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**BAD BRIEFS, BAD LAW, BAD MARKETS:  
DOCUMENTING THE POOR QUALITY OF PLAINTIFFS'  
BRIEFS, ITS IMPACT ON THE LAW, AND THE MARKET  
FAILURE IT REFLECTS**

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ABSTRACT

*For a major field, employment discrimination suffers surprisingly low-quality plaintiffs' lawyering. This Article details a study of several hundred summary judgment briefs, finding as follows: (1) the vast majority of plaintiffs' briefs omit available caselaw rebutting key defense arguments, many falling far below basic professional standards with incoherent writing or no meaningful research; (2) low-quality briefs lose at over double the rate of good briefs; and (3) bad briefs skew caselaw evolution, because even controlling for win-loss rate, bad plaintiffs' briefs far more often yield decisions crediting debatable defenses. These findings are puzzling. In a major legal service market, how can clients persistently choose bad lawyers, lawyers persistently perform so poorly, and judicial and ethics authorities tolerate this situation? Answers include poor client information, ethics authorities' limited ability or will to discipline bad lawyers, and two troubling lawyer behaviors: (1) overoptimistically entering the field without realizing, until suffering losses, that it requires intensive research and writing; and (2) knowingly litigating on the cheap, rather than expending briefing effort to maximize case value, because contingency-paid lawyers may profitably run "mills" and live off quick, small settlements. A survey of the worst brief-writers' law firms hints that the problem may be a mix of the former (nonspecialists in over their heads) and the latter (knowingly litigating cheaply). This Article offers the*

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following reforms that, while no cure-all for a problem stemming from stubborn market forces, could help: (1) expanding educational efforts, including law school experiential learning, bar resource-sharing, and bar exam reform; (2) enhancing client access to information on lawyers by liberalizing ethics rules restricting expertise claims and public access to court files; (3) broadening the supply of competent lawyers by liberalizing rules restricting the standing to sue of discrimination “testers” and ethics rules on corporations owning law firms; and (4) toughening ethics enforcement against the worst offenders, who almost all go unpunished now.

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*"We Have Met the Enemy and He Is Us"*—Walt Kelly<sup>1</sup>

## INTRODUCTION

Employment discrimination features surprisingly low-quality plaintiffs' lawyering for a field that reflects important federal policy<sup>2</sup> and, at six to ten percent of the federal docket, is one of the most common case types.<sup>3</sup> This Article details a study showing that, on the summary judgment motions that

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<sup>1</sup> WALT KELLY, *POGO: WE HAVE MET THE ENEMY AND HE IS US* (1972). The saying classically applies whenever advocates hurt their cause, as plaintiffs' lawyers do with the bad briefs this Article analyzes.

<sup>2</sup> See *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401–02 (1968) (per curiam) (noting that the Civil Rights Act of 1964 "vindicate[s] a policy that Congress considered of the highest priority").

<sup>3</sup> Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103–04 (2009) (finding that employment discrimination, which was previously the most common federal case type, is currently the third most common federal case type).

dispose of employment cases with “almost Pavlovian . . . frequency,”<sup>4</sup> the vast majority of plaintiffs’ briefs omit available caselaw rebutting key defense arguments and lose at more than double the rate of competent briefs. These bad briefs cause broad harms: to the *plaintiffs* suffering poor representation, to the *caselaw* resulting from poorly opposed motions, and to the *lawyers* themselves—at least those unaware that their cases were doomed from the start. This finding raises a series of questions as to how clients persistently choose bad lawyers, lawyers persistently perform poorly, and judicial and ethics authorities tolerate this state of affairs.

Part I explains this Article’s study. Part I.A describes how this Article uses the “same-actor” defense to test plaintiffs’ briefing quality because the defense is the topic of dueling caselaw. Numerous summary judgment decisions credit this defense, finding that a strong inference of nondiscrimination arises when the same actor who hired the plaintiff was also the one who fired her; yet in the same circuits, other decisions reject the defense. This intra-circuit split makes for an excellent objective test of plaintiffs’ summary judgment brief quality: if a defendant’s brief cites cases crediting the same-actor defense, there is no excuse for the plaintiff’s opposing brief not to cite caselaw within the same circuit rejecting the defense.

Part I.B then details the study’s methodology. The case sample consists of cases in which employment discrimination defendants’ summary judgment briefs on Westlaw argue the same-actor defense. The study was limited to selected federal district courts with (a) an intra-circuit split on the same-actor defense and (b) enough case volume for a large sample. The data set also contains the plaintiffs’ opposing summary judgment briefs, both those on

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<sup>4</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1052–53 (2003) (noting that courts increasingly dismiss age discrimination and certain other cases on summary judgment). The increase in summary judgment grants spans all employment discrimination types, not just age. *See id.* at 1068–69. *See generally* Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 55 tbl.1 (2005) (finding that in selected districts, summary judgment was granted in 63.6% of employment discrimination cases); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 559 (2001) (“[A] . . . higher percentage (15.85 percent) of employment cases [are] resolved through pretrial motions than . . . either insurance (12.98 percent) or personal injury cases (9.4 percent).”); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson, 1–2 (June 15, 2007), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (finding that, of all summary judgment motions in 2006, in seventy-eight federal district courts, “[a]pproximately 60 percent . . . are granted in whole or in part,” while “[o]ver 70 percent of the summary judgment motions in employment discrimination cases are granted in whole or in part”).

Westlaw and those on only the PACER<sup>5</sup> repository of federal court filings. Of the several hundred briefs reviewed, 101 complete briefings allowed examination of the plaintiff's brief and ensuing summary judgment decision (if any), whether a Westlaw-reported decision or an unreported decision on PACER. Others have studied and criticized brief quality anecdotally<sup>6</sup> or have noted plaintiffs' *perceptions* of poor lawyering.<sup>7</sup> But no studies systematically review a large database of lawyer filings, likely because that was previously infeasible: only now, several years after e-filing became universal in the mid-2000s, has a large sample of digitized briefs become available for analysis.<sup>8</sup>

Part II details the following three findings. First, as Part II.A explains, most plaintiffs' briefs lack caselaw any competent brief would have. Even where in-circuit caselaw rejects the same-actor argument that the defendant's brief made, and that many courts credit in granting summary judgment, over twice as many plaintiffs' briefs do not cite that caselaw (72%) as do (28%). Many such briefs fall far below basic professional standards in other ways: most fail to respond to the same-actor defense at all, not even on the facts; many feature oddly incoherent prose; and many cite long-abrogated caselaw or offer only boilerplate recitations of the most basic Supreme Court precedents—indicating the lawyer did no actual legal research for the main, and fatal, motion in the case. The low quality of plaintiffs' briefs has not previously been documented in an academic study, but is a well-known fact to judges concerned about summary judgment practice.<sup>9</sup>

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<sup>5</sup> PACER, the "Public Access to Court Electronic Records," allows lawyers to e-file documents and the public access to case files; each district has its own PACER page. *See, e.g., CM/ECF Filer or PACER Login*, U.S. DISTRICT CT. S. DISTRICT N.Y., <https://ecf.nysd.uscourts.gov/cgi-bin/login.pl> (last visited Aug 14, 2013).

<sup>6</sup> *See, e.g.,* Stephen J. Dwyer et al., *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 418–19 (2008) (criticizing and citing common briefing errors); Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 2–3 (1997) (analyzing briefs with a wide range of legal and writing errors).

<sup>7</sup> Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & SOC'Y REV. 1, 21 (2012) (finding from survey data that roughly one-fourth of employment discrimination plaintiffs "feel their attorneys were corrupt"—numerous plaintiffs "recount serious mistakes their lawyers made and other forms of incompetence," and "mention ways . . . their lawyers disappointed them by giving bad advice [or] making mistakes").

<sup>8</sup> *See supra* note 5.

<sup>9</sup> In response to a presentation of this Article's early, partial data, two federal district judges admitted agreeing with its diagnosis of bad briefs. "There are a lot of what I will gently call 'underrepresented' litigants whose responses to summary judgment motions . . . are often not what they ought to be to assist district judges in reaching more accurate results," Judge Lee Rosenthal said; but, she added, "I said that more nicely than the article." Lee Rosenthal, Judge, U.S. Dist. Court, S.D. Tex., Remarks during Panel I: A View from the Bench—The Judges' Perspective on Summary Judgment in Employment Discrimination Cases at the New York Law

Second, as Part II.B details, while bad brief-writers almost always lose, good brief-writers do not. Many have documented that discrimination cases lose on summary judgment at high rates.<sup>10</sup> Not previously documented, but shown by this Article, is that while bad brief-writers lose summary judgment at a remarkably high rate (86%), good brief-writers do not (42%). The former's loss rate may reflect bad writing or bad case selection (bad briefers likely assess cases badly too); but either way, good lawyers do not suffer the unusually high loss rates for which employment discrimination law has become notorious.

Third, as Part II.C details, bad briefs impact judicial reasoning, skewing the caselaw. When a defendant briefs the same-actor defense and the ensuing decision mentions the defense, whether that decision credits the defense depends on whether the plaintiff rebutted it: when the plaintiff did rebut it, 30% of decisions accept the defense while 70% reject it; when the plaintiff did not rebut, 86% of decisions accept the defense while 14% reject it. So even if a bad brief does not affect the outcome of a particular case (those plaintiffs might have lost anyway), it affects future case outcomes by skewing the caselaw toward defendants.

Part III then discusses several puzzling questions posed by this Article's finding that incompetent lawyering dominates a major field of law—a discussion largely absent from prior literature on briefing quality, which ably assesses writing but tends not to address broader problems that pervasively bad lawyering indicates.

First, how can clients persistently choose failed service providers, equivalent to car buyers choosing rickety Yugos or exploding Pintos over Hondas or Toyotas? Part III.A diagnoses the problem as imperfect information: clients are (a) non-repeat players, (b) in a market requiring specialized knowledge, (c) where performance outcome measures are elusive, given how few cases yield public verdicts and how hard briefs are for laypeople to access

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School Law Review Symposium: Trial by Jury or Trial by Motion? Summary Judgment, *Iqbal*, and Employment Discrimination (Aug. 14, 2013), available at <http://www.youtube.com/watch?v=8c8rrleRpxc&feature=youtu.be> (last visited May 13, 2013) (comments at 15:41). Retired Judge Nancy Gertner was more blunt: pro-defense doctrines trace in part, she agreed, to “the incompetent lawyers” whose losses may “feed back on the rest” of the cases. Nancy Gertner, Retired Judge, U.S. Dist. Court, D. Mass., Remarks during Panel III: The Interplay of Pleading Standards and Summary Judgment at the New York Law School Law Review Symposium: Trial by Jury or Trial by Motion? Summary Judgment, *Iqbal*, and Employment Discrimination (Apr. 23, 2012), available at <http://www.youtube.com/watch?v=iA2PorDJZk&feature=youtu.be> (last visited Aug. 14, 2013) (comments at 1:47:17).

<sup>10</sup> See *supra* note 4.



or analyze. Legal services markets do not readily drive out bad performance; they are less like a restaurant market, to which people never return after bad experiences, than like a market for retirement planning that is complex and utilized only once.

Second, even if bad client choices are explicable, why would contingency-paid lawyers keep filing cases they litigate badly and overwhelmingly lose—the equivalent of a factory churning out products it cannot profitably sell? Part III.B discusses two competing answers. Part III.B.1 notes that perhaps bad lawyers do not stay in the field; perhaps the number of experts simply is swamped by hordes of unqualified lawyers entering briefly, then leaving after losses. On this view, employment cases are a siren song for nonexperts who mistakenly think this complex, writing-intensive field entails only going to trial on a claim of injustice. Part III.B.2 suggests a darker explanation: in certain contingency-fee cases, litigating with ethically proper diligence (heavy discovery, research, writing, etc.) may maximize client recovery yet decrease lawyer profitability. Expending minimal effort to procure few wins, many small settlements, and many summary judgment losses may be profit-maximizing for lawyers, despite yielding disappointing average values for clients and an increased pool of pro-defense precedent that decreases the future pool of winnable cases. A principal-agent problem thus drives a wedge between client and lawyer interests in fields featuring (a) contingency fees, (b) complex issues requiring high effort, and (c) modest recoveries typically in the five to six figures. Part III.B.3 reviews the best and worst lawyers' practice areas to assess these two theories.

Third, even if persistent bad lawyering is explicable, why do sanction-wielding judges reading incompetent briefs, and ethics panels that discipline irresponsible lawyers, let such lawyering continue without consequences? Part III.C notes the difficulty of aggressive ethics enforcement without (a) raising the cost of legal services, potentially worsening the problem of inadequate competent supply, (b) requiring murky assessments of brief quality sure to be hotly disputed by accused lawyers, and (c) demanding unrealistic effort by understaffed judges and by ethics panels often staffed by volunteers busy with their own careers.

Part IV proposes varied measures to redress this state of affairs, but it begins on two darker notes in Part IV.A. First, not all blame for crediting debatable defenses and generating high dismissal rates lies with the bar; caselaw shows that some judges just get it wrong, eagerly granting summary

judgment in defiance of Rule 56 standards that are too established to blame the lawyers. Second, any specific reforms cannot fully eliminate a problem that derives partly from stubborn market forces: many lawyers knowingly litigate on the cheap because they reap only a fraction of the gain from efforts to maximize case value (a principal-agent problem); they rarely face consequences for sub-optimal performance due to limited client ability to catch bad performance (an asymmetric-information problem); and a briefing crackdown may be difficult because ethics authorities have limited resources and such a crackdown could be viewed as decreasing access to justice or hindering entry for new lawyers (a regulatory cost problem). In this light, the legal services market is like other flawed markets, from shady investments to dietary supplements, where insufficiently informed buyers suffer at the hands of unscrupulous sellers whom regulators lack the firepower or will to police.

Those cautionary notes aside, Part IV offers several prescriptions. Part IV.B proposes educational efforts and reforms: increasing support for bar association resource- and expertise-sharing that could drive down the cost of complex briefings; targeting law school experiential learning to the type of briefings lawyers write badly; and making employment discrimination law both simpler and a bar examination topic. Part IV.C proposes increasing client information about lawyer expertise in two ways: liberalizing the ethics rules that now restrict lawyer claims of expertise and broadening public access to litigation filings. Part IV.D proposes reforms to increase the supply of competent lawyers: eliminating the ban on corporations owning law practices and relaxing standing-to-sue restrictions on “testers” whom advocacy groups deploy to find discrimination. Part IV.E proposes increasing enforcement of “competence” ethics rules against incompetent brief-writers. The Conclusion summarizes and discusses possible future research based on both the findings and the methodology this Article adds to the literature.

## I. METHODOLOGY

A. *The “Same-Actor” Defense: A Case Study in Briefing Quality*1. *The Same-Actor Defense: A Powerful Tool That Defeats Many Claims, but Faces Deep Intra-circuit Splits*a. *Extensive Caselaw Crediting the Defense*

“When the same person hires and later fires the employee who claims that his firing was discriminatory, judges are skeptical, because why would someone who disliked whites, or Germans, or members of some other group to be working for him have hired such a person in the first place?”<sup>11</sup>

This “same-actor defense,”<sup>12</sup> “same-actor inference,”<sup>13</sup> or “common-actor presumption”<sup>14</sup> rests on the logic Judge Richard Posner bluntly explained in the above quotation. Extensive caselaw in most circuits credits the defense as a

<sup>11</sup> *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002). Other courts’ elaborations of the rationale for the same-actor defense are similar:

Lamb and . . . Phillips were the sole actors involved in Wofford’s hiring and termination. Under the “same-actor inference” . . . , the fact that the same person or group . . . did both the hiring and firing over a short time frame is strong evidence that there was no discrimination . . . . If Lamb and Phillips had despised Wofford because of [his] color . . . , it seems odd that they would have hired him . . . .

*Wofford v. Middletown Tube Works, Inc.*, 67 F. App’x 312, 318 (6th Cir. 2003).

Davis was hired . . . [and] fired only four years later . . . by Kimzey, . . . giv[ing] rise to an inference that age discrimination was not the motive . . . . This “same actor” inference has been accepted . . . [because] “[c]laims that employer animus exists in termination but not in hiring seem irrational. . . . [I]t hardly makes sense to hire workers from a group one dislikes . . . , only to fire them once they are on the job.”

*Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996) (alteration to “claims” in original) (quoting *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991)) (internal quotation marks omitted).

<sup>12</sup> *E.g.*, *Tuttle v. Metro. Gov’t of Nashville*, 474 F.3d 307, 319 (6th Cir. 2007) (“Metro argues that it is entitled to [judgment as a matter of law] because Tuttle cannot establish pretext due to the ‘honest belief rule,’ [and] the ‘same actor’ defense . . . .”).

<sup>13</sup> *E.g.*, *Schechner v. KPIX-TV*, 686 F.3d 1018, 1026 (9th Cir. 2012) (“[W]here the same actor is responsible for both the hiring and the firing . . . within a short period . . . , a strong inference arises that there was no discriminatory motive. . . . [This] is a ‘strong inference’ that a court must take into account on a summary judgment motion.” (alteration to “where” in original) (citations omitted) (internal quotation marks omitted)).

<sup>14</sup> *E.g.*, *Herrnreiter*, 315 F.3d at 747.

basis for summary judgment, in appellate<sup>15</sup> and district<sup>16</sup> decisions alike. *Schechner v. KPIX-TV*<sup>17</sup> is typical in reciting the key same-actor facts: “Longinotti and Rosenheim signed [Plaintiffs] to new contracts not long before they laid off [both]. In light of the same-actor inference, . . . [Plaintiffs] failed to present sufficient evidence . . . to survive summary judgment . . . .”<sup>18</sup>

This caselaw shows it is no empty verbiage when judges call the inference “strong” and “powerful,”<sup>19</sup> or a “significant burden” that overcomes “fealty to proof schemes.”<sup>20</sup> Because same-actor facts are a “recurrent situation,”<sup>21</sup> the defense, though “largely ignored in the legal academic literature[,] . . . has been a silent killer” of discrimination claims.<sup>22</sup> Courts focus less on the nature of a “presumption” (which implies ability to rebut) than on the presumption being “strong,” “approach[ing] same actor [cases] with overwhelming skepticism toward the plaintiff[] . . . [that] is extremely difficult for a plaintiff to overcome as a practical matter.”<sup>23</sup> Scholarship documents how commonly the presence of a “same actor” yields dismissal despite strong evidence the

<sup>15</sup> See, e.g., *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183–84 (10th Cir. 2006); *Wofford*, 67 F. App'x at 318–19; *Herrnreiter*, 315 F.3d at 747; *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560–61 (2d Cir. 1997); *Brown*, 82 F.3d at 658; *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 959–61 (4th Cir. 1996); *EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 152 (7th Cir. 1996); *Proud*, 945 F.2d at 797–98.

