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Better Briefs

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COMMENT

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[*] The author thanks her fiancé, Ian Paul Hamilton, whose belief in her dream sparked belief in herself. She also thanks her St. Mary's Law colleagues, but specifically: Alex Pine, Cyra Dumitru, Hunter Schiro, Kaitie Free, Kelli Gohmert, Kelsey Hanson, and Taylor Crull, whose friendship and support saw her through law school and this Comment.

I. INTRODUCTION[1]

A systematic failure of lawyers to produce competent briefs is threatening the heart of the legal profession. As the law develops, the number of lawsuits—particularly appeals cases—grows. In response, there is widespread concern for judicial economy, zealous advocacy, and the health of the law. Such concerns fashion a necessity for better briefs.[2]

1. "[T]hink of one point, above all, that you want the court to remember from your brief—and then put it in that first sentence." Raymond M. Kethledge, *A Judge Lays Down the Law on Writing Appellate Briefs*, GPSOLO, Sept./Oct. 2015, at 25, 27.

2. "Words are the tools of a lawyer's trade." Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 562 n.2 (1997) ("[W]ords are of central importance to the lawyer because they are, in a very particular way, the tools of his trade." (quoting Glanville Williams, *Language and the Law*, 61 L. Q. REV. 71, 71 (1946))). *See* Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 ST. MARY'S L.J. 1093, 1095 (1999) (emphasizing the significant effect brief writing has on the durability of precedent and quality of judicial decisions (quoting JOHN W. COOLEY, CALLAGHAN'S APPELLATE ADVOCACY MANUAL § 1.03, at 7 (1989))). A careful use of words helps a lawyer illustrate her arguments and present them to the court. She does this within a

II. QUESTIONS PRESENTED[3]

A. Whether a duty to write better briefs exists within the ABA Model Rules of Professional Conduct (Model Rules);[4]

B. Whether, in light of current standards, an ethical duty should additionally be adopted imposing stricter brief writing requirements; and

C. In the absence of controlling authority, how do we define the scope of an ethical obligation for better brief writing?

III. SUMMARY OF ARGUMENT[5]

Writing is central and imperative to the legal profession. Yet, briefs frequently breach ethical duties and go unpunished. Current standards focus heavily on procedural aspects of brief writing. This is not enough.

Imposing an additional ethical standard for briefs will enhance the quality of legal writing and benefit the justice system as a whole. A more uniform standard will help to fulfill goals of the Model Rules by increasing the effectiveness and value of legal services, while simultaneously alleviating judges and litigants from arduous appellate practices.

Because competency is a requirement in all aspects of legal practice, competency in brief writing is a necessary component to the practice of law. Therefore, a lawyer's duty to produce better briefs is an *ethical necessity*.

written brief, and thus, brief writing has a central significance to the legal profession. *See* Hodge v. McGowan, 50 V.I. 296, 316 (2008) (per curiam) (noting the confusing and vague quality of the party's argument, and how it discounted the party's credibility at trial); Duncan, *supra*, at 1094–95 (garnering the filing of an unhelpful brief akin to "failing the judicial system as a whole"). If "the eyes may be windows to the soul," then the *pen* may be the heart of the law. State v. Magett, 850 N.W.2d 42, 58 (Wis. 2013) (citing ALEXIS TADIÉ, STERNE'S WHIMSICAL THEATRES OF LANGUAGE: ORALITY, GESTURE, LITERACY 50 (2003)). Truthfully, I struggled to use a quote as my own choice words, for whimsical quotes, while perhaps eye-catching—or at least entertaining—are not always an effective use of space. This is particularly true in legal writing, where space, or—more importantly—the reader's patience and time is limited. *See* Duncan, *supra*, at 1094 ("If you are not communicating, you are wasting your time." (quoting Mark Rust, *Mistakes to Avoid on Appeal*, A.B.A. J., Sept. 1998, at 79)). *But cf.* Peter Friedman, *Book Review: Bryan A. Garner, The Winning Brief (Oxford University Press 1999)*, 2 J. APP. PRAC. & PROCESS 219, 219 (2000) ("I hate quotations. Tell me what you know." (quoting 11 RALPH WALDO EMERSON, THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 110 (A. W. Plumstead et al. eds., 1975))).

3. "You want to state the issue fairly, to be sure, but also in a way that supports your theory of the case. A well-framed issue statement suggests the outcome you desire." ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 83 (2008).

4. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2017).

5. "Treat your summary of argument like the precious asset it is." Kethledge, *supra* note 1, at 25, 27; *see also* SCALIA & GARNER, *supra* note 3, at 97–98 ("State the main lines of thought without embellishment, omit quotations, and cite only key cases (if any at all).").

A pattern of three key qualities—organization, compression, and revision—are centrally tied to a lawyer's brief writing duties. When focusing on these factors, a lawyer helps to improve the quality of her briefs, the quality of legal precedent, and the current state of legal writing.

IV. PROCEEDINGS BELOW: CURRENT BRIEF WRITING STANDARDS[6]

There are, of course, current brief writing guidelines. To provide structural criteria for briefs, courts implement both procedural and substantive rules.[7] Such rules make it easier to decipher the parties' arguments, which helps judges to render accurately informed decisions and opinions.[8]

Courts adopt rules like these with the purpose of preventing inadequacies.[9] Some courts post sample briefs to their websites to help

6. "Your goal at this stage isn't to argue, but to tell the court how the issues before it arose procedurally and how the case got here." SCALIA & GARNER, *supra* note 3, at 93.

7. *Compare* FED. R. APP. P. 28 (declaring, as a minimum, arguments in briefs should contain citations to the authorities, statutes, and parts of the record relied on—which is a procedural requirement), *with* Coe v. Coe, 788 S.E.2d 261, 267 (Va. Ct. App. 2016) (advancing substantive guidelines, demanding that "an appellant's opening brief contain [t]he principles of the law, the argument, and the authorities relating to each question presented" (alteration in original) (quoting Fadness v. Fadness, 667 S.E.2d 857, 865 (Va. Ct. App. 2008))).

8. *See* Floyd v. Brown, 790 S.E.2d 307, 310 (Ga. Ct. App. 2016) ("[R]equirements as to the form of appellate briefs were created, not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by [the appellate court]." (quoting Aldalassi v. Drummond, 477 S.E.2d 372, 373 (Ga. Ct. App. 1996))); *accord* Henderson v. Henderson, No. 2007-CA-001470-MR, 2009 WL 3231254, at *1–3 (Ky. Ct. App. Oct. 9, 2009) (announcing movant's brief as disorganized and poorly written, and addressing, as best as possible, where arguments lacked supporting authority, but refusing to address issues not raised at trial). *Cf.* Mitchell v. Campbell, No. 2150003, 2016 WL 4261133, at *4 (Ala. Civ. App. Aug. 12, 2016) ("It is not the duty of the appellate court to make arguments for the parties, nor is it the appellate court's duty to conduct the parties' legal research." (quoting Woods v. Federated Mut. Ins. Co., 31 So.3d 701, 706 (Ala. Civ. App. 2009))).

9. *See* BLAKE A. HAWTHORNE, TEX. SUP. CT., GUIDE TO CREATING ELECTRONIC APPELLATE BRIEFS 1–2 (2014), http://www.txcourts.gov/media/124903/guidetocreatingelectronicappellatebriefs.pdf [https://perma.cc/AU2V-3Q48] (showing six basic steps to creating electronic appellate briefs, followed by requirements to "[b]ookmark the body of the brief," and "[h]yperlink citations"); U.S. CT. OF APP., FIFTH CIR., CHECKLIST FOR PREPARATION OF BRIEFS, RECORD EXCERPTS, MOTIONS, AND OTHER PAPERS (2016), http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents—-clerks-office/rules/brchecklist.pdf [https://perma.cc/5RP2-YGHX] (stressing a lawyer must submit her brief with "[d]urable cover on both front and back"); U.S. CT. OF APP., FIFTH CIR., SAMPLE BRIEF FORMATS, [hereinafter FIFTH CIR. SAMPLE BRIEF FORMATS], http://www.ca5.uscourts.gov/docs/default-source/sample-briefs/how-to-cite-to-the-record-on-appeal.pdf [https://perma.cc/G36Y-N592] (tracing specific requirements in compliance with the recent amendment to Fifth Circuit Rule 28.2.2, regarding citations

guide brief writers.[10] These sort of rules, however, do not independently alleviate the current problems with brief writing.

A lawyer's brief may be inadequate for several different reasons, namely: procedurally,[11] if it is too late, too long, or non-existent; substantively,[12] by failing to cite authority, failing to mention the right area of law, or failing to include pertinent requirements; and lastly, it may just be poorly written,[13] unclear, incomprehensible, unhelpful, and unpersuasive. Part of the issue with court specific or procedural and substantive rules is that case law analysis only binds the jurisdiction where the rule is applied, resulting in varying precedent. When the subject of a decision is procedural or substantive, however, variation is acceptable—a higher court will eventually review and overrule any deficiencies.

Ethical matters, on the other hand, are less frequently reviewed in the courts, and thus precedential framework is frail. Uniform guidelines set forth in the Model Rules provide overarching coherence in ethical standards; core principals of concern present throughout each jurisdiction.[14] Although each state is free to adopt its own version of the Model Rules, adhering to some sort of ethical standard is a prerequisite to the practice of law.[15] It so follows that an argument for a more uniform

to appellate records); U.S. CT. OF APP., SIXTH CIR. ECF TRAINING: FILING A BRIEF, [hereinafter SIXTH CIR. ECF TRAINING], http://www.ca6.uscourts.gov/sites/ca6/files/documents/electronic_case_filing/Brief.pdf [https://perma.cc/S4ZE-2FF4] (acknowledging briefs must be submitted in a "PDF" file format).

