing.”¹⁴ The court stated that the brief in support of the motion for summary judgment “provided, at best, only the most minimal assistance to the court. Indeed, in a number of instances, it was of no help at all.”¹⁵ The quality of the briefs rendered it “impossible to make an informed judgment” about one of the counts in the complaint for which the party sought summary judgment.¹⁶ The court emphasized the effects of deficient “quality of briefing at all levels of the judicial system” as follows:

5 *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”).

6 No. 11 C 5544, 2011 WL 5404150, at *2 (N.D. Ill. Nov. 8, 2011).

7 *Id.*

8 663 F.3d 879 (7th Cir. 2011).

9 *Id.* at 880.

10 *Id.* at 881.

11 *Id.*

12 *Id.* at 882.

13 *Id.*

14 417 F. Supp. 2d 992, 994 (N.D. Ill. 2006).

15 *Id.*

16 *Id.* The court noted that it could simply deny the motion on this count but that “enough questions appear to be implicated that it would not be institutionally responsible to take that course, which would necessitate a trial where perhaps there should be none.” *Id.* The court thus gave the defendant the option to file an additional brief on that count, directed to the specific questions discussed in the opinion. *Id.*

Underinclusive and inadequate presentations shift the responsibility to the court to do the lawyer's work. That's a risky business, for it requires the judge to be clairvoyant or intuitively to know the contours of the unmade argument. And, it rests on the hope that the judge will explicate the arguments that the briefs have left undeveloped, rather than resorting to the rule that superficial, skeletal, and unsupported arguments will be deemed waived or forfeited.¹⁷

As the foregoing cases demonstrate, poorly organized and convoluted legal writing can inhibit the court from finding a justification to rule in a client's favor. Judges have no obligation to do idle lawyers' work¹⁸ and may view cases a completely different way if left to ascertain the facts and law on their own.

B. Omitting Key Substantive Components from Briefs Stifle the Court's Understanding of a Party's Claims.

Many law-school professors, whether in the legal writing classroom or in doctrinal law classes, introduce law students to the basics of written legal analysis through structural formulae.¹⁹ Seasoned attorneys might not recall these structural blueprints from law school, but subconsciously use them because such frameworks present a legal analysis in a logical way. Law students and new lawyers need to embrace this structure fully so the logic of their thought process leads the reader down a substantive path toward a well-reasoned conclusion. A writer who skips steps in logic inevitably loses the reader along the way. Legal writing formulae are simple, but they work. Yet, for some reason, many lawyers stray from using any type of logic formula in their writing, leaving the reader guessing and potentially frustrated and annoyed.

Poor legal writing, however, goes beyond an attorney's decision to reject a rigid formulaic structure. A legal reader will be confounded equally at a pleading or brief that is missing anticipated substantive components. In fact, many courts promulgate official rules that list key substantive elements that must appear in particular types of work product

¹⁷ *Id.* at 993–94 (citing *United States v. Cusimano*, 148 F.3d 824, 828 n. 2 (7th Cir. 1998)).

¹⁸ See also *Latsko v. Shinseki*, No. 09–2617, 2011 WL 3557234 at *4 (Vet. App. Aug. 15, 2011) (noting the court's refusal to address arguments that were "baseless, undeveloped, and at times mystifying"); *Reyes-Garcia*, 82 F.3d at 15 ("[E]ven if we were inclined to do [the party's] homework—and that is not our place—[the party's] substantial noncompliance with the rules would hamstring any attempt to review the issues intelligently.").

¹⁹ See e.g. Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* chs. 7, 10, 19, 20 (5th ed. 2010) (discussing IREAC and various legal writing formulae). These might include various iterations of IRAC (Issue, Rule, Application–Analysis, Conclusion), IREAC (Issue, Rule, Explanation, Application–Analysis, Conclusion) or CREAC (Conclusion, Rule, Explanation, Application–Analysis, Conclusion). Even professors who do not have an affinity for IRAC likely still expect students to use some logical analytical structure in their writing, even if it does not echo the traditional acronym.

filed with the court. These rules are based on judges’ vast experience in knowing exactly what they—and opposing parties—need to see in a party’s pleadings and briefs in order to understand the facts and legal issues in the case and recognize what responsive action to take.

For example, the Federal Rules of Civil Procedure require a Complaint to include three items: (1) “a short and plain statement of the grounds for the court’s jurisdiction . . .,” (2) “a short and plain statement of the claim showing that the pleader is entitled to relief,” and (3) “a demand for the relief sought”²⁰ Likewise, a party filing an Answer to a Complaint in federal court must (1) “state in short and plain terms its defenses to each claim asserted against it” and (2) “admit or deny the allegations asserted against it.”²¹ Regarding motions for summary judgment, many local court rules require the parties to include a separate section itemizing undisputed material facts; for example, the United States District Court for the District of New Jersey requires the moving party to list such facts “in separately numbered paragraphs citing to the affidavits and other documents submitted in support of the motion.”²² Further, in appellate briefs, for example, the Alabama Rules of Appellate Procedure require appellants to include eleven items: (1) a statement requesting oral argument (if desired), (2) a table of contents, (3) a statement of jurisdiction, (4) a table of authorities, (5) a statement of the case, (6) a statement of the issues, (7) a statement of the facts, (8) a statement of the standard of review, (9) a summary of the argument, (10) the argument, and (11) a conclusion.²³ If an attorney fails to submit any of these required substantive items, neither the court nor opposing counsel has all the raw materials necessary to take responsive action.

Courts know what they need from an attorney in order to get up to speed quickly on the facts and the law of a client’s case and to convey these requirements to the litigants in local and system-wide rules. Some attorneys still ignore these directives. Unfortunately, an attorney’s failure to follow express court instructions can leave a negative impression on the judge making key legal decisions in the case.

A federal case entitled *Scott v. Arrow Chevrolet, Inc.*²⁴ offers a particularly embarrassing example of a court’s admonition for poor legal writing and a failure to follow court rules. The court declared that “counsel have

20 Fed. R. Civ. P. 8(a).
21 Fed. R. Civ. P. 8(b).
22 U.S. Dist. Ct. D.N.J. Civ. R. 56.1 Furthermore, “[t]he opponent of summary judgment shall furnish, with its opposition papers, a responsive statement of material facts, addressing each paragraph of the movant’s statement, indicating agreement or disagreement and, if not agreed, stating each material fact in dispute and citing to the affidavits and other documents submitted in connection with the motion; any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion.” *Id.*
23 Ala. R. App. P. 28.
24 No. 01 C 7489, 2001 WL 1263498 (N.D. Ill. Oct. 22, 2001).

established themselves as prime candidates for the Worst Federal Pleading of the Year Award.”²⁵ In drafting an answer to a complaint, the lawyer failed to follow the Federal Rules of Civil Procedure and neglected to properly admit or deny the numbered allegations in the Complaint, instead making allegedly nonsensical statements about the substance in the pleading.²⁶ In response, the court struck the entire answer and required counsel to “to send a copy of this opinion to [the] client together with a letter advising that no charge will be made for any time and expense incurred in correcting counsel’s own errors”²⁷ The court demonstrated that an Answer that fails to follow the substantive requirements in the rules and properly admit or deny each allegation in the Complaint is virtually worthless to the court and the opposing party.

Likewise, in *Skybridge Spectrum Foundation v. F.C.C.*,²⁸ in ruling on a party’s motion for summary judgment, the court rejected the responding party’s Cross-Statement of Material Facts Not in Dispute, because it “flatly contravene[d]” the court’s scheduling order by failing “to respond to each of the . . . factual assertions ‘with a correspondingly numbered paragraph, indicating whether that paragraph is admitted or denied.’”²⁹ Without responses to assertions of undisputed material facts tied to corresponding numbered paragraphs, it was impossible for the court or opposing counsel to tell whether the party accepted or rejected the undisputed nature of a particular fact. The attorney’s failure to follow the substantive rules precluded the court from narrowing the issues in dispute, which, of course, was the fundamental function of the motion for summary judgment.³⁰

Similarly, in *Moore v. State of Indiana*,³¹ a lawyer submitted an appellate brief without an accurate Statement of the Case, an express requirement under the Indiana Rules of Appellate Procedure.³² The court emphasized that the purpose of the substantive requirement of the Statement of the Case in the appellate rules was to assist the court by encapsulating the procedural posture of the case.³³ The court admonished that adherence to the standards set forth in the appellate rules is not optional.³⁴ Without the Statement of the Case, the court could not refer readily to the procedural posture of the case, which it needed to fully understand the nature of the appeal. The court ordered a rebriefing,

25 *Id.* at *1.

26 *Id.*

27 *Id.* at *2.

28 842 F. Supp. 2d 65 (D.D.C. 2012).

29 *Id.* at 70 n.1.

30 *Id.*

31 426 N.E.2d 86 (Ind. Ct. App. 1981).

32 *Id.* at 89. Further, the attorney’s substantive arguments were “predominantly bald assertions,” and failed to include citations to the record. *Id.* at 90.

33 *Id.* at 89.

concluding that the attorney’s originally filed brief was a “disservice to his client and this court.”³⁵

Recently, in *United States v. Johnson*,³⁶ Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit again pointed out how attorneys’ failure to include substantive materials in compliance with court rules “hampered our ability to evaluate the arguments for both sides.”³⁷ Even though the court rules required the appellant to attach the trial court’s decision to the appellate brief, the party failed to do so.³⁸ When one lawyer falsely certified that all such materials had been filed with his brief, the court issued a public “rebuke” and assessed a \$2,000 sanction.³⁹

As these cases demonstrate, an attorney’s failure to include required substantive components in attorney work product precludes the court and opposing parties from fully grasping the nature of the case, impeding their ability to move the case forward.⁴⁰

C. Poor Handling of the Case Facts Adds to the Court’s Workload and Could Thwart a Judge’s Willingness or Ability to Address a Particular Factual Claim.

Law students and practicing attorneys sometimes groan at the burden of providing accurate pinpoint citations to pages (and line numbers) in a voluminous case transcript to identify factual support for a claim. However, courts routinely explain that an attorney’s failure to handle case facts properly and provide precise citations to the factual record forces court staff members to perform excess work to find the references in bulky transcripts, or worse, to *guess*—which could result in the court’s having no choice but to decline to address unsupported claims or arguments.⁴¹

For example, in *Jones v. Jones*,⁴² the court criticized a lawyer for failing to comply with the rules and provide the exact reference to the pages of

34 *Id.* at 90.

35 *Id.*

36 No. 13-1350, 2014 WL 466084 (7th Cir. Feb. 6, 2014).

37 *Id.* at *3.

38 *Id.*

39 *Id.* at *4.

40 Pro se litigants are also held to these standards. In *Means v. Housing Authority of the City of Pittsburgh*, 747 A.2d 1286 (Pa. Cmmw. 2000), the court explained that “the Pennsylvania Rules of Appellate Procedure exist to ensure that litigants present appeals of sufficient clarity to allow appellate courts to evaluate those appeals with the benefit only of the record below.” *Id.* at 1289. In this case, a brief submitted by a pro se litigant (not a licensed attorney) ignored the rules applicable to his appellate brief by failing to provide a statement of scope and standard of review, a statement of the case, and a summary of the argument. *Id.* at 1287. These failures impaired the court’s “ability to discern his issues and arguments, and preclude[d] any meaningful appellate review of this case.” *Id.* at 1289.

41 Further, misstating the factual record undermines attorneys’ credibility and can warrant disciplinary action. In *re Disciplinary Action of Raymond P. Boucher*, 850 F.2d 597 (9th Cir. 1988) (censuring attorney whose brief went beyond the bounds of proper advocacy in characterizing the factual record).

42 202 S.W.2d 746 (Ky. 1947).

the record supporting his alleged facts.⁴³ The court declared, “The rules are more than suggestive, and it is the duty of the members of the Bar to comply therewith.”⁴⁴ Similarly, in *Commonwealth v. Stoppie*,⁴⁵ when an attorney failed to provide record citations in a brief, the court described the monumental task involved in having to fill in the blanks to confirm facts:

The argument in this brief is 134 pages long and contains innumerable references to evidence and other matters in the record. Yet, there is not one place in the argument where counsel refers us to the page in the record where we may find the subject matter that he is discussing. The trial in this case covered ten days. . . . The Notes of Testimony from the trial alone cover 680 pages and the testimony in other proceedings . . . cover just over 200 pages.⁴⁶

The court noted that “it is a cause of continuing frustration to appellate judges and their staffs to find incomplete and inaccurate citations.”⁴⁷ The court emphasized that a lawyer’s failure to cite to the factual record forces the court to “perform, to a certain extent, the duties of appellate counsel and search the record in an attempt to discover what counsel is talking about.”⁴⁸

The court in *State v. Dillard*⁴⁹ reiterated the point that the lawyer’s failure to properly cite to the record adds to the court’s workload: “An appellate Court is improperly burdened where briefs fail to consistently and accurately cite to the record.”⁵⁰

When confronted with poor record citation, a court may feel compelled to speculate,⁵¹ or the court may simply limit its review. In *Murken v. Solv-Ex Corp.*,⁵² the court explained that the lawyers’ failure to include specific cites to the sizable record restricted the scope of the court’s review.⁵³ The particular record covered “approximately eight years

43 *Id.* at 748

44 *Id.* at 749.