<sup>16</sup> See, e.g., *Blasi v. N.Y.C. Bd. of Educ.*, Nos. 00-CV-5320 (RRM)(MDG), 03-CV-3836 (RRM)(MDG), 2012 WL 3307227, at \*18 (E.D.N.Y. Mar. 12, 2012) (granting summary judgment because “plaintiff has not established a *prima facie* case” where she “was hired and fired by the same decisionmakers over a short time”); *Cheesman v. Amerititle*, No. CV-07-3094-LRS, 2010 WL 2926241, at \*8 (E.D. Wash. July 22, 2010); *Martin v. State Univ. of N.Y.*, 704 F. Supp. 2d 202, 225 (E.D.N.Y. 2010) (crediting same-actor defense in granting summary judgment: “[Her] claims are also badly weakened in light of Henry’s instrumental role in hiring . . . . [T]he notion that Henry subsequently developed prejudice against . . . [her] national origin, less than two years after hiring her, is simply not credible.”); *Abuzir v. Bd. of Educ. of Chi.*, No. 04 C 5835, 2007 WL 2003081, at \*6 (N.D. Ill. July 6, 2007) (granting summary judgment because of the “strong inference of nondiscrimination”: “it makes little sense that Greenlee’s evaluation was based upon racial animus [because] she had hired him”); *Keri v. Bd. of Trs. of Purdue Univ.*, No. 1:04-CV-224-TS, 2005 WL 4715211, at \*22 (N.D. Ind. Nov. 9, 2005); *Bernstein v. St. Paul Cos.*, 134 F. Supp. 2d 730, 740 (D. Md. 2001).

<sup>17</sup> 686 F.3d 1018.

<sup>18</sup> *Id.* at 1027.

<sup>19</sup> *Evans*, 80 F.3d at 959 (stating that “because Houseman is the same person who hired Evans, there is a ‘powerful inference’ that the failure to promote” was not discriminatory).

<sup>20</sup> *Proud*, 945 F.2d at 796, 798.

<sup>21</sup> *Id.* at 796.

<sup>22</sup> Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. REV. 313, 359 (2010).

<sup>23</sup> Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 128 (2011).

employer gave the sort of pretextual explanation that typically lets a claim survive summary judgment.<sup>24</sup>

*b. Criticism of the Defense, Including in the Circuits Crediting It*

The defense has earned mostly unfavorable academic attention—yet the one publication initially mentioning it, in passing, somehow has trumped the wider criticism. The origin of the doctrine was a brief mention in a prominent 1991 law and economics publication<sup>25</sup> that *Proud v. Stone*,<sup>26</sup> “[t]he first case to apply the same-actor inference to dismiss” a claim,<sup>27</sup> turned into a “strong inference”:

“[C]laims that employer animus exists in termination but not in hiring seem irrational.” . . . [For] the putative discriminator, “[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them . . . .”<sup>28</sup>

Though the defense is the rare major doctrine to trace directly to an academic article, almost all academic commentary since has been negative. With cases declaring a “strong presumption” going well beyond the original article’s simple logical point, scholars have argued that a “strong presumption” yields “erratic and unthinking” dismissals of too many claims,<sup>29</sup> especially given “the structure so prevalent in today’s work environments where several individuals contribute to a decision.”<sup>30</sup> Others attack the psychological

<sup>24</sup> See Julie S. Northup, Comment, *The “Same Actor Inference” in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193, 201 (1998) (noting that *Proud*, as an early decision crediting the defense, “[f]oreshadow[ed] the future breadth of the doctrine, . . . conclud[ing] that ‘employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing’” (quoting *Proud*, 945 F.2d at 798)); Stone, *supra* note 23, at 118 (blaming the inference’s “undue strength” for “premature and unjust” summary judgment grants).

<sup>25</sup> John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

<sup>26</sup> 945 F.2d 796.

<sup>27</sup> Ross B. Goldman, Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1546 (2007).

<sup>28</sup> *Proud*, 945 F.2d at 797 (quoting Donohue & Siegelman, *supra* note 25, at 1017).

<sup>29</sup> Northup, *supra* note 24, at 193 (arguing that “erratic and unthinking application of the ‘same actor inference’ will discourage . . . valid complaints[.] . . . permit[ting] employers to discriminate”); see Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor “Inference” in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 257 (“[T]he policy justifications for the inference are relatively weak, and . . . if the inference is given a strong presumptive effect, it could result in the dismissal of meritorious discrimination claims.”).

<sup>30</sup> Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1163 (2008).

assumption of the defense. “[E]mpirical research suggests . . . [the] model of behavioral consistency on which the same actor inference is based[] is deeply flawed, and . . . behavior is far less consistent across situations” than courts assume.<sup>31</sup> Specifically, because “resistance to or unintended reliance on implicit stereotypes varies[,] . . . [s]mall changes in the situation[] . . . give rise to marked behavioral inconsistency.”<sup>32</sup>

There are well-founded reasons . . . bias will express itself less readily in the hiring context than later . . . . [H]iring . . . tends to make equal[ity] . . . norms and goals salient. . . . There is . . . little reason to believe . . . [a] biased employment decision maker who has hired a stereotyped person will . . . evaluat[e] . . . free from . . . stereotypes. . . . Decision makers who hold egalitarian beliefs but are affected by implicit bias operate in . . . tension . . . . [C]ross-situational consistency . . . cannot be expected . . . to support a . . . “strong inference,” like the same actor rule.<sup>33</sup>

Others argue that the same-actor inference, even if justifiable, is misused: “same-actor facts are simply evidence . . . [but] *do not* . . . justify . . . summary judgment.”<sup>34</sup> This procedural critique blends with the substantive critique that crediting the defense “reduc[es] intricacies of the modern workplace and the complex inquiry of discrimination to a shorthand . . . [to] avoid thinking about discrimination in any real sense, relying instead on an insufficient marker.”<sup>35</sup>

A few circuits share this academic skepticism of the defense, rejecting it as a basis for summary judgment. The Third Circuit held that even if the same actor fires “soon after” hiring, he may “argue to the factfinder that it should not find discrimination. But this is simply evidence . . . and should not be accorded any presumptive value.”<sup>36</sup> The Eleventh Circuit held the same even where the actor had executed multiple actions (not just hiring) in Plaintiff’s favor:

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<sup>31</sup> Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1048 (2006).

<sup>32</sup> *Id.* at 1050–51.

<sup>33</sup> *Id.* at 1051–52; see Stone, *supra* note 23, at 114 (noting that because the defense ignores how “bias may form [or] evolve” over years, “without any . . . refined understanding of human behavior [or] interpersonal dynamics, . . . [it] inexplicably creates an assumption that a single act evinces a mindset that one should be presumed to have years later”).

<sup>34</sup> Goldman, *supra* note 27, at 1537; see Stone, *supra* note 23, at 116 (“Simplistic narratives such as ‘someone who hires . . . should be presumed to act without bias[.]’ . . . have no place . . . at the summary judgment stage.”).

<sup>35</sup> Martin, *supra* note 30, at 1174.

<sup>36</sup> *Waldron v. SL Indus.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995). Though almost two decades old, *Waldron* remains a much-cited case; no Third Circuit decision since has criticized or limited its same-actor holding. See also *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 321 (3d Cir. 2000) (criticizing the defense,

Although . . . the same individual [was] responsible for hiring[,] . . . promoting[,] . . . [and] terminating him, we decline to accord to this “same actor” fact[] . . . a *presumption* [against] discrimination . . . [T]his [same-actor] inference is a permissible—not a mandatory— inference that a jury may make . . . [T]hat “same actor” evidence . . . [is] evidence that a jury may consider . . . [I]t is the province of the jury rather than the court . . . whether the inference . . . is strong enough to outweigh a plaintiff’s evidence of pretext.<sup>37</sup>

Interestingly, though most courts credit the same-actor defense as a basis for summary judgment,<sup>38</sup> some circuits—in particular, the Second and Seventh—feature an *intra*-circuit split. Second Circuit cases hold that the defense “*strongly suggest[s]* . . . discrimination was unlikely”—“especially . . . when the firing . . . [was] only a short time after the hiring,” because “it is difficult to impute . . . invidious motivation . . . inconsistent with the decision to hire.”<sup>39</sup> Seventh Circuit cases hold that the defense supports “a presumption of nondiscrimination” sufficient for summary judgment<sup>40</sup> even if the hiring was seven years<sup>41</sup> before the firing.

Yet other cases in those circuits *reject* the defense with language rivaling cases in circuits wholly rejecting the defense. The Seventh Circuit in *Nwanna v. Ashcroft*<sup>42</sup> reversed a summary judgment grant because “resort[ing] to the ‘same actor inference’ is premature . . . [I]t ‘is just something for the trier of fact to consider.’”<sup>43</sup> Also reversing summary judgment, in *Johnson v. Zema*

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explaining that “an employer who harbors a discriminatory animus may nevertheless allow one or two females to advance for the sake of appearances”).

<sup>37</sup> *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998).

<sup>38</sup> *Martin, Pretext in Peril*, *supra* note 22, at 358 (“The principle has received affirmation from most of the courts addressing the issue . . . [C]ourts deem same-actor evidence relevant for consideration on summary judgment and significant to their rulings if plaintiffs fail to rebut it, making it particularly difficult for plaintiffs to prove discrimination. . . . [T]he doctrine is fully entrenched in employment discrimination jurisprudence.”).

<sup>39</sup> *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997) (crediting same-actor defense in affirming summary judgment) (emphasis added); *see Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir. 2000) (affirming summary judgment; declaring the same-actor defense a “highly relevant factor in adjudicating a motion for summary judgment”); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (2d Cir. 2000) (citing *Grady*, 130 F.3d 553) (holding that same-actor facts are a highly relevant factor).

<sup>40</sup> *Chiaromonte v. Fashion Bed Grp.*, 129 F.3d 391, 399 (7th Cir. 1997) (crediting same-actor defense on summary judgment); *see Rand v. CF Indus., Inc.* 42 F.3d 1139, 1147 (7th Cir. 1994).

<sup>41</sup> *Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 392, 398 n.5 (7th Cir. 1998) (crediting same-actor defense in affirming summary judgment); *see also Chiaromonte*, 129 F.3d at 399.

<sup>42</sup> 66 F. App’x 9 (7th Cir. 2003).

<sup>43</sup> *Id.* at 15 (quoting *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002)).

*Systems Corp.*<sup>44</sup> the court held that the defense “is unlikely to be dispositive in very many cases” and “is not itself evidence of nondiscrimination”:

The psychological assumption underlying the same-actor inference may not hold true on the facts . . . . [A] manager might hire a person of a certain race expecting them not to rise to a position . . . [of] daily contact with the manager . . . . [or] expecting that person to act, or dress, or talk in a way . . . deem[ed] acceptable[,] . . . then fire that employee if she fails to comply with . . . stereotypes. . . . [For] the first African-American hired, an employer might be unaware of his own stereotypical views . . . . [and] subsequently discover[] he does not wish to work with African-Americans . . . .

. . . [F]or these reasons . . . [the] inference is unlikely to be dispositive . . . . [W]e have found no case . . . [of] a plaintiff . . . [who] produce[d] sufficient evidence . . . on summary judgment . . . yet was foreclosed . . . by the same-actor inference. This is unsurprising given that the . . . inference is not itself evidence . . . . It simply provides a convenient shorthand for . . . [when] a plaintiff is unable to present sufficient evidence of discrimination.<sup>45</sup>

In case *Johnson* left any doubt, a later Seventh Circuit decision characterized *Johnson* as having “emphatically rejected the ‘same-actor inference.’”<sup>46</sup>

The Second Circuit in *Carlton v. Mystic Transportation, Inc.*,<sup>47</sup> paralleling the Seventh Circuit in *Johnson*, credited an argument that the same-actor defense does not support summary judgment: “the enthusiasm with which the actor hired the employee years before may have waned . . . because the relationship . . . [is] subject to time’s ‘wreckful siege of battering days.’”<sup>48</sup> In *Feingold v. New York*,<sup>49</sup> paralleling the Seventh Circuit in *Nwanna*, the Second Circuit declared the defense just a permissive inference, insufficient for summary judgment: “we reject defendants’ argument that because Sullivan and Schulgasser hired Feingold, an inference [of nondiscrimination] *must* be drawn”; the “‘same actor inference’ . . . would not *necessarily* apply here

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<sup>44</sup> 170 F.3d 734, 746 (7th Cir. 1999).

<sup>45</sup> *Id.* at 745.

<sup>46</sup> *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361 (7th Cir. 2001) (affirming summary judgment but rejecting same-actor defense based on *Johnson*).

<sup>47</sup> 202 F.3d 129 (2d Cir. 2000).

<sup>48</sup> *Id.* at 132 (quoting William Shakespeare, *Sonnet LXV*, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* (W.J. Craig ed., 1928)).

<sup>49</sup> 366 F.3d 138 (2d Cir. 2004).



given . . . changes in circumstances during the course of Feingold's employment."<sup>50</sup>

For the district court briefings this Article studies, district precedents are apt citations,<sup>51</sup> and the Second and Seventh Circuits feature extensive district caselaw on both sides of the same-actor defense. While many decisions credit the defense on summary judgment,<sup>52</sup> many not only reject it as *Johnson*, *Nwanna*, *Carlton*, and *Feingold* did, but use strongly critical language.

In *Santiago v. General Dynamics Electric Boat Division*, for example, the court granted summary judgment against the *pro se* plaintiff but rejected the same-actor defense, explaining, "[T]his court will not apply the inference, certainly not in the context of a summary judgment motion."<sup>53</sup>

Similarly, in *Masters v. F.W. Webb Co.*, the court denied summary judgment in relevant part, stating, "[T]he inference alone is generally not a sufficient basis to grant summary judgment . . . when the employee has proffered evidence of pretext."<sup>54</sup>

In *Stodola v. Finley & Co.*, the court also denied summary judgment in relevant part, stating, "[Gill] both hire[d] and then fire[d] Stodola. . . . [O]n the cogent analysis in *Johnson*, the Court finds the same actor doctrine unpersuasive. . . . Gill's role . . . does not persuade . . . that discrimination played no role . . . . Should Stodola not have met [Gill's] expectations due to . . . disability, . . . his decision could [be] . . . discrimination."<sup>55</sup>

In *Ray v. Forest River, Inc.*, the court denied summary judgment, explaining, "[T]he same-actor inference may not hold true on the facts of a given case and, thus, is unlikely to be dispositive in many cases. . . . Plaintiffs

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<sup>50</sup> *Id.* at 154–55 (emphases added).

<sup>51</sup> Even in *appellate* briefs, a leading advocacy source explains, while appellate authority is "almost always preferable[,] . . . the value of nonmandatory sources," like district court caselaw, is in "tell[ing] the court . . . this nonauthoritative source . . . was addressing the same issue as the issue the court is currently addressing." MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 126 (3d ed. 2010). A key reason district precedents can persuade not only district but appellate courts is that "most judges are not interested in breaking new ground or making new law," so advocates should "reassure them that the result [they] seek is consistent with" how district judges have interpreted that authority. *Id.* at 46.

<sup>52</sup> See *supra* Part I.A.1.a.

<sup>53</sup> No. 3:04-cv-2062 (JCH), 2006 WL 3231413, at \*1, \*5 (D. Conn. Nov. 7, 2006).

<sup>54</sup> No. 03-CV-6280L, 2008 WL 4181724, at \*6 (W.D.N.Y. Sept. 8, 2008).

<sup>55</sup> No. 2:05-CV-464-PRC, 2008 WL 835709, at \*13–14 (N.D. Ind. Mar. 24, 2008).

have rebutted any of the asserted inferences by the . . . evidence offered . . . such that the resolution of the inferences is left to the jury.”<sup>56</sup>

Finally, in *Copeland v. Rosen*, the court denied summary judgment in relevant part, detailing at length various criticisms of the same-actor defense:

“[S]ame actor” . . . is not a necessary inference, . . . only a plausible one, and decisions in this Circuit . . . warn[] that its use is not . . . a substitute for a fact-intensive inquiry . . . . [P]lausible explanations of such “hire-fire” conduct . . . may support an inference of discriminat[ion] . . . . [A] supervisor . . . would come to realize his or her animus . . . only upon actually . . . working with such persons. . . . [One] who previously has worked . . . with members of a protected class [may] develop a prejudice . . . [after] an experience outside the workplace . . . . [S]upervisors [may] purposefully hire members . . . and then fire them in the hope that the act of hiring . . . will allay any suspicions . . . . [A] penitent supervisor [may] . . . assuage his or her guilt . . . by hiring . . . , only later to . . . [be] overcome again by animus . . . . [T]he variety of unlawful motivations . . . , like all issues of intent, are . . . difficult to bring to light . . . [before] trial.<sup>57</sup>

The reason this subpart so deeply details the criticisms of the same-actor defense is to document that, despite the broad success of the defense, well-supported counterarguments exist—and should be cited by plaintiffs facing a same-actor defense, especially in circuits with split authority.

## 2. *The Hypothesis: Given the Intra-circuit Split, Plaintiffs Have No Excuse for Omitting Caselaw Rejecting the Same-Actor Defense*

The same-actor defense may seem an odd focus for studying briefs: it does not arise in all cases, so it is not the most ubiquitous issue. But it is a powerful defense, fatal to many cases,<sup>58</sup> and it engenders the heated mix of support and criticism noted above.<sup>59</sup> Most importantly here, the same-actor defense makes for an unusually good case study of plaintiffs’ brief quality for several reasons.

Holistic evaluation of briefing quality is difficult to undertake with the objectivity and replicability academic study requires. Style and strategy choices are subjective, but even more critically, an evaluator lacks the fact evidence to know what arguments were available. For example, one major

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<sup>56</sup> No. 2:07-CV-246-JTM-PRC, 2009 WL 6749583, at \*22 (N.D. Ind. Oct. 14, 2009).