10. *See* Brief for Appellant at 1–26, Berry v. Auto-Owners Ins. Co., 634 F. App'x 960 (5th Cir. 2015) (No. 16-31139), http://www.ca5.uscourts.gov/docs/default-source/sample-briefs/appellant-39-s-civil-brief.pdf [https://perma.cc/GB6D-XZVK] (utilizing appellant's brief as a sample). The briefs referenced are part of an entire closet of briefs posted on the website for the United States Court of Appeals for the Fifth Circuit. Each brief posted provides guidance in creating a brief of that specific type.

11. *E.g.*, *In re* Adinolfi, 934 N.Y.S.2d 94, 95–98 (App. Div. 2011) (per curiam) (criticizing an attorney who failed to timely file appellate briefs after requesting frequent extensions after passed deadlines).

12. *E.g.*, State v. Mendenhall, Nos. 20146-5-III, 21160-6-III, 2003 WL 1901276, at *8 (Wash Ct. App. Apr. 17, 2003) (commenting on an attorney who failed to cite to a single authority in his brief).

13. *E.g.*, Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015) (distinguishing an attorney's brief writing as "careless," and suggesting the attorney raised too many issues for the judge not to comment).

14. *See* Robert W. Meserve, *Introduction* to AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT, at xv, xvii (2015) [hereinafter Introduction to Model Rules] (extending an intention of the Model Rules to serve as a national framework).

15. *Cf.* TEX. GOV'T CODE ANN. § 82.037 (West 2015) (refusing the distribution of a new lawyer's license until she takes the official statement of oath that promises moral behavior).

standard of brief writing can be found within the lawyer's ethical obligations under the Model Rules.

The Model Rules describes conduct, some of which a lawyer *may* adhere to, but in others she *must* partake.[16] Generally, this conduct consists of: duties to clients—a lawyer must competently represent and diligently serve her client's interests;[17] duties to opposing counsel—a lawyer must treat opposing counsel fairly;[18] and duties to the court—every claim submitted to the court must be a good faith argument for an extension, modification, or reversal of existing law.[19]

Ultimately, the Model Rules act only as guidance for state courts to adopt their own professional responsibility standards,[20] and courts have discretion in punishing deficient conduct.[21] Therefore, lawyers must reference caselaw to define what gives rise to deficient conduct within each specific jurisdiction. Concerning brief guidelines, however, caselaw isn't all that helpful.

16. *Compare* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017) ("A lawyer *shall* provide competent representation to a client." (emphasis added)), *with id.* r. 1.2 ("A lawyer *may* limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." (emphasis added)); *see also id.* r. 3.1 ("A lawyer *shall not* bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." (emphasis added)); *id.* r. 3.3 ("A lawyer *may* refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." (emphasis added)); *id.* r. 3.7 ("A lawyer *may* act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." (emphasis added)).

17. *See id.* r. 1.1 (requiring competence of an attorney); *id.* r. 1.3 (requiring diligence of an attorney).

18. *See id.* r 1.3 (categorizing conduct a lawyer shall not engage in, because it would make things difficult for opposing counsel).

19. *See id.* r. 3.1 (ordering a lawyer not to bring claims without merit); *see also id.* r. 3.3 (reducing false facts a lawyer introduces into a tribunal).

20. *See* Introduction to Model Rules, *supra* note 14, at xv, xvii (indicating the Model Rules are "subject to modification at the level of local implementation").

21. *See* State *ex rel.* Cosenza v. Hill, 607 S.E.2d 811, 817 (W. Va. 2004) (per curiam) ("[C]ourts are given broad discretion to disqualify counsel when their continued representation of a client threatens the integrity of the legal profession . . . ."). This is particularly true in situations involving conflicts of interest:

> A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice.

Id. at 817.

Lower court precedent marginally defines the elusive bad brief,[22] and the Supreme Court is relatively silent on brief writing. As a response, an overwhelming number of secondary sources focus on improving attorney's briefs.[23] Ultimately, lawyers are not bound by advice laid out in these sources. It follows that each court treats briefs subjectively.

V. STATEMENT OF FACTS: EFFECT OF CURRENT BRIEF WRITING STANDARDS[24]

Law schools teach legal writing in varying ways, mirroring our courts' foundation of subjective brief management.[25] In light of legal writing's current state, the ultimate issue before us is how to reconcile the pattern of insufficiency in brief writing.[26]

Keeping in mind the close relationship of the law and the written word, exposure to prose in the onset of legal writing is not always the best teacher. One learns to write by exposure to the written word; if you want to be a better writer, be a better reader.[27] Taking special notice of legal casebooks'

22. *E.g.*, *In re* Roman, 921 N.Y.S.2d 79, 82 (App. Div. 2011) (per curiam) (finding sanctions warranted when an attorney filed "deficient briefs in multiple cases"). The court in *In re* Roman hardly illustrates what a deficient brief actually is, despite finding that a lawyer may be sanctioned for filing one. *See id.* at 81 (showing an attorney is subject to sanctions when, after losing contact with clients, he failed to file briefs, and failed to "withdraw from the case or stipulate to a dismissal"); Griffin v. Wainwright, 760 F.2d 1505, 1515 (11th Cir. 1985) (per curiam) ("[C]ounsel need not brief issues *reasonably* considered to be without merit." (emphasis added)), *rev'd on other grounds*, 476 U.S. 1112 (1986).

23. *See* Richard A. Posner, *Legal Writing Today*, 8 SCRIBES J. LEGAL WRITING 35, 37–38 (2002) (asserting the importance of improving the quality of judicial opinions, and how brief writing will facilitate improved quality due to judicial dependence on the briefs); Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 331 (1999) (showing the importance in writing quality briefs, noting that it keeps lawyers on their toes when at opposing ends); Parker, *supra* note 2, at 597 (discussing the importance of a good legal writing program, implemented throughout a student's time in law school).

24. "Facts should be organized in a manner that rings out a clear theme without your having to spell the theme out." Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client's to the Judge's Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 1011 (2011).

25. *See* Parker, *supra* note 2, at 601 (comparing differences found in law school legal writing programs based on each particular law school's sources and resources).

26. *See*, *e.g.*, Eric G. Pearson, *Seventh Circuit Chastises Lawyer for Raising Too Many Issues on Appeal (Among a Litany of Other Missteps)*, NAT'L L. REV. (July 3, 2015), http://www.natlawreview.com/article/seventh-circuit-chastises-lawyer-raising-too-many-issues-appeal-among-litany-other-m [https://perma.cc/Q7FE-YRP7] (announcing a problem with the quality of attorney's brief when Judge Easterbrook condemned it as "careless to boot" (citing Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015))).

27. Maureen B. Collins, *Communication As an Art Form (Or Reading Is Fundamental)*, 86 ILL. B.J. 95, 95 (1998) ("Expose yourself to good writing, and it will help you be a better writer.").

decadence, a first-year law student has no business attempting to write *flowery* before she writes *clearly*.[28] She has not developed a deep enough sense of the power of legal language to yield it effectively. However, even those students *explicitly* instructed not to dabble will not always be able to help themselves. Using words as the tools of our trade,[29] to lawyers, writing has a deeper purpose. Despite recognizable beauty in different writing styles,[30] lawyers need to treat legal writing with a certain distinction.

As lawyers, we should strive to set clearer, improved examples so that writing's nature within the profession may flourish. This becomes a revolving concern when, respectfully speaking, not all judicial opinions are models of legal writing.[31] Rather than address this issue head on, attorneys relish in it.[32] Legal writing professors continue to teach subjectively, and attorneys continue to brief inadequately. The ecosystem we live in as legal writers must be fed accordingly, and right now it is starving.[33] Feasibly, the only brief writing standards regularly enforced are procedural and our writing remains in a perpetual state of subjectivity.[34]

28. *See* Posner, *supra* note 23, at 36 (echoing the problem with judicial writing today is an "exaggerated formalism," misleading conceptions concerning legal writing's requirements). *Cf. id.* at 38 (analyzing the improvement of judicial opinions through improving attorney's briefs, noting judicial dependence on briefs when writing opinions and thus the importance of briefing the issues with only the deepest understanding). Until we can correct the case law, we will not be able to change the state of legal writing. Case law correction, of course, will not occur until judicial opinions are revitalized, which cannot happen unless there is progression in brief writing.

29. *See* Parker, *supra* note 2, at 562 (discussing the importance of words in the legal profession).

30. *Cf.* Posner, *supra* note 23, at 36 (claiming legal writing prose is likely to decline if judges continue to use ghost writers from the best law schools).

31. *See id.* (urging the problem with judicial writing today is an "exaggerated formalism" attempting to make judicial opinion seem more rigorous).

32. In other words, lawyers use elevated, elegant words to disguise their misgivings.

33. *See* Posner, *supra* note 23, at 37–38 (expounding doubt in possible solutions to the problem of declining judicial writing). The text suggests four factors to improve judicial writing:

> 1. Judges can make clear in their opinions and in their occasional speeches to bar groups and in writing for the bar what they want to see in the lawyers' briefs . . . .
> 2. Judges can take on the opinion-writing task themselves . . . .
> 3. It's an excellent mental discipline for a judicial opinion writer to pretend that he's writing for a lay audience . . . .
> 4. Finally, this very journal can use the newly revived idea of "shaming penalties" to frighten the judges into writing better . . . .