45 486 A.2d 994 (Pa. Super. 1984).

46 *Id.* at 996.

47 *Id.*

48 *Id.*

49 No. 2005AP2696, 2007 WL 115872 (Wis. App. Jan. 17, 2007).

50 *Id.* at *2 (citing *Weiland v. Paulin*, 259 Wis. 2d 139). See also *Hurlbert v. Gordon*, 824 P.2d 1238, 1245 (Wash. App. Div. I 1992) (Typographical errors in record cites create

more work for the court: there were “numerous references to clerk’s papers which were either non-existent, or difficult if not impossible to find, because of typographical errors in the references.”); *Moore*, 426 N.E. 2d at 88 (Counsel’s failure to place marginal notations on each page of the record pursuant to the rules “makes our examination of the transcript of evidence especially burdensome”).

51 See *Latsko* 2011 WL 3557234 at *3 (Failure to provide a record citation left “the Court with the task of engaging in blind guessing”).

52 124 P.3d 1192 (N.M. Ct. App. 2005).

53 *Id.* at 1194.

and 4,712 pages of litigation.”⁵⁴ The court declined to review the party’s “arguments to the extent that it would have to comb the record to do so.”⁵⁵

Likewise, in *Benford v. Minneapolis*,⁵⁶ the court criticized the quality of the record citations in an attorney’s brief, noting it was “rife with incomplete sentences and blank citations to the record” and that some citations referred “to irrelevant deposition testimony or documents, or to only a single page from a larger passage of relevant testimony.”⁵⁷ Explaining how the attorney’s failure to use proper citation added to the court’s workload, the court stated, “Although the Court has attempted to locate relevant portions of the record on its own, the task of sifting through several thousand pages of documents to support Plaintiffs’ claims is not the Court’s function. The Court will not advocate for Plaintiffs by mustering the evidence and making arguments when their counsel has neglected to do so.”⁵⁸

Poor citation, quite simply, prevents judges from accessing key information that can facilitate a ruling in a party’s favor. As stated in *Kentucky–Indiana Municipal Power Assn v. Public Service Co. of Indiana*,⁵⁹ the rules are for the “benefit of the court” so that it can retrieve key information from the record, and “facilitate review and utilization of the transcript in determining the appeal.”⁶⁰ Further, the rules are designed to afford a level playing field to opposing parties; “opposing counsel may be disadvantaged in rebutting or explaining assertions” that are unsupported with accurate cites to the record.⁶¹

Because of the impact on courts’ and opposing counsel’s ability to do their jobs, some judges might impose sanctions upon attorneys who ignore record citation rules. For instance in *Hurlbert v. Gordon*,⁶² the court rebuked an attorney for “laissez-faire” legal briefing replete with factual statements lacking citation to the record.⁶³ The court had to cull through 6000 pages of clerk’s papers, exhibits and transcripts.⁶⁴ The court imposed \$750.00 in sanctions, explaining that the briefing errors “wasted the time of opposing counsel and hampered the work of the court.”⁶⁵

.....

| | |
|--|---|
| <p>54 <i>Id.</i> at 1196.</p> <p>55 <i>Id.</i></p> <p>56 No. 10–04539 ADM/LIB, 2012 WL 6200365 (D. Minn. Dec. 12, 2012).</p> <p>57 <i>Id.</i> at *2.</p> <p>58 <i>Id.</i> See also <i>Northwestern Natl. Ins. Co. v. Baltes</i>, 15 F.3d 660, 662–63 (7th Cir. 1994) (“District judges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits—not only because the rules of procedure place the burden on the litigants, but also because their time is scarce. Other parties, who live by the rules, have a priority</p> | <p>claim on the judge’s attention. Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won.”).</p> <p>59 393 N.E.2d 776 (Ind. App. 3d Dist. 1979).</p> <p>60 <i>Id.</i> at 784.</p> <p>61 <i>Id.</i></p> <p>62 824 P.2d 1238 (Wash. App. Div. 1 1992).</p> <p>63 <i>Id.</i> at 1245–46.</p> <p>64 <i>Id.</i> at 1245.</p> <p>65 <i>Id.</i> at 1246.</p> |
|--|---|

Though it is tedious to comb through tomes of transcripts to find exact cites for factual documents, new attorneys need to understand the importance of doing so—to enable judges and their clerks to review the factual support for arguments made, and afford opposing counsel a fair opportunity to respond. It is neither the judge’s nor the clerks’ job to conduct such a search, and lawyers should not assume that they will fill in the blanks.

D. Deficient Citation to Legal Authority Hampers the Court’s Ability to Evaluate the Merits of a Case and Undermines an Attorney’s Credibility.

Law students often find legal citation rules to be onerous, and some perceive professors as overly nitpicking in penalizing Bluebooking errors. Some frustrated students remark, “As long as the reader can find the case, isn’t that sufficient?” From a practical standpoint, it would seem logical that a lawyer’s improper citation of statutes and cases would add to a judicial clerk’s workload in preparing a bench memo for a judge, requiring him or her to first take the time to track down accurate cites and pinpoint page numbers instead of immediately proceeding to review the applicable law and verify that the cases actually stand for the propositions set forth in the brief.⁶⁶ Citation errors certainly add an extra step during a legal writing professor’s grading process; when a student quotes from, or references a proposition in, a case, and yet provides the wrong citation, the professor cannot check the student’s substantive accuracy without first having to do the initial work to fix the citation.

An example of a court’s frustration with a brief plagued by sloppy citation is *Hurlbert v. Gordon*.⁶⁷ In *Hurlbert*, an attorney’s brief contained case citations with typographical errors as well as references to cases that “did not support the positions for which they were cited.”⁶⁸ The court explained that the purpose of the citation rules is “to enable the court and opposing counsel efficiently and expeditiously . . . to review the relevant legal authority.”⁶⁹ Similar to an attorney’s failure to cite to the factual record, the court stated that “the violations of the rules will not go unnoticed and unsanctioned.”⁷⁰

⁶⁶ Worse, an attorney’s intentional citation of a case that does not support the contentions asserted in a brief, or a lawyer’s failure to cite adverse authority on point, immediately undermines the offending attorney’s credibility.

⁶⁷ 824 P.2d at 1238.

⁶⁸ *Id.* at 1245.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1246.

Similarly, in *Bradshaw v. Unity Marine Corp., Inc.*,⁷¹ the court colorfully chastised two lawyers for poor legal writing and deficient legal citation:

[T]his case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact³complete with hats, handshakes and cryptic words⁴to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions.⁷²

The judge frowned upon both lawyers’ scarcity of citation to mandatory precedent,⁷³ their inaccurate citations, and the shortage of pinpoint cite page numbers—which forced the court to search through a forty-page legal decision to locate legal support for the lawyer’s arguments.⁷⁴

Further, in *Hnot v. Willis Group Holdings*,⁷⁵ the court reprimanded a lawyer’s overt failure to cite many relevant cases that ran contrary to the party’s position in a motion *in limine* seeking to exclude an expert’s testimony at trial.⁷⁶ The court ultimately denied the lawyer’s motion, cautioning that “[a]lthough lawyers are expected to make the strongest argument possible for their clients, they undermine their own credibility when they ignore authority unhelpful to their position.”⁷⁷ The judge referred to the attorney’s brief as “disappointing” and his behavior as verging on “disingenuous.”⁷⁸

New legal writers need to understand that learning Bluebook rules is not just an annoying rite of passage and a fussy category on a professor’s grading rubric. A well-cited brief enhances the court’s ability to review and apply the law efficiently and further boosts the credibility of an advocate.

71 147 F. Supp. 2d 668 (S.D. Tex. 2001).

72 *Id.* at 670.

73 *Id.* at 670–71; see also *Yun Shou Xie v. Board of Immigration Appeals*, 186 Fed. Appx. 88, 91 (2d Cir. 2006) (“[T]he brief filed by petitioner’s counsel is seriously deficient. . . . The argument section is only two pages long and fails to cite a single case from this Court or any other court or a single statute or regulation.”).

74 *Bradshaw*, 147 F. Supp. 2d at 670–71.

75 No. 01 CIV 6558, 2007 WL 1599154 (S.D.N.Y. June 1, 2007).

76 *Id.* at *4; see also *Donnelly*, 417 F. Supp. 2d at 994 (expressing dissatisfaction with a lawyer’s brief because it failed to assist the court, instead taking the “ostrich-like tactic” of omitting relevant, potentially dispositive legal authority).

77 *Hnot*, 2007 WL 1599154 at *4.

78 *Id.*

E. Disregarding Procedural and Formatting Rules May Be Perceived as an Attempt to Garner an Unfair Advantage.

Law students sometimes consider procedural rules imposed by their professors, such as page limits or word-count limits, to be unfairly arbitrary. Some undertake creative formatting maneuvers to circumvent such rules, via miniscule font and eye-straining line spacing. Others simply submit papers that exceed the word-count or page limit, accepting a grading penalty instead of making the effort to shave the excess through dogged editing. Many practitioners also flout court rules regarding font, line spacing, and footnotes, assuming that substance will trump these bothersome limitations. However, courts have specific logical and logistical reasons for imposing these requirements, not the least of which is to level the playing field for litigants.⁷⁹

Noting a disturbing trend of lawyers' ignoring appellate-brief-writing rules, the court in *Commonwealth v. Stoppie* reprimanded an attorney who completely ignored the court-imposed word-count restrictions and page limits.⁸⁰ The lawyer submitted (1) a thirteen-page Statement of Questions, defying an express fifteen-line limit; (2) an eight-page Summary of Argument, disobeying a two-page limit; and (3) a brief exceeding the maximum page limit by ninety pages.⁸¹ The court explained that the purpose of these limits is fairness; lawyers who ignore the rules have an unfair advantage over counsel "who conscientiously attempt to comply, as judicial resources are needlessly devoted to cases involving noncompliance."⁸² The court warned that "where gross deviations from the appellate rules, which substantially impair our ability to exercise the power of review, are present, we will not hesitate to suppress the party's brief and quash the appeal."⁸³

The goal of an even playing field was also emphasized in *Hawkins v. Miller*.⁸⁴ In *Hawkins*, a party appeared *pro se*, but had vast legal experience in over thirty lawsuits filed in Kentucky federal and state courts.⁸⁵ The *pro se* litigant's briefs disregarded the Kentucky Rule of Civil Procedure requiring briefs to be double-spaced; he instead crammed thirty-five lines of text onto each page, violating the twenty-three-line per page limit.⁸⁶

79 See, e.g. *Stann v. Levine*, 180 N.C. App. 1, *6-*7 (2006) ("[A]d hoc application of the rules, with inconsistent and arbitrary enforcement, could lead to allegations of favoritism for one counsel over another.").

80 *Stoppie*, 486 A.2d at 996.

81 *Id.*

82 *Id.* at 997.

83 *Id.* (citing *Commonwealth v. Taylor*, 451 A.2d 1360 (Pa. Super. 1982)).

84 301 S.W.3d 507 (Ky. 2009).

85 *Id.* at 508 n.1.

86 *Id.* at 508.

The court explained the repercussions: “Such a disregard of the rule puts him at an advantage over the Appellees, who complied with the rule.”⁸⁷ The court struck his briefs.⁸⁸

Like law professors, courts are not blind to lawyers’ not-so-surreptitious attempts to outwit the rules. In *Murken v. Solv-Ex Corp.*, the court critiqued a brief that contained too many footnotes, an obvious attempt by the drafter to circumvent the page limits.⁸⁹ The court stated, “While this court appreciates having briefs under the page limit, it does not enjoy receiving briefs with one hundred eleven footnotes. Nor does it enjoy receiving footnotes that are single spaced and in very small print.”⁹⁰ The court described the lengthy footnotes as “aggravating.”⁹¹

As the foregoing cases indicate, courts may perceive attorneys who disregard court-imposed procedural and formatting rules as trying to garner an unfair advantage. Law students and new lawyers might be more inclined to follow procedural and formatting rules if they understand the negative message their defiance sends to their audience.