<sup>57</sup> 38 F. Supp. 2d 298, 305 (S.D.N.Y. 1999).

<sup>58</sup> See *supra* notes 38–41 and accompanying text.

<sup>59</sup> See *supra* Part I.A.1.

issue in employment cases is whether witnesses partial to the employer can be credited on summary judgment.<sup>60</sup> When plaintiffs omit that argument, it is hard to know whether they erred or whether the cases did not feature the relevant sort of witness. “[A] judge knows nothing at all about the facts” beyond what is presented “through the attorneys and the[] evidence” they submit,<sup>61</sup> and the same is true for academic study: it is hard to know when lawyers neglect available arguments.

In contrast, searching objectively for “same actor” or “common actor” briefings is feasible: (1) review all defense briefs with those terms<sup>62</sup> (eliminating irrelevant ones not pressing the defense), (2) review the plaintiffs’ opposing briefs for citations to the available contrary caselaw, and (3) review the court decision for its outcome and any holding on the same-actor defense.

The same-actor defense is a perfect issue to study because of the deeply split caselaw. Few legal fields feature persistent *intra-circuit* splits, corroborating the observation that “[e]mployment discrimination law continues to be an evolving and complex area for litigators,”<sup>63</sup> one of the more “uniquely evolving areas of law.”<sup>64</sup> Ethics rules require lawyers to disclose “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,”<sup>65</sup> but the *intra-circuit* split lets defendants off the hook: given competing caselaw, defendants can argue no “controlling” authority is “directly” adverse

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<sup>60</sup> *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (“[T]he court . . . *must disregard all evidence favorable to the moving party that the jury is not required to believe*[.] . . . giv[ing] credence to the evidence favoring the nonmovant as well as that . . . supporting the moving party that is *uncontradicted and unimpeached*, at least to the extent . . . [it] comes *from disinterested witnesses*.” (emphases added) (internal quotation marks omitted)); see *Salitros v. Chrysler Corp.*, 306 F.3d 562, 569 (8th Cir. 2002) (holding that under *Reeves*, courts “must accept all the evidence favoring [Plaintiff], but *only* the evidence favoring [Defendant] that is *uncontradicted and unimpeached* and that comes from *disinterested witnesses*” (emphases added)).

<sup>61</sup> RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 307 (6th ed. 2009).

<sup>62</sup> For the details of the Westlaw search, see *infra* note 84 and accompanying text.

<sup>63</sup> Justin D. Cummins, *Overcoming Obstacles to Prosecuting Employment Discrimination Claims in the Twenty-First Century*, in *REPRESENTING EMPLOYEES IN DISCRIMINATION CASES: LEADING LAWYERS ON DETERMINING A CASE’S MERIT AND DEVELOPING AN EFFECTIVE LITIGATION STRATEGY* 23, 24 (2012), available at 2012 WL 3058206, at \*1.

<sup>64</sup> Christopher B. Cato & Eric S. Volkert, *Current Developments and Strategic Considerations in Employment Discrimination Cases*, in *STRATEGIES FOR EMPLOYMENT DISCRIMINATION CASES: LEADING LAWYERS ON ANALYZING RECENT CASES, IMPLEMENTING EFFECTIVE EMPLOYEE TRAINING PROGRAMS, AND LEVERAGING ALTERNATIVE DISPUTE RESOLUTION* 51, 54 (2011), available at 2011 WL 5629126, at \*2.

<sup>65</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2009).

to its position that the defense is valid.<sup>66</sup> Some claim lawyers must disclose even *nonbinding* contrary caselaw,<sup>67</sup> but there is a powerful counterargument: a strong duty to disclose contrary-to-interest arguments conflicts with the lawyer's basic duty to be "a representative of clients" who "zealously asserts the client's position."<sup>68</sup> Thus courts do not require defendants to disclose contrary same-actor caselaw: in the case sample, almost no defendants cited cases rejecting the defense, and no judge imposed discipline for the omission.

In sum, the premise of this study is this: when a defendant presses the same-actor defense in a circuit with split authority, there is no excuse for a plaintiff failing to rebut with caselaw rejecting and criticizing the defense. Saying "no excuse" is blunt but, per scholarly and judicial authorities on briefings, fair.

- A lawyer cannot "ignor[e] controlling authority" cited by opposing counsel,<sup>69</sup> such as the circuit caselaw crediting the same-actor defense.
- A brief-writer must "[a]ttack an opposing argument . . . made by [his] adversary . . . . Otherwise, the court will assume that [he] ha[s] no defense . . . ." <sup>70</sup> Truly, "a lawyer who ignores adverse authority throws away the opportunity . . . to give the court reasons for not following it."<sup>71</sup>
- Not executing "research of readily available authority" is malpractice,<sup>72</sup> and the "competence" ethics rule requires "briefs . . . [with] citation to pertinent and significant authority on the issues raised."<sup>73</sup>

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<sup>66</sup> See J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 Sw. L.J. 677, 708 (1989) (noting that "authorities have opined that the directly adverse formulation basically reduces the disclosure obligation to nothing," not covering cases from courts other than the applicable circuit); cf. Rural Water Sys. #1 v. City of Sioux Ctr., 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997) (holding that while the ethics rules "require only the disclosure of *controlling authority*, . . . [they] establish the 'floor' or 'minimum' standards for professional conduct, not the 'ceiling'; basic notions of professionalism demand something higher").

<sup>67</sup> See, e.g., Robert M. Tyler, Jr., *Practices and Strategies for a Successful Appeal*, 16 AM J. TRIAL ADVOC. 617, 665 (1993) ("An attorney who discovers a split of authority may face a dilemma whether to acknowledge [it] . . . . [Some] believe that attorneys owe the court an obligation to disclose existence of contrary authority, although not necessarily to cite it.").

<sup>68</sup> MODEL RULES OF PROF'L CONDUCT Preamble ¶ 2 (2009).

<sup>69</sup> Dwyer et al., *supra* note 6, at 426 (noting that good briefs avoid both "mischaracterizing the holding" and "ignoring controlling authority" of adverse caselaw).

<sup>70</sup> NEUMANN, *supra* note 61, at 325.

<sup>71</sup> *Id.* at 324.

<sup>72</sup> Smith v. Lewis, 530 P.2d 589, 596 (Cal. 1975). For more detail on this point, see *infra* Part II.A.3.

<sup>73</sup> Rowe v. Nicholson, No. 05-222, 2007 WL 1470305, at \*6 (Ct. Vet. App. Apr. 26, 2007). For more detail on this point, see *infra* Part II.A.3.

Rebutting powerful opposing arguments may be the most pivotal, and is certainly not an optional, part of a good brief. When asked, “[w]hat’s the most important part of a brief . . . ?” Justice Ruth Bader Ginsburg responded, “anticipate what is likely to come from the [opponent] and account for it . . . . You know the vulnerable points, so deal with them.”<sup>74</sup>

Failing to find and cite available caselaw has become especially inexcusable with online research costs having substantially decreased.<sup>75</sup> From the late 1990s to present, basic Lexis or Westlaw for a solo practitioner has cost as little as \$100–\$175 a month.<sup>76</sup> Caselaw is also free online, if in less easily searchable form.<sup>77</sup>

The hypothesis that lawyers should cite available caselaw does not go too far. Some minor issues are not worth the distraction; but the same-actor defense is fatal to enough cases<sup>78</sup> that failure to rebut it is costly. Other issues, like basic Rule 56 standards, are well-known, rendering elaborate citations unnecessary. However, the same-actor defense arises in only some cases, and this study finds that whether courts credit it depends on whether plaintiffs brief it—indicating that judges do not know the defense so well as to render briefing unnecessary.

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<sup>74</sup> Bryan A. Garner, *Interviews with United States Supreme Court Justices: Ruth Bader Ginsburg*, 13 SCRIBES J. LEGAL WRITING 133, 142 (2010).

<sup>75</sup> Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers’ Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608–09 (2000) (noting that even in 2000, as online legal research tools became cheaper, lawyers had less excuse for neglecting research). See also *infra* Part II.A.3.

<sup>76</sup> See Jesse J. Richardson, Jr., *How a Sole Practitioner Uses the “Electronic Office” to Maintain a Competitive Law Practice*, 3 DRAKE J. AGRIC. L. 141, 144 (1998) (noting, in 1998, Lexis and Westlaw charged approximately \$125 to “allow a solo practitioner . . . unlimited access to . . . [a] state’s database . . . [and] federal materials in his or her circuit”); Josh Williams, *WestlawNext and Lexis Advance*, LAWYER 2.0 (Mar. 20, 2011), [www.lawyer2point0.com/research](http://www.lawyer2point0.com/research) (noting, in 2011, WestlawNext costs \$250, and Lexis Advance \$175, for monthly “unlimited access to all case and statutory law from all state and federal jurisdictions[,] . . . briefs, pleadings, and motions, . . . [and] 24 different treatises and forms databases”).

<sup>77</sup> Robert J. Ambrogi, *The Internet Has Come a Long Way (But It Still Has a Long Way to Go)*, OR. ST. B. BULL. (Apr. 2012), [www.osbar.org/publications/bulletin/12apr/legalonline.html](http://www.osbar.org/publications/bulletin/12apr/legalonline.html).

<sup>78</sup> See *supra* notes 38–41 (collecting summary judgment grants based on the same-actor defense).

## B. Case Sample and Data Set: Same-Actor Briefings in Selected Districts

### 1. Case Sample: Selected Judicial Districts with a High Density of Cases, Quality Lawyers, and Legal Resources

The case sample is as follows: all employment discrimination cases with fully briefed and decided summary judgment motions in which the defendant pressed the same-actor defense in the Southern District of New York or in any districts within the Seventh Circuit. These districts were chosen for several reasons.

First, the Second and the Seventh Circuits feature a rich split of authority on the same-actor defense, with multiple appellate and district precedents on both sides.<sup>79</sup> Other circuits are not so split; the Third Circuit alone has rejected the same-actor inference,<sup>80</sup> and the same-actor defense has been strongly adopted without much contrary caselaw in the Fourth and Eighth Circuits.<sup>81</sup>

Second, the selected jurisdictions have high case volume. The Southern District of New York alone had more qualifying briefings (fifty-two) than all districts in the Seventh Circuit (forty-nine). The Seventh Circuit has substantial volume in the Chicago-based Northern District of Illinois, but the study included the Circuit's other districts to obtain a sample size similar to that of the Southern District of New York.

Third, a study scrutinizing and ultimately criticizing plaintiffs' lawyers should examine a sample likely to include relatively strong lawyering. Major cities like New York and Chicago not only have many top employment lawyers, but active chapters of leading bar associations.<sup>82</sup> For example, the

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<sup>79</sup> See *supra* Part I.A.1.

<sup>80</sup> *Waldron v. SL Indus.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995) (reversing a summary judgment grant that had been based in part on the same-actor defense, because, quoting the Equal Employment Opportunity Commission, same-actor facts are "simply evidence like any other and should not be accorded any presumptive value").

<sup>81</sup> JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 6:15 (2012) (noting clarity of Fourth and Eighth Circuit caselaw and contrary caselaw elsewhere).

<sup>82</sup> See, e.g., *Employment Lawyers*, CHI. B. ASS'N, [http://www.chicagobar.org/AM/Template.cfm?Section=Employment\\_Lawyers](http://www.chicagobar.org/AM/Template.cfm?Section=Employment_Lawyers) (last visited Aug. 14, 2013); *Labor and Employment Law*, N.Y. ST. B. ASS'N, [http://www.nysba.org/AM/Template.cfm?Section=Labor\\_and\\_Employment\\_Law\\_Home&Template=/CustomSource/SectionHome.cfm&Sec=LABR](http://www.nysba.org/AM/Template.cfm?Section=Labor_and_Employment_Law_Home&Template=/CustomSource/SectionHome.cfm&Sec=LABR) (last visited Aug. 14, 2013); *Law Firm Rankings 2013: The Best Law Firms in Each Practice Area: Labor and Employment*, VAULT, <http://www.vault.com/wps/portal/usa/rankings/individual?rankingId1=16&rankingId2=22&rankings=1&regionId=0&rankingYear=2013> (last visited Aug. 14, 2013) (showing that nine of the top fifteen labor and employment law firms are located in New York City or Chicago).

plaintiff-side National Employment Lawyers Association has large Illinois and New York chapters with listservs and continuing legal education events that advise lawyers and keep them current.<sup>83</sup> If plaintiffs' briefings are poor in even these jurisdictions with a high density of specialists and resources, that bodes poorly for the entire field.

## 2. *Data Set: Summary Judgment Briefs on the Same-Actor Defense*

The starting point was the set of all defendants' summary judgment briefs pressing the same-actor defense in the Westlaw "District Court Filings" database of each selected district.<sup>84</sup> The search yielded hundreds of filings, many irrelevant (pleadings, off-point motions, etc.), but the plurality were summary judgment briefs—the main context for same-actor argument. The databases include briefs dating back to 1999, but with many more following the 2003–2005 federal e-filing mandate.<sup>85</sup> The data set then consisted of the plaintiffs' summary judgment briefs opposing defense briefs pressing the same-actor defense. When a defense brief cited the defense, the plaintiff's brief and ensuing decision (if any) were procured from Westlaw—or, if unavailable (the Westlaw database is incomplete), from PACER.<sup>86</sup> In total, 102 briefings fit the criteria for inclusion in this study.

## II. FINDINGS

This Part details the three findings of this study. First, *the vast majority of plaintiffs' briefs (72%) are badly deficient*, lacking the caselaw and arguments against the same-actor defense that competent briefs feature. Disturbingly many fall far below the most basic professional standards, either lacking any legal research or amounting to a troubling mess of incoherent writing.<sup>87</sup>

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<sup>83</sup> See *infra* notes 198–99 and accompanying text.

<sup>84</sup> District Court Filings Database, WESTLAW, <http://directory.westlaw.com/default.asp?GUID=WDIR00000000000000000000000099982819&RS=WDIR2.0&VR=2.0> (follow "NY-SDCT-FILING" hyperlink or "IL-NDCT-FILING" hyperlink, etc.; then using the terms and connectors search function, search "(("same actor" "same decisionmaker" "same decision-maker" "common actor" "common decisionmaker" "common decision-maker") +1 (doctrine presumption inference theory defense)").

<sup>85</sup> Revised General Order 09-014: General Order on Electronic Case Filing § I(A)(1) (N.D. Ill. Apr. 30, 2009), available at [http://www.ilnd.uscourts.gov/home/\\_assets/\\_news/PRESS/GeneralOrder102607.pdf](http://www.ilnd.uscourts.gov/home/_assets/_news/PRESS/GeneralOrder102607.pdf) (noting that the court implemented electronic case filing in 2005); *Electronic Case Filing Rules & Instructions*, U.S. DISTRICT CT. S. DISTRICT N.Y. 3 (Jan. 30, 2013), [http://www.nysd.uscourts.gov/ecf/ecf\\_rules\\_013013.pdf](http://www.nysd.uscourts.gov/ecf/ecf_rules_013013.pdf) (noting that, with few exceptions, the district implemented electronic case filing (ECF) in December 2003).

<sup>86</sup> See *supra* note 5.

<sup>87</sup> *Infra* Part II.A.

Second, *bad brief-writers overwhelmingly lose on summary judgment*, at an 88% rate, whereas only 44% of good ones lose. Whether bad briefs cause losses or bad brief-writers choose bad cases, this finding is a major caveat to prior findings that discrimination cases lose on summary judgment at high rates; they do, but not nearly so often when lawyers litigate competently.<sup>88</sup>

Third, *bad briefs impact judicial reasoning* in those decisions expressly addressing the same-actor defense. When a plaintiff did rebut the defense, only 30% of decisions accept the defense; when a plaintiff did not rebut, 86% of decisions accept the defense. Accordingly, bad briefs affect future cases, skewing the caselaw in favor of the same-actor defense.<sup>89</sup>

A. *Finding #1: Most Employment Discrimination Plaintiffs' Briefs (73%) Lack Caselaw and Arguments Any Competent Brief Would Feature*

Even in the Second and Seventh Circuits, where caselaw exists rejecting the same-actor defense,<sup>90</sup> over twice as many plaintiffs' briefs do not cite that caselaw (73%) as do (27%). Below, the left column of Table 1 shows the frequency of plaintiffs citing same-actor caselaw; the center and right columns detail the differences in win-loss rates that subpart B discusses next.

<b>Cites Same-Actor Cases?</b>	<b>Summary Judgment Motion Outcome</b>	
<b>No</b> 74/102 → (73%)	<b>P Survives Summary Judgment</b> →	<b>10/74 (14%)</b>
	<b>P Loses on Summary Judgment</b> →	<b>59/74 (80%)</b>
	<b>Settled Post-Briefs, Pre-Decision</b> →	<b>5/74 (7%)</b>
<b>Yes</b> 28/102 → (27%)	<b>P Survives Summary Judgment</b> →	<b>15/28 (54%)</b>
	<b>P Loses on Summary Judgment</b> →	<b>12/28 (43%)</b>
	<b>Settled Post-Briefs, Pre-Decision</b> →	<b>1/28 (4%)</b>

Worse, many briefs fail the most basic professional standards.

<sup>88</sup> *Infra* Part II.B.

<sup>89</sup> *Infra* Part II.C.

<sup>90</sup> *See supra* notes 38–41.