Id. at 38.

34. *See, e.g.*, *In re* Vialet, 460 F. App'x 30, 35 (2d Cir. 2012) (delineating the poor quality of an attorney's brief as merely troubling, while the attorney's failure to comply with procedural and substantive rules was punishable (citing Barry v. Holder, 322 F. App'x 22 (2d Cir. 2009))).

VI. ARGUMENT[35]

A. *Lawyers Have an Ethical Duty to Write Better Briefs Based on Concerns Within the Model Rules.*

Current brief writing standards are insufficient because they revolve only around the technical aspects of brief writing. Due to the importance of the written word to our profession, we should not settle for this. A closer analysis reveals two sets of rules exist: technical rules,[36] and ethical rules.[37] Given this distinction, it is precarious to focus on only the technical aspects of brief writing.[38] Levying the requirements of the Model Rules in accordance with current brief writing standards suggests hope for an evolved state of brief writing, encouraging that "[i]t is not enough for an appellant in his brief to raise issues; they must be pressed in a professionally

35. "The [a]rgument is the guts of your brief, the part for which all the rest is just preparation and summary." SCALIA & GARNER, *supra* note 3, at 98.

36. *See, e.g.*, SIXTH CIR. ECF TRAINING, *supra* note 9, http://www.ca6.uscourts.gov/sites/ca6/files/documents/electronic_case_filing/Brief.pdf [https://perma.cc/S4ZE-2FF4] (paraphrasing instructions and requirements for filing an electronic brief).

37. *See, e.g.*, MODEL RULES Preamble and Scope ¶¶ 7, 20 (AM. BAR ASS'N 2017) (appointing ethical guidelines, but no obligation to enforce them).

38. In fact, a court of appeals may discipline an attorney for "failure to comply with any court rule" or for "*conduct unbecoming a member of the bar*." FED. R. APP. P. 46(c) (emphasis added). Accordingly, at least one circuit has adopted into its own rules a provision providing that:

> An attorney . . . may be subject to discipline or other corrective measures for any failure to comply with a Federal Rule of Appellate Procedure, a Local Rule of the Court, an order or other instruction of the Court, or a *rule of professional conduct* or *responsibility of the Court*, or any other conduct unbecoming a member of the bar.

In re Vialet, 460 F. App'x at 37 (emphasis added) (citation omitted). This shows that courts have the authority to discipline attorneys for ethical misconduct as well as for violations of substantive and procedural rules. *Id.* Correspondingly, there are sources imposing professionalism as a requirement for brief writing, despite explicit force within the Model Rules. *E.g.*, Linc Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921 (7th Cir. 1997) (proposing issues raised in a brief must be made in a professionally responsible fashion). The mystery lies in what defines an issue briefed in a professionally responsible fashion. Certainly, it includes refraining from allowing non-lawyers to draft and file pleadings. *See* Graham v. Dallas Indep. Sch. Dist., No. 3: 04-CV-2461-B, 2006 WL 2468715, at *4 (N.D. Tex. Jan. 10, 2006) (ordering plaintiff to pay defendant's attorney's fees, and finding plaintiff's previous attorney's failure to comply with the federal rules "should have put plaintiff and her current attorney *on notice* of the importance of filing a summary judgment response in a timely manner" (emphasis added)); *In re* Sobolevsky, 944 N.Y.S.2d 20, 22 (App. Div. 2012) (per curiam) (affirming the suspension of an attorney who submitted briefs of "shockingly poor quality," shown by incorrect client names, irrelevant boilerplate, and reference to evidence that had not been submitted, all while relying on his paralegal's work without review).

responsible fashion."[39] In essence, we must view inadequate brief writing as an ethical lapse—not just a procedural one.

Under the Model Rules, lawyers have a "special responsibility for the quality of justice."[40] This includes a "duty to uphold legal process," meaning to "seek improvement of the law, access to the legal system, the administration of justice[,] and the quality of service rendered by the legal profession."[41] In other words, the Model Rules emphasize the lawyer's important role in preserving the profession's esteem.

1. Health of the Law

Bad precedent is harmful to the profession's well-being. When a judge crafts an opinion from a lawyer's poorly written brief, the resulting precedent is similarly lacking. Model Rule 3.3[42] declares:

> A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing counsel.[43]

This rule's purpose is to ensure the court's full ability to make the most precise and informed decisions in light of controlling authority.[44] This speaks to the heart of the issue, and works to shield the law from the corruption of unrelated resolutions.[45]

39. *Linc Fin. Corp.*, 129 F.3d at 921 (quoting Pearce v. Sullivan, 871 F.2d 61, 64 (7th Cir. 1989)). "Every brief provides its author with the opportunity to make an impression as a lawyer worth listening to. A brief that is measured, careful, and professional will make that impression for you." Kethledge, *supra* note 1, at 25, 27.

40. MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 1 (AM. BAR ASS'N 2017).

41. *Id.* ¶¶ 5–6.

42. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2017).

43. *Id.*

44. *See* Miner, *supra* note 23, at 330 ("[T]he best and most appropriate assurance that adverse authorities and arguments will come out is the adversary system itself." (quoting Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 838 (1982))). To elaborate:

> No matter how enamored we are of the adversary system as the great engine in the search for the truth, we must recognize its limitations and cabin it with as many rules as are necessary to maintain as even a playing field as possible . . . . Not all attorneys are equal in skill, and there is no reason to permit the stronger to play the hidden ball trick with the weaker.

Id.

45. *See, e.g.*, Basic v. Amouri, 58 N.E.3d 980, 985 (Ind. Ct. App. 2016) ("Moreover, '[an appellate] brief cannot "be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or profession[al] discourtesy or any nature for the court of review, trial judge, or opposing counsel."'"

Protecting the law's health further includes a duty to present the court with the best possible arguments. The brief is a central component of trial because lawyers submit arguments through written briefs.[46] Juxtaposing this with Model Rule 1.1,[47] the competence of a lawyer's brief speaks to competent trial preparation.[48] Model Rule 1.1 pronounces:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[49]

Many judges formulate opinions on a case after only reading the briefs—using oral argument as merely a supplemental tool to clarify issues and ask questions.[50] The Texas Court of Criminal Appeals recently came to *St. Mary's School of Law* and heard two oral arguments. I found it remarkable that in one of the hearings—a death penalty case—counsel was allotted so little time that he barely finished his first issue. The judges arrived prepared—clearly, they had read the briefs—and before counsel finished speaking his name, they began firing off questions. In contrast to my previous presumption on oral argument, the ball was very much in the judges' court (pun intended). The experience spotlighted the brief's role in appellate practice; relying on oral argument alone, the judges would not have reached the heart of the issues. Due to an appellate court's heavy dependence on briefs, it follows that an incompetent brief is detrimental to the appellate process.[51]

(second alteration in original) (quoting Cochran v. Cochran, 717 N.E.2d 892, 895 n.3 (Ind. Ct. App. 1999))).

46. *See* Duncan, *supra* note 2, at 1095 ("Many of the fine appellate judges and lawyers who have written on brief writing agree on the principal purpose and attributes of a helpful brief . . . .").

47. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017).

48. *Id.*

49. *Id.*

50. *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 13 (1986) ("It is contended that some judges, for example, assimilate ideas more effectively through oral rather than written communication." (citing PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 17 (1976))). *But cf. id.* at 14 (explaining the justifications for the use of oral argument in appellate cases do not necessarily support a need for oral argument in all cases).

51. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017) (promoting competent representation by requiring standards that are *reasonably necessary* for representation). After all, if a brief is essential, then is it not reasonable to say an insufficient brief constitutes a lack of "thoroughness, and preparation reasonably necessary for the representation." *Id.*; *see, e.g.*, *In re* Liu, 977 N.Y.S.2d 6, 7–8 (App. Div. 2013) (per curiam) (echoing public censure was appropriate reciprocal discipline for submitting deficient and untimely briefs in connection with petitions for review in

A standard under the Model Rules would further ask lawyers to evaluate the brief writing of their colleagues. Model Rule 8.3[52] states:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.[53]

Concerning brief writing specifically, failure to act under Model Rule 8.3 allows a number of inadequate briefs to slip through the cracks.[54] And,[55] the greater the number of inadequate briefs circulating the dockets, the greater the chances of inadequacies infecting case law and legal precedent.[56] "Obviously, a lawyer cannot argue to distinguish, modify or overrule an adverse precedent not mentioned in the brief[,]"[57] thus, a duty to report opposing counsel who acts as such protects the court's ability to make fully informed decisions on the law. In other words, failing to report this conduct may manipulate the law, whether or not manipulation is intended.

immigration cases, which would also constitute misconduct in New York under the former code of professional conduct).

52. MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2017).

53. *Id.*

54. By "slip through the cracks," I am referring to conduct that should not be accepted, but that judges allow to pass anyway—usually in efforts to protect the client from extra attorney's fees or case delay. There is a general consensus that courts see it as the lawyer's duty to prevent these instances of misconduct. *See* Ishimatu v. Royal Crown Ins. Corp., No. 06-0043-GA, 2010 WL 2219348, at *28 (N. Mar. I. June 1, 2010) (highlighting a prior decision denying attorney's fees for "reworking apposing counsel's brief into a better form"). A brief may not be incompetent just because it is poor and muddled; I am suggesting that a lawyer should realize there is a scale of bad brief writing, and past a certain point, a brief becomes incompetent and is therefore reportable.