F. Proofreading Errors Can Cause Courts to Question Attorneys’ Competence in Client Representation.

Some law students scurrying to meet deadlines shrug off the importance of proofreading a memo or brief and seem ruffled when they lose precious grading points for spelling and grammatical errors. Similarly, new attorneys sometimes think a senior partner is being “uptight” for ranting about typographical errors appearing in an e-mail to a client or opposing counsel. Again, these novice legal writers just might not grasp the potential repercussions of submitting attorney work product abounding with embarrassing punctuation, spelling, and grammar mistakes. Several courts have emphasized that unprofessionally presented work product causes the bench to question the competency of the attorney’s representation of his or her client.

For example, in *In re Jacoby Airplane Crash Litigation*,⁹² the court criticized a lawyer’s work product, noting that it was “consistently replete

87 *Id.*

88 *Id.* See also *Barry v. Lindner*, 81 P.3d 537, 544 (Nev. 2003) (Noting it would “not permit flagrant violations of the Nevada Rules of Appellate Procedure,” the court fined an attorney \$500 for, among other brief-writing violations, failing to double-space the text and hand-writing page numbers.).

89 124 P.3d 1192, 1196 (N.M. App. 2005).

90 *Id.*

91 *Id.* at 1197. See also *Lundy v. Farmers Group, Inc.*, 750 N.E.2d 314, 318 (Ind. App. 2d Dist. 2001) (Quoting court rules discouraging footnotes and stating they should be used “sparingly,” the court recognized a party’s overuse of footnotes as an obvious attempt to avoid exceeding the page limit and struck all the footnotes.).

92 No. 99-6073, 2007 WL 5037683 (D.N.J. Aug. 27, 2007).

with grammatical and typographical errors.”⁹³ The court pointed out numerous misspellings, musing, “[t]he reader of this is left to wonder” about an incomplete sentence in the Argument.⁹⁴ Further, in *Kuzmin v. Thermaflo, Inc.*,⁹⁵ the court stated that “counsel’s brief is poorly written, replete with improper spelling and bad formatting. By submitting a poorly written brief, the attorney fails the court as well as the clients.”⁹⁶

An attorney’s written work product is a reflection of the individual’s professionalism and competence; every word matters. Spelling, grammatical, and typographical errors cause the reader to question the care with which the attorney prepared the document. A reader’s concerns about presentation can trigger doubts about substance as well.

G. Briefs That Vent Their Authors’ Frustration and Attack the Court, Opposing Counsel, or Adverse Parties, Undermine the Public Trust in the Legal System.

Unfortunately, it is not a new trend for lawyers to show disrespect to the bench, opposing counsel, or opposing parties in written submissions.⁹⁷ Even in cases decided over a hundred years ago, attorneys were reprimanded for projecting a brazen tone toward the court and counsel.⁹⁸ Of course, litigation can be vexing, and there are often times when a court’s decision might seem unfair, biased, or flat-out wrong, but attorneys cannot use written advocacy to display their exasperation and rail against the court or their opponents for perceived injustices; instead, they must make well-reasoned persuasive arguments. Law students and new practitioners need to understand that attorneys who use the written word to

.....

93 *Id.* at *41 n.28.

94 *Id.* See also *State v. Dillard*, 2007 WL 115872 at *2 (Wis. App. 2007) (pointing out that a lawyer’s brief contained typographical and collating errors); *Yun Shou Xie* 186 Fed. Appx. at 91 (“[C]ounsel’s brief is replete with typographical errors.”); *Moore*, 426 N.E.2d at 87 n. 1 (“The brief contains many grammatical, semantic and typographical errors; we suggest appellant carefully proof his next brief.”); *Simmons v. John F. Kennedy Medical Centers*, 727 F. Supp. 440, 444 (N.D. Ill. 1989) (admonishing “counsel for both parties to proofread their briefs for typographical and spelling errors before filing”).

95 No. 2:07CV00554, 2009 WL 1421173 at *2 n. 6 (E.D. Tex. May 20, 2009).

96 *Id.*

97 For example, in *Miles v. Miles*, 994 P.2d 1139 (Mont. 2000), a lawyer submitted briefs in which he made accusations against opposing counsel and attacked the judge for alleged *ex parte* communication with opposing counsel. The court concluded that the briefs were “some of the worst we have read in terms of being uncivil and demeaning toward the District Court, the personal representative, and opposing counsel.” *Id.* at 1147. The court emphasized that “an attorney who engages in this sort of behavior is not properly representing his client. He brings public discredit to the legal profession. He wastes the time and resources of the courts, of opposing counsel and of the parties.” *Id.* at 1148.

98 See e.g. *Rahles v. J. Thompson & Sons Mfg. Co.*, 119 N.W. 289, 289 (Wis. 1909) (criticizing an attorney’s language in a brief for a rehearing as “mere scolding” and in violation of Wisconsin Supreme Court Rules); *Rose v. Campbell*, 77 S.W. 707 (Ky. 1903) (“We decline to consider the questions attempted to be presented by the petition for rehearing, because of its offensive and disrespectful tone and language.”); *Anderson v. Cook*, 65 P. 113, 113 (Mont. 1901) (striking a disrespectful brief from the record).

disrespect the court and their fellow members of the bar undermine the public trust in the legal system.⁹⁹

1. Attacking the integrity of the court

In *Rahles v. J. Thompson & Sons Manufacturing. Co.*, a lawyer challenged a court ruling and submitted a brief that suggested that the court had “utterly disregard[ed] the jury’s findings,” “usurp[ed]” the role of the jury, and “substitute[d]” its own factual findings.¹⁰⁰ The court deemed the language disrespectful to the court and took the time to explain—in eloquent fashion—the distinction between “argument” and “mere scolding”:

“Argument” is a connected discourse based upon reason; a course of reasoning tending and intended to establish a position and to induce belief. “Scolding” is mere clamor, railing, personal reproof. Argument dignifies the orator and instructs and convinces the auditor. Scolding relieves somewhat the hysteria of the scolder, but only amuses or irritates the hearer. Argument is the professional weapon of the lawyer; scolding that of the communis rixatrix. Argument is enjoyed and welcomed in a brief for rehearing; scolding has no proper place therein.¹⁰¹

The lawyer should have presented persuasive arguments demonstrating the flaws in the ruling; the attacks on the integrity of the court distracted from the pertinent legal issues.¹⁰²

Further, in *Dabney v. Ledbetter*,¹⁰³ a lawyer filed a brief challenging an opinion issued by the Supreme Court of Oklahoma, suggesting that the court had concocted a set of facts beyond the record.¹⁰⁴ In reviewing the brief, the court concluded that the “language employed is too harsh, critical, and carries with it an attitude of disrespect.”¹⁰⁵ The court described attorneys who engage in such behavior as “a destructive factor

99 In *Attorney General v. Superior Court of the Commonwealth of the Northern Mariana Islands*, No. 99–001, 1999 WL 33992417 *3 (N. Mar. Is. June 28, 1999), a lawyer used language offensive toward parties in a brief. Counsel also criticized the trial court judge, accusing him of “refus[ing] to follow the law.” *Id.* The court noted that the rules of professional conduct help to ensure that false statements by a lawyer will not “unfairly undermine public trust and confidence in the administration of justice” through criticism of the judiciary. *Id.* at *4.

100 119 N.W. at 289.

101 *Id.* at 290; see also *Anderson*, 65 P. at 113 (striking a brief and denying the underlying motion when the lawyer employed language and tone which was disrespectful to the court, using terminology such as “absurd,” and challenging the court’s “legal or moral right” to make a certain ruling).

102 *Id.*; see also *Strowbridge v. City of Chiloquin*, 277 P. 722, 723 (Or. 1929) (“Abuse is not argument; calumny is not convincing; defamation is not determinative of an issue; perversion of speech is not persuasive.”).

103 18 P.2d 1085 (Okla. 1933).

104 *Id.* at 1086.

105 *Id.* at 1087.

in our institutions of government.”¹⁰⁶ Noting the societal effects of an attorney’s attacks on the court via written advocacy, the court explained,

Public confidence and respect for courts of justice are indispensable requisites of a democratic form of government. Where attorneys do not evince a proper respect and confidence, the public cannot be expected to do so. Thus the threat to organized government becomes grave and of no little concern.¹⁰⁷

More recently, in *Ligon v. McCullough*,¹⁰⁸ an attorney filed a motion to abate a \$550 fine imposed by the Professional Conduct Committee.¹⁰⁹ The motion contained “unnecessary, strident, and disrespectful language” toward the Executive Director of the Committee.¹¹⁰ The court struck the motion in its entirety, cautioning “attorneys from filing motions containing irrelevant, disrespectful, and caustic remarks that only serve to vent a party’s emotions such as anger or hostility.”¹¹¹ The court referred the lawyer to the Committee for disciplinary action.¹¹²

Finally, in *Cruz v. Commissioner of Social Security*,¹¹³ the court noted several unprofessional comments in an attorney’s brief in which he accused an administrative law judge of misconduct.¹¹⁴ The court explained, “Heated rhetoric like this does nothing to advance a client’s cause. It serves only to distract attention from the merits and to call counsel’s judgment into question.”¹¹⁵ The court indicated it could “no longer tolerate the pollution of appellate practice that these repeated *ad hominem* attacks represent.”¹¹⁶ The court referred the attorney to the Court’s Standing Committee on Attorney Discipline.¹¹⁷

106 *Id.*

107 *Id.* See also *White v. Priest*, 73 S.W.3d 572, 580 (Ark. 2002) (per curiam), in which an attorney’s “continued strident, disrespectful language used in his pleadings, motions, and arguments, and his repeated refusal to recognize and adhere to precedent” resulted in the court’s striking his 70-page brief, and referring him to the Professional Conduct Committee. Also, in *People v. Maynard*, 238 P.3d 672 (Colo. 2009), an attorney was suspended from the practice of law for a year for misconduct. A concurring judge noted the lawyer’s “repeatedly intemperate, unprofessional and vitriolic language in briefs and other court filings, directed at the trial judge, opponents and opposing counsel.” *Id.* at 693 (Holme, J., concurring). The lawyer referred to the judge by last name and used terms like “revolting level of cronyism,” “lie,” and “outrageous abuse of power.” *Id.* at 694. Citing *In the matter of Lester T. Vincenti*, 458 A.2d 1268, 1275 (N.J. 1983), the concurring judge emphasized, “Bullying and insults are no part of a lawyer’s arsenal.” *Id.* at 696.

108 247 S.W.3d 868 (Ark. 2007).

109 *Id.* at 869.

110 *Id.*

111 *Id.*

112 *Id.* See also *Prudential Ballard Realty Co. v. Weatherly*, 792 So.2d 1045, 1060 (Ala. 2000) (per curiam) (“[Counsel’s] remarks . . . are indicative of a growing trend among some attorneys who feel that an application for rehearing provides them with a bully pulpit for venting their frustrations after receiving an adverse decision. Whether some attorneys believe it to be necessary to spew this venom for the benefit of their unhappy clients or to take the spotlight off their own inadequacies as legal practitioners, such childish behavior is uncivil and beneath the members of a professional bar association and it is a dangerous method of appellate advocacy.”).

113 244 Fed. Appx. 475 (3d Cir. 2007).

114 *Id.* at 482–83.

115 *Id.* at 483.

116 *Id.* at 484.

From a teaching and learning standpoint, professors and practitioners should alert new legal writers to anticipate times in their legal careers when courts may seem partial to an opposing party or appear to have made flawed decisions. However, novice practitioners should be counseled to refrain from using a brief to launch caustic attacks on the integrity of the court and instead be encouraged to craft persuasive arguments that respectfully challenge a court decision through logical reasoning and clear phrasing.