### 1. *Incoherent or Ungrammatical Writing*

Some briefs are so incoherent or ungrammatical it is hard to believe the author is even a college graduate. Most likely, the lawyer dictated the contents, then never reviewed what was typed. Writing quality exists along a spectrum, so no objective “count” exists of how many briefs contained bad writing, but the following are five of the worst. Each block quote is an excerpt from one brief; the omissions replaced with ellipses did not cause the grammar or clarity problems.<sup>91</sup>

In this first example, all four of the following ungrammatical sentences are in just the brief’s short “Preliminary Statement,” which also fails to say what kind of discrimination (race, sex, etc.) Plaintiffs claimed:

The Defendants seeks dismissal of the above mentioned Causes of Action . . . . The Plaintiffs will demonstrate that they suffered an adverse employment [“action” is missing], and that there is an inference of discrimination and/or a discriminatory intent . . . . The Plaintiffs will set forth sufficient facts detailing the Defendant enactment and/or enforcement of a policy designed to permit unlawful discrimination . . . . Upon presenting such evidence a trial is required, and not, dismissal as sought by the Defendants.<sup>92</sup>

In this second example, the fragmentary first sentence was a full sentence in the brief, and the second sentence runs on confusingly:

Defendants’ suggestion that because Allegra is also Caucasian [sic] is a red herring. . . . Plaintiff had every reason to believe that her employment would continue, as she relied on the course of actions that occurred the year prior, when she was kept on, as she had been hired as a full time employee, as others had not.<sup>93</sup>

The following two ungrammatical sentences are in a brief consisting entirely of numbered paragraphs—the proper form for affidavits, not briefs:

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<sup>91</sup> For briefs criticized as ungrammatical, the actual PDFs—not just the text in the Westlaw database—were reviewed to make sure the errors did not trace to scanning inaccuracy. Some of the more egregious errors have been highlighted with a “[sic].”

<sup>92</sup> Memorandum of Law in Support of Plaintiffs’ Cross-Motion and in Opposition to Defendants’ Motion for Summary Judgment at 1–2, *Estate of Hamilton v. City of New York*, No. 06CV15405(DC) (S.D.N.Y. Aug. 13, 2009).

<sup>93</sup> Plaintiff Robin Rinsler’s Memorandum of Law in Opposition to Defendants’ Sony Pictures Entm’t, Inc. and Entrada Prods., Inc. Motion for Summary Judgment, *Rinsler v. Sony Pictures Entm’t, Inc.*, No. 02 CV 4096 (SAS) (S.D.N.Y. July 21, 2003). Both quoted sentences appear as they do in the brief; neither was truncated by the ellipses.

22. It is true that when the same person who initially hired a Plaintiff is the same person who also carried out the termination, that this does “strongly suggest that invidious discrimination was unlikely.” And that “it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.”<sup>94</sup>

The argument section of the following quoted brief began with this essentially incoherent and ungrammatical header: “STANDARD OF REVIEW AND ANALYSIS OF THE SUBSTANTIVE CLAIMS *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 . . . (1973) Is Controlling Herein and *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000).”<sup>95</sup> The section then proceeds to make a series of awkwardly choppy assertions with no fact citations for any of them:

Plaintiff was the recipient of gender and ethnic remarks. Plaintiff was constantly threatened. Plaintiff’s private and confidential information was divulged to the team (medical information) contrary to HIPPA and other applicable laws and regulations; An atmosphere against Hispanics permeated the work force; Plaintiff was demeaned and humiliated in a team meeting and on other occasions; Plaintiff was threatened to wit: “This is a very unfortunate situation for you to be in. Now all eyes will be on you watching every step you make. You might be 20% of the team but 80% of its problems. This is about you, not the team”. Plaintiff was continuously harassed; [sic] Plaintiff was unreasonably transferred and then demoted; Plaintiff was assigned to undesirable working conditions to wit: Cramped, dusty and unsanitary storage room with no windows or ventilation. There was a ventilation conduct at the ceiling right above his desk that emanated toxic gasses.<sup>96</sup>

This final example is an excerpt from a brief fraught with grammatical errors in each of several consecutive sentences:

Moreover, it is questionable whether or not defendant Amy Etheride [sic] is the person, who in fact hired plaintiff. . . . Amy Etheridge was among the four people, who interviewed plaintiff . . . . Therefore, defendant Amy Etheridge was merely a member of the committee,

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<sup>94</sup> Plaintiff Bryant Torres’ Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 7, *Torres v. Affinity Health Plan, Inc.*, No. 09 Civ. 10244 (S.D.N.Y. Dec. 10, 2010) (citation omitted).

<sup>95</sup> Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 3, *De La Cruz v. City of New York*, 783 F. Supp. 2d 622 (S.D.N.Y. 2011) (No. 09 Civ. 4905(FM)).

<sup>96</sup> *Id.* at 5.

who hired her but she is not clear as to her authority to hire plaintiff on her own.<sup>97</sup>

## 2. *Agreeing That Same-Actor “Strongly” Implies Nondiscrimination*

Three plaintiffs’ briefs not only fail to dispute the defense, but affirmatively *concede* that same-actor facts in their cases strongly imply nondiscrimination.

- It is true that when the same person who initially hired a Plaintiff is the same person who also carried out the termination, that this does “strongly suggest that invidious discrimination was unlikely.” Schnabel v. Abramson, 232 F.3d 83, 91 (2nd Cir. 2000). And that “it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.” Id. See also Grady v. Affiliated Central, Inc., 130 F.3d 553 (2nd Cir. 1997). However, this factor is only one factor to consider, and is not dispositive of the issue of potential discrimination.<sup>98</sup> [The preceding is the brief’s entire discussion of the same-actor caselaw.]
- Grady does not present an un rebuttable presumption, but only a strong inference, against discriminatory intent. Plaintiff respectfully submits that, in light of the circumstances surrounding plaintiff’s termination, she has overcome this strong inference.<sup>99</sup>
- [Defendant] argu[es] that the “same actor” doctrine applies. . . . “[W]hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute . . . an invidious motivation that would be inconsistent with the decision to hire.” See *Grady*. . . . [T]he inference is permissive, not mandatory, thus the Court would not be compelled to give SunGard the benefit of the doubt . . . .<sup>100</sup>

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<sup>97</sup> Plaintiff’s Memorandum of Law & Affirmation in Opposition to Defendant’s Motion for Summary Judgment at 16, *Chestnut v. Esquire Deposition Servs. LLC*, No. 08-CV-4030 (LAK)(MHD) (S.D.N.Y. Feb. 13, 2009).

<sup>98</sup> Plaintiff Bryant Torres’ Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment, *supra* note 94, at 7.

<sup>99</sup> Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment at 5–6, *Lenhoff v. Getty*, No. 97 Civ. 9458 (LMM) (S.D.N.Y. June 18, 1999).

<sup>100</sup> Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 13–14, *Gioia v. Sungard Data Sys., Inc.*, No. 09 Civ. 8342 (JGK) (S.D.N.Y. Dec. 29, 2010) (second ellipsis in original).

### 3. *No Legal Research—Just Boilerplate Lists of Unhelpful, Basic Cases*

Many briefs offer no caselaw beyond boilerplate citations to a few decades-old basic decisions, citations so perfunctory that they establish nothing useful. One brief consisted of thirty-four numbered paragraphs—the format of complaints<sup>101</sup> and fact evidence submissions,<sup>102</sup> not briefs—and cited only six cases:

- *McDonnell Douglas Corp. v. Green*,<sup>103</sup> the 1973 Supreme Court case listing each side’s basic evidentiary burdens in a Title VII case;
- *Anderson v. Liberty Lobby, Inc.*<sup>104</sup> and *Celotex Corp. v. Catrett*,<sup>105</sup> two of the three major 1986 precedents on modern Rule 56 standards;<sup>106</sup> and
- three circuit precedents cited only for basic Title VII law.<sup>107</sup>

A similar brief had an unusually short “Argument” section (barely seven-and-a-half pages), of which four pages were boilerplate basic law, such as the following beginnings of several paragraphs taking up much of those four pages:

A court may grant summary judgment only if . . . .

If the summary judgment movant satisfies its initial burden of production, the burden of proof shifts to the nonmovant . . . .

A genuine factual issue exists if there is sufficient evidence favoring the nonmovant . . . .

When ruling on a summary judgment motion, a court must construe the facts in a light most favorable to the nonmoving party . . . .

. . . .

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<sup>101</sup> *E.g.*, FED. R. CIV. P. 10(b) (“PARAGRAPHS; SEPARATE STATEMENTS. A party must state its claims or defenses in numbered paragraphs . . .”).

<sup>102</sup> *E.g.*, S.D.N.Y. R. 56.1 (requiring on summary judgment that each party file not only a brief, but an evidentiarily supported “statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried”).

<sup>103</sup> 411 U.S. 792 (1973).

<sup>104</sup> 477 U.S. 242 (1986).

<sup>105</sup> 477 U.S. 317 (1986).

<sup>106</sup> The third, also part of the boilerplate summary judgment standard sections of many of the briefs, is *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>107</sup> Plaintiff’s Response to Defendants’ Motion for Summary Judgment at 4–6, *O’Shields v. Liberty Mut. Ins., Co.*, No. 02 C 9218, (N.D. Ill. Jan. 22, 2004).

To establish a *prima facie* case of discrimination . . . .

In a series of decisions, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs v. Burdines*, 450 U.S. 248(1981) [sic] and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), . . . set forth the allocation of burdens and orders of presentation in Title VII cases . . . .<sup>108</sup>

Many other briefs had only boilerplate caselaw stating unhelpfully basic points, typically at the start of the summary judgment standard or argument sections:

- one brief cited only three cases on the discrimination claim—one Rule 56 precedent from 1986 and two basic discrimination precedents;<sup>109</sup>
- one cited six basic cases—three on Title VII, three on Rule 56 (with overlap between the Title VII and Rule 56 citations);<sup>110</sup>
- one cited eight cases—five on Rule 56 standards in a boilerplate first paragraph, then just three cases *defendant* cited as supporting summary judgment (without any competing caselaw);<sup>111</sup>
- one cited nine cases—six in the “Summary Judgment Standard” section, and then—in an “Argument” section of just 497 words—three cases on basic discrimination and retaliation standards;<sup>112</sup> and
- one cited ten cases—all just for general principles of Rule 56 (six cases) and Title VII (four)—and all ten in the six boilerplate paragraphs that start the summary judgment standard and argument sections.<sup>113</sup>

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<sup>108</sup> Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 5–8, *Siddiqi v. N.Y.C. Health & Hosps. Corp.*, 572 F. Supp. 2d 353 (S.D.N.Y. 2008) (No. 07 CV 2740(CM)(RLE)).

<sup>109</sup> Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment at 2–3, 7, *Parker v. City of Elgin*, No. 03 C 0171 (N.D. Ill. Aug. 25, 2004) (offering three similarly unhelpful cases on Plaintiff's unrelated Due Process claim).

<sup>110</sup> Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment at 5–6, 9, 12–13, *Augsburger v. Firststar Bank*, No. 03 C 50019 (N.D. Ill. Jan. 27, 2004).

<sup>111</sup> Plaintiff's Memorandum of Law in Response to Defendant's Motion for Summary Judgment at 5–6, 10, *Aguilera v. Vill. of Hazel Crest*, 234 F. Supp. 2d 840 (N.D. Ill. 2002) (No. 01 C 5913).

<sup>112</sup> Plaintiff's Response to Defendant's Motion for Summary Judgment at 19–23, *Whalen v. Vuteq USA, Inc.*, No. 08-cv-00009-RLY-WGH (S.D. Ind. May 13, 2009) (excluding headings and citations in word count).

<sup>113</sup> Memorandum in Support of Response to Motion for Summary Judgment at 9–10, *Tinnin-Bey v. Marion Cnty. Juvenile Court Justice Complex*, No. 07-cv-1248-SEB-TAB (S.D. Ind. Mar. 31, 2009).

Others cited more cases, but in reusable boilerplate reciting basic Rule 56 and Title VII standards not tailored to the particular case.<sup>114</sup>

The above ten briefs are only some of the clearest examples of doing no research tailored to the case. Other briefs are similar, featuring only one or very few on-point citations. Such briefs not only fail to support their arguments with authority, but risk citing long-abrogated law, as noted below.

#### 4. *Relying on Long-Abrogated Caselaw Declaring Summary Judgment “Ordinarily Inappropriate” in Employment Discrimination Cases*

Some lawyers claim unawareness that courts regularly grant summary judgment in employment cases. The below excerpts are from five briefs that cite long-abrogated cases from the 1970s to early 1990s deeming summary judgment improper in such cases.

- STANDARD FOR SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

This well established law that summary judgment in employment discrimination cases is especially questionable because as a general rule, summary judgment is not a proper vehicle for resolving claims of employment discrimination which often turn on an employer’s motivation and intent. Disputes as to the employer’s motives, intent or state of mind raise factual issues, precluding summary judgment. In the absence of direct evidence of discrimination, motivation and intent must often be proven through the use of circumstantial evidence which may necessitate the resolution of conflicting inferences, a task peculiarly within the province of the jury. *Delgado v. Lockheed-Georgia Co.*, 815 F2d 641, 644 (11th Cir. 1987)(emphasis added); see also, *Clemons v. Dougherty Co.*, 684 F2d 1365 (11th Cir. 1982).

See also *Hayden v. First Nat. Bank of Mt. Pleasant*, 595 F.2d 994, 997 (5th Cir.1979). (“When dealing with employment discrimination cases, . . . granting of summary judgment is especially questionable.”)<sup>115</sup>

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<sup>114</sup> *E.g.*, Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 2–3, 14–15, 17–19, *Vargas v. Midtown Air Condition & Ventilation, Ltd.*, No. 07-03343 (S.D.N.Y. May 12, 2008); Plaintiff Robin Rinsler’s Memorandum of Law, *supra* note 93.

<sup>115</sup> Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment at 11–12, *Turowski v. Triarc Cos.*, 761 F. Supp. 2d 107 (S.D.N.Y. 2011) (No. 09 Civ. 03979(VM)) (omission in original).

- When deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue. *See Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir.1989); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829, 106 S. Ct. 88 L Ed. 2d 74 (1085)[sic], *Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984).<sup>116</sup>
- [T]his is a drastic remedy that precludes a trial . . . . Because this is a discrimination case where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate . . . .<sup>117</sup>
- In employment discrimination cases, courts are particularly cautious about granting summary judgment where intent is at issue.<sup>118</sup>

This presumption against summary judgment in discrimination is not good law now, and it has not been for decades. The Supreme Court's 1986 "trilogy" of decisions expanding summary judgment<sup>119</sup> "completely changed the landscape in employment discrimination summary judgment proceedings"<sup>120</sup>:

Before the summary judgment trilogy, courts had been reluctant to grant summary judgment . . . in a civil rights case . . . . In response to the trilogy, lower courts have granted summary judgment . . . where there exist questions of fact concerning . . . motive, thereby denying to employment discrimination plaintiffs their "day in court."<sup>121</sup>

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<sup>116</sup> Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 4, *Liburd v. Bronx Lebanon Hosp. Ctr.*, No. 07-CV-11316 (H.B.) (S.D.N.Y. Mar. 5, 2009).

<sup>117</sup> Plaintiff Bryant Torres' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, *supra* note 94, at 2.

<sup>118</sup> Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, *supra* note 108, at 7.

<sup>119</sup> *See supra* notes 104–06.

<sup>120</sup> Christopher J. Emden, Note, *Subverting Rule 56? McDonnell Douglas, White v. Baxter Healthcare Corp., and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY BUS. L. REV. 139, 151 (2010).

<sup>121</sup> Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–07 (1993) (footnote omitted); *see* Benjamin D. McAninch, Commentary, *Removing the Thumb from the Scale: The Eleventh Circuit Summary Judgment Standard for Disparate Treatment Cases in the Wake of Chapman v. A1 Transport*, 53 ALA. L. REV. 949, 950 (2002) ("Because of the intent requirement in employment discrimination . . . [courts were] reluctant to grant motions for summary judgment in these cases. The Supreme Court moved away from this sparing use . . . with its 1986 trilogy." (footnote omitted)).

Judge Posner even has admitted the view that “docket pressures” require summary judgment dismissals whenever employment discrimination cases are “marginal,” even if “a rational fact finder *could* return a verdict for the nonmov[ant]”<sup>122</sup>—a sentiment surprising to hear a judge admit, but unsurprising for a judge to hold, given the high rate of summary judgment grants.<sup>123</sup> Briefs such as the above, still citing obviously out-of-date caselaw declaring summary judgment “especially questionable” in discrimination cases,<sup>124</sup> hint that their authors copied caselaw from old and long-outdated briefs, never noticing the obvious, decades-long trend in favor of granting summary judgment in most such cases.

### 5. *Defaulting by Failing to Oppose Summary Judgment At All*

A few plaintiffs’ lawyers fully defaulted, filing nothing opposing the defense summary judgment motion. Having never filed anything seeking to dismiss the case voluntarily<sup>125</sup> or to withdraw as plaintiff’s counsel,<sup>126</sup> one plaintiff’s lawyer defaulted without explanation.<sup>127</sup> Another plaintiff’s lawyer defaulted repeatedly after a series of extensions he sought and won with a variety of excuses: first, he sought and received a three-week extension; next, he sought and received another one-week extension, citing alleged computer problems related to an office move; then, he defaulted, filing nothing for almost three months after the twice-extended deadline.<sup>128</sup> Whatever their

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<sup>122</sup> Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990) (“The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures . . . , makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter because the plaintiff’s case . . . is marginal.”).

<sup>123</sup> See *supra* note 4.

<sup>124</sup> See *supra* note 115.

<sup>125</sup> Plaintiffs can dismiss a claim or entire case voluntarily, either unilaterally before any defendant answers, with the consent of all parties, or with leave of court. FED. R. CIV. P. 41(a).

<sup>126</sup> District courts typically require that an “attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw . . . without leave of the Court granted by order . . . upon a showing by affidavit or otherwise of satisfactory reasons.” S.D.N.Y. R. 1.4.; *accord* N.D. ILL. LOC. R. 83.17.

<sup>127</sup> Robinson v. N.Y.C. Dep’t of Educ., 08 Civ. 10293 (LAK) (S.D.N.Y. Dec. 23, 2010), ECF No. 30 (granting summary judgment) (“Plaintiff has not responded to the motion although the time within which to do so has expired[,] . . . [the] assertions of defendants . . . are deemed admitted. There are, in consequence, no genuine issues as to any material fact.”).