55. Believe it or not, it *is* actually acceptable to start a sentence with "and." *See* SCALIA & GARNER, *supra* note 3, at 63 (dispelling hesitation to start a sentence with "and").

56. *See* Miner, *supra* note 23, at 331 ("[T]here is no reason to say that it is wrong only for the lawyer to omit the citation of contrary authority known to him or her. With modern computer research techniques, precedent cases are easily knowable to all lawyers. Beyond all this, it may very well be counterproductive to one's case to omit the citation of authority, whatever its source.").

57. *Id.*

2. Zealous Advocacy

The Model Rules call for the lawyer to be a zealous advocate,[58] meaning she must act ethically to change the law in favor of her client's outcome.[59] Conceivably, a lawyer who writes a brief failing to convey her client's case has breached her duty of zealous advocacy.[60] Model Rule 1.3[61] states:

> A lawyer shall act with reasonable diligence and promptness in representing a client.[62]

Its commentary further asserts:

> A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.[63]

Hence, a lawyer fulfills her duty of advocacy when she raises issues carefully and strategically in her brief.[64] Focusing on a few chosen issues is acting diligently on her client's behalf, assuring competence and confidence.[65]

58. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2017) ("A lawyer must also act with commitment and dedication to the interests of the client and with *zeal in advocacy* upon the client's behalf." (emphasis added)).

59. *See Principle of Partisanship*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Also termed *doctrine of zealous advocacy*.").

60. *Cf.* John E. Nelson, III, *Marshalling Authority*, APP. ADVOC., Winter 1989, at 10, 10 ("Facilitating the court's production of its opinion by supplying even the most elementary building blocks will establish the advocate's craftsmanship and credibility. In a close case, the judge may resolve the issue in favor of the side more clearly displaying such qualities.").

61. MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2017).

62. *Id.*

63. *Id.* r. 1.3 cmt. 1.

64. "As an advocate, you want to find the premise that will pull the court toward your conclusion and then make that premise explicit in your statement of the issue." SCALIA & GARNER, *supra* note 3, at 84. "If the court decides to answer the question you pose, it will probably reach the conclusion you urge." *Id.*

65. *See, e.g.*, Julie A. Oseid, *The Power of Zeal: Teddy Roosevelt's Life and Writing*, 10 LEGAL COMM. & RHETORIC: JALWD 125, 127 (2013) ("The word 'zeal' is used here not as an appeal to the emotions or passion of the reader but as a way to convince the reader that the author actually believes what the author writes.").

3. Judicial Economy

Poorly written briefs are a huge contributor to the decline of judicial economy.[66] However, together, Model Rule 3.1[67] and Model Rule 3.2[68] move towards protecting it,[69] instilling a duty to only bring the most pertinent arguments. Model Rule 3.2 asserts:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.[70]

In concert, Model Rule 3.1 states:

> A lawyer shall not bring or defend a proceeding, or *assert or controvert an issue* therein, *unless* there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.[71]

66. *See* Duncan, *supra* note 2, at 1098 ("To write a [q]uality brief, a lawyer must first understand an aspect of being a judge I frankly did not comprehend until I became one—volume and limited resources.").

67. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017).

68. *Id.* r. 3.2.

69. The Wolters Kluwer Bouvier Law Dictionary defines *judicial economy* as follows:

> Reducing the court's case load. Judicial economy is the goal of many judges: to reduce the number of cases pending in court by reducing the number of cases brought and by simplifying those that are filed. Judicial economy, carefully pursued, *is in the interests of the bench, the public, and the litigants, by reducing the costs and burdens of litigation*. Procedural devices such as simplified pleading, joinder of claims or parties, class actions, and tightly enforced calendars are tools of this pursuit. Even so, judicial economy is a dangerous concept when invoked to close the courthouse door to claims that merit relief in law or equity.

Judicial Economy, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Compact ed. 2011) (emphasis added). Similarly, Black's Law Dictionary describes judicial economy as:

> Efficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to *avoid wasting the judiciary's time and resources*. A court can enter a variety of orders to promote judicial economy. For instance, a court may consolidate two cases for trial to save the court and the parties from having two trials, or it may order a separate trial on certain issues if doing so would provide the opportunity to avoid a later trial that would be more complex and time-consuming.

Judicial Economy, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

70. MODEL RULES OF PROF'L CONDUCT r. 3.2 (AM. BAR ASS'N 2017).

71. *Id.* r. 3.1 (emphasis added).

The idea is to prevent unnecessary information from delaying and disrupting judicial proceedings.[72] When a brief asserts frivolous arguments, the judge's vision of the case and path to resolution are clouded.[73] Furthermore, this makes it harder for courts to make a decision, breaching the lawyer's duty to take "reasonable efforts to expedite litigation" under Model Rule 3.2.[74]

Certain rules requiring defense counsel to answer each and every claim the plaintiff raises in her complaint[75] could be onerous when a plaintiff raises frivolous issues. Therefore, acting in accordance with the concept of fairness to opposing counsel, the Model Rules further strengthen judicial economy under Rule 3.4,[76] which proclaims:

> A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . .[77]

A lawyer who must answer a complaint with an excessive number of claims spends more time responding, and charges more fees to her client.[78]

72. *See id.* ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, *unless* there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." (emphasis added)).

73. *See* Duncan, *supra* note 2, at 1096 ("Writing a [q]uality brief requires an understanding of what judges need from a brief and an appreciation of why they need it."); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017) (forbidding a lawyer from asserting issues without a basis in law or fact).

74. MODEL RULES OF PROF'L CONDUCT r. 3.2 (AM. BAR ASS'N 2017).

75. FED. R. CIV. P. 8(b)(1) ("In responding to a pleading, a party must admit or deny the allegations asserted against it by an opposing party."). Further, affirmative defenses must be raised in the answer, or they are waived. *Id.* R. 8(c) (requiring an affirmative defense to be raised in the answer or it is waived).

76. MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2017).

77. *Id.*

78. *See* FED. R. CIV. P. 8(b)(1) (contending parties must admit or deny each and every allegation asserted in the complaint). But when a complaint filed against a client contains frivolous claims, *must* the attorney answer each claim? At least one court seems to think so, considering not responding to issues raised by opposing counsel is an unfavorable offense. *See* Hodge v. McGowan, 29 V.I. 142, 147 n.5 (1993) ("More disturbing is the unwillingness of either counsel to address issues raised by the other . . . ."). Judges most often place the monetary burden of this extra work upon the attorney—rather than the client—as punishment. *See In re* Estate of Malite, 2010 MP 20U, ¶ 45 (finding an award of attorney fees involves determining both "whether the requested fees are reasonable[,]" and "the appropriate fee award"); *see also* Camacho v. J.C. Tenorio Enters., Inc., 2 N. Mar. I. 509, 512 (1992) (deciding against awarding costs associated with an attorney rewording and reorganizing a brief when it was unnecessary under the circumstances); Ishimatu v. Royal Crown Ins. Corp., No. 06-0043-GA,

Ultimately, briefs that assert only a few, well-chosen arguments allow opposing counsel the freedom to appropriately respond, and give the judge full access to the most prevalent issues.[79] Preserving judicial time and resources is invaluable because it frees up judges to spend time where it is needed: crafting well-thought-out opinions.[80]

B. *Imposing an Ethical Brief Requirement in Addition to Current Brief Writing Standards Is a Necessity.*

A revival of quality legal writing relies on the ethical resuscitation of briefs. Case law on brief writing is frail and diseased: there is no precise way to determine what is unacceptable, and—perhaps even more concerning—there is sparse to zero controlling precedent to help an attorney *better* her brief writing. Because of the necessity of certain ethical obligations to law practice, there is a space within current brief writing standards where ethical brief requirements fit comfortably.

1. Secondary Sources

An overwhelming amount of secondary material calls out for better brief writing.[81] Often written by sitting judges, the intended audience is the

2010 WL 2219348, at *28 (N. Mar. I. June 1, 2010) ("[A]n award of fees must be reasonable, and fees for certain practices and conduct will almost always be unrecoverable.").

79. *See* MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2017) (forbidding a lawyer from alluding to any matter the lawyer does not reasonably believe is relevant or supported by facts). The Model Rules also require the following:

> A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or] fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .

Id. r. 3.3.

80. *See* Duncan, *supra* note 2, at 1098–101 (construing time judges waste reading irrelevant arguments within briefs as taking away from time spent on other judicial functions); *Judicial Economy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting the importance of the efficient management of litigation so as not to waste the judiciary's time or resources).

81. *See* James H. Coleman, Jr., *Appellate Advocacy and Decisionmaking in State Appellate Courts in the Twenty-First Century*, 28 SETON HALL L. REV. 1081, 1083 (1998) (stressing the imperative importance in a lawyer's ability to "[s]tate the issues early, clearly, accurately, and concisely"); Duncan, *supra* note 2, at 1101–04 (listing ways attorneys can write more helpful briefs by showcasing the importance of quality briefs); Kethledge, *supra* note 1, at 25 ("Filing a brief with these mistakes is like walking up to the podium with stains on your shirt. The court will be reluctant to trust your judgment."); Robert M. Tyler, Jr., *Practices and Strategies for a Successful Appeal*, 16 AM. J. TRIAL ADVOC. 617, 647 (1993) (surveying important aspects of appellate procedure—namely how brief writing fits in and how to create convincing briefs). One of these authors has a plethora of advice for brief writers, most

functioning legal community, and not first-year law students.[82] This suggests a large number of judges willing the brief's evolution.