2. Personal attacks on opposing counsel or an adverse party

Similarly, all new attorneys need to realize the reality that, at some point in their careers, they will encounter an opposing party or its counsel that causes endless frustration and possibly even infuriation. Discovery disputes, negotiations, and arguments outside the courtroom can become heated and intense, and lawyers might feel tempted to bring to the court's attention certain nefarious behavior of an opposing party or counsel. As hard as it might be to "take the high road," restraint and respect are the best course of action. Courts never appreciate having to referee counsel who cannot get along. Using a disrespectful tone toward an opponent in a written submission might feel cathartic at the time, but the court most likely will view a lawyer's written words differently.¹¹⁸

For example, in *U.S. Neurosurgical, Inc. v. Chicago*,¹¹⁹ a lawyer submitted a brief that—in the court's view—made unnecessary and unfounded attacks on opposing counsel.¹²⁰ In striking portions of the brief, the court explained, "Not only are such attacks unnecessary and

117 *Id.* See also *U.S. v. Venable*, 666 F.3d 893, 904 n. 4 (4th Cir. 2012) ("[A]dvocates . . . do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses," including disdainful language, sarcasm, and use of words like "absurd" and "charlatan."); *Davidson & Schaaff, Inc. v. Liberty National Fire Ins. Co.*, 69 F.3d 868, 871–72 (8th Cir. 1996) ("[S]everal unwarranted, unprofessional aspersions" in a party's briefs directed at the district court's treatment of the case "were totally uncalled for and far beyond the pale of responsible advocacy."); *Exigence, LLC v. Baylark*, 367 S.W.3d 550, 557–58 (Ark. 2010) (cautioning counsel about rules that prohibit the use of disrespectful language, including counsel describing the circuit court's decision as "a flagrant case of retaliatory abuse of discretion").

118 See e.g. *Anderson v. Federal Cartridge Corp.*, 156 F.2d 681, 686 (8th Cir. 1946) (briefs containing language that is disrespectful to the court or opposing counsel—such as claims of malicious conspiracy—may be stricken); *Davidge v. Simmons*, 266 F. 1018, 1020 (D.C. Cir. 1920) (court took issue with disrespectful language in a brief directed at an opposing party and struck the brief); *Anderson v. Coolin*, 27 Idaho 334 (1915) (striking a brief "devoted largely to personalities, vituperation, and abuse directed against one of the attorneys," because it was "of no assistance to this court in reaching a correct determination of the legal questions involved"); *Grathwohl v. Garrity*, 871 N.E.2d 297, 299 n. 1 (Ind. App. 2007) (noting the disrespectful tone toward opposing counsel in briefs and calling counsel's writing "convoluted" and "nearly incoherent," including language that is "inappropriate and does not assist this court in resolving the issues on appeal"); *Hoosier Outdoor Advertising Corp. v. RBL Management, Inc.*, 844 N.E.2d 157, 162 (Ind. App. 2006) (The court deemed an attorney's brief using terms like "scheme," "cockamamie theory," "obtuse if not foolhardy," and "shell game" to describe his opposing counsel's arguments to be disrespectful, stating, "[V]itriol is inappropriate and not appreciated by this court, nor does it constitute effective appellate advocacy.").

119 No. 02 C 4894, 2006 WL 752970 (N.D. Ill. Mar. 21, 2006).

120 *Id.* at *1–3.

distracting from the issues in the case, they do not assist the court in resolving the matter and give the impression, whether accurate or not, that the position taken by [the party] is unsupported by the law or facts because it has resorted to such distractions.”¹²¹ Further, as noted in the Seventh Circuit’s Preamble to the Standards for Professional Conduct, “[c]onduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.”¹²²

In *Thomas v. Tenneco Packaging Co.*,¹²³ the court affirmed the district court’s sanctioning of an attorney who submitted documents to the court that contained “abusive and offensive remarks” directed at opposing counsel.¹²⁴ The court emphasized, “[h]aranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.”¹²⁵

Similarly, in *Lockheed Martin Energy Systems, Inc. v. Slavin*,¹²⁶ a lawyer’s personal attacks on opposing counsel were so appalling to an Administrative Law Judge that she referred to the lawyer’s style of practicing law as “a prime example of the continuing problem of lack of civility in litigation,” and outright barred the attorney from appearing before her.¹²⁷ The court censured the attorney, directed the clerk to send a copy of the opinion to each bar of which the attorney was a member, ordered a written apology, and imposed a suspended monetary sanction of \$10,000 “for the great amount of judicial resources wasted in this case” in the event of the attorney’s non-compliance with the court’s directives.¹²⁸

Certain opposing counsel or adverse parties simply will behave despicably. Spending countless hours and the client’s money responding to such behavior—either in discovery or during trial—can be exasperating. However, law students and new lawyers need to know that briefs to the court are not the appropriate forum for “tattling” on opposing counsel via a disrespectful or attacking tone. Instead, lawyers must try to remove personal feelings from the equation and maintain a level of professionalism at all times, focusing instead upon the merits of the case via well-written, persuasive, advocacy pieces.

121 *Id.* at *1.

124 *Id.* at 1308.

122 *Id.* See also *Dranow v. U.S.*, 307 F.2d 545 (8th Cir. 1962) (“[A]ll calumnious, defamatory, disrespectful, derogatory, impertinent and scandalous matter contained in appellant’s briefs directed toward or denunciatory of the Trial Judge or Counsel for the Government is hereby ordered stricken.”).

125 *Id.* at 1323.

126 190 F.R.D. 449 (E.D. Tenn. 1999).

127 *Id.* at 460.

128 *Id.* at 461–63.

123 293 F.3d 1306 (11th Cir. 2002).

H. Flouting Filing Deadlines or Expecting Special Treatment Is Disrespectful to the Court and Opposing Counsel.

Some law students present myriad excuses for submitting assignments late, often assuming that their circumstances are unique and that a waiver of the professor's penalty is warranted. In parallel fashion, some lawyers disregard filing deadlines and submit pleadings and briefs late, often expecting a judge or opposing counsel to act leniently and grant time extensions. It is essential for law students and new attorneys to realize that court deadlines are not suggestions; they are rules and serve important purposes such as judicial efficiency and fairness to litigants.¹²⁹

In *Williams v. Chicago Bd. of Education*,¹³⁰ the court explained several factors that judges should consider when deciding whether to dismiss a case for failure to prosecute, including (1) the frequency and magnitude of an attorney's failure to comply with court deadlines; (2) the impact of these failures on the court's time and schedules, and (3) the prejudice to other litigants.¹³¹ The *Williams* court dismissed the plaintiff's case after her counsel "repeatedly disregarded the court's orders and deadlines and wasted the court's time and resources despite numerous warnings that further dilatory behavior would result in dismissal."¹³² Likewise, in *Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, P.C.*,¹³³ the court affirmed the dismissal of a case because of a lawyer's inability to meet deadlines.¹³⁴ The judge emphasized, "Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated."¹³⁵

Prejudice to other parties was the paramount consideration in *Pacific Information Resources, Inc. v. Musselman*.¹³⁶ In *Pacific Information*, the plaintiff's counsel repeatedly submitted late filings, prompting the court to assert, "some form of sanction is necessary to discourage plaintiff and its counsel from continuing to engage in the sort of conduct which is tantamount to requiring the defendants to aim at a moving target."¹³⁷ Similarly, in *Donald v. Cook County Sheriff's Department*, the court urged,

¹²⁹ See e.g. *Brill v. New York*, 814 N.E.2d 431, 433 (N.Y. 2004) (explaining that the purpose of a summary-judgment deadline was to minimize impacts to judicial economy and prejudice to opposing counsel: "Eleventh-hour summary judgment motions, sometimes used as a dilatory tactic, left inadequate time for reply or proper court consideration, and prejudiced litigants who had already devoted substantial resources to readying themselves for trial.")

¹³⁰ 155 F.3d 853 (7th Cir. 1998).

¹³¹ *Id.* at 857.

¹³² *Id.* at 857–58.

¹³³ 840 N.E.2d 565 (N.Y. 2005).

¹³⁴ *Id.* at 566.

¹³⁵ *Id.* at 569. See also *Levine v. Shackelford, Melton & McKinley, L.L.P.*, 248 S.W.3d 166 (Tex. 2008) (per curiam) (refusing to set aside a default judgment entered because of the attorney's pattern of ignoring deadlines).

¹³⁶ No. C06-2306, 2008 WL 2338505 (N.D. Cal. June 4, 2008).

¹³⁷ *Id.* at *2.

“The requirement that parties who simply ignore deadlines make a showing of excusable neglect should be taken seriously by the district courts, precisely because of the prejudice to the other party, exemplified here, which may result from untimely filings.”¹³⁸

Law students and new lawyers need to understand that untimeliness of written work product affects other individuals and entities; late filings affect both professors’ and courts’ efficiency in processing substantive review, and distract such readers from focusing on timely submissions from students or lawyers who complied with the deadlines. Although certain circumstances might warrant a court’s understanding and leniency, new practitioners need to evolve from any previous “excuse” mindset and instead show respect for the court and opposing counsel by submitting documents on time.

I. Backslaps: When the Pleadings or Briefs Are Well Written and Facilitate the Service of Justice, Judges Say So.

In stark contrast to judges’ expressed frustration with poor legal writing, they articulate their appreciation for well-written submissions that streamline the judicial process. For example, in *In re Law Offices of James Sokolove, LLC*,¹³⁹ the Supreme Court of Rhode Island stated, “We wish to express our sincere appreciation for the articulate arguments and well-written briefs submitted by counsel for both sides in this case, as well as for the insightful *amicus curiae* briefs submitted in this case.”¹⁴⁰

.....

138 95 F.3d 548, 558 (7th Cir. 1996) (emphasizing the “dilatory tactics” of the defendant in responding late to a complaint and finding that the district court’s *sua sponte* enlargement of the time period for the defendant to respond to the complaint “seriously prejudiced” the plaintiff’s prosecution of his case); see also *Kovacic v. Tyco Valves & Controls*, 433 Fed. Appx. 376, 381–82 (6th Cir. 2011) (dismissing a case in which plaintiff’s “counsel’s conduct was extremely dilatory” and “defendant was prejudiced by opposing counsel’s delay”); *McLaurin v. East Jordan Iron Works, Inc.*, 666 F. Supp. 2d 590, 593 (E.D.N.C. 2009) (acknowledging the defendants’ frustration with plaintiffs’ counsel’s failure to comply with case-management deadlines, and warning that future late filings will result in the imposition of sanctions); *Kalispel Tribe of Indians v. Moe*, No. CV–03–423–EFS, 2008 WL 2273286 (E.D. Wash. June 2, 2008) (affirming imposition of sanctions against counsel when a late-filed summary-judgment response forced plaintiff’s counsel to incur unnecessary expenses drafting an additional reply brief).

139 986 A.2d 997 (R.I. 2010).

140 *Id.* at 1006 n. 14. See also *East Greenwich School Committee v. East Greenwich Educ. Ass’n*, 982 A.2d 1049, 1049 n. 1 (R.I. 2009) (“We hasten to express our sincere appreciation for the articulate arguments and well-written briefs submitted by counsel for both sides in this case, as well as the *amicus curiae* brief submitted.”). Other state and federal courts also have complimented the quality of attorneys’ legal writing. See, e.g. *Gauer v. Genesco, Inc.*, No. C-73-1375, 1975 WL 429, at *1 (N.D. Cal. Aug. 1, 1975) (“[T]he court wishes to express its appreciation to counsel for each of the parties for their very well-written briefs and the incisive arguments contained therein.”); *Brunswick Corp. v. U.S.*, No. 07 C 3792, 2008 WL 5387086, at *12 (N.D. Ill. Dec. 22, 2008) (“The court also thanks all counsel for their exceptionally thorough and well-written briefs.”); *Kennedy Ship & Repair, L.P. v. Loc Tran*, 256 F. Supp. 2d 678, 687 (S.D. Tex. 2003) (“The Court appreciates the informative and well-written briefs that it has received from Parties’ counsel in this case.”); *Carpenter v. Mattes Electric*, No. 96A–07–005 WTQ, 1997 WL 528044, at *1 n. 1 (Del. Super. Apr. 9, 1997) (The court appreciated “the well-written and well-argued briefs of both parties.”); *Templeton Coal Co. v. Shalala*, 855 F. Supp. 990, 994 (S.D. Ind. 1993) (“[T]he parties have done a remarkably good job of compiling documents and well written briefs for the court’s consideration.”); *Watts v. Winn Parish School Bd.*, 66 So.2d 350, 355 (La. App. 2d Cir. 1953) (“The lengthy well written briefs of both counsel have been read with interest, and we express our

In demonstrating gratitude for well-written briefs, courts emphasize their effectiveness in assisting the court.¹⁴¹ For instance, in *Cisneros v. Corpus Christi Independent School District*,¹⁴² the court highlighted the helpfulness of the efforts exerted by counsel in preparing quality written work in a complex case involving the politically charged issue of school desegregation. Near the start of the opinion, the court stated,

Because it is an important case I want again to express my appreciation for the efforts of the attorneys who have appeared here, not only for their cooperation in providing the court with all the relevant and pertinent evidence, voluminous data and statistics, but also for well-written briefs, and also for the expeditious manner in which the evidence was presented.¹⁴³

The court explained that it had the arduous task of reviewing voluminous statistical data, exhibits and testimony, and that it found the plaintiffs' submissions to be "accurate and very illuminating."¹⁴⁴ The court likewise complimented the statistical calculations offered by the defendants, stating, "[T]he court is deeply appreciative of the cooperation, and of the long, tiresome work that the school administration had to undertake to furnish this data."¹⁴⁵ The court relied heavily on the voluminous evidence clearly presented by both parties in rendering its decision on this pivotal subject matter.