<sup>128</sup> Second Motion to Extend Time to File Response to Motion for Summary Judgment, Thompson v. Am. Family Ins., No. 1:06-CV-4059 (N.D. Ill. Sept. 10, 2008).



reasons, these lawyers are unequivocally disregarding multiple ethical rules on serving clients competently and diligently.<sup>129</sup>

*B. Finding #2: Bad Brief-Writers Lose on Summary Judgment Over Twice as Often (86%) as Good Brief-Writers (42%)*

Excluding the six post-briefing settlements yielding no court decision, Table 1 shows bad brief-writers lost on summary judgment in 86% of cases (fifty-nine of sixty-nine), while good brief-writers lost in only 42% of cases (eleven of twenty-six)—a statistically significant difference.<sup>130</sup> While a good brief does not ensure success, it at least buys a spin of what legendary U.S. District Judge Charles Briant called the “fair roulette wheel” that, win or lose, leaves even the losers feeling they got a fair shake.<sup>131</sup> In contrast, bad brief-writers are essentially doomed to lose, their clients never enjoying the trial that is so critical to a sense that, regardless of the result, they had their fair day in court. High rates of summary judgment grants draw criticism for “denying to employment discrimination plaintiffs their ‘day in court.’”<sup>132</sup> Critics argue that “a legal representative’s motions and questions are no substitutes for the victim’s own day in court,”<sup>133</sup> especially on the theory that litigation must serve goals of not only accuracy, but also “procedural justice” under “the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.”<sup>134</sup>

The finding that summary judgment loss rates vary substantially with brief quality is a major caveat to (a) studies showing employment discrimination plaintiffs lose on summary judgment at high rates<sup>135</sup> and (b) scholarship

<sup>129</sup> *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); *Id.* R.1.3 (“A lawyer shall act with reasonable diligence . . . in representing a client.”); *Id.* R. 8.4 (“It is professional misconduct . . . [to] engage in conduct that is prejudicial to the administration of justice . . .”).

<sup>130</sup> The difference in loss rate between good and bad briefs is significant at the  $p < 0.0001$  level—the probability is less than one in ten thousand that the difference in loss rate is random.

<sup>131</sup> The judge gave this oral warning—“I run a fair roulette wheel”—at the start of the author’s first trial for a discrimination plaintiff; the jury found for the defendant, making the quote memorable.

<sup>132</sup> McGinley, *supra* note 121, at 207.

<sup>133</sup> Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 702 (2010).

<sup>134</sup> Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004).

<sup>135</sup> *See* Berger et al., *supra* note 4, at 54–60 (discussing results of a study examining the rate at which summary judgment is granted in employment discrimination cases); Miller, *supra* note 4, at 1052–53 (noting that courts increasingly grant summary judgment in many types of cases, including age discrimination cases);

interpreting courts' increased dismissal of such cases as broad-based "hostility to litigation as a tool of dispute resolution."<sup>136</sup> Broadly, this study comports with both of those scholarship lines: (a) pooling good and bad briefs together, only 22% of cases survived summary judgment—a somewhat lower success rate than in prior studies, which makes sense because the sample is somewhat defense skewed, consisting of cases in which defendants knew to cite, and had evidence supporting, the same-actor defense; and (b) courts unquestionably have increased use of both summary judgment and prediscovery dismissal motions to terminate cases before trial.<sup>137</sup> Yet the caveat this Article adds is significant: courts do not indiscriminately dismiss regardless of plaintiffs' efforts to show case merit; where plaintiffs do a *good* job of briefing their cases, courts more often than not *deny* defendants summary judgment. In short, the quality of the plaintiff's brief is an important, but previously unexamined, variable in the basic loss rates documented in previous studies.

This finding that bad briefs are far more likely to lose is not, however, necessarily a finding of causation. The cause of the loss could be poor case merits, not just poor brief quality, because bad brief-writers, unaware they should have rebutted a key defense, likely are bad at case selection as well. Their weak command of the discrimination caselaw can lead them to litigate cases rejected by more knowledgeable lawyers who spotted weaknesses in those cases.<sup>138</sup> Because case merit is not objectively discernible or quantifiable

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Selmi, *supra* note 4, at 558–60 (noting that plaintiffs in employment discrimination cases “generally fare worse than most other kinds of civil plaintiffs” and that “nearly ninety-eight percent of [employment discrimination cases decided by pretrial motions] were decided in favor of defendants”); Cecil & Cort, *supra* note 4, at 2–4, 9–10 (indicating that in 2006 summary judgment was granted about 60% of the time in civil cases as a whole and over 70% of the time in employment discrimination cases).

<sup>136</sup> Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *FORDHAM L. REV.* 981, 982, 1002–03 (2007) (citing and applying to employment litigation the theories of Andrew Siegel); see Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 *TEX. L. REV.* 1097, 1108 (2006) (theorizing that the Court's “hostility to litigation” is the “all-encompassing theme of the Rehnquist era” and explains many of the Court's decisions).

<sup>137</sup> See Miller, *supra* note 4, at 1048–56 (noting increased summary judgment rates, starting with, and since, the 1986 trilogy of summary judgment precedents); Moss, *supra* note 136, at 987–93 (noting that judicially created doctrines from the late 1990s to the late 2000s increased grounds for dismissing discrimination cases); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 *U. ILL. L. REV.* 1011, 1014 (studying all Rule 12 dismissal motions in Title VII cases the year before and year after *Twombly*, and finding after *Twombly* “a higher percentage of decisions that granted a motion to dismiss”).

<sup>138</sup> A substantial number of prospective clients have no claim because “an overwhelming majority” of at-will employees incorrectly believe they can be fired only for “just cause” or “good cause,” leading many fired employees to the incorrect belief that they can sue to prove their firings were simply unjust. See, e.g., Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-*

to an outside observer, the above finding of a statistical disparity cannot control for case merit.

Despite this causation ambiguity, the striking finding remains: lawyers who file bad briefs are all but doomed to lose, showing that loss rates are not independent of briefing or case quality. Further, as detailed in the next subpart, even if bad briefs are not provably the sole cause of plaintiffs' losses, there is strong evidence that bad briefs impact the caselaw: When a plaintiff loses on summary judgment, the judicial decision is much more likely to credit the same-actor defense after a bad plaintiff's brief than after a good one.

*C. Finding #3: Bad Briefs Yield More Pro-defense Caselaw*

Do bad writers lose on summary judgment because they write bad briefs or because, lacking legal acumen, they take bad cases that savvy lawyers reject? The causation of bad writers' high loss rate is hard to pinpoint because bad briefings and bad case selection trace to the same lack of knowledge. However, the data do disclose another, clearer causal relationship.

Of the thirty-one summary judgment decisions in the sample expressly addressing the same-actor defense, when a plaintiff rebutted the defense with a quality brief, the decision is far more likely to reject the defense—even controlling for whether the court granted or denied summary judgment, as summarized by Table 2 below.

<b>Brief:</b>	<b>Decisions <i>Denying</i> SJ to D:</b>	<b>Decisions <i>Granting</i> SJ to D:</b>
<b>Good Brief by P</b>	Total #Decisions: 15	Total #Decisions: 12
	#Crediting SA Defense: 0 (0%)	<b>#Crediting SA Defense: 3 (25%)</b>
	<b>#Rejecting SA Defense: 7 (47%)</b>	#Rejecting SA Defense: 0 (0%)
<b>Bad Brief by P</b>	Total #Decisions: 10	Total #Decisions: 59
	#Crediting SA Defense: 0 (0%)	<b>#Crediting SA Defense: 18 (31%)</b>
	<b>#Rejecting SA Defense: 2 (13%)</b>	#Rejecting SA Defense: 1 (2%)

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*Will World*, 83 CORNELL L. REV. 105, 110–11 (1997) (reporting a survey finding that although the law “clearly permits an employer to terminate an at-will employee out of personal dislike . . . an overwhelming majority . . . 89% . . . erroneously believe that the law forbids such a discharge).

Thus a summary judgment *denial* far more likely *rejects* the same-actor defense if the plaintiff's brief was good: among denials, a decision expressly rejecting the same-actor defense follows 47% of good briefs but only 13% of bad briefs. Conversely, summary judgment *grants* expressly *credit* the same-actor defense in 25% of well-briefed, but 31% of poorly-briefed, cases. The differences are not statistically significant: with three of the four cells in Table 2 containing only ten to fifteen data points, the sample sizes are small, and there are major selection biases as well, such as the likely conservative skew of the pool of judges who grant summary judgment even after a talented plaintiff's lawyer took the case and filed a strong brief. But the pattern Table 2 shows is not only internally consistent, but also consistent with this Article's other findings that briefing quality matters: whether a decision credits the defense depends on the plaintiff's briefing of the issue.

In short, good plaintiffs' briefs generate more pro-plaintiff caselaw than bad briefs, even controlling for win rate. This does not mean the same-actor caselaw is necessarily wrong, but it means bad plaintiffs' briefs skew the adversarial process in which arguments for and against doctrines compete in a marketplace of ideas. Therefore, even if a bad plaintiff's brief may not cause that plaintiff's loss, it tends to cause *future* plaintiffs' losses by skewing the caselaw in favor of the defense. This finding is consistent with Nancy Gertner's critique of how, because "judges are encouraged to write detailed decisions when *granting* summary judgment and not to write when *denying* it . . . decision after decision details why the plaintiff loses . . . serv[ing] to justify prodefendant outcomes and thereby exacerbate the one-sided development of the law."<sup>139</sup> This Article, like Gertner's in a different way, is an "account of employment discrimination law's skewed evolution"<sup>140</sup>: the caselaw is path-dependent, skewing in favor of defendants because (a) a pro-defense skew in the precedent yields more pro-defense caselaw (Gertner's analysis),<sup>141</sup> and (b) a pro-defense skew in the briefings similarly can yield more pro-defense caselaw (this Article's analysis).

It is counterintuitive that brief quality affects judges' *rationales*, not just *rulings*. It makes sense that a ruling depends on whether a brief effectively proves case merit; but if judges know the law, then plaintiffs' citations theoretically should not impact their rationales. But this argument goes too far

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<sup>139</sup> Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 110 (2012), <http://yalelawjournal.org/images/pdfs/1111.pdf>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 115.

in deeming briefs wholly irrelevant. The same-actor defense, though a “recurrent situation,”<sup>142</sup> arises much less often than more basic discrimination issues. For example, in districts in the Second and Seventh Circuits from 2001 to 2010, 127 decisions mentioned the same-actor defense, but far more mentioned “constructive discharge” (1,049) or “hostile work environment” (3,400). Given the volume and subject breadth of modern litigation, judges are generalists who “know a great deal about rules of procedure (which they use constantly), [but] usually know much less about individual rules of substantive law.”<sup>143</sup> Thus, “[u]nless a case turns on . . . law about which a judge has thought deeply lately, the judge depends on the attorneys to explain what the law is and how it governs the case,”<sup>144</sup> explaining how even judges well-versed in summary judgment and discrimination fundamentals may depend on lawyers’ briefs for a specific issue like the same-actor defense.

### III. QUESTIONS POSED BY THE FINDINGS—AND POSSIBLE ANSWERS

Three riddles arise from the finding that most employment discrimination plaintiffs’ lawyers are incompetent, lose, and produce disproportionately pro-defense caselaw. First, *failure by clients*—how can those needing lawyers consistently choose bad ones, given the existence of competent lawyers who show superior ability and results? Second, *failure by lawyers*—how can lawyers take cases they are destined to litigate badly, and lose, without being driven from the market? Third, *failure by ethics authorities*—how can judges and the bar, empowered to police irresponsible lawyering, tolerate this incompetence, especially in a field that is a substantial portion of federal litigation<sup>145</sup> and that “vindicat[es] a policy that Congress considered of the highest priority[,] . . . advanc[ing] the public interest” against discrimination?<sup>146</sup> Subparts A–C discuss each riddle and suggest answers, focusing on the broad range of market failures that must exist for the majority of actors in a major market to be fatally subpar.

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<sup>142</sup> Proud v. Stone, 945 F.2d 796, 796 (4th Cir. 1991).

<sup>143</sup> NEUMANN, *supra* note 61, at 307.

<sup>144</sup> *Id.*

<sup>145</sup> See Clermont & Schwab, *supra* note 3, at 103–04 (explaining that employment discrimination cases used to be the largest category of federal cases and has remained among the top three categories).

<sup>146</sup> Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

A. *Bad Client Choices: Why Do Most Clients Hire Lawyers Who File Bad Briefs and Overwhelmingly Lose with Little Hope of Reaching Trial?*

The riddle of persistently poor client choices is perhaps the least perplexing; the answer is that this Article's findings show legal services, at least in employment litigation, to be a market featuring extremely poor buyer (client) information. A market can contain mostly bad apples given two conditions.

First, bad buyer choices are most common where buyers typically are not repeat players able to learn from a bad first choice or two. Repeat play allows learning, but nonrepeated decisions can be persistently erroneous: a weekly restaurant-goer never returns after a terrible meal, but someone who chooses a too-risky retirement fund never gets to reinvest decades of lost savings.

Second, bad buyer choices are most common where assessing service quality requires specialized knowledge. Researching lawyer filings is not a feasible option: it requires an ability to research court records that most clients lack;<sup>147</sup> and not citing caselaw is a failing discernible to far from all clients.<sup>148</sup> Neither is researching win-loss records feasible: case outcomes are generally unavailable to find, because far more cases end in confidential settlements than in verdicts;<sup>149</sup> and win-loss records in the few cases reaching verdicts are uninformative because the best lawyers may litigate riskier cases, win large settlements, etc. The difficulty of spotting bad lawyering is corroborated by evidence that clients cannot spot incompetence even after a lawsuit: contrast this Article's finding that the *vast majority* of plaintiffs' lawyers file bad (and doomed) briefs with the finding that only *one-quarter* of employment discrimination plaintiffs think their lawyers made "serious mistakes" or demonstrated "other forms of incompetence."<sup>150</sup>

B. *Bad Lawyer Choices: How Can So Many Lawyers Litigate Cases They Cannot Handle Competently Without Being Driven from the Market?*

Even if clients hiring bad lawyers is understandable, the question remains: bad brief-writers lose, so why do lawyers compensated mainly by contingency

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<sup>147</sup> See *infra* Part IV.C.2 (detailing the infeasibility of researching lawyers with court dockets).

<sup>148</sup> See *infra* Part IV.C.2 (discussing how some but not all clients can assess brief quality).

<sup>149</sup> See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007) (noting the prevalence of confidential settlement).

<sup>150</sup> See Berrey et al., *supra* note 7, at 21.

fees<sup>151</sup> take these cases? Even if clients are not well-informed about what it takes to win, surely lawyers are better informed. How can a market consist mostly of service providers not competent enough to earn money providing the service? There are two possible answers: ignorant optimism and profitable laziness.

### 1. *Ignorant Optimism: Employment Law as a Siren Song to the Unqualified*

The first explanation for lawyers taking cases they are destined to litigate badly, and lose, is ignorant optimism: bad brief-writers may not stay long in employment law, but they are so numerous that if each tries the field for just a few years, there would be more bad than good brief-writers at any time. People suffer cognitive biases, including overoptimism—and lawyers, “overconfident in their [case] predictions” in experimental findings, are no exception.<sup>152</sup>

Employment law “is complex for those who do not regularly practice in this field,”<sup>153</sup> making it “a relatively specialized field, between the complicated proof structures and the complex theoretical foundation.”<sup>154</sup> Many lawyers litigating discrimination cases are “novices” to the field—“tort, criminal or family lawyers who take a federal fee-shifting case as an outgrowth of their regular practices.”<sup>155</sup> Such lawyers may be ignorant of key pitfalls and legal issues in the field.<sup>156</sup> Federal district judge and former NAACP lawyer

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<sup>151</sup> See *infra* note 158 (noting how contingency fees predominate plaintiffs’ lawyering).

<sup>152</sup> Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133, 133 (2010). Even judges, specially tasked to assess relevance, are only mildly less susceptible to bias. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) (reporting an experiment that found judges suffered all biases—to a lesser degree on two (framing and representativeness), but the same degree on three (anchoring, hindsight, egocentrism)); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251 (2005) (reporting an experiment that found judges avoid influence from only some, not most, inadmissible information).

<sup>153</sup> Adele L. Abrams & Justin M. Winter, *Lawyers Can Be Employers, Too*, 45 MD. B.J. May/June 2012, at 22, 27; see also Galit Kiercut, *Recent Developments in Employment Law and the Impact of Technology on Workplace Trends*, in COMPLYING WITH EMPLOYMENT REGULATIONS: LEADING LAWYERS ON ANALYZING LEGISLATION AND ADAPTING TO THE CHANGING STATE OF EMPLOYMENT LAW 159, 179 (2011), available at 2011 WL 4452119, at \*14 (“Employment law is a complex field where the laws change rapidly.”).

<sup>154</sup> Marcia L. McCormick, *Federal Regulation and the Problem of Adjudication*, 56 ST. LOUIS U. L.J. 39, 65–66 (2011); see also Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 880 (2012) (“Employment discrimination is an area . . . with an unusual abundance of distinct statutes . . . Congress frequently overrides the Court[] . . . Courts in turn demonstrate unusually high levels of disagreement about the meaning of civil rights overrides.”).

<sup>155</sup> Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, 556 (2009).

<sup>156</sup> See *id.* (noting novices may not know the risks of rejecting Rule 68 or other settlement offers).

Constance Baker Motley put it bluntly: “[T]he most serious problem with Title VII litigation today is the paucity of competent and experienced lawyers available to plaintiffs.”<sup>157</sup>

Consequently, bad brief-writers may exit the field quickly after suffering losses, but may still dominate the market: for every one good brief-writer, there may be a dozen who prove to lack the briefing chops after a few years, such as talented personal injury trial lawyers who try employment law until losing several cases. For a plaintiff’s lawyer inexperienced at legally complex briefings but skilled at legally simple cases alleging grave wrongs (e.g., major personal injuries), employment discrimination litigation may be a siren song—appealing from a distance, but deadly for reasons unseen until too late to turn back.

## 2. *Lazy Lawyering Pays: A Lawyer’s Troubling Incentive for a Low-Effort “Settlement Mill” Strategy, Not Maximizing Case Value*

The second explanation for lawyers taking cases they litigate badly, and lose, is more troubling: profitable laziness. Contingency fees, the form of payment for most employment discrimination litigation,<sup>158</sup> incentivize lawyers to minimize hours worked, unless more hours increase not just case value, but the lawyer’s 33%–40% share of the value by enough to outweigh the opportunity cost.<sup>159</sup> This is a principal–agent problem with no perfect solution, because hourly pay poses the opposite problem: incentivizing lawyers to maximize their hours,<sup>160</sup> subject to the constraint of minimizing other costs of

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<sup>157</sup> *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 267 (S.D.N.Y. 1998).