The premise of their argument runs back to judicial economy. Appellate judges reading poorly written briefs might find themselves glazing over arguments or even failing to understand them.[83] When faced with this issue, the judge has three options: 1) spend more time trying to decode the brief; 2) ask counsel to re-write the brief; or—perhaps the most detrimental—3) render a less informed decision.[84] The vast number of secondary materials indicate an awareness and fear for such harm and reach towards ethical writing as a solution.[85]

notably: "When reviewing the factual and procedural history, the writer should remember that from the perspective of an appellate judge, the cold trial record 'is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried.'" Coleman, *supra*, at 1082 (quoting Trusky v. Ford Motor Co., 88 A.2d 235, 237 (N.J. Super. Ct. App. Div. 1952)). Another calls out for a brief writer to "think of one point, above all, that you want the court to remember from your brief—and then put it in that first sentence. The sentence should be thematic, expressing an original thought that transcends the particular doctrines at issue." Kethledge, *supra* note 1, at 25, 27.

82. *Compare* Duncan, *supra* note 2, at 1096–98 (summarizing the difficulty judges have in dealing with the briefs in appellate cases, and explaining the ways in which attorneys can write more helpful briefs for appellate judges), *with* JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 11–12 (5th ed. 2013) (introducing basic concepts of the law and legal writing, i.e., sources and the hierarchy of laws, within a section titled "Introduction to Law").

83. *See* Early v. Toledo Blade Co., No. G-4801-CI-0199003434-000, 2010 Ohio Misc. LEXIS 20583, at *6 (Ohio Ct. Com. Pl. Dec. 20, 2010) (sanctioning an attorney for misstating the law and filing briefs "so poorly written 'they were virtually unreadable'").

84. *See* Duncan, *supra* note 2, at 1098–100 (reiterating reasons good briefs are helpful to judges).

85. *See* Miner, *supra* note 23, at 331 ("My own view is that candor to the tribunal should require even more than the Rule requires. I think that a lawyer should cite pertinent authority from other jurisdictions to help the court in its labors, even if the adversary fails to do so."). Some seem to think that more focus on ethics, in general (and in writing), would solve a lot of our legal system's problems. *See* Frances C. DeLaurentis, *When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal*, 7 DREXEL L. REV. 1, 38 (2014) (illustrating deficiencies in the study of ethics in law schools). For example:

> All too often law school fails to provide students with knowledge of the governing ethics rules as applied to legal documents, understanding of the judiciary's expectations with respect to candor, and appreciation of the complexities inherent in evaluating authorities. While law students are required to take classes in basic substantive law such as torts, property, contracts, civil procedure, constitutional law, and criminal law; an introductory course in legal research and writing; and one professional responsibility or ethics class, none of these classes necessarily prepares students to engage in meaningful discussion of professional or ethical issues in writing.

DeLaurentis, *supra*, at 5.

2. *Anders* Briefs

Concern for judicial economy really comes alive as a result of the increasing volume of appellate cases.[86] Created as a product of this rise in case load, the *Anders* brief[87] serves as a placeholder; ensuring compliance with ethical and other duties inherent to the practice of law—particularly advocacy.[88] Describing the *Anders* brief, the Supreme Court stated:

> [A defense counsel's] role as an advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of the counsel's brief should be furnished [to] the indigent and time allow[ing] him to raise any points that he chooses; the court—not counsel—then proceeds, after full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points are arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.[89]

86. *See Judicial Economy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (recommending a reach for the efficient operation of courts); Duncan, *supra* note 2, at 1098–100 (warning of an increasing number of cases at the appellate level, and the increased difficulty judges have in handling these cases).

87. Penson v. Ohio, 488 U.S. 75, 81–82 (1988) ("The so-called '*Anders* brief' serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation.").

88. *See* Anders v. California, 386 U.S. 738, 744 (1967) (allowing the attorney to withdraw from the case even though her client wished to pursue an appeal because the attorney believed the case was frivolous, and the withdrawal request accompanied a brief pointing to any arguable support for appeal in the record).

89. *Id.*

Ostensibly, *Anders* briefs allow an attorney to reconcile her duty not to bring frivolous claims under the Model Rules, without depriving her client of the constitutional right to appeal.[90]

Assuming appellate case load continues to rise, lawyers will likely find *Anders* briefs to be an increasingly valuable tool.[91] This threatens danger because *Anders* briefs, in essence, allow attorneys to legally excuse ethical obligations that might otherwise be burdensome. Accordingly, one wonders how often a lawyer mitigates the integrity of her client's claim—consciously or unconsciously—due to time constraints or an inability to competently handle her workload.[92]

3. Court-Specific Rules

Those (un)lucky enough to have to write a true appellate brief face other problems. Court-specific rules for briefs are mostly technical writing guidelines that focus on procedure, or merely amend rules of procedure in the context of briefs;[93] they do not help a writer in crafting a

90. *Compare id.* (outlining situations where an attorney may withdraw from the case even though her client wishes to pursue appeal), *with* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2017) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea to be entered, whether to waive jury trial and whether the client will testify."), *and id.* r. 3.3(a)(3) (implying a check on the *Anders* notions because "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false").

91. *See* Duncan, *supra* note 2, at 1098–100 (exploring the increasing number of cases at the appellate level and the difficulty judges have in dealing with the briefs for these cases).

92. *See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), http://www.nytimes.com/2008/11/09/us/09defender.html [https://perma.cc/46EU-RSBQ] ("Public defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor.").

93. *See* HAWTHORNE, *supra* note 9, at 1–31 (including the procedural steps required to submit an electronic brief); Order Adopting Texas Rules of Civil Procedure 21c and Amendments to Texas Rules of Civil Procedure 4, 21, 21a, 45, 57, and 502; Texas Rules of Appellate Procedure 6, 9, and 48; Supreme Court Order Directing the Form of the Appellate Record, Misc. Docket No. 13-9165, at 1–33 (Tex. Dec. 13, 2013) [hereinafter Order Adopting Texas Rules], *available at* http://www.txcourts.gov/media/273991/order-13-9165.pdf [https://perma.cc/JR27-MCWL] (developing procedural aspects to be followed in brief submission).

good argument.[94] Ironically, the few court-specific rules that do direct the form of a brief are vague.[95] This is bothersome to the attorney striving to write a quality brief;[96] but to the client—and especially to the court—this is detrimental.

4. Rules of Procedure

Not surprisingly, there are procedural rules protecting similar notions such as those found in the Model Rules. For example, the Federal Rules of Civil Procedure involving trial, oral argument, and discovery all prevent harassment and unnecessary delay to the legal system,[97] similar to Model Rules 3.1, 3.2 and 3.3.[98] However, regardless of whether a brief is—or is

94. *See, e.g.*, U.S. Bank Tr. Nat'l Ass'n v. Junior, 57 N.E.3d 588, 594 (Ill. App. Ct. 2016) (promulgating court rules restricting the form and contents of a brief, noting such rules are not arbitrary because their purpose is to provide the reviewing court an understanding of the issues involved (quoting Tannenbaum v. Lincoln Nat'l Bank, 493 N.E.2d 143, 144 (1986))).

95. *See* Order Adopting Texas Rules, *supra* note 93, at 34–67 (creating guidelines for the form in which briefs are to be submitted); *see also* FIFTH CIR. SAMPLE BRIEF FORMATS, *supra* note 9 (promoting the parties' use of the ROA citation format only for electronic records on appeal including "the case number followed by a page number, in the format 'YY-NNNNN.###'").

96. Particularly if they attempt to act competently, yet still get it wrong. There are some provisions within the Model Rules that allow a court to have broad discretion when imposing sanctions for a violation of state court rules; however, these are suggested provisions and not per se violations of the Model Rules. *Compare* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017) (insisting that a lawyer "*shall* provide competent representation to a client" (emphasis added)), *with id.* r. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Using the word "reasonably" indicates a decision-maker has the discretion to make decisions, acting as the reasonable person. *See Reasonable Person*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[A] person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests.").

97. *See* FED. R. CIV. P. 11(b) (requiring pleadings not be "presented for any improper purpose, such as to harass, [or] cause unnecessary delay"); *id.* R. 26(g) (mandating discovery requests are "not interposed for any improper purpose, such as to harass, [or] cause unnecessary delay"); *id.* R. 42(a)(3) (allowing the court to "issue any other orders to avoid unnecessary cost or delay").

98. *See* MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2017) (relaying a lawyer's duty to only bring or defend a proceeding by meritorious claims and contentions); *id.* r. 3.2 (addressing a lawyer's duty to reasonably expedite litigation within her client's interest); *id.* r. 3.3 (proclaiming a lawyer's duty of candor to the tribunal).

not[99]—procedurally sound, there are other grounds which affect whether a brief is inadequate. These are the inadequacies that pose the real confusion.