Law students and new attorneys might be more motivated to generate quality briefs if they are exposed to similar examples of how attorney work

.....

appreciation for them."); *Scuderi v. Monumental Life Ins. Co.*, 344 F. Supp. 2d 584, 586 n. 1 (E.D. Mich. 2004) ("The Court commends and thanks counsel for the thoroughness and clarity of their well[-]written briefs."); *Quirk v. Premium Homes, Inc.*, 999 S.W.2d 306, 310 n. 5 (Mo. App. E. Dist. 1999) ("We would be remiss if we failed to make public our appreciation for the well written briefs, superior arguments and, above all, exemplary courtesy and professionalism exhibited by counsel for both parties."); *Tait v. North America Equitable Life Assurance Co.*, 194 N.E.2d 456, 457 (Ohio Com. Pl. 1963) ("The Court at the outset wishes to thank and to express its sincere appreciation to both counsel for their excellent, well-written and very comprehensive briefs."); *Anderson v. State*, 905 S.W.2d 367, 368 (Tex. App.—Fort Worth 1995) ("The well written briefs and cogent arguments of both State and Appellant are appreciated by the court").

¹⁴¹ See e.g. *Dewey v. Allstate Ins. Co.*, 588 F. Supp. 479, 483 (D. Kan. 1982) (acknowledging that a trial brief "was well written and helpful to the Court"); *Livingood v. Townsend*, 422 F. Supp. 24, 28 (D. Minn. 1976) ("The court appreciates the excellent assistance afforded by all counsel in the form of well written briefs and candid oral presentations"); *Verizon Directories Corp. v. Yellow Book USA, Inc.*, No. 04–CV–0251, 2004 WL 1598917, *1 (E.D.N.Y. July 19, 2004) ("The court thanks the parties for their full, well-written and helpful briefs and other materials"); *Trenda v. Astrue*, 2009 WL 5184344, *2 (D.N.D. 2009) (acknowledging that "briefs were well written, addressed numerous issues, and provided substantial assistance to the court"); *Indiana-American Water Co., Inc. v. Indiana Off. of Util. Consumer Counselor*, 844 N.E.2d 106, 109 n. 1 (Ind. App. 2006) ("We thank the parties for their well-organized and well-written briefs, which greatly facilitated our review of the Commission's 127–page order and the twenty-two-volume record").

¹⁴² 324 F. Supp. 599 (S.D. Tex. 1970).

¹⁴³ *Id.* at 600.

¹⁴⁴ *Id.* at 601.

¹⁴⁵ *Id.* at 602.

product made the court’s job easier in rendering decisions, and see the real impact their own typewritten words can have on creating law in this country.

II. Why Attorneys and Law Students Break Rules

Regarding writing, T.S. Eliot once said, “I always feel it’s not wise to violate rules until you know how to observe them.”¹⁴⁶ It is clear that even seasoned lawyers and ambitious law students disregard court mandates, professor rules, and principles of good legal writing. The question is why and how do we motivate more practitioners, and especially the next generation of lawyers, to embrace necessary and well-thought-out court requirements and legal writing standards instead of resisting (even subconsciously) or ignoring them.¹⁴⁷

Any community—family, society, population, profession, industry—includes groups of individuals who tend to follow applicable rules and those who do not. The task of untangling how to motivate more people to follow a particular set of rules starts with an analysis of (1) why certain people follow rules, (2) why others break them, and (3) how to change the latter’s mindset.¹⁴⁸

When asked why some people violate rules or laws, one Protestant minister offered, “ignorance, apathy, or greed.”¹⁴⁹ Ethics analysts cite arrogance or a sense of entitlement.¹⁵⁰ According to law-and-economics theory, rules or laws “are followed when the expected cost of noncompliance exceeds the expected benefit of noncompliance.”¹⁵¹ The

146 Donald Hall, *T.S. Eliot, The Art of Poetry No. 1*, <http://www.theparisreview.org/interviews/4738/the-art-of-poetry-no-1-t-s-eliot> (last visited 2/14/2014) (accessed Mar. 7, 2014).

147 Law professors in today’s legal academy know that simply telling students to follow the rules because they are important, or because “we say so,” is not a foolproof plan. At a very basic level, individuals’ psychology is why some resist rules or authority. As professors or law-office mentors, we may be able to recognize these “human nature” factors and address them in our syllabi or via personal interactions with those who exhibit some of these behaviors.

148 Lidia Yuknavitch, author of the memoir, *The Chronology of Water* 201 (Hawthorne Books 2011), explains rule-breakage in an interesting framework of a base human need to connect, stating,
I don’t have any problem understanding why people flunk out of college or quit their jobs or cheat on each other or break the law or spray-paint walls. A little bit outside of things is where some people feel each other. We do it to replace the frame of family. We do it to erase and remake our origins in their own images. To say, I too was here.

Nonetheless, as members of the legal academy and of the bar, representing clients with fundamental needs, we need to have a sense of, and respect for, rules and order; in our client representation, we must, at appropriate times, suppress any personal need to express ourselves through rebellion or resistance to authority, for the greater good of the legal system.

149 This minister pointed to the “Parable of the Sower” in the Bible, found in the book of *Matthew* 13:18–23, which suggests lack of understanding, apathy, and “deceitfulness of wealth” as reasons why individuals stray from moral decisionmaking.

150 Sandeep Kathuria, *Best Practices for Compliance With The New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 Pub. Contract L.J. 803, 810 (2009) (“In addition to pecuniary motivations, some individuals seem to violate rules due to arrogance or a sense of entitlement.”).

cost-benefit analysis includes three components: (1) the advantage of breaking a rule, (2) the likelihood that a rule violation will be discovered, and (3) the penalty for disobedience.¹⁵² In a *Business Insider* article entitled *27 Psychological Reasons Why Good People Do Bad Things*, the authors note that “problematic punishments,” such as fines or other economic punishments for immoral behavior convert a right–wrong analysis into “an economic calculation about the likelihood of getting caught versus the potential fine.”¹⁵³ Examining theories and research related to medical error, author Peter Roberts explains, “Rules are broken when the [medical] practitioner cuts corners in pursuit of efficiency, lacks discipline due to boredom or criminal intent, or the situation demands an adjustment to the rules.”¹⁵⁴

Evaluating the use of corporate law as a regulatory tool, Professor Kent Greenfield acknowledges respect for the system as a motivating factor in rule compliance.¹⁵⁵ He cites to Tom Tyler, a psychologist and “leading authority on the effects of fairness and trust within organizations,”¹⁵⁶ for the proposition “that individuals’ compliance with rules and productivity improve[s] with their feelings of being treated fairly, and that individuals’ beliefs about the fairness of the institution are better predictors for rule compliance and productivity than their exposure to material incentives and penalties.”¹⁵⁷ Nisen and Groth also reiterate that “[r]ules are designed to prevent unethical behavior, but when they’re seen as unjust or excessive they can provoke the opposite reaction.”¹⁵⁸ The

¹⁵¹ Note, *Rule Porousness and the Design of Legal Directives*, 121 Harv. L. Rev. 2134, 2136 (2008), citing Richard A. Posner, *Economic Analysis of Law* §7.1 at 218, §7.2 at 219 (7th ed. 2007) and Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Political Economy 169 (1968).

¹⁵² *Id.* See also Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. Leg. Stud. 237, 248 (2002) (citing Becker, *supra* n. 151). (“The question of why people comply with the law in general has been investigated from various perspectives. There is the neoclassical economic model of criminal deterrence put forth by the Nobel laureate Gary Becker.”).

¹⁵³ Max Nisen & Aimee Groth, *Bus. Insider*, *27 Psychological Reasons Why Good People Do Bad Things*, <http://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-things-2012-8?op=1> (Aug. 27, 2012).

¹⁵⁴ Peter Roberts, *Policy to Protection: The Role of Human Nature and System Nature in Preventing Patient Injury*, 35 Vict. U. Wellington L. Rev. 829, 834 (December 2004).

¹⁵⁵ Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. Davis L. Rev. 581 (2002).

¹⁵⁶ *Id.* at 614.

¹⁵⁷ *Id.* at 614–615. See also Huang, *supra* n. 153 at 248 (“More recently, Tom Tyler and Gregory Mitchell have provided explanations for legal compliance that is due to perceived legitimacy of the law.”) (citing Tom R. Tyler, *Why People Obey the Law* 30–39 (1990)); Tom R. Taylor & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 Duke L.J. 703, 783–84 (1994); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. Intl. L. & Pol. 219, 229–30 (1996–97); Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 Swiss J. Econ. & Statistics 219, 224 (1997).

¹⁵⁸ Nisen & Groth, *supra* n. 154.

¹⁵⁹ Gladwell at 207–08.

author Malcolm Gladwell echoes this fairness concept in his book, *David and Goliath: Underdogs, Misfits, and the Art of Battling Giants* (Little, Brown and Company 2013), stating,

[L]egitimacy is based on three things. First of all, the people who are asked to obey authority have to feel like they have a voice—that if they speak up, they will be heard. Second, the law has to be predictable. There has to be a reasonable expectation that the rules tomorrow are going to be roughly the same as the rules today. And third, the authority has to be fair. It can't treat one group differently from another.¹⁵⁹

Community influence and awareness of the effect of one's behavior on others might also be a motivating factor for rule compliance, just as indifference or lack of concern for the effect of one's behavior on others might engender the opposite result. Professor Peter Huang, quoting Nobel laureate Kenneth Arrow, summarizes the theory that "[i]ndividuals comply because they expect others to also comply."¹⁶⁰

III. Instilling Professional Accountability in New Legal Writers

The next question is whether these potential explanations for rule defiance—ignorance, apathy, arrogance, cost-benefit analysis, lack of respect for the system, and indifference to the effect of behavior on others—apply to law students and new legal practitioners. If they do, how do we tackle that behavior?

At first glance, it would seem that *ignorance* of court rules and legal writing standards is profoundly not an excuse for any law-school graduate. Legal writing professors provide detailed course policies that mirror court rules for written submissions, itemizing deadlines and clear standards for substantive components, formatting, citation, font, margins, line spacing, page numbering or word count, and electronic or hard-copy transmission to the grader. However, ignorance of the *context* behind the importance of such rules might be. Professors and supervising attorneys can begin to remove this contextual ignorance by showing students the case examples in this article¹⁶¹ and reinforcing the themes that a lawyer who follows the

160 Huang, *supra* n. 153, at 249 (citing Kenneth J. Arrow *The Limits of Organization* 72 (1974)).

161 See *supra* sec. I.

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

rules enables the court to “forg[e] enlightened decisions” and ensure “fairness and orderliness.”¹⁶²

Likewise, *laziness, apathy and lack of pride of authorship* might be mitigated by a professor or law-practice mentor lighting an intellectual fire beneath a student or new graduate. Context can be useful here as well: examples of cases in which good legal writing directly affected a court’s decision might ignite a flicker of passion in unenthusiastic or apathetic writers. Law students and junior attorneys might benefit from hearing from judges and law clerks who, because of a good piece of legal writing that adhered to the court rules, were able to perform their judicial roles more effectively and efficiently.

Further, procrastination and cutting corners due to a perceived lack of time and a misguided *cost-benefit analysis* can be addressed through working with students and recent law graduates to develop, and stick to, drafting and editing schedules so that they can fine-tune every piece of work product before submitting it to a supervising attorney or a court. Law students and lawyers might skirt rules and spend an insufficient amount of time perfecting a piece of legal writing when (1) doing so affords them more time to focus on something else; (2) they do not believe their rule-shirking or failure to appropriately edit a document will be discovered, or truly will bother anyone; or (3) any penalty for such behavior, if one exists or is known, fails to outweigh the free time gained. Again, using illustrative cases, we can educate new legal writers about the real costs of defying court rules and of poor legal writing; the toll this behavior takes on the judicial system; and the potential grading or monetary penalties, sanctions, embarrassment and other professional ramifications which can result from a “benchslap.”