<sup>158</sup> With employment litigation typically costing six figures in fees, *infra* note 165, plaintiffs typically can afford at most the few thousand dollars in out-of-pocket litigation costs (exhibits, deposition transcripts, etc.), leaving attorneys paid on contingency. See generally James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349, 350 (1993) (viewing contingency as “a mechanism for financing cases when the plaintiff is liquidity constrained and capital markets are imperfect” and for “allow[ing] the attorney and her client to share risk”). That is why contingency fees have applied to virtually all employment cases the author litigated in five years of full-time practice at a major firm, has continued to litigate in years of occasional co-counseling since then, and has seen in other plaintiff-side lawyers’ practices.

<sup>159</sup> See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1525 (2009) (noting that contingency fees induce attorneys “to invest in a claim only up to the point at which further investment is not profitable,” likely below what is “optimal . . . for the client”).

<sup>160</sup> See Dana & Spier, *supra* note 158, at 350, 364 (noting that attorneys paid hourly “might lead the plaintiff blindly into litigation regardless of the case’s merit” and, once in litigation, “have an incentive to prevent the case from settling”).



working excessive hours, such as opportunity costs and upsetting the client.<sup>161</sup> Full analysis of contingency fee effects and incentives is a complex matter beyond the scope of this Article,<sup>162</sup> but a narrow point is relevant here: even if contingency fees are not clearly worse than hourly fees, in employment cases they can make it profitable to file a low-quality brief, despite the risk of summary judgment loss.

Assume a lawyer has a twenty-case portfolio. Some case events are mandatory (e.g., attending hearings and party depositions), but others are discretionary: deposing more witnesses to poke holes in the defense, issuing third-party subpoenas, preparing witnesses for deposition, and researching and writing a strong summary judgment brief. Assume high- and low-effort strategies as to the discretionary matters yield the following mix of case values: (a) a million-dollar verdict for a full trial win (i.e., several years' lost pay plus interest, a modest emotional distress award, punitive damages, and low-six-figure attorney's fees);<sup>163</sup> (b) low- to mid-five-figure average settlements, ranging from four-figure "nuisance-value" to six figures;<sup>164</sup> and

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<sup>161</sup> See *id.* at 364 (noting that, as clients, major corporations like insurance companies are "repeat purchaser[s]," which both makes them "better monitors of the attorney's effort" and gives the attorney "greater incentive to invest in her reputation" by avoiding overbilling such clients).

<sup>162</sup> For an illustrative analysis of how contingency fees unintuitively can incentivize lawyers to file even claims with negative expected values, see, for example, Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1290 (2006) and *infra* text accompanying note 166, for a model of contingency fee litigation based on "real options theory."

<sup>163</sup> See, e.g., *Kuper v. Empire Blue Cross & Blue Shield*, No. 99-CV-1190, 2004 WL 97685, at \*1 (S.D.N.Y. Jan. 20, 2004) (awarding \$902,835.50—lost pay, \$237,500; emotional distress damages, \$62,500; punitive damages, \$200,000; legal fees, \$395,605; cost repayment, \$7,230.50); *Detje v. James River Paper Corp.*, 167 F. Supp. 2d 248, 249 (D. Conn. 2001) (awarding \$1,290,760 to ADEA plaintiff as double his lost pay upon the "finding that he had been willfully discriminated against" under ADEA double-damages provision).

As to fees, courts reject the argument that fees must be proportional to the verdict. See *City of Riverside v. Rivera*, 477 U.S. 561, 574, 585 (1986) (plurality joined in part by Justice Powell); *Quarantino v. Tiffany & Co.*, 129 F.3d 702, 707 (2d Cir. 1997) (rejecting proportionality rule for employment claims). Thus courts regularly award fees in the low to mid six figures, whether a verdict was large or modest. See, e.g., *Kuper*, 2004 WL 97685, at \*1–2; *Sherry v. N.Y. Med. Coll.*, No. 99 Civ. 2310 (LAK), 2000 WL 781867, at \*1 (S.D.N.Y. June 19, 2000) (awarding fees of \$129,975.20 in ADA and ADEA case that did not even go to trial, following pretrial settlement entered as judgment for \$175,000); *cf. Dodge v. Hunt Petrol. Corp.*, 174 F. Supp. 2d 505, 510 (N.D. Tex. 2001) (noting that fees totaled \$146,604.40, but reducing award by 75% to \$36,651.10, because plaintiff won only "on one of her two claims" and only to a "modest" degree).

<sup>164</sup> Because most cases end on confidential terms, see Moss, *supra* note 149, at 869, "[e]mpirical research in this area is extremely difficult," ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 19 (2003). Three studies exist, each showing low- to mid-five-figure average settlements. See Berrey et al., *supra* note 7, at 1, 26 (finding an average settlement of \$30,000 in a national but more limited 1988–2003 sample); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 111, 144 (2007) (finding an average settlement of

(c) losses in the vast majority of non-settled cases (twelve of thirteen) given low effort, but in three-quarters given high effort.<sup>165</sup>

<b>Strategy</b>	<b>#Loss (\$0 for P)</b>	<b>#Small (\$5K)</b>	<b>#Large (\$100K)</b>	<b>#Full Verdict (\$1 million)</b>	<b>Value of Portfolio</b>
<b>Low</b>	12	6	2	1	<b>\$1,230,000</b>
<b>High</b>	6	6	6	2	<b>\$2,630,000</b>

A high-effort strategy substantially increases case value: (a) the rare million-dollar full trial win is more likely after aggressive discovery increases the odds of unearthing strong evidence and forcing the defense to disclose more arguments and evidence before trial; (b) large settlements come mainly when a plaintiff's lawyer litigates the case well in discovery or works hard on a brief to survive summary judgment; and (c) losses and small nuisance-value settlements are less likely when the lawyer both screens out bad cases with quality research (factual and legal) and writes quality briefs that get good cases past dispositive motions.

But compared to the low-effort strategy, the high-effort strategy easily can multiply the attorney time by more than it increases case value. Anecdotal experience confirms this: in contingency cases, elaborate research, discovery, and briefings may not be cost-effective investments for plaintiff's lawyers, except in the largest cases. In most cases, it may be most profitable to litigate lazily—tolerating losses in most cases, but profiting from (a) minimizing cost with the low-effort strategy, (b) amassing many small settlements quickly after

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\$54,651 in a 1999–2005 database of confidential employment discrimination settlements in the Chicago federal court); Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 187 (2010) (finding in a sample of 945 cases that median settlement was \$30,000, with a median of \$40,000 for a small number of post-summary judgment settlements).

<sup>165</sup> Loss rates are high because plaintiffs may lose not only at trial, but pretrial on summary judgment (or another dispositive motion); a good brief-writer may survive summary judgment in slightly over half of all cases, *see supra* Part II.B, but then faces roughly a coin toss at trial, making the *ex ante* win probability about 25%. Compare George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 18–19 (1984) (noting that with settlements weeding out many cases, trial win rates should “approach 50 percent,” assuming symmetric information and predictable doctrine), with Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 249–52 (1996) (finding, among over 3,500 federal trials in 1980s, that plaintiffs won in 26.9%, with lower rates in most labor, employment, and civil rights areas).

filing those cases, and (c) enjoying the rare big verdict or substantial pretrial settlement.

Worse, even where a high-effort strategy is a good case investment, the plaintiff's lawyer's incentive is for a low-effort strategy, because contingency lawyers enjoy only a fraction of any gain in case value. Assume the following: the lawyer is on a one-third contingency fee; the low-effort strategy yields expected liability of  $L$ , for attorney-fee time of cost  $C$ ; and the high-effort strategy increases cost, but increases expected liability more, with cost rising to  $3C$  but liability rising to  $4L$ . The high-effort strategy is worthwhile *for the case* but not *for the lawyer*, who prefers the low-effort profit ( $L/3 - C$ ) to the high-effort profit ( $4L/3 - 3C$ )—whenever (per simple algebra)  $L < 2C$ , which is to say whenever case value is not high enough. High effort maximizes case value (to the client's benefit) but passes the point at which the lawyer's marginal revenue (i.e., the 33%–40% share of the amount by which effort increases case value) surpasses the marginal cost of additional effort (i.e., the lawyer's opportunity cost of time).

A critical variant on the low-effort strategy is the more nuanced “litigation as . . . option” strategy: file many cases; see which prove promising in early, modest-effort pretrial stages (party depositions, initial document exchange, etc.); then drop any cases that do not strengthen, focusing effort on the handful where the early effort proves strong.<sup>166</sup> This theory, based on “real options” concepts from securities, explains how the option to drop a case may incentivize lawyers to file a large portfolio of seemingly weak cases, in the hopes a few will prove strong.<sup>167</sup> This strategy can be rational for a lawyer who satisfies the following conditions:

- (1) lacks access to cases with high expected values (i.e., a non-prominent lawyer who does not get the plum cases);
- (2) has access to a large pool of cases with (a) low or even negative expected value but (b) high variance in that expected value, such that a large portfolio eventually will prove to have a few strong cases;
- (3) can learn more about case merit in early pretrial stages; and
- (4) can, during pretrial, drop the cases that do not strengthen.<sup>168</sup>

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<sup>166</sup> Grundfest & Huang, *supra* note 162, at 1290.

<sup>167</sup> *Id.* at 1267–68 (modeling litigation with “options” theory).

<sup>168</sup> See generally *id.* (providing an analysis of how contingency fees can incentivize lawyers to file claims with negative expected values).

The problem is that civil procedure, court, and ethics rules restrict dropping cases: a lawyer cannot drop an already-filed federal suit without permission from both the client<sup>169</sup> and either the court or opposing counsel (either of whom may refuse to drop the case if, for example, there is a counterclaim or an argument that the suit is frivolous enough to warrant sanctions);<sup>170</sup> nor can a lawyer simply quit the litigation mid-stream without permission from the client or the court.<sup>171</sup>

The tension between the appealing “option” strategy (file many middling cases and drop any that do not strengthen) and rules restricting case-dropping may explain bad briefs: a lawyer may *knowingly default on summary judgment by filing a hopeless, low-effort brief* as a way to drop weak cases unilaterally. That tactic would amount to an end-run around the above rules barring lawyers from unilaterally dropping cases, and it certainly violates the ethical mandates of competence and diligence that continue to apply until and unless an attorney has permission to withdraw from, or to voluntarily dismiss, his or her case.<sup>172</sup> In sum, the litigation-as-option theory is rational, and may be fine to pursue as long as lawyers consult clients and win court permission before dropping cases. But lawyers’ incentives to maximize their case-dropping freedom may explain why they file hopelessly low-effort briefs—to evade important rules barring unilateral case-dropping.

The above analysis shows how, based on various similar strategies, a profit-maximizing lawyer may choose a low-effort strategy yielding losses and token settlements in most cases. This may be what bad-writing plaintiffs’ lawyers do: by declining to spend much time on briefings or discovery, they enjoy the low costs that make it profitable to live off quick nuisance-value settlements. Personal injury lawyers with similar practices draw criticism as “[s]ettlement mills[,] . . . high-volume personal injury practices that . . . take few—if any—cases to trial.”<sup>173</sup> The bad-writing employment lawyers are similar, and their clients face similar outcomes: “those with unmeritorious claims . . . [or] meritorious but very small claims, fare reasonably well. On the other hand, those with particularly meritorious claims[,] . . . and those with

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<sup>169</sup> ABA MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2009) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall abide by a client’s decision whether to settle a matter.”).

<sup>170</sup> FED. R. CIV. P. 41(a)(1)(A)(ii) (indicating the permission of all counsel suffices to allow voluntary dismissal); *id.* at 41(a)(2) (indicating the permission of a judge suffices to allow voluntary dismissal).

<sup>171</sup> *See supra* note 126 (detailing the requirement of court permission for attorney to withdraw).

<sup>172</sup> *See supra* note 129 (detailing such rules).

<sup>173</sup> Engstrom, *supra* note 159, at 1491.

meritorious claims who are seriously injured, likely fare relatively poorly”<sup>174</sup>—their lawyers’ low-effort strategy, yielding no credible threat of trial, pools meritorious claimants together with unmeritorious claimants to receive nuisance-value settlements.<sup>175</sup> Incentives to litigate lazily may trump lawyers’ ethical obligations to represent clients “zealously” and to serve clients’ interests by doing work that benefits their cases.

3. *Who Are the Bad Brief-Writers? An Odd Mix Indicating That Lazy-Lawyer “Settlement Mills” Are Likely Not the Entire Problem*

Identifying two very different causes of bad briefing—ignorant overoptimism and knowing laziness—is unsatisfying, because the solution depends on the problem. Scrutiny of the nature of each lawyer’s practice can hint at answers, but lawyers’ practice areas cannot be pinned down with statistical accuracy. Many lawyers claim multiple expertise areas. Other lawyers have websites claiming expertise in a field in which they merely aspire to practice. Searching reported decisions or dockets also is inconclusive, because practice areas differ in yielding filings. A lawyer with mainly state-court personal injury and criminal cases, but only a little federal employment law, would appear in a federal docket search to be an employment lawyer. Docket searching is even less helpful for lawyers who mix litigation with transactional work yielding no court filings at all. Consequently, this Article could not feature a truly quantitative study of the practice areas of the lawyers who wrote the briefs in the data set.

But the tentative evidence is that most of the bad brief-writers are not employment lawyers; most appear to be personal injury or general practice lawyers. Extensive searching of the worst brief-writers’ websites, listings in online directories, LinkedIn pages, etc., showed that the sixteen lawyers who wrote the very worst briefs (those cited and described in the Part II.A.1–5 listing of the worst briefs) broke down as follows by practice area<sup>176</sup>:

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<sup>174</sup> *Id.* at 1490.

<sup>175</sup> *Id.* at 1527 (noting low sizes of settlements at settlement mills, typically \$2,000 to \$6,000).

<sup>176</sup> The data underlying this search are on file with the author. The two “unknown” practices reflect that, by the time of this study, one lawyer was deceased while another left private practice for a government job; neither left a residual internet footprint about his practice area.

**TABLE 4:**  
**The Worst Brief-Writers, by Reported Practice Area**

<b>Practice Area</b>	<b>Number</b>
<b>General Practice</b>	<b>7 of 16</b>
<b>Employment Law</b>	<b>4 of 16</b>
<b>Personal Injury</b>	<b>3 of 16</b>
<b>Unknown</b>	<b>2 of 16</b>

These figures are imprecise, as noted earlier: the seven lawyers who market a general practice may actually have mostly employment cases; the four professed employment lawyers may be inexperienced or general practitioners who want to market themselves in employment cases. But the disparity between these lawyers' abilities and their bragging is striking. The lawyers whose websites feature the below boasts are the ones whose briefs were the very worst—not just devoid of a same-actor rebuttal, but either incoherent, research-empty, or both:

- Personal injury lawyer who defaulted on summary judgment<sup>177</sup>: “[W]e have developed a reputation in Indiana and the Chicagoland area for aggressive, yet thoughtful representation. . . . We are experienced; We are Aggressive; and We Want You to Win.”<sup>178</sup>
- General practice firm whose brief was pervasively ungrammatical<sup>179</sup>: “an attorney that you know and trust, one whom you can call on and be assured that your matter will be given full attention by skilled and knowledgeable legal practitioners dedicated to fulfilling your needs.”<sup>180</sup>
- General practitioner whose brief cited only three boilerplate cases on the discrimination claim<sup>181</sup>: “Ours is not a cookie-

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<sup>177</sup> See *supra* note 128 and accompanying text.

<sup>178</sup> KELLY LAW OFFICES, <http://www.tfklawfirm.com> (last visited Aug. 15, 2013).

<sup>179</sup> See *supra* note 92 and accompanying text (citing and quoting brief featuring four ungrammatical sentences in just the four-paragraph “Preliminary Statement,” which also failed to say what kind of discrimination (race, sex, etc.) Plaintiffs claimed).

<sup>180</sup> LAW OFFICES OF BARRY D. HABERMAN, <http://www.bhaberman.com> (defunct as of June 7, 2013), available at <http://web.archive.org/web/20130113000431/http://www.bhaberman.com/> (last visited Aug. 15, 2013).

<sup>181</sup> See *supra* note 109 and accompanying text (citing and quoting brief).

cutter practice,” but a “practice promot[ing] visionary tenacity, flexibility, [and] creativity.”<sup>182</sup>

The contrast is notable: many of the 27% filing good briefs, but *none* of the 73% filing bad briefs, are expert plaintiff-side employment litigators who publish in the field, speak at major conferences, and serve as bar association leaders.<sup>183</sup>

This review of lawyers’ practice areas does not conclusively pinpoint the problem. The prevalence of general practitioners could show that overoptimism is the main explanation: perhaps these are the lawyers who try employment litigation, lose cases, then leave. Or it could mean settlement mills span subject matters: perhaps these lawyers litigate on the cheap and settle quickly with a docket of employment, personal injury, and other cases.

But this practice area review does hint that settlement mills cannot be the whole story. If it were, we would see multi-lawyer employment firms enjoying the fruits of lazy lawyering in the field—but just *one* of sixteen bad brief-writers was at an employment-focused firm with more than one or two lawyers. The practice area data therefore indicate that (a) even if lazy-lawyering settlement mills are part of the story, the problem spans practice areas, because employment law does not appear especially apt to support a settlement-mill practice, and therefore also that (b) overoptimism is likely a key explanation for bad briefings.

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<sup>182</sup> LAW OFFICES OF THOMAS J. FLEISCHMANN & ASSOCIATES, <http://fleischmannlaw.com/firm.html> (last visited Aug. 15, 2013).