5. Case Law

Examples of existing precedent include a focus on: deficiency,[100] underdeveloped arguments,[101] meritorious arguments on appeal,[102]

99. *See* Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015) (addressing the attorney's brief, noting it breached procedural and substantive rules, and that it had problems beyond such aspects because it presented thirteen issues for decision). "We have mentioned [attorney's] failure to comply with our order to address the interaction between Rule 23(c)(3) and Rule 58. And his brief on the merits has problems beyond those pointed out already." *Id.* The court asserts that bringing thirteen issues up for discussion violates the principle that "appellate counsel must concentrate attention on the best issues." *Id.* That principle is based on the idea that:

> To brief more than three or four issues not only diverts the judges' attention but also means that none of the issues will be addressed in the necessary depth; an appellate brief covering [thirteen] issues can spend only a few pages on each.

Id. "The brief's writing is careless to boot; it conveys the impression of 'dictated but not read.'" *Id.* Two sentences in the attorney's brief read:

> This Court should be entered a high daily statutory penalty in this matter. Respectfully, the award of the District Court to the contrary law and an abuse of discretion.

Id. The court goes on to say that there's more to the attorney's brief that is equally ungrammatical. *Id.* Finally, the opinion concludes that, "[Attorney] is in no position to contend that his compensation is too low." *Id.*; *see also* Pearson, *supra* note 26 (appraising a judicial opinion where the judge speaks out against an attorney's brief).

100. *See In re* Vialet, 460 F. App'x 30, 31 (2d Cir. 2012) (ruling public censure is an appropriate punishment for a lawyer who "filed deficient briefs in several cases, in violation of Federal Rule of Appellate Procedure 28, and continued to do so even after receiving notice of the Court's referral order").

101. *See* Fielder v. Comm'r of Soc. Sec., No. 13-10325, 2014 WL 1207865, at *1 n.1 (E.D. Mich. Mar. 24, 2014) (warning routine filing of "one size fits all" briefs containing conclusory assertions and underdeveloped arguments would be reviewed, and that sanctions would be imposed if continued). *But see* Smith v. Comm'r of Soc. Sec., No. 14-CV-10833, 2015 WL 1300040, at *1–2 (E.D. Mich. Mar. 23, 2015) (noting attorney's use of underdeveloped arguments in his briefs "amounts to 'conduct [that] is egregious . . . to bad faith, resulting in the gross misrepresentation of his client,'" yet does not warrant sanctions, for the court usually reserves sanctions for intentional or knowing violations (alteration in original) (quoting Report & Recommendation Cross Motions for Summary Judgment (Dkt. 9, 11) at 21, Smith v. Comm'r of Soc. Sec., No. 14-CV-10833 (E.D. Mich. Mar. 23, 2015))).

102. *See* Lively v. Henderson, No. 14-05-01229-CV, 2007 WL 3342031, at *6 (Tex. App—Houston [14th Dist.] 2007, pet. denied) (mem. op.) (declaring arguments on appeal, although without merit, were not egregious circumstances warranting sanctions).

compliance with court orders regarding briefs,[103] untimely submissions,[104] misstatements,[105] copying arguments,[106] and poor language.[107]

In *State v. Mendenhall*,[108] the court demonstrated caselaw's overarching message on brief writing,[109] ruling that briefs may be "poorly written, [yet] adequate."[110] The problem with opinions like *Mendenhall* is that attorneys

103. *See* People v. Reardon, No. 15PDJ100, 2016 WL 3950724, at *5 (Colo. O.P.D.J. June 1, 2016) (sanctioning an attorney who repeatedly, and *knowingly*, failed to comply with the 10th Circuit's admonishment of attorney's insufficient briefs); *In re* James, 911 A.2d 409, 409–10 (D.C. 2006) (per curiam) (warranting disbarment where the attorney failed to file a brief, as required by several court orders).

104. *See In re* Rochon, 746 A.2d 876, 876–77 (D.C. 2000) (per curiam) (admitting public censure furthered public policy when the attorney frequently ignored briefing deadlines and, one week before an extended deadline, filed a motion to withdraw as counsel); *In re* Liu, 977 N.Y.S.2d 6, 7 (App. Div. 2013) (per curiam) (enforcing public censure as reciprocal discipline for submitting deficient and untimely briefs in connection with petitions for review in immigration cases); *In re* Adinolfi, 934 N.Y.S.2d 94, 96–97 (App. Div. 2011) (per curiam) (affirming public censure for an attorney who failed to timely file appellate briefs and requested frequent extensions to file after passed deadlines); *In re* Kramer, 672 N.Y.S.2d 895, 896–97 (App. Div. 1998) (per curiam) (issuing a three-year suspension for an attorney who submitted opening briefs late).

105. *See In re* Mundie, 945 N.Y.S.2d 310, 311 (App. Div. 2013) (per curiam) (recommending public censure for attorney who, among other misgivings, submitted a brief containing misstatements of petitioner's name and facts).

106. *See id.* (affirming public censure for an attorney who copied—verbatim—"extensive and significant portions of . . . legal argument" from brief filed by another attorney in another case).

107. *See* Casper v. Kalt-Zimmers Mfg. Co., 150 N.W. 1101, 1102 (Wis. 1915) (striking from the files a brief using blatantly disrespectful language, which cast the court's discretion in a less than favorable light). The court found the language in appellants' brief suggested that courts of equity use their powers to reach a personally desirable end. *Id.* The court responded:

> [Such language] presents a most flagrant violation of professional ethics and of the duty and respect which attorneys owe courts . . . . Counsel for appellants will be allowed no costs, either for printing the brief or for attorney's fees . . . . [A]ppellants' brief upon the motion is ordered stricken from the files.

Id.

108. State v. Mendenhall, Nos. 20146-5-III, 21160-6-III, 2003 WL 1901276 (Wash. Ct. App. Apr. 17, 2003).

109. *Id.* at *8. Per Washington state law, this unpublished opinion has no precedential value and is in no way binding on any court. Washington law does permit a party to cite to this opinion if permitted to do so within that jurisdiction. Therefore, please understand that I am using this opinion for demonstrative purposes only.

110. *Id.* The *Mendenhall* court does not state precisely why it found the brief to be adequate, but it is possible that the court didn't want to create a bright line rule and be bound to impose and enforce such a rule on its future litigants.

are left with no suggestable guideline as how to better their brief writing.[111] This poses a greater threat than precedent failing to show brief writers what not to do. It is not logical to believe that attorneys, when writing a brief, check controlling authority to determine whether they might decrease or enhance the quality of the brief.[112] It is frightening to imagine that an attorney might think to themselves: "I don't feel like citing to any authority in my brief, so instead, I'll just look up case law and determine what's acceptable to do in lieu of citing to authority."[113] It is even more frightening when opinions like *Mendenhall* become controlling authority.[114]

6. Ethical Obligations

Arguably, if before consulting case law you suspect your brief is inadequate, then it probably is. When a new lawyer is sworn in to the practice of law, she must take an oath before receiving her license.[115] The oath requires the attorney to solemnly swear, to "discharge the attorney's duty to the attorney's client to the best of the attorney's ability," and to "conduct oneself with integrity and civility in dealing and communicating with the court and all parties."[116] It follows that a lawyer does not discharge her duties to the best of her ability when she produces insufficient briefs. Thus, poor brief writing breaches the promise she exchanged with the Bar in consideration for her law license. That is unacceptable because her ethical duties are a requisite to legal practice.

Requiring lawyers to conform to ethical standards of practice requires them to understand the problems within current standards of brief writing and to seek improvement.[117] "Neglect of these responsibilities

111. The Model Rules state that "a lawyer should seek *improvement* of the law," as well as the "quality of service rendered by the legal profession." MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 6 (AM. BAR ASS'N 2017) (emphasis added).

112. *See, e.g.*, *Mendenhall*, 2003 WL 1901276, at *8 (suggesting a brief was poorly written, yet adequate when it failed to cite authority but cited to the record instead).

113. *Cf. id.* (permitting a similar writing error, yet unrelated attorney thought-process).

114. *See id.* (describing a brief as adequate when counsel failed to cite to authority because the court understood what he was attempting to say).

115. TEX. GOV'T CODE ANN. § 82.037 (West 2015).

116. *Id.* § 82.037(a)(3)–(4).

117. *See* MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 13 (AM. BAR ASS'N 2017) ("Lawyers play a vital role in the preservation of society. The fulfillment of this role *requires* an understanding by lawyers of their relationship to our legal system." (emphasis added)); *id.* ¶ 7 ("A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."); *accord id.* ¶ 6 ("[A] lawyer should seek

compromises the independence of the profession and the public interest which it serves,"[118] and thus, imposing additional ethical requirements for brief writing is not only important to the future of the law, but it is also a necessary and required responsibility of lawyers.[119]

Several provisions prevent attorneys from being able to contract out of their ethical obligations. A lawyer is subject to liability for legal malpractice if a client establishes four elements: (1) duty, (2) breach, (3) causation, and (4) damages; yet the lawyer may limit her duties by contractual agreement through an engagement letter.[120] However, limiting the scope of this duty still must coincide with her ethical obligations; while writing the engagement letter and performing legal services, a lawyer must always be competent.[121] This hinges on a notion of fairness; a lawyer should not be able to contract out of duties she is obligated to follow once admitted to legal practice.

Markedly, competence is subsumed within all aspects of a lawyer's practice of law, for under the Model Rules, "[a] lawyer *shall* provide competent representation to a client,"[122] which recognizes "[i]n *all* professional functions a lawyer should be competent, prompt and diligent."[123] Thus, competence is an essential quality to legal practice and is not one of the limited aspects that a lawyer may contract out of.[124] I suspect this is because competency is central and vital to the practice of law—and brief writing.