For practitioners and educators, the collective challenge, and deeper problem, is the student or new lawyer who does not fear these repercussions, penalties, or negative fallout, who feels he or she is beyond reproach, or who does not yet *respect or care enough about the system as a whole*, or the detrimental impacts upon colleagues, opposing counsel, clients, or court staff, to be concerned about the broader ripple effect of poor writing. A motivated law professor or practitioner-mentor can remove these barriers to professionalism by continuing to emphasize context from several angles.

.....
¹⁶³ It is equally frustrating when “blawgs” suggest such rules are overzealous or overly harsh, especially when legal writing professors take great care to craft course policies to help students learn. A recent post serves as an example of a blawg criti-

A. Law Professors Can Illuminate the Contexts for Strict Rules.

For some professors, it seems shocking, and disrespectful, when students balk at following the rules and complain that professors impose unrealistic deadlines and penalties for failure to follow submission requirements.¹⁶³ To curtail this type of attitude from the beginning of a professor–student relationship, syllabi should be explicit in providing context of why such rules are in place, and what aspects of professionalism they are intended to teach—removing the “ignorance” excuse. For example, students who believe they have had experience working in court-houses where late filings were not penalized and time extensions were routinely granted need to be informed that (a) their experience was likely an aberration and (b) there are very real examples of courts rejecting attorney work product that is late or does not comply with court rules and penalizing lawyers and their clients.¹⁶⁴ Further, syllabi can explain that

- (1) IRAC structure (or a variation thereof) is not negotiable when students are first learning how to write, because students who fail to follow a structural formula tend to omit key components of a logical legal analysis, leaving the reader (i.e., the grader) confused;
- (2) procedural rules for submitting documents using specific e-mail headers or document-naming conventions help a professor keep track of voluminous submissions from dozens of students so that documents do not get lost, much as a court clerk has to handle voluminous submissions;
- (3) a professor’s preferences for a certain font or line spacing in all written submissions are not meant to be overly nit-picky; instead, a certain amount of “white space” on the page helps a professor process voluminous pages of student writing in a short time period and logistically allows professors to write comments without straining for space;
- (4) late papers deserve a penalty (not because a professor wants to arbitrarily punish students) because they delay the administrative task of collecting and printing documents and the

cizing a caring, thoughtful professor for providing these exact types of course policies, without (in this author’s opinion) fully understanding the challenges that legal writing professors face. Joe Patrice, *Above the Law, A Law Professor’s Detailed, Ridiculous, Condescending “Local Rules” for Class*, <http://abovethelaw.com/2014/02/a-law-professors-detailed-ridiculous-condescending-local-rules-for-class/> (Feb. 7, 2014).

¹⁶⁴ See section I, *supra*.

professor’s ability to start grading in a preferred sequence, and their lateness unfairly disadvantages students who submit work on time in one class perhaps to the detriment of their study time in another.

To facilitate this contextualization, professors could assign court opinions like those summarized earlier, then have the students write about, or discuss, their own reactions, including how they would feel if a court rejected their filing, required them to report such rejection to their client, and mandated they reimburse the client for any legal fees paid to create the rejected work product.¹⁶⁵

To address the issue of cost-benefit analysis and clarify the repercussions for failing to follow rules from the outset of a semester, professors can take a hard stance and state in the syllabus (perhaps even having students certify that they have read, and acknowledge, such rules) that they will (1) assess rule-violation or lateness penalties in a numerical quantity that actually “hurts” the bottom line in a grading rubric;¹⁶⁶ or (2) “bounce” (i.e., refuse to accept) papers that violate substantive or procedural rules, or are late. Professors could require students who wish noncompliant papers to be considered at all to file motions for leave to resubmit the documents. In that instance, students might process the cost-benefit analysis and realize that it would likely be less work to actually file a paper in compliance than draft the motion for leave.

Of course, some individuals will respond better to a “carrot” rather than a “stick,” but, unfortunately, grades do not seem to be enough of an incentive for many students. To reach students who are more motivated by positive reinforcement than penalties, schools and professors could encourage good legal writing by offering scholarships and other accolades for strong written work product starting as early as the first year of law school, publicizing and otherwise raising awareness about these potential boons from Day One of law school.

Additionally, the more often students are exposed to legal writing rules and criteria for excellence in written work product, the more deeply the importance of such standards should become entrenched. Legal

165 It might even be interesting to create a simulation in which a student in a legal writing class is “paid” (via Monopoly money or some other simulated “currency”) by a client for all the billable hours expended in researching, drafting, and submitting a brief. The “court,” however, has the right to assess sanctions or penalties for rule violations, which would require the student to give the “money” back to the client or pay it to someone else, i.e., opposing counsel, or the court.

166 Legal writing professors may debate whether a rule-violation or lateness penalty is too harsh, but students need to be deterred from “gaming” the system by taking a lateness penalty in order to have a full extra day to finish an assignment, or violating a word count simply because they do not want to put the work into closely editing a lengthy draft. These are unfortunate habits that need to be curtailed before the students graduate law school; otherwise, these behaviors will continue in their representation of real clients before real courts.

writing scholarship already abounds with the call for more practice-oriented legal writing across the curriculum beyond the 1L year.¹⁶⁷ More opportunities for law students to prepare written work product similar to what they will produce in real law practice will reinforce the context learned in 1L programs.

Further, students routinely ask legal writing professors to serve as references for legal employment and to complete moral-character evaluations as part of students' bar-exam applications. Much as certain state bars require lawyers to certify that they have read the court rules prior to admission,¹⁶⁸ professors might consider requiring these students to sign written certifications, in which the signatories¹⁶⁹ affirm that they understand and acknowledge why good legal writing, professionalism, and adherence to court rules is important and reflect upon the school and their fellow graduates.

B. Law Practitioners Can Provide Context for Professional Accountability and Compliance with Court Rules.

Seasoned attorneys can serve as role models to the next generation of the legal community by renewing their own commitment to excellence in legal writing and adherence to court rules. Experienced practitioners might consider ways to make high-quality legal writing a more overt criterion of legal competence in both broad-scale and small-scale legal communities, such as bar associations and law offices.

1. Broad-scale legal community efforts

Means of enhancing professional accountability in legal writers include considering (1) whether court rules should be modified to define more expressly how attorneys should organize and structure legal arguments, and to identify more clearly the potential penalties for failure to comply with procedural and formatting rules; (2) whether state bars should examine the oaths attorneys take upon bar admission and propose new language specifically identifying legal writing as an aspect of professionalism; and (3) whether state annual Continuing Legal Education (CLE)

¹⁶⁷ See e.g. Keith A. Findley, *Rediscovering The Lawyer School: Curriculum Reform in Wisconsin*, 24 Wis. Intl. L.J. 295 (2006); Phyllis Goldfarb, *So Near And Yet So Far: Dreams Of Collaboration Between Clinical and Legal Writing Programs*, 4 J. ALWD 35 (2007); Pamela Lysaght, *Writing Across the Law School Curriculum in Practice: Considerations For Casebook Faculty*, 12 Leg. Writing 191 (2006).

¹⁶⁸ For example, Rule 49(c)(7)(ii) of the Rules of the District of Columbia Court of Appeals requires applicants for admission *pro hac vice* to certify that they have read and agree to be bound by the applicable court rules. D.C. Ct. App. R. 49(c)(7)(ii)(9).

¹⁶⁹ See, e.g. John Garvey, *Intellect And Virtue: The Idea of a Catholic University*, 60 Cath. U. L. Rev. 563, 567 (2011) ("In 2009, Harvard Business School proudly announced an effort by its graduating students to get classmates to sign the MBA Oath—a pledge to act ethically in the business world. Students pledge to refrain from corruption, unfair competition, and harmful business practices; to protect human rights; and to set an example of integrity").

requirements should include at least one credit per reporting cycle closely tailored to legal writing issues, as many states do for ethics and professionalism courses. Ideally, these mechanisms will help address the psychological reasons behind writer transgressions mentioned above: ignorance, apathy, entitlement, cost-benefit analysis, lack of respect for the system, and indifference to the effect of behavior on others. Clarity of rules and a range of possible penalties for both one-time and repeated violations should quash any claim of ignorance. Updated bar admission oaths might help squelch apathy and ignite a spark of respect for the system and a flash of awareness in how a new attorney's behavior can affect the system and others. Annual CLE programs can reinforce these concepts and show how the benefits (both system-wide and personal) of good legal writing and rule adherence outweigh the perceived costs of investing the extra time to follow court rules and fine-tune a legal writing document.

a. Modifying court rules

The Federal Rules of Civil Procedure, and local federal court rules that supplement the uniform set of rules, mandate substantive and structural components for certain types of pleadings, motions, and other litigation documents, and contain certain procedural, formatting, and transmission requirements for court submissions. Interestingly, however, express rules regarding the quality of, and substantive standards for clarity and organization of, written work product are sometimes harder to extract. For example, only three Federal Rules of Civil Procedure expressly mention the term “clarity” in legal writing: the rules regarding forms of pleadings,¹⁷⁰ class actions,¹⁷¹ and temporary restraining orders.¹⁷² Other substantive writing directives in the rules are limited to

- Stating certain items with “particularity,” such as grounds for written motions,¹⁷³ allegations in pleadings involving fraud or

¹⁷⁰ Fed. R. Civ. P. 10(b) (“Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. *If doing so would promote clarity*, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.”) (emphasis added).

¹⁷¹ Fed. R. Civ. P. 23(c)(2)(B) (“For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *The notice must clearly and concisely state in plain, easily understood language:* (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members.”) (emphasis added).

¹⁷² Fed. R. Civ. P. 65(b) (referencing what the affidavit or verified complaint in support of the request must “clearly show”).

¹⁷³ Fed. R. Civ. P. 7(b)(1)(B).

mistake,¹⁷⁴ denials that conditions precedent have occurred,¹⁷⁵ and items sought in a Request for Production of Documents;¹⁷⁶

- Stating items in “short and plain” terms, such as claims for relief in pleadings,¹⁷⁷ defenses to claims,¹⁷⁸ and the contents of a complaint to condemn property;¹⁷⁹
- Making sure items “fairly respond” to substance in other pleadings, such as denials in pleadings¹⁸⁰ and requests for admissions;¹⁸¹
- Stating items in a “simple, concise, and direct” fashion, such as allegations in pleadings;¹⁸²
- Stating items “specifically” or with “specificity,” such as an item of special damages,¹⁸³ grounds for objecting to an interrogatory,¹⁸⁴ or a denial of a request for admission;¹⁸⁵
- Allowing “vagueness or ambiguity” as grounds for a motion for more definite statement in a pleading;¹⁸⁶
- Stating items “separately,” such as in requests for admissions;¹⁸⁷ and
- Describing items “sufficiently,” such as identifying property in a notice of condemnation.¹⁸⁸

The rules for drafting two specific types of motions provide a bit more-substantive guidance. Rule 50(a), governing motions for judgment as a matter of law, requires attorneys to specify “the law and facts that entitle the movement to the judgment.”¹⁸⁹ Likewise, Rule 56(c), regarding summary-judgment motions, instructs lawyers to show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,” and to support factual positions by “citing to particular parts of materials in the record.”¹⁹⁰ Beyond these instructions, however, the rules do not provide further substantive direction on what precise type of content the court expects to see in these types of motions,

174 Fed. R. Civ. P. 9(b).

175 Fed. R. Civ. P. 9(c).

176 Fed. R. Civ. P. 34(b)(1)(A).

177 Fed. R. Civ. P. 8(a).

178 Fed. R. Civ. P. 8(b)(1)(A).

179 Fed. R. Civ. P. 71.1(c)(2).

180 Fed. R. Civ. P. 8(b)(2).

181 Fed. R. Civ. P. 36(a)(4).

182 Fed. R. Civ. P. 8(d)(1). Rule 30 also requires objections in depositions to be stated “concisely.” Fed. R. Civ. P. 30(c)(2).

183 Fed. R. Civ. P. 9(g).

184 Fed. R. Civ. P. 33(b)(4).

185 Fed. R. Civ. P. 36(a)(4).

186 Fed. R. Civ. P. 12(e).

187 Fed. R. Civ. P. 36(a)(2).

188 Fed. R. Civ. P. 71.1(d)(2)(A).

189 Fed. R. Civ. P. 50(a)(2).

190 Fed. R. Civ. P. 56(a), 56(c)(1)(A).

or how such subject matter might best be organized or structured to assist the court in processing facts and law. Some local rules provide more detailed substantive expectations, but these rules are not consistent across jurisdictions.¹⁹¹ Courts might consider being even more explicit and stringent in outlining their expectations for the content and structure of motions and briefs, such as requiring (1) the proper case caption with all identifying information; (2) the title of the document, identifying the party filing it; (3) a concise introduction listing the party's key arguments or legal issues; (4) a statement of the facts with clear and accurate citations to the case record; (5) substantive headings and subheadings for each of the key arguments or legal issues; (6) an express statement of the applicable rule(s) governing each issue; (7) case citations and explanations of the governing case law to illustrate the rule(s); (8) a brief application of the rule(s) to the case at hand; and (9) well-defined requests for particular categories of relief.