<sup>183</sup> A count of “top” lawyers would be arbitrary: some bar leaders are mediocre lawyers, many lawyers reside at various points along a spectrum from prominence to anonymity, and many excellent lawyers never take on prominent roles. What is notable is that top plaintiff-side employment lawyers like the following were among the 27% of good brief-writers, but not among the 73% of bad ones. Kathleen Peratis, former ACLU Women’s Rights Project director, is a published author and a partner at New York’s largest plaintiff-side employment firm. *Kathleen Peratis*, OUTTEN & GOLDEN, <http://www.outtengolden.com/lawyer-attorney/kathleen-peratis> (last visited Aug. 15, 2013). L. Steven Platt, a Chicago law firm partner, is a regular CLE speaker and author who was formerly on the Board of Directors, and Illinois chapter President, of the National Employment Lawyers Association. *L. Steven Platt*, CLARK HILL, <http://www.clarkhill.com/Attorney/splatt> (last visited Aug. 15, 2013). Carolyn Shapiro, a law professor and former Supreme Court clerk, wrote her brief at a major Chicago plaintiff-side civil rights firm. *Carolyn Shapiro*, IIT CHI.-KENT COLL. L., <http://www.kentlaw.iit.edu/faculty/full-time-faculty/carolyn-shapiro> (last visited Aug. 15, 2013). Michael Sussman, now in a rural New York practice, litigated at the NAACP and Department of Justice Civil Rights Division. *Michael H. Sussman*, SUSSMAN & WATKINS, [http://www.sussmanwatkinslaw.com/attorneys\\_staff/sussman.html](http://www.sussmanwatkinslaw.com/attorneys_staff/sussman.html) (last visited Aug. 15, 2013).

C. *Bad Ethics Enforcement: Why Do the Bar and Judiciary Tolerate Widespread Incompetence in a Major Field of Law?*

As detailed above, when a defendant presses the same-actor defense in a circuit with split authority, a plaintiff's lawyer's professional responsibility includes finding and arguing the contrary authority.<sup>184</sup> Yet the 73% of briefs failing to cite same-actor caselaw fail this basic duty,<sup>185</sup> and a substantial fraction badly fail basic professional standards with incoherent writing, a lack of research, a failure to address the defense at all, or even a full default on the motion.<sup>186</sup> But remarkably, in *none* of the over 100 cases with an inadequate plaintiff's brief did the judges issue orders sanctioning the lawyers or referring them to the bar for possible discipline—two types of orders judges know how to issue when troubled by a lawyer.<sup>187</sup> It is puzzling why judges do not act against such clearly deficient lawyering; three possible answers exist, each plausible but troubling.

1. *The Difficulty of Knowing not only What Plaintiffs' Counsel Should Have Argued, but also What Errors Are Harmless*

A judge or other observer may be able to spot a bad brief, but not what particular arguments a lawyer should have made. As noted above, when a plaintiff's lawyer does not argue a point, it may not be clear whether the lawyer failed or whether the facts failed to support more argument on the point.<sup>188</sup> Even where an error is purely legal and is therefore apparent (such as a failure to make readily available arguments against a same-actor defense), it is hard to know if the error is harmless because a competent version of the brief was never written; perhaps the plaintiff would have lost anyway. Unprofessional lawyering should not be tolerated even if arguably a "harmless error," because future clients may suffer at the hands of the unprofessional lawyer. Yet the more a lawyer's error is harmless to his or her client, the easier it is to understand judicial reluctance to initiate sanctions or disciplinary proceedings, which can be burdensome, as detailed below.

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<sup>184</sup> See *supra* Part I.A.2 (detailing legal writing treatises, cases, and ethics rules so instructing).

<sup>185</sup> See *supra* Part II.A.

<sup>186</sup> See *supra* Part II.A.1–5.

<sup>187</sup> See, e.g., *In re Amgen Inc.*, No. 10-MC-0249 (SLT)(JO), 2011 WL 2442047, at \*20 n.26 (E.D.N.Y. Apr. 6, 2011) (quoting *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (noting "sanctions[] such as holding [attorneys] in contempt or referral to the state bar for disciplinary proceedings" (internal quotation mark omitted))).

<sup>188</sup> See *supra* note 61 and accompanying text.



## 2. *Bureaucracy and Controversy Avoidance*

Judges have heavy dockets, and the largely volunteer lawyers staffing disciplinary committees have limited time. Given the large quantity of poor lawyering this Article documents, sanctioning or disciplining bad lawyering risks opening the floodgates, especially given how time-consuming each individual proceeding would be. “[D]ue process requires that courts provide notice and an opportunity to be heard before imposing any kind of [attorney] sanctions,”<sup>189</sup> and because sanctions and disciplinary action inflict permanent stains on attorneys’ records, such inquiries are hotly disputed and subject to appeal—making sanctions and disciplinary proceedings unappealing endeavors for judges and bar committees.

## 3. *Raising the Cost of Litigation as Harmful to the Plaintiff’s Side—Even if the Rate of Bad Writing Is Similar on Both Sides*

A major caveat of this Article’s findings is that it does not prove plaintiffs’ lawyers are worse than defendants’. The data sample starts with defense briefs that *do* make the same-actor argument, and it is hard to know if a defendant’s moving brief omitted the same-actor argument because the lawyer did not know the law or because the facts failed to support the point. Because this Article cannot assess the frequency of defense counsel knowing to make an argument, it cannot assess whether plaintiffs’ briefs are worse than defendants’. But even if a similar crackdown might apply to plaintiffs and defendants, increased odds of sanctions or discipline for bad writers could, on the whole, harm plaintiffs: increasing the risk and attorney time of a case disincentivizes filing suit.<sup>190</sup> Consequently, any writing crackdown could face dueling bias accusations: plaintiffs’ lawyers could claim it burdens lawsuits with an extra threat; their opponents could claim it is an effort to restrict new competitors from entering the plaintiffs’ bar.

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<sup>189</sup> *Martens v. Thomann*, 273 F.3d 159, 175–76 (2d Cir. 2001) (quoting *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999) (per curiam) (holding the same for a monetary sanction) (reversing the sanction of an order removing an attorney from the case, where the order was imposed without adequate briefing and hearing).

<sup>190</sup> See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 74 & n.1 (1983) (analyzing evidence that “[r]ising costs are seen as a barrier to some and a problem for all litigants,” including pretrial disputes that delay litigation and increase the required attorney time); cf. Berrey et al., *supra* note 7, at 21–22 (noting that plaintiffs’ out-of-pocket expenses disincentivize them from filing suit).

## IV. POSSIBLE REDRESS

A. *The Caveats: A Degree of Judicial Blame and a Degree of Intractability*

This Article does not mean to overstate the point that plaintiffs' summary judgment losses trace to bad briefs. Often courts just get it wrong, defying Rule 56 standards too established to blame the lawyers. For example, in *Nagle v. Village of Calumet Park*, the court dismissed a claim that a police chief retaliated against an officer who filed a discrimination charge.<sup>191</sup> On summary judgment, plaintiffs merit favorable inferences from uncertain facts, yet the court in *Nagle* rejected evidence plausibly but not conclusively showing the chief knew of the discrimination charge:

The EEOC charge was mailed to the department on January 27, 2005, . . . to "Chief David" rather than Chief Davis. . . . [and] the envelope was addressed to "Personnel Manager, Human Resources Department, Village of Calumet Park." . . . [F]rom this evidence[,] . . . no jury could reasonably conclude that Chief Davis was aware of the EEOC charge . . . [as] of the February 2005 suspension.<sup>192</sup>

Next the *Nagle* court granted Defendant summary judgment against Plaintiff's claim that his reassignment was "adverse," despite admitting the evidence "cuts both ways":

While one can imagine . . . reassignment to less desirable . . . positions would dissuade a reasonable worker from making a charge[,] . . . the senior liaison position was posted . . . , and after no one applied, Nagle was assigned to [it]. . . . [A]n employer . . . cannot assign an employee to a less favored position because [he] . . . exercised his statutory rights.<sup>193</sup>

"[But] [t]his fact arguably cuts both ways: the senior liaison position had to be filled by some-one [sic] and an employer is entitled to fill the position."<sup>194</sup>

The *Nagle* panel was not particularly ideologically identifiable: two of the judges were Democratic appointees,<sup>195</sup> and none had a reputation as unusually

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<sup>191</sup> 554 F.3d 1106, 1111 (7th Cir. 2009).

<sup>192</sup> *Id.* at 1122.

<sup>193</sup> *Id.* at 1120.

<sup>194</sup> *Id.*

<sup>195</sup> Judge Ann Claire Williams and Terence T. Evans were appointed by President Bill Clinton. See Jason J. Czarneski and William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 856 tbl.1 (2006).

hostile to plaintiffs. *Nagle* therefore is an example of the empirical finding that judges' backgrounds and life experiences, but not their simple political affiliation, influence the rate at which they dismiss employment discrimination cases on summary judgment.<sup>196</sup> In short, stretching summary judgment standards to dismiss cases is a wide-ranging phenomenon, as shown by not only cases like *Nagle* and empirical studies, but the first-hand report by retired judge Nancy Gertner of how federal judges are trained "to get rid of civil rights cases": "At the start of my judicial career in 1994, the trainer teaching discrimination law to new judges announced, 'Here's how to get rid of civil rights cases[]' . . . ."<sup>197</sup>

Despite the role of judicial error or unfairness, this Article's diagnosis remains: while good plaintiffs' briefs are not always lifesavers, bad briefs are deadly. They concede contestable points, overwhelmingly lose, and generate pro-defense caselaw; they thereby hurt not only the losing plaintiff, but future plaintiffs who face the increased pro-defense caselaw that bad plaintiffs' briefs yield. Accordingly, without exonerating judges, this Article finds bad lawyering is a previously overlooked, troubling contributor to plaintiffs' summary judgment loss rate and to the heavy body of debatable pro-defense caselaw.

So what can be done? There is no perfect solution, given that information gaps and troubling incentives render the legal services market deeply flawed:

- clients lack sufficient access to, or ability to understand, information on research and writing quality differences among lawyers (Part III.A);
- many lawyers lack sufficient information, until after years of losing cases, about how employment law requires more research and writing than many other fields of small-firm practice (Part III.B.1);
- other lawyers are all too well-informed about the potential profitability of litigating on the cheap, minimizing lawyer effort to maximize per-hour profit even while sacrificing victory odds (Part III.B.2); and

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<sup>196</sup> Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 320–21 (2012) ("Our data show . . . that white judges tend to dismiss cases for summary judgment at a higher rate than minority judges. . . [but] no political party effects, suggesting judicial decisionmaking may be less influenced by political ideology than some political scientists suggest and more influenced by experience.").

<sup>197</sup> Gertner, *supra* note 139, at 117.

- judges and bar authorities feel ill-positioned to discipline lawyers due to heavy dockets, information limitations, and fear that a crackdown would (or would be perceived to) harm plaintiffs by increasing litigation risk (Part III.C).

In this light, the legal services market is just like many other flawed markets in which ill-informed buyers suffer at the hands of unscrupulous or incompetent sellers whom regulators lack the firepower or the will to police.

While Part III paints a bleak picture, this Part offers some hope of improving matters with targeted reforms—a mix of modestly helpful measures and more aggressive measures that carry both intriguing promise and substantial risks.

### *B. Increasing Lawyer Training with Educational Efforts and Reforms*

One direct response to poor lawyering is to improve educational efforts for practicing lawyers (subpart 1 below) and law students (subpart 2). While it is hard to fault educational efforts, they hold limited promise: it is unclear whether more education truly can make bad lawyers better, much less convince unethical lawyers to work harder for modest returns.

#### *1. Supporting Bar Association Outreach*

The easiest prescription is expanding outreach and educational efforts by bar associations with substantial plaintiff-side membership, such as the National Employment Lawyers Association (exclusively plaintiff-side employment lawyers), the American Association for Justice (plaintiff-side trial lawyers), or more broad-based state and local bar associations, especially those with divisions on litigation or employment law.<sup>198</sup>

First, such entities should maximally share, by publishing and posting on websites, articles and sample briefs helping plaintiffs' lawyers oppose summary judgment motions. Bar associations may be reluctant to give away what dues-paying members buy, but as this Article shows, bad plaintiffs' briefs produce negative externalities by polluting the caselaw for all, thereby justifying collective prevention efforts. Second, associations should expand

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<sup>198</sup> See, e.g., NAT'L EMP. LAW. ASS'N, <http://www.nela.org/NELA/> (last visited Aug. 15, 2013) ("NELA is the country's largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3000 members.").

mind-sharing initiatives, such as moot courts and listservs. Mooting is common for appeals, but as this Article shows, the plaintiff's bar has a major problem with the trial court summary judgment motions that are the pivotal, dispositive events in so many cases. Listservs, powerful means for sharing research and enlisting motion guidance, exist in active large-state and big-city chapters;<sup>199</sup> they could more actively invite participation from smaller neighboring states lacking a large plaintiff's bar.<sup>200</sup>

Public support could help these modest private ordering initiatives, which by themselves lack a governmental entity's resources or ability to reach disengaged lawyers. All except the most prominent national bar associations typically run on a shoestring; most lack office space, conference rooms, mock courtrooms, or the funding to procure such space for events. Even modest government support could make a real difference. For example, public entities could provide free use of courtrooms, or rooms in other public buildings, for bar associations and small-firm lawyers to hold moot courts or continuing legal education events that more affluent firms can host in-house.

## 2. *Experiential Learning Targeting the Writing That Lawyers Do Badly*

While this Article documents one shortcoming in lawyer performance, the broader criticism, that lawyers need better training at practice skills, is not new. In 1992, the "MacCrate Report"—a detailed critique of legal education by the American Bar Association's Task Force on Law Schools and the Profession, chaired by Robert MacCrate—offered a "comprehensive effort to address the lack of competence among graduating lawyers,"<sup>201</sup> including numerous recommendations for law schools to do better at making graduates "well-

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<sup>199</sup> See, e.g., *Advocates for Employee Rights*, NAT'L EMP. LAW. ASS'N/N.Y., <http://www.nelany.com/EN/index.cfm?event=showPage&pg=whoware> (last visited Aug. 15, 2013) (offering listservs through a link under the member services tab and explaining that "NELA/NY, the local affiliate of the National Employment Lawyers Association . . . advances and encourages the professional development of its [more than 400] members through networking, educational programs, publications and technical support").

<sup>200</sup> For example, while the NELA state chapters in Colorado, New York, and Illinois have active listservs, those in smaller neighboring states do not. The Illinois-based listserv actively includes those elsewhere in the Seventh Circuit (i.e., Wisconsin and Indiana), and New York's listserv draws some participation from neighboring states, but Colorado's does not draw participation from the handful of members in the more sparsely populated neighboring states.

<sup>201</sup> Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 115 (2001).

trained . . . to practice law competently and professionally.”<sup>202</sup> But the MacCrate Report was not the first such effort, having been preceded by “the Reed Report (1921), the writings of Jerome Frank in the 1930’s and 1940’s, and the Crampton Report (1979),” as well as “[t]he growth of clinical legal education beginning in the 1970’s . . . [upon] demands for relevance in the law school curriculum.”<sup>203</sup> By the 1990s, the diagnosis was pervasive that “law schools are quite successful in teaching substantive law and the basic skills of problem-solving, legal reasoning, and writing, but they have not devoted comparable attention to practice skills.”<sup>204</sup>

Following these criticisms, many have called for more “experiential learning” in law schools: clinical legal education representing live clients or otherwise participating in real legal matters; internships and externships in which students work for real lawyers; and law school courses teaching practical lawyering skills, such as writing briefs, drafting contracts, negotiating, and trying cases.<sup>205</sup> Such offerings have proven popular with students,<sup>206</sup> and while it is hard to assess educational efficacy, there is evidence experiential learning imparts useful skills. Lawyers give high marks to the usefulness of most forms even years later,<sup>207</sup> and experiential learning may even improve abstract thinking skills as well. In one study comparing student aptitudes before and after these offerings, “the data . . . support the notion that an experiential approach in the classroom may impact student learning in a positive way.”<sup>208</sup> “[P]articularly among students who began their law school

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<sup>202</sup> AM. BAR ASS’N SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHS. & THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 125 (1992).

<sup>203</sup> Engler, *supra* note 201, at 115 (internal quotation mark omitted).

<sup>204</sup> Wallace Loh, *The MacCrate Report: Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 510 (1994).

<sup>205</sup> See generally Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership*, 8 LEGAL COMM. & RHETORIC: 191, 191–94, 197–99 (2011) (surveying types of experiential learning).

<sup>206</sup> Karen Sloan, *Recent Graduates Report Satisfaction with ‘Real World’ Training in Law School*, NAT’L L.J. (Apr. 19, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202490652136> (citing growing “prevailing wisdom . . . that law schools should provide more practical skills and ‘real world’ training,” and reporting survey data that “clinics and externships are gaining in popularity,” and “[p]ractical skills courses proved most popular”).

<sup>207</sup> Debra Cassens Weiss, *Associate Survey Gives Low Marks to Law School Pro Bono, Props to Legal Clinics*, ABA J. (Apr. 19, 2011), [http://www.abajournal.com/news/article/law\\_school\\_pro\\_bono\\_not\\_so\\_useful\\_associate\\_survey\\_finds](http://www.abajournal.com/news/article/law_school_pro_bono_not_so_useful_associate_survey_finds) (citing survey of law firm associates about the usefulness of any experiential learning they had in law school: “[t]he average usefulness rating, with four being most useful, was 3.4 for legal clinics and externships, 3.1 for skills courses, and 2.2 for pro bono”).

<sup>208</sup> Eric A. DeGroff, *Training Tomorrow’s Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Student Learning Styles*, 36 S. ILL. U. L.J. 251, 254 (2012).

careers with relatively undeveloped analytical skills,” data indicate experiential learning “may . . . develop[] and encourag[e] the use of law students’ abstract thinking skills.”<sup>209</sup>

Experiential learning also draws criticism. Legal education requires “not only the acquisition of knowledge, skills, and values, but also theory and policy”; arguably, “pressure on law schools to teach this set of skills, regardless of the opportunity costs,” risks a “‘McDonalds-ization’” of law schools.<sup>210</sup> Further, given the varied “capability and resources of law faculties to offer it,”<sup>211</sup> experiential learning may be successful at one school but not another, or in one form but not another (e.g., clinics versus externships). This Article cannot resolve these debates, but its diagnosis, that lawyers perform a major skill badly, supports particular types of experiential learning.