There are concepts discussed in the law of business organizations[125] that are similar to the role of competency in the Model Rules. For example, the

improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.").

118. *Id.* at ¶ 12.

119. *See* Posner, *supra* note 23, at 38 ("[F]or if the briefs improve, so will the opinions, given the judges' heavy dependence on the briefs.").

120. Lopez v. Clifford Law Offices, 841 N.E.2d 465, 470–71 (Ill. App. Ct. 2005) (citations omitted). Whether, or not, there was an attorney-client relationship, defines the lawyer's duty. *Id.*

121. *See id.* at 476–77 (holding the absence of an engagement letter expressly showing the attorney accepted plaintiff as a client does not preclude a previous lawyer's liability to plaintiff for incompetent work).

122. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017) (emphasis added).

123. *Id.* Preamble and Scope ¶ 4 (emphasis added).

124. *See id.* r. 1.2(c) ("A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."). Of course, what client would consent to representation where a brief need not be competent?

125. *See* MODEL BUS. CORP. ACT § 2.02(b)(4) (AM. BAR ASS'N 2016) (defining several instances where the financial responsibility of directors may never be limited—specifically those subsumed within the duty of loyalty).

duty of loyalty is necessary to the carrying out of business and may not be contractually limited.

In *In re Caremark International, Inc., Derivative Litigation*,[126] shareholders accused the directors of violating their duty to monitor contracts that officers executed on behalf of the corporation. Although evidence showed directors knew the contracts were not in legal compliance,[127] the directors moved to dismiss based on a clause within the corporation's articles of incorporation eliminating director liability for this duty.[128] Such a limitation was within the law because the duty to monitor an employee's acts fell within a director's duty of care, as opposed to the duty of loyalty; accordingly, the corporation could legally elect to shield its directors from liability.[129] The shareholders argued the directors should be liable despite this shield from liability; the failure to take adequate precaution with knowledge of noncompliance with the law was a breach of the duty of loyalty, which may never be limited.[130] The court agreed and reasoned that the directors should not be able to act in bad faith in regards to the corporation and still escape liability; the duty of loyalty is only intact when there is an actual good faith effort to comply with the law.[131] In accepting the shareholders' argument, the *Caremark* court acknowledges fairness and an understanding that liability for some duties is inescapable because of their vital importance.[132]

Suitably, the argument for the necessity of ethical brief writing is that the Model Rules show a universal understanding that it is unfair for a lawyer to

126. *In re* Caremark Int'l, Inc., Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

127. *Id.* at 963.

128. *Id.* at 965. *See* BUS. § 2.02(b)(4) (providing a company may elect to limit its directors' duty of care shielding directors from liability for certain acts).

129. *Caremark*, 698 A.2d at 967.

130. *See id.* (explaining the complaint did not allege self-dealing or "loyalty-type" problems, but was rather concerned with an alleged "breach of care"); *see also* BUS. § 2.02(b)(4) (defining the duty of loyalty as an instance where financial responsibility of directors may never be limited). Before *Caremark*, decisions concerning a duty to monitor were virtually unchallengeable when a board was reasonably informed because courts presumed the board exercised good faith. *Caremark*, 698 A.2d at 967–68. The *Caremark* court, however, changed this and found that decisions made with actual good faith are protected, but decisions that are not made with actual good faith will breach the duty of loyalty. *Id.* at 968–69.

131. *Caremark*, 698 A.2d at 970. This effectively subsumed the duty to monitor within the duty of *loyalty*. *Id.* at 967. It rationalized that "a demanding test of liability in the oversight context is probably beneficial to corporate shareholders as a class, as it is in the board decision context, since it makes board service by qualified persons more likely, while continuing to act as a stimulus to *good faith performance of duty* by such directors." *Id.* at 971.

132. *Id.* at 967–70.

mislead or disregard the interests of her investors—whether they are shareholders or clients. Such protections see competency as vital to the legal profession; its limitation unreasonable and its breach inexcusable.[133]

Accordingly, at least one court has recognized that the failure to submit a brief is grounds for sanction based on a violation of the duty of competency.[134] In *In re Mance*,[135] an attorney admitted to conduct that was in violation of the District of Columbia's Rules of Professional Conduct, namely, "failure to provide competent representation[,]" "failure to serve a client with skill and care[,]" and "failure to provide zealous and diligent representation[,]" all of which stemmed from the failure of the attorney to file a brief.[136] The attorney's client filed a complaint with the Bar Counsel, but withdrew the complaint after entering into a written agreement in which the attorney agreed to pay a monetary sum to settle any differences with the client.[137] Although the attorney only made one payment, the court did not find that the attorney's behavior constituted "misappropriation, dishonesty, or intentional misconduct."[138] However, the court ruled that because the "sanction f[ell] within the range of discipline imposed for similar *misconduct*," the application of the sanction was appropriate.[139] The use of the word

133. *Compare* MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 4 (AM. BAR ASS'N 2017) ("In *all* professional functions a lawyer should be *competent*, prompt and diligent." (emphasis added)), *and id.* r. 1.1 ("A lawyer *shall* provide competent representation to a client." (emphasis added)), *with id.* r. 1.2(c) ("A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."). Further, protections for this notion of fairness are also present in criminal cases, in that the constitutional right to assistance of counsel was found to be a right to effective assistance of counsel; a lawyer may not limit her duties to her client in such a way that they limit her duty to provide effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688 (1984). Similar to the duties in business organizations, the Supreme Court characterizes these duties as duties of loyalty. *Id.* To establish ineffective assistance of counsel, a client must prove deficient performance, measured by "reasonableness under prevailing professional norms"—not the Model Rules. *See id.* ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are *only guides*." (emphasis added)). If prevailing professional norms are based on the rules of the state bar association and/or the state supreme court, is this a synchronized calling for the presence of the element of fairness?

134. *See In re* Mance, 748 S.E.2d 216, 217–19 (S.C. 2013) (per curiam) (establishing sanctions were warranted when an attorney admitted to misconduct, including "failure to provide competent representation[,]" "failure to serve a client with skill and care[,]" and "failure to provide zealous and diligent representation" stemming from attorney's failure to submit a brief).

135. *In re* Mance, 748 S.E.2d 216 (S.C. 2013) (per curiam).

136. *Id.* at 217–18.

137. *Id.* at 218.

138. *Id.* at 219.

139. *Id.* (emphasis added) (citing *In re* Evans, 902 A.2d 56 (D.C. 2006) (per curiam)).

misconduct implies sanctions were appropriate because of an attorney's breach of her ethical duties—failing to file a brief.

True, failure to file a brief is not akin to writing a good brief, but *Mance* represents two key aspects in support of imposing ethical briefs: 1) there is a connection between ethical duties and the attorney's conduct in brief writing; and 2) the bar of current brief writing standards is set too low—it is always in tune with a need to punish attorneys for misconduct. Incidentally, the current state has developed so that some brief writing mistakes are tangible,[140] while others are relatively extinct.[141] The latter are the not-so-obvious mistakes bringing havoc to our precedential system, and require judicial evaluation.[142] Infusing ethical standards with current ones will raise the bar throughout, thereby fulfilling the purpose embodied in what the Model Rules call a lawyer's "special responsibility for the quality of justice."[143]

140. For example, failing to submit briefs. *See In re* Koenig, 959 N.Y.S.2d 158, 158–62 (App. Div. 2013) (per curiam) (referring a three-month suspension when an attorney neglected to file briefs for nine separate immigration matters); *see also In re* James, 911 A.2d 409, 409–10 (D.C. 2006) (per curiam) (sentencing disbarment when an attorney failed to file a brief despite a court order compelling it); *Mance*, 748 S.E.2d at 218 (regulating an attorney's misconduct in failing to file a brief). Other situations, like stating the trial facts correctly, should also be obvious. *See* Am. Paging of Tex., Inc. v. El Paso Paging, Inc., 9 S.W.3d 237, 240–42 (Tex. App.—El Paso 1999, pet. denied) (justifying sanctions for a party whose brief asserted material misrepresentations of fact). Without accurate statements of fact, the issues may be distorted. *See* Lidia Stiglich & Zelalem Bogale, *Writing to Judges . . . Persuasively*, NEV. LAW., Oct. 2013, at 16, 17 ("Within each issue, decide which facts are relevant and use them to propel your analysis. If certain facts are relevant to more than one issue, be sure to recast them (accurately) using greater or lesser detail to fit each issue.").

141. *See In re* Sobolevsky, 944 N.Y.S.2d 20, 22 (App. Div. 2012) (per curiam) (relaying suspension for attorney who submitted briefs of "shockingly poor quality"). In *In re Sobolevsky*, the attorney's brief was actually written by his paralegal and the attorney failed to review the brief before submission. *Id.* This did not come as a surprise to the court—the brief had "incorrect client names[,] . . . irrelevant boilerplate" language, and made "reference to evidence that had not been submitted." *Id.* In situations like this, lawyers should know that "[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." MODEL RULES OF PROF'L CONDUCT r. 5.2(a) (AM. BAR ASS'N 2017). Further, "a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure" a non-lawyer acting on behalf of the lawyer or the lawyer's firm provides "reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." *Id.* r. 5.3.

142. *See, e.g.*, State v. Mendenhall, Nos. 20146-5-III, 21160-6-III, 2003 WL 1901276, at *8 (Wash. Ct. App. Apr. 17, 2003) (concluding counsel's brief was poorly written, but ultimately finding it acceptable). Where courts accept a poorly written brief, it is after concluding there was no deficient performance. *Id.* at *6.

143. MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 1 (AM. BAR ASS'N 2017).

C. *Defining the Scope of an Ethical Brief Standard Through Organization, Compression, and Revision*

Citing to a procedural rule to justify why a brief is inadequate does little to move the law forward; procedural reasoning requires little articulation, offering little explanation. Lack of controlling authority or mention within the Model Rules constricts the definition of the ethical brief's scope. Luckily, books, periodicals, and law review articles ("secondary sources") offering advice on adequate brief writing are ever present[144] and unwaveringly patient.[145] Within these sources lies the best hope of completing the puzzle that is the "better brief."

Fundamentally, sources within secondary sources persistently align with the concerns of the Model Rules. Recognizing the importance of zealous advocacy, judicial economy, and the health of the law, these are relevant and reliable[146] sources. Their authors, as advocates for better briefs,[147] instill three components to brief writing: organization, clarity, and compression.

1. Organization[148]

When organizing a brief, a lawyer is essentially organizing her many thoughts on the issues; developing the structure of her argument so that the

144. *See* SCALIA & GARNER, *supra* note 3, at xix ("Published advice on how to persuade judges is as old as the profession of judging itself."). "[S]ources include Aristotle, Isocrates, Demetrius, Cicero, and Quintilian." *Id.*

145. *See id.* ("So anything fundamentally new contributed by [a] small volume would probably be wrong.").

146. Federal Rules of Evidence require an expert witness to be qualified. FED. R. EVID. 702. The foundation must be reliable, and the testimony itself helpful—i.e., connected to the issues in question. *Id.* The Texas Supreme Court made this determination by evaluating six factors:

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
> (3) whether [or not] the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the non-judicial uses which have been made of the theory or technique.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

147. *See* SCALIA & GARNER, *supra* note 3, at 83 (manifesting advice on how to persuade judges); *see also* Duncan, *supra* note 2, at 1101–36 (portraying—from a judge's perspective—several ways in which briefs can be improved to be more helpful to judges).

148. Knowing how to use and arrange the parts of a brief. Namely, your structure. SCALIA & GARNER, *supra* note 3, at 82.

reader can determine the exact method to her madness.[149] If a lawyer organizes her thoughts in a way that proceeds logically towards a conclusion, it might help convince a judge that the law logically follows suit.

This type of organizational structure is a game of strategy.[150] It can be done similarly to outlining in law school—"[b]egin with the big picture and, before you write, try to articulate the distilled version orally in language that a non-lawyer could understand. Then, break up the brief by stating the issues and carry it out in stages, issue by issue."[151] As an alternative, a lawyer can dictate issues based on the specific facts in question, and their relevance to her argument.[152]

Whichever way a lawyer chooses to arrange her brief, some sort of organization is imperative.[153] It keeps her thoughts separate, and helps her to understand the issues in relation to the rest of the brief—preventing her from getting off topic and running into illogical territory.[154]

2. Compression

"A judge who realizes that a brief is wordy will skim it; one who finds a brief terse and concise will read every word."[155] Compression means resolving to not use words that do not add something to a brief; "[e]liminating those sentences, phrases, and words that do no work."[156] In

149. *See* Lewis, *supra* note 24, at 1011 ("Facts should be organized in a manner that rings out a clear theme without your having to spell the theme out.").

150. *But cf. id.* ("All the careful strategy in the world will be of no assistance to you unless you write clearly and forcefully." (quoting Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 169 (1978))).

151. Stiglich & Bogale, *supra* note 140, at 16–17. "If this reminds you of outlining in law school, it's not a coincidence." *Id.*

152. *See id.* ("Within each issue, decide which facts are relevant and use them to propel your analysis.").

153. In almost every source attempting to facilitate adequate brief writing, organization is always a factor. *See id.* (detailing ways to organize a brief); SCALIA & GARNER, *supra* note 3, at 83 (construing how important it is to know how to use and arrange the parts of a brief, for example, "[p]lac[ing] right up front what you want the judges to resolve"); Duncan, *supra* note 2, at 114 ("Having a structure helps beat a bout of writer's block . . . ."). *Cf.* Douglas Abrams, *10 Tips for Effective Brief Writing*, WIS. LAW., Feb. 2015, at 14, 16 (relaying focus on "quality" instead of organization).

154. *See* Lewis, *supra* note 24, at 1011 ("Organization is key."). It can help with researching because you can easily find yourself outside the scope of your brief when researching a particular idea if you cannot determine where, within the organizational structure of your brief, the idea would fit in. *See id.* ("Keep your focus on a spirit of justice. You must convince the appellate judges early on that ruling in favor of your client would be just, and to rule against her would be unjust." (citing MYRON MOSKOVITZ, WINNING AN APPEAL 21 (4th ed. 2007))).

155. SCALIA & GARNER, *supra* note 3, at 81.

156. *Id.*

other words, "strive for economy in your language and you will produce a hard-hitting brief."[157]

To compress means to be brief. It is one thing to take many pages to effectively cover a complicated topic,[158] while it is entirely another to continuously repeat information supporting your argument once it effectively stands.[159] Repeating even support material becomes, well, repetitive, and, "[r]epetition bores, and boredom invites skimming."[160] Concerning string cites: there is no need to continuously assert your point by citing to multiple cases if merely one will suffice.[161]

A brief writer should also compress the number of issues she raises; keeping in mind that raising many issues is advocating, but not necessarily zealously. The fewer issues she chooses, the more thought she gives to each one.[162]

3. Revision

Revision most concerns professionalism; a lawyer may be diligent in organizing and compressing her brief, yet her work is not professionally fit until she reviews and revises—assuring competence.

Writing ideas out on paper helps;[163] "[m]ore often than not, the act of writing a brief will actually change how you think about your case."[164]

157. Stiglich & Bogale, *supra* note 140, at 17.

158. *Contra* Aaron P. v. Hawaii, Dep't of Educ., Civ. Nos. 11-00635 ACK-RLP, 11-00711 ACK-RLP., 2013 WL 4791444, at *4 (D. Haw. Sept. 5, 2013) (asserting a motion for attorneys' fees was poorly drafted because it was 48 pages long and still failed to clearly ask for a calculated attorneys' fee).

159. *See* Abrams, *supra* note 153, at 16 ("'I have yet to put down a brief,' reports Chief Justice John G. Roberts, Jr., 'and say, "I wish that had been longer. . . ." Almost every brief I've read could be shorter.'" (quoting *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 35 (2010))). Particularly, concerning a brief's preliminary statement, "[w]hatever you do, don't allow this section to duplicate what is written elsewhere." SCALIA & GARNER, *supra* note 3, at 92.

160. SCALIA & GARNER, *supra* note 3, at 92.

161. *See id.* at 99 ("Brevity means abandoning string cites with more than three cases."). That being said, "[i]f you're dueling with opposing counsel about what constitutes 'the weight of authority,' put all your cases in a footnote." *Id.*

162. *See* Duncan, *supra* note 2, at 1114 (asserting outline formats can help discover "the deep issues in a case" when focusing on three of your best issues).

163. I stress that "[a]t least one set of edits should be made on the printed page, pen in hand." SCALIA & GARNER, *supra* note 3, at 80.

164. Stiglich & Bogale, *supra* note 140, at 18. "Once written, you may think it better to lead your analysis of a complex issue with a conclusion rather than an issue statement and the legal principles." *Id.* "Or, you may discover the facts of your case need to be rearranged or told with more detail to harness their persuasive force." *Id.*

"Seeing your arguments on paper tends to give them more definition," and therefore, "[r]evisiting your brief once it is written will ensure you are saying exactly what you mean to say."[165]

Because saying exactly what you mean invokes clarity, revision denotes a special focus on clarity.[166] If a brief must be clear to be understood, then a brief must be clear to be competent. Thus, competency requires an effort to review what you have written and ask yourself: could this be "put more clearly, more vividly, more crisply?"[167]

VII. CONCLUSION[168]

In light of the evidence, it is no coincidence that the core purposes of the Model Rules and the sources aiding better briefs are in agreement. Because our ethical obligations as lawyers are deemed necessary to the practice of law, so should our obligations to be better brief writers.[169] May it please our courts, I request better briefs.

165. *Id.*

166. *See id.* ("Clarity speaks for itself. It requires no introduction or assurances."). That being said, one nuance of clarity is not so intuitive: "[s]imply stating that something is 'clear' does not make it so." *Id.* "Don't detract from your narrative or analysis by stating that something is 'clear.'" *Id.* "State it declaratively and provide authority for the proposition, then move on." *Id.* "In his first play, 'Oedipus,' Voltaire writes, 'Virtue debases in justifying itself.'" *Id.*

167. SCALIA & GARNER, *supra* note 3, at 81. *See* Coleman, *supra* note 81, at 1083 ("State the issues early, clearly, accurately, and concisely.").

168. "A conclusion specifying with particularity the relief the party seeks." SCALIA & GARNER, *supra* note 3, at 100 (citing SUP. CT. R. 24(1)(j)). Issues "should be articulated in a manner that tends to pull the court toward your conclusion." Coleman, *supra* note 81, at 1083.

169. *See* MODEL RULES OF PROF'L CONDUCT Preamble and Scope ¶ 1 (AM. BAR ASS'N 2017) (favoring a "special responsibility for the quality of justice").