Further, to motivate lawyers to comply with procedural and formatting rules, it might be helpful to clarify the real negative ramifications of not following such directives. Notably, the Federal Rules of Civil Procedure include four references to sanctions, none of which seems to specifically target the substantive or procedural shortcomings identified in the cases summarized earlier. For example, Rule 16(f) governs sanctions for failing to appear at, participate in, or obey orders relating to scheduling and pretrial conferences, referencing monetary penalties.¹⁹² Rules 26(g)¹⁹³ and 37¹⁹⁴ address sanctions for violations of mandatory initial disclosure

¹⁹¹ For example, regarding drafting motions, the United States District Court for the Southern District of New York requires all motions to include "[a] notice of motion, or an order to show cause signed by the Court, which shall specify the applicable rules or statutes pursuant to which the motion is brought, and shall specify the relief sought by the motion." U.S. Dist. Ct. S.D.N.Y. Civ. R. 7.1(a)(1). Further, the moving party must draft a memorandum of law, "setting forth the cases and other authorities relied upon in support of the motion, and divided, *under appropriate headings*, into as many parts as there are issues to be determined." U.S. Dist. Ct. S.D.N.Y. Civ. R. 7.1(a)(2) (emphasis added). This is a helpful instruction for a novice legal writer, for it prompts the drafter to think about organizing the document around issues, headings, and cases. Similarly, Local Rules of the United States District Court for the Eastern District of Virginia indicate, "All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought," U.S. Dist. Ct. E.D. Va. Civ. R. 7(A), and certain "motions . . . shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies," U.S. Dist. Ct. E.D. Va. Civ. R. 7(F)(1). This is still informative, but not as detailed—structure-wise—as the Southern District of New York rule. Further, the Local Rules of the United States District Court for the District of New Jersey contain very detailed and helpful procedural, formatting, and submission requirements for motions, but do not seem to contain substantive content-oriented instructions to the same degree as those promulgated by the Southern District of New York or even the Eastern District of Virginia. U.S. Dist. Ct. D.N.J. Civ. R. 7.1, 7.2.

¹⁹² Fed. R. Civ. P. 16(f)(2) ("Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust").

¹⁹³ Fed. R. Civ. P. 26(g)(3) ("If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation").

¹⁹⁴ Fed. R. Civ. P. 37(b).

and discovery rules. Rule 37(b)(2)(A) specifically lists the dramatic penalties that can occur from a party's failure to obey a discovery order, including striking pleadings, prohibiting parties from introducing evidence, dismissing the action, rendering a default judgment, or finding a party in contempt of court.¹⁹⁵

Rule 11 focuses on sanctions for signing pleadings or briefs that are filed for an improper purpose, are not warranted by existing law (or a nonfrivolous argument for extending, modifying, or reversing existing law), or include factual contentions without evidentiary support.¹⁹⁶ As an initial matter, it is rather difficult to obtain Rule 11 sanctions against opposing counsel; a moving party must afford the offender the chance to cure the defect before filing a motion for sanctions with the court.¹⁹⁷ The rule further states that "[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated," yet gives little indication of the harshness of the possible penalties, other than to say that "[t]he sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."¹⁹⁸ Additionally, a party could argue that Rule 11 does not really apply to a scenario in which a party violates a court-imposed substantive, procedural, formatting, or transmission rule, or simply submits an alarmingly poorly written brief. In reality, the Rule 37 penalties looming for discovery abuses (i.e., striking pleadings, prohibiting parties from introducing evidence, dismissing the action, rendering a default judgment, or finding a party in contempt of court) seem scarier and more readily imposed than any existing deterrent consequence for a lawyer's blatant rule violations or submission of truly substandard written work product to the court.

Perhaps if the Federal Rules of Civil Procedure incorporated more-express penalties for poor legal writing and failure to follow court rules, attorneys might weigh the cost-benefit analysis, step up their writing, and favor compliance. For example, a proposed rule could state as follows:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it¹⁹⁹—an

195 Fed. R. Civ. P. 37(b)(2)(A).

196 Fed. R. Civ. P. 11.

197 *Id.*

198 *Id.* at 11(c)(4).

199 These four verbs would hold accountable both the signer and filer of the document and any attorney presenting oral argument on the same document.

attorney²⁰⁰ certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the document complies with the Federal Rules of Civil Procedure, applicable Local Rules, the Scheduling Order, and any applicable individual rules issued by the presiding judge or magistrate, in substance, procedure, formatting, and transmission to the court. Further, the attorney certifies his or her understanding that the court is relying upon this written work product in order to (1) understand the facts and legal theories of the party's case, (2) efficiently administer justice in the case, and (3) facilitate fairness to all parties. The attorney further certifies his or her understanding that opposing counsel—a fellow member of the bar—is relying upon this written work product to understand the facts and legal theories of the filing party's case, and respond thereto.

To efficiently and clearly convey the facts and legal theories of the case to the court and opposing counsel, all briefs filed in support of motions must contain (1) the proper case caption with all identifying information; (2) the title of the document, properly identifying the party filing it; (3) a concise introduction listing the party's key arguments or legal issues; (4) a statement of the facts with clear and accurate citations to the case record; (5) substantive headings and sub-headings for each of the key arguments or legal issues; (6) an express statement of the applicable rule(s) governing each issue; (7) case citations and explanations of the governing case law to illustrate the rule(s); (8) a brief application of the rule(s) to the case at hand; and (9) well-defined requests for particular categories of relief.

If a pleading, motion, or other paper filed with the court violates the applicable court rules, Scheduling Order, the individual judge's or magistrate's rules, or the foregoing paragraph—in substance, procedure, formatting, or mode of transmission to the court—the court may²⁰¹ reject the document, and mandate a refiling by the time the clerk's office closes the following business day.²⁰² Any party may file a motion—totaling no more than two (2) pages—opposing the court's consideration of such refiling, which the court will take under advisement.

This rule is designed to instill and reinforce respect among lawyers filing documents with this court, for one another, for the court's time in administering cases pending on its docket, and for all parties. Therefore, to deter repetition of rule-violating conduct or comparable conduct by

.....
200 This proposed rule could differ from Rule 11 by excluding unrepresented parties proceeding *pro se*. This article does not address whether law graduates and *pro se* litigants should be held to the same writing standards. However, *pro se* litigants should be held accountable for following the court rules.

201 This proposed rule could afford the court discretion whether to reject the filing or not; however, there should be a system in place in which lawyers regard this result as a very real risk.

202 This time limit would prevent parties from taking advantage of a refiling rule simply to obtain more time to draft and edit a document.

others similarly situated, the court may, in its discretion, impose the following penalties:

Individual Lawyer's²⁰³ First Violation: The court may reject the document and mandate a refile as set forth above.

Individual Lawyer's Second Violation: The court may reject the document and mandate a refile as set forth above. The court may also impose a fine of \$____.²⁰⁴

Individual Lawyer's Third Violation: The court may reject the document and either mandate a refile as set forth above, or may disallow a refile. The court may also impose a fine of \$____ and may order the lawyer to pay to any affected parties, including the lawyer's own party, part or all of the reasonable attorneys' fees and other expenses directly resulting from the violation. The court may order the lawyer to send a copy of the court's ruling on the document to the lawyer's client.

Four or More Violations by an Individual Lawyer: The court may reject the document and either mandate or disallow a refile. The court may also impose a fine of \$____, and may order the lawyer to pay to any affected parties, including the lawyer's own party, part or all of the reasonable attorneys' fees and other expenses directly resulting from the violation. The court may order the lawyer to send a copy of the court's ruling on the document to the lawyer's client. The court may order the lawyer to attend a minimum number of hours of Continuing Legal Education (CLE) courses specifically providing instruction on legal writing or adherence to court rules. The court may order the lawyer to enroll in a legal writing course at an ABA-approved law school.²⁰⁵

The rules as drafted already consider the need to protect parties from losing valuable rights based on an attorney's non-compliance. Rule 5(d)(4) of the Federal Rules of Civil Procedure currently states, "The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice." But this form-focused rule should not trump proposed penalties for outright rule violations and material substantive and procedural shortcomings. Further, Rule 83(a)(2) already furthers the goal of protecting clients from non-willful attorney noncompliance with form standards, stating, "A local rule imposing a requirement

.....

203 This warrants further discussion as to whether the penalties should be imposed and tracked against the individual lawyer or the law firm. A law firm that is a repeat violator, even through different lawyers therein, could be tracked as well.

204 These fines need to be substantial enough to affect the particular attorney; otherwise, such a penalty will be ineffective. Fines might be assessed on a sliding scale, perhaps based on the billing rate of the attorney. Depending on the administrative and logistical complexity of doing so, the funds could also be earmarked for establishing CLE programs tied specifically to legal writing and adherence to court rules.

205 Of course, legal writing professors would have to sign off on this concept, and consider pedagogical and logistical issues such as whether it would be disruptive to include practicing lawyers in a regular LRW class (auditing? pass-fail?), or whether a separate refresher course for practitioners should be created.

of form must not be enforced in a way that causes a party to lose any right because of a non-willful failure to comply.”²⁰⁶ Finally, Rule 83(b) reiterates that “[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.” The foregoing proposed new rule would provide express notice of the potential penalties for rule violations.

If courts agree that attorney noncompliance with substantive and procedural rules in written submissions to the court detrimentally affects the judicial process, perhaps providing more explicit notice of such substantive content and organizational requirements and an overt description of the penalties for noncompliance would help ameliorate these circumstances. On an optimistic note, courts also could continue to recognize good legal writing or even award a “Best Brief” honor each year. Such positive reinforcement might encourage other legal writers to strive for similar recognition.

b. State-bar-admission oaths

A second possible way to prompt new practitioners to take pause and think more carefully about legal writing and rule-compliance as important components of professionalism might be for state bars to evaluate the language of the oaths that new attorneys take upon admission, and propose incorporating therein an express commitment to rule-adherence and quality written work product.

The bars of all fifty states require new attorneys to swear or affirm an oath of admission.²⁰⁷ Many of us might recall the moment we raised our right hands and murmured our oaths as we were sworn into various state or federal bars, but few of us probably remember the actual words uttered. This could be because, out of understandable respect for tradition, the words—sometimes archaic—refer to laudable principles about honor and civility, but might fail to resonate with new lawyers on a practical level. Modernizing at least a portion of these oaths, to encompass exactly what new lawyers will be doing in their daily practice of law, might resound more deeply as these new practitioners recite the words, especially if the oath is reiterated at various later points in the attorney’s career (i.e., written renewals of bar memberships, periodic anniversaries of bar admission, etc.). The oath-swearing is, or should be, a momentous rite of

.....
²⁰⁶ However, one federal court has emphasized, “While we are sympathetic to the plight of a client prejudiced by his attorney’s inadvertence or negligence, the proper recourse for the aggrieved client . . . is to seek malpractice damages from the attorney.” *Pryor v. U.S. Postal Service*, 769 F.2d 281, 289 (5th Cir. 1985).

²⁰⁷ A summary of the fifty states’ attorney oaths is on file with the author.

passage in a new attorney's career; as a legal community, we might think about ways to make the spoken text more memorable and impactful—on an intellectual and ethical level.

Though some might view our bar admission oaths as simply a symbolic ritual without any lasting intellectual or emotional impact, the act of raising our right hands in a courtroom along with our peers could have more of an effect than we think. Some scholars suggest that the physical act of signing a document or making a pledge may heighten an otherwise nebulous concept into a moral obligation.²⁰⁸ As Carol Rice Andrews states, "Even the simple oath can prompt ethical reflection, as the actual act of taking the oath is a moment of high ethical aspiration."²⁰⁹ Likewise, according to David G. Yosifon, "There is evidence that putting one's commitments in writing, and signing them, has a particularly powerful impact in terms of internalization and identifying with a commitment, perhaps also with the group with whom one is signing the oath or statement."²¹⁰

The average layperson is likely aware that new doctors take a Hippocratic Oath, whether an ancient or modernized²¹¹ version, promising to help sick people,²¹² but what exactly are new lawyers promising to do? Interestingly, only *four* out of the fifty states mention the

208 See, e.g. Timothy Mazur, Compliance Programs & the Corporate Sentencing Guidelines § 12:28 (2013) (discussing the act of signing an honor code or honesty pledge and suggesting how "delivering a message promoting compliance immediately prior to a moment of risk can have a powerful, positive impact on behavior"); Jeffrey M. Lipshaw, *Duty And Consequence: A Non-Conflating Theory of Promise and Contract*, 36 Cumb. L. Rev. 321, 334 (2005–2006) (discussing precontractual negotiations, and suggesting that a "ritual act, like signing, dripping wax, or stitching with special string, changes its legal character").

209 See, e.g. Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 Geo. J. Leg. Ethics 3, 55 (2009).

210 David G. Yosifon, *Discourse Norms As Default Rules: Structuring Corporate Speech To Multiple Stakeholders*, 21 Health Matrix 189, 213 n. 64 (2011). See also *id.* at 213 ("The active expression of commitment introduces a crucial psychological dynamic. Human beings are deeply motivated to see themselves, and to be seen by others, as consistent and coherent across different behavioral and decisionmaking contexts. Expressions of commitment can thus lay the tracks for future conduct that will be consistent with the commitment, as we are loath to view ourselves as hypocritical or contradictory.") (internal citations omitted); Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 Stan. L. Rev. 509, 518 (1992) ("Professor Harold Berman describes the significance of oath-taking as 'legal speech' in an oral society: 'All oaths were cast in poetic form, with abundant use of alliteration The dramatic and poetic elements . . . elevated legal speech above ordinary speech.'" (citing Harold J. Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. Chi. L. Rev. 553, 562–63 (1978))).

211 The ancient version of the Hippocratic Oath was modernized in 1964 by Louis Lasagna, Academic Dean of the medical school at Tufts University. That version of the Oath is used by many medical schools today. *Hippocratic Oath, Modern Version*, <http://guides.library.jhu.edu/content.php?pid=23699&sid=190964> (last updated Jan. 7, 2014).

212 See e.g. Lisa R. Hasday, *The Hippocratic Oath as Literary Text: A Dialogue Between Law and Medicine*, 2 Yale J. Health Pol'y, L. & Ethics 299, 300 (2002) ("An oath represents the strongest possible commitment a speaker can make. In linguistic parlance, an oath belongs to a specific class of statements known as 'speech acts' or 'performative utterances.' By their very articulation, such statements have the power to put their contents into effect. . . . In short, "speech acts" do more than just say something; they also do something. . . . By swearing an oath, for example, a person promises to perform certain actions in the world. This promise is all the more powerful if, as is usually done, the oath taker swears upon some divine power and utters the oath in a public setting. Perhaps the most well-known example of an oath is the Hippocratic Oath—the famous code of medical ethics often taken by those about to begin medical practice.") (internal citations omitted).

act of writing in their oaths, and yet many lawyers—litigators and transactional attorneys alike—write on an almost daily basis (even on the most basic level such as emails to clients and opposing counsel). Arkansas, Florida, Louisiana and South Carolina require new attorneys to promise as follows: “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”²¹³ No other states mention any form of the word “writing” in their oaths.

The oaths of fifteen states (including Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Michigan, Missouri, Nevada, New Mexico, Ohio, South Carolina, Utah, and Washington) make some reference to the Rules or Code of Professional Conduct or Responsibility, standards of conduct, or principles of professionalism. However, the oaths do not expressly include quality legal writing as an overt component of professionalism.²¹⁴

Here is a sampling of the text of bar oaths:

Alabama: “I do solemnly swear (or affirm) that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person’s cause for lucre or malice, and that I will support the Constitution of the State of Alabama and of the United States, so long as I continue a citizen (or legal resident) thereof, so help me God.”²¹⁵

Iowa: “I do solemnly swear: I will support the Constitution of the United States and the Constitution of the State of Iowa; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except the defense of a person charged with a public offense; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth, and will never seek to mislead the judges by any artifice or false statement of fact or law; I will maintain the confidence, and, at any peril to myself, will preserve the secret of my client; I will abstain from all offensive personality, and

213 See *Supreme Court of Arkansas, In Re Attorney Oath of Admission*, <http://opinions.aoc.arkansas.gov/WebLink8/0/doc/274119/Electronic.aspx> (Feb. 23, 2012); The Florida Bar, *Oath of Admission to the Florida Bar*, <http://www.floridabar.org/tfb/TFBProfess.nsf/basic+view/04E9EB581538255A85256B2F006CCD7D?OpenDocument> (last updated June 25, 2013); The Louisiana Supreme Court Committee on Bar Admissions, *Lawyer’s Oath*, http://www.lascba.org/lawyers_oath.asp (accessed Mar. 14, 2014); Supreme Court of South Carolina, Order RE: Amendment to Rule 402, SCACR, <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03> (Oct. 22, 2003).

214 This article does not address whether the referenced Rules of Professional Conduct or Responsibility discuss rule-adherence and legal writing excellence, but instead suggests that the actual text of the oath could be the first step for implanting these goals and obligations in the new lawyer’s mindset.

215 Alabama State Bar, *The Oath*, <http://www.alabar.org/video/2008-Oath.cfm> (accessed Mar. 14, 2014).

advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will refuse to encourage either the commencement or continuance of an action proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; and I will faithfully discharge the duties of an attorney and counselor at law to the best of my ability and in accordance with the ethics of my profession, So Help Me God.”²¹⁶

Kentucky: “I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of . . . according to law; *and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.*”²¹⁷

From a practical standpoint, law-school graduates swearing these oaths in 2014 and beyond might not grasp how traditional words like “lucre,” “artifice,” or “fight[ing] a duel with deadly weapons” apply to the day-to-day practice of law upon which they are about to embark. Even if members of the various state bars wish justifiably to preserve tradition and preserve much of the venerable language in their respective oaths, it might be worth considering adding two sentences:

Out of respect for the judges administering this oath today, my future colleagues standing to the left and right of me, those attorneys who swore this oath before me, and those who will follow behind me, I promise, that in every legal document I write on behalf of my clients from this day forward, I will strive for clarity, logic, precision, and integrity.²¹⁸ And with every legal document I submit to this or any other

216 Neil Hamilton & Sandra Francis, *Inside the Iowa Lawyer's Oath, The Iowa Lawyer*, [http://www.iabar.net/iowa%20Lawyer.nsf/7410b4ac565446c1862566b40069ac86/66de657359ddea55862569060042fba5/\\$FILE/June%20IA%20Lawyer.pdf](http://www.iabar.net/iowa%20Lawyer.nsf/7410b4ac565446c1862566b40069ac86/66de657359ddea55862569060042fba5/$FILE/June%20IA%20Lawyer.pdf) (June 2000).

217 *Kentucky Constitution, Section 228*, www.lrc.state.ky.us/legresou/constitu/228.htm (accessed Mar. 14, 2014) (emphasis added). This oath was ratified on August 3, 1891, and revised on September 28, 1891, but has not been revised since that date. *Id.* Although some Kentucky lawyers have proposed updating the oath to remove the language regarding duels, those efforts have not been successful. Kevin Underhill, *Kentucky Lawyers, Legislators Still Not Allowed to Duel*, <http://www.forbes.com/sites/kevinunderhill/2010/12/17/kentucky-lawyers-legislators-still-not-allowed-to-duel/> (Dec. 17, 2010).

218 This proposed language would apply to both transactional and litigation attorneys.

court, out of respect for my clients, opposing counsel, and the court, I promise to learn, honor, and follow the substantive and procedural court rules, so that I may contribute to the fair and orderly administration of justice for all parties.

Revising the traditional oaths (without losing the merits of tradition) by simply a sentence or two might help enhance new attorneys’ awareness of the importance of their role in the legal system.

c. State-bar CLE requirements

A survey of the CLE requirements in all fifty states reveals that, although numerous states require all attorneys to satisfy ethics-related CLE requirements during a particular reporting cycle and although some states require new attorneys to take “professionalism” courses,²¹⁹ *not a single state* mandates attorneys (seasoned or new) to participate in an annual CLE devoted specifically to legal writing or adherence to court rules.²²⁰ States could consider modifying CLE rules to require at least a single hour-long course credit per reporting cycle focused on legal writing or rule compliance issues that have affected the judicial process within the prior year. Though at first glance this CLE suggestion might apply primarily to litigators, clear legal writing is also of the utmost importance to transactional lawyers and can obviate future litigation evolving from transactional relationships. Legal-writing-based CLEs could be tailored for both litigators and transactional lawyers, focusing on the legal writing issues that affect each practice area.

d. Bar-sponsored seminars

Supplemental cost-effective efforts that state bar associations could undertake to demonstrate a commitment to excellence in legal writing and attorneys’ adherence to court rules might include

- (1) offering, or requiring, legal writing and rule-oriented boot camps for new admittees;²²¹ and

219 Some state bars’ “jumpstart” New Member CLE programs include a writing component, but I propose a CLE requirement tailored to legal writing for each reporting cycle for the duration of a practitioner’s career. The CLE offerings could range from introductory writing courses to advanced courses in persuasion, storytelling, appellate brief writing, and so on.

220 A survey of all fifty states’ CLE requirements is on file with the author. The state bar in the Commonwealth of Virginia, for example, requires attorneys to complete twelve (12) hours of Continuing Legal Education (CLE) per year, but has imposed certain restrictions: two credits per year must relate to Ethics, and attorneys must complete at least four of the twelve hours in a “live conference” rather than simply watch taped conferences online (the prior system, allowing all 12 hours to be satisfied online, was easy to abuse). However, there is no requirement that one hour per year be devoted to legal writing. Virginia State Bar, *Mandatory Continuing Legal Education*, <http://www.vsb.org/site/members/mcle-courses> (last updated Mar. 14, 2014).

221 For example, the New York City Bar offered “Legal Writing Jumpstart” program to new practitioners in October 2012. New York City Bar, *Boot Camp 2012*, http://www2.nycbar.org/EventsCalendar/show_event_new.php?eventid=1975 (accessed Mar. 14, 2014).

- (2) facilitating mentoring relationships between new lawyers and seasoned practitioners to instill professionalism in legal writing and adherence to court rules.

Further, courts offering tours and electronic courtroom training also might facilitate short seminars by court clerks and judicial clerks—to explain and show new practitioners how pleadings and briefs physically are processed at the courthouse (even electronically), and how attorneys’ lack of compliance with court rules can affect court logistics detrimentally. Judges or judicial clerks might conduct short seminars for new lawyers explaining how poor legal writing or attorneys’ failure to follow court rules affects their practical ability to administer justice.

2. Law-office emphasis on excellence in legal writing

In the law-firm environment, seasoned practitioners can accentuate the importance of excellence in legal writing and professionalism when hiring new associates. For example, during the hiring process, experienced attorneys can spend time evaluating applicants’ writing samples, and communicate with applicants regarding whether and how their written submissions helped or harmed their employability. Law offices can offer in-house legal writing seminars to new associates, emphasizing the law firm’s commitment to excellence in any piece of written work product bearing its name.

Supervising attorneys can establish law-office training for new practitioners, requiring them to research and read court rules before starting any new writing assignment. These lawyers can also take the time to edit a new practitioner’s work—and discuss, in a constructive manner, why a particular draft fell short. Law offices can reward good legal writing—either monetarily in conjunction with year-end bonuses²²² or through personal recognition—and likewise, require additional professional development efforts for struggling legal writers, such as assigning a mentor. These relationships between new lawyers and seasoned practitioners—through mentoring and setting a positive example—can help remove some of the aforementioned barriers to legal writing excellence: ignorance, apathy, entitlement, cost-benefit analysis, lack of respect for the system, and indifference to the effect of behavior on others.

.....
²²² Some law firms might consider awarding an annual prize for legal writing excellence.

IV. Conclusion

Law professors caution novice writers against making assumptions about their readers' knowledge and familiarity with the material. At the same time, as legal educators and supervising attorneys, we cannot assume that new legal writers will automatically grasp the context of why clear and logical substantive components and adherence to procedural and formatting rules are critical in court submissions. It is important to lay a foundation for this elusive context, providing concrete examples of how (1) clear and logical substantive legal writing enables courts to process complex intellectual material efficiently so judges can "forge enlightened decisions" and (2) written work product submitted in compliance with court procedural rules ensures "fairness and orderliness" in the judicial process.

Keeping in mind the traditional reasons why even accomplished and ambitious individuals ignore standards or flout rules in general, law professors and practitioners can consider fresh ways to motivate new lawyers to invest more care into their written work. Perhaps by making quality legal writing a more overt criterion of professionalism for the next generation of practitioners, we can convert "benchslaps" to backslaps and increase the frequency of judicial commendation of effective pleadings and briefs.