First, as Erwin Chemerinsky has argued, education in writing briefs should focus more on the trial court motions, which all litigators regularly handle, than on appeals, which new lawyers rarely litigate and which rarely predominate even experienced lawyers’ practices: “Most first-year legal writing classes conclude with an appellate brief and argument,” but students instead could “argue a motion to dismiss or a summary judgment motion, something more likely to be seen . . . in their early years of practice.”<sup>212</sup>

Second, the highest-stakes writing in plaintiffs’ litigation is *opposing* such dispositive motions (i.e., motions to dismiss and for summary judgment), which is “*responsive* writing” in *opposition* to a motion, rather than the writing of one’s own motion—and “[m]ost law school persuasive writing assignments are *nonresponsive*.”<sup>213</sup> This Article supports more experiential learning in, or at least tweaking the existing writing curriculum toward, responsive writing in dispositive motions. It more broadly supports expanded experiential learning in the sort of complex federal law briefings required on summary judgment motions—not the sort of skill experiential learning opponents can easily deride as unintellectual, given that a good summary judgment brief marshals a range of arguments, sources, and ideas that are at least as intellectually challenging as a law school seminar paper.<sup>214</sup>

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<sup>209</sup> *Id.* at 284.

<sup>210</sup> Loh, *supra* note 204, at 512–13.

<sup>211</sup> *Id.* at 513.

<sup>212</sup> Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 597 (2008).

<sup>213</sup> NEUMANN, *supra* note 61, at 325 n.1.

<sup>214</sup> Chemerinsky, *supra* note 212, at 597 (“[A]n emphasis on skills training is often thought to be the opposite of teaching theory and interdisciplinary perspectives. This is a false dichotomy that law schools

### 3. *Making Substantive Employment Discrimination Law Simpler and a Bar Examination Topic*

As noted above, employment discrimination law is “a relatively specialized field, between the complicated proof structures and the complex theoretical foundation,”<sup>215</sup> making it “complex for those who do not regularly practice in this field.”<sup>216</sup> But it need not be: many call for reforming employment discrimination law, replacing its labyrinthine “seven-step inquiry”<sup>217</sup> and “definitional incoherence”<sup>218</sup> with a streamlined focus on simply whether discrimination caused a challenged action.<sup>219</sup> Such proposals draw support in this Article’s finding that existing doctrine not only flummoxes most lawyers, but is complex enough that generalist judges do not know the doctrine well enough to avoid being influenced by disparities in brief quality.<sup>220</sup>

The growth of employment discrimination into one of the truly major federal practice areas also supports making it a bar examination topic. Most states do not test employment discrimination, but Pennsylvania does.<sup>221</sup> What topics bar examinations should cover is beyond the scope of this Article, except to note that bar authorities should consider whether their lists of covered subjects have kept up with the times when they lack employment discrimination, one of the top fields of litigation, yet include topics such as “Trusts & Future Interests,”<sup>222</sup> “Guardianship,”<sup>223</sup> “Workers’ Compensation,”<sup>224</sup> “Suretyship,”<sup>225</sup> and “Bulk Transfers.”<sup>226</sup>

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should emphatically reject. . . . [L]aw is inherently interdisciplinary and must be shaped by understanding fields such as economics, philosophy, and psychology.”)

<sup>215</sup> McCormick, *supra* note 154, at 65–66.

<sup>216</sup> Abrams & Winter, *supra* note 153, at 27.

<sup>217</sup> See Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 671 (1998) (calling for simplifying employment discrimination doctrine because the existing burden-shifting scheme requires “a cumbersome analysis . . . [that] entails a seven-step inquiry”).

<sup>218</sup> See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 493 (2006) (arguing that employment discrimination law suffers “definitional incoherence” because “myriad causal formulations” apply to different types of cases, causing “uncertainty over the causation requirement . . . [that] has given rise to vast amounts of needless, expensive litigation”).

<sup>219</sup> See, e.g., Chin & Golinsky, *supra* note 217, at 671–72; Katz, *supra* note 218, at 493.

<sup>220</sup> See *supra* Part II.C (finding that even among only defense grants of summary judgment, whether judges credit the same-actor defense depends on whether the plaintiff briefed the defense).

<sup>221</sup> *Bar Exam Tests and Topics Tested*, PA. BOARD L. EXAMINERS, [http://www.pabarexam.org/bar\\_exam\\_information/testssubjects.htm](http://www.pabarexam.org/bar_exam_information/testssubjects.htm) (last updated Aug. 2, 2013) (listing fifteen subjects, including “Employment Discrimination”).

<sup>222</sup> *Bar Exam Guide*, NAT’L JURIST, <http://www.nationaljurist.com/content/bar-exam-guide> (last visited Aug. 15, 2013) (listing “Trusts & Future Interests” in California and others states).



*C. Increasing Client Information About Lawyers by Liberalizing Ethics Rules on Marketing and Broadening Public Access to Litigation Filings*

Because some clients could make informed decisions among lawyers yet lack enough information, this subpart discusses two informational measures: liberalizing ethics rules that restrict lawyer claims of expertise (subpart 1) and broadening public access to lawyers' litigation filings (subpart 2).

*1. Liberalizing Ethics Rules Restricting Lawyer Claims of Expertise*

Certain ethics rules largely bar lawyers from professing to be certified specialists in their areas of law. The following is the relevant ethics rule:

Rule 7.4 Communication of Fields of Practice and Specialization . . .  
 (d) A lawyer shall not state or imply . . . certifi[ca]tion as a specialist . . . unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.<sup>227</sup>

The unhelpfully narrow exceptions are that a lawyer may communicate (a) the mere fact that he or she “does or does not practice in particular fields” at all<sup>228</sup> and (b) two highly specific areas of expertise, “Patent Attorney”<sup>229</sup> and “Proctor in Admiralty.”<sup>230</sup>

A split exists on the Rule 7.4 Comment letting lawyers claim specialties, just not official “certification”: “A lawyer is generally permitted to state that the lawyer is a ‘specialist,’ . . . or ‘specializes in’ particular fields, . . . subject to the ‘false and misleading’ standard applied in Rule 7.1 to communications

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<sup>223</sup> *Id.* (listing Texas bar subjects).

<sup>224</sup> *Id.* (listing Montana bar subjects).

<sup>225</sup> *Id.* (listing Illinois bar subjects).

<sup>226</sup> *Id.* (listing Tennessee bar subjects).

<sup>227</sup> MODEL RULES OF PROF'L CONDUCT R. 7.4 (2009).

<sup>228</sup> *Id.* R. 7.4(a).

<sup>229</sup> *Id.* R. 7.4(b) (allowing “the designation ‘Patent Attorney’ or . . . similar” title if “admitted to engage in patent practice before the United States Patent and Trademark Office”).

<sup>230</sup> *Id.* R. 7.4(c) (allowing “the designation . . . ‘Proctor in Admiralty’ or a substantially similar designation” if “engaged in Admiralty practice”).

concerning a lawyer's services."<sup>231</sup> States such as Florida hold the opposite: "A lawyer *shall not state or imply* that the lawyer is . . . a 'specialist.'"<sup>232</sup>

This Article's finding that many nonspecialists simply cannot file competent briefs supports permitting lawyers more, not less, leeway to convey a field of expertise. Massachusetts's Rule 7.4 liberalization lets lawyers "hold themselves out publicly as specialists" with enhanced accuracy, disclosure, and competence duties:

- (a) Lawyers *may hold themselves out publicly as specialists* in particular services [and] fields . . . if [doing so] . . . does not include a false or misleading communication[.]. . . includ[ing] a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area . . .
- (c) . . . [L]awyers who associate their names with a particular service, field, or area of law imply an expertise and *shall be held to the standard of performance of specialists* in that particular service, field, or area.<sup>233</sup>

Admittedly, advertising a specialty risks misleading, and even accurate claims may not maximally draw clients to the best lawyers. But many lawyers litigate cases in which no well-informed client would hire them—a problem worsened by rules preventing actual specialists from informing clients of the expertise that substantially improves the effectiveness of their representation.

## 2. *Making Lawyers' Filings Free and More Searchable by Laypeople and Potential Reviewers*

Allowing specialty marketing may increase client information on what lawyers *claim*, but there is a more direct way to increase information on lawyers' *performance*: make litigation filings free to obtain and searchable by laypeople and those who might seek to review lawyers' performance.

For several years, lawyers have had to e-file all federal case filings; some such filings are textually searchable PDFs, allowing character-recognition content-searching and appearing on Westlaw or Lexis in plain-text form. Admittedly, non-lawyer plaintiffs cannot spot failure to cite precedents, and many cannot assess lawyer writing at all—but many can. This author has

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<sup>231</sup> *Id.* R. 7.4 cmt.1.

<sup>232</sup> FLA. RULES OF PROF'L CONDUCT R. 4-7.2(c)(6) (2013). The only exception to this bar in Florida is where the lawyer is certified by a state bar and displays the name of the certifying organization. *Id.*

<sup>233</sup> MASS. RULES OF PROF'L CONDUCT R. 7.4 (2013) (emphases added).

represented non-English-speaking and uneducated clients unable to read briefs,<sup>234</sup> but also professionals quite able to spot good and bad writing;<sup>235</sup> in between are many of this author's non-college-educated clients who still are savvy enough to read both sides' briefs and spot whether a brief tells a persuasive story, rebuts the other side's arguments, etc.<sup>236</sup>

Massive improvement in public accessibility should be a key benefit of mandating e-filing of litigation documents. Yet the current e-filing system is so primitive it not only provides almost no value to laypeople, but is cumbersome to search even for experts. Searching the text of litigation filings requires a paid Westlaw or Lexis subscription, because only those private services, not the courts, use basic character-recognition software to create plain-text versions; almost no layperson has such a subscription, and even for experts, those paid databases are incomplete, missing numerous filings (such as those this study could find only on PACER). Searching court dockets requires a subscription to PACER that is publicly available, though not quite free; downloads are ten cents a page,<sup>237</sup> which can be substantial for laypeople and can add up for researchers trying to review filings from many lawyers. Finally, PACER is not easily searchable: each of the ninety-three federal districts has a separate PACER site, making cumbersome a search for all filings by a lawyer or firm; and the search process is infeasible for laypeople, as detailed below.

- (1) Searching by attorney is possible only by unintuitively entering the *attorney* rather than *party* name as the case "name."
- (2) The search result is a list of hyperlinked case names, with no way to tell which feature briefings and which do not.

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<sup>234</sup> *E.g.*, *Ansoumana v. Gristede's Operating. Corp.*, 255 F. Supp. 2d 184, 185–86 (S.D.N.Y. 2003) (granting non-English-speaking deliverymen partial summary judgment in wage class action); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (barring immigration status discovery in non-English-speaking garment workers' wage class action).

<sup>235</sup> *E.g.*, *Sarmiento v. Queens College CUNY*, 153 Fed. App'x 21, 21–22 (2d Cir. 2005) (ruling on an anthropologist's racial discrimination and retaliation claims); *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 455 (S.D.N.Y. 2004) (deciding *Daubert* motions in financial professionals' pattern and practice sex discrimination case); *Sherry v. N.Y. Med. Coll.*, No. 99 Civ. 2310(LAK), 2000 WL 781867, at \*1 (S.D.N.Y. June 19, 2000) (granting plaintiff, a doctor, attorney's fees on her age discrimination and FMLA claims).

<sup>236</sup> *E.g.*, *Reyes v. Snowcap Creamery, Inc.*, 898 F. Supp. 2d 1233, 1233–34 (D. Colo. 2012) (denying immigration status discovery on cook's wage claims); *Marini v. Adamo*, 812 F. Supp. 2d 243, 248 (E.D.N.Y. 2011) (denying summary judgment on RICO and securities fraud claims of a successful but non-college-educated small business owner).

<sup>237</sup> *Electronic Public Access Fee Schedule*, PACER (Apr. 1, 2013), [http://www.pacer.gov/documents/epa\\_eesched.pdf](http://www.pacer.gov/documents/epa_eesched.pdf).

- (3) Each case name links to an unintuitive list; seeing filings requires clicking not “attorney” or “history/documents,” but “docket report.”
- (4) Clicking “docket report” yields a list of all parties’ lawyers followed by a typically multi-page list of all filings, each in terminology likely to leave laypeople unclear which of dozens or hundreds to read. For example, in one case this author litigated, the ten-page docket shows ten lawyers, six parties, and 222 docket entries; a layperson looking for the author’s brief would need to spot the following entry as “the brief”:

12/29/2010 116 MEMORANDUM in Opposition re 102  
Notice of MOTION for Partial Summary Judgment  
Corrected Memorandum filed by Josephine Marini,  
Rocco Marini, T&R Knitting Mill, Inc. (Attachments:  
# 1 Appendix) (Moss, Scott).<sup>238</sup>

Such a labyrinthine and jargon-filled process makes PACER possibly the Internet’s least user-friendly database, less a “Public” system of “Access” (the “P” and “A” in “PACER”) than a virtual world’s Rube Goldberg machine concocting ways of “doing simple tasks in convoluted ways.”<sup>239</sup> Better searchability is almost universal for Internet-accessible content, from not just private information providers like Westlaw and Lexis, but online stores, media entities, etc.—none of which leave their content in non-textually-searchable PDFs not indexed by service provider.

Federal courts should digitize their content, or negotiate with Westlaw or Lexis to share that content, rather than leave essentially inaccessible the litigation filings so critical to efforts to review lawyers’ performance. If searches were more intuitive, at least some laypeople could review lawyer filings for basic competence. Further, if searches were free and could span all districts, a better market for lawyer reviews might arise organically, with well-informed reviewers (e.g., non-practicing lawyers) far better able to provide online reviews than they are now.

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<sup>238</sup> Docket Sheet, *Marini*, 812 F. Supp. 2d 243 (No. 2:08-cv-03995).

<sup>239</sup> “Rube Goldberg was a 20th century cartoonist . . . best known for his depictions of complex devices doing simple tasks in convoluted ways.” Gregory L. Fordham, *Using Keyword Search Terms in E-Discovery and How They Relate to Issues of Responsiveness, Privilege, Evidence Standards, and Rube Goldberg*, 15 RICH. J.L. & TECH., Spring 2009, Article No. 8, at 30.

*D. Increasing Competent Lawyer Supply by Liberalizing Tester Standing Restrictions and Ethics Rules on Corporate Ownership of Law Practices*

Because part of the problem is insufficient supply of competent lawyers, this subpart discusses two supply-increasing measures: liberalizing standing-to-sue restrictions on “testers” filing employment discrimination cases (subpart 1) and liberalizing ethics rules barring corporate ownership of law practices (subpart 2).

*1. Liberalizing Tester Standing*

[A] “tester” is an individual who, without the intent to accept . . . employment, poses as a job applicant . . . to gather evidence of discriminat[ion] . . . . [T]he dispatch of pairs of equally credentialed candidates, one black and one white . . . with similar personalities and . . . similar backgrounds, credentials, and [job] interview techniques . . . can [yield] invaluable evidence of discrimination in the job market.<sup>240</sup>

Testers provide “invaluable evidence,” but can they, and organizations who dispatch them, sue for the discrimination they uncover? “Courts have differed as to whether employment testers have standing under Title VII”: on the one hand, a successful “test” shows a core violation—“[t]wo people apply for the same position . . . [and] the company offers the position to [only] the white applicant”; on the other hand, “the motives of the employment tester and of a bona fide applicant are different—the applicant wants a job while the tester wants to uncover evidence,” so testers’ “alleged injuries do not fall within the statute.”<sup>241</sup>

This Article adds another argument to the debate about testers: because most discrimination suits by private parties are litigated so badly, tester suits may be more valuable than previously recognized, because the average lawyering quality will be stronger. An organization undertaking a major endeavor like testing is unlikely to litigate lazily or with ignorance of modern discrimination law, as too many private plaintiffs’ lawyers do. One traditional argument for restricting standing is that “[t]he likelihood that a party’s advocacy will be sufficiently vigorous has traditionally been thought to vary

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<sup>240</sup> Michael Bowling, Note, *The Case Against Employment Tester Standing Under Title VII and 42 U.S.C. § 1981*, 101 MICH. L. REV. 235, 236–37 (2002) (first capitalization alteration in original) (internal quotation marks omitted).

<sup>241</sup> Anthony F. Spalvieri, Note, *Employment Testers: Obstacles Standing in the Way of Standing Under § 1981 and Title VII*, 52 CASE W. RES. L. REV. 753, 753–55 (2002).

with the party's stake in the outcome"; thus the "traditional rules" restricting standing reflect a "belief that only injury will adequately assure the personal stake necessary for vigorous advocacy."<sup>242</sup> But tester standing likely improves rather than weakens advocacy, supporting standing despite the lack of a more traditional form of injury.

## 2. *Liberalizing Rules Barring Corporate Ownership of Law Practices*

"Under rules effective throughout the United States, corporations are prohibited from law practice ownership."<sup>243</sup> Thus law firms typically are partnerships or individuals, and corporations offering financial and personal services offer no legal services. In Europe, the supermarket Tesco offers legal services: "will writing, do-it-yourself divorce kits, rental agreements, and forms for setting up a small company."<sup>244</sup> But American retailers like Target cannot "add a legal assistance window next to the banking center or health care provider located in its stores"; nor can Google, a leading information provider, "take the next step to directly own or invest in a law practice."<sup>245</sup>

Business law scholars argue that barring the basic business form (corporations) from a major service field (law) has "created an inefficient legal services market[,] . . . limiting [firms'] opportunities for expansion, curtailing investments in technology and training, and hindering competition."<sup>246</sup> Permitting lawyers more versatile corporate forms, and letting corporations enter legal markets, advocates claim, could lower costs, thereby "increas[ing] access to legal services for moderate and low-income individuals," as well as those in rural areas lacking major law firms; it also could improve the "quality of legal services," because enhanced competition increases incentive "to practice law competently."<sup>247</sup> Notably, some legal ethicists agree, calling "indefensibly lawyer-centered"<sup>248</sup> the corporate bar that "suppress[es] competition," serving only "the interests of ABA control groups."<sup>249</sup> Such

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<sup>242</sup> Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 650 (1983).

<sup>243</sup> Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 5 (2012).

<sup>244</sup> *Id.* at 40.

<sup>245</sup> *Id.* at 7.

<sup>246</sup> Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 1 (1998) (criticizing corporate bar as an inefficient barrier to entry); see also Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 792.

<sup>247</sup> Knake, *supra* note 243, at 43 (surveying benefits noted by various scholars).

<sup>248</sup> Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 247 (1985).

<sup>249</sup> *Id.* at 268.

ethicists “suggest corporate ownership and investment in legal services . . . to address the dire access-to-justice problem”<sup>250</sup> that “[m]illions in need of representation cannot afford to hire[,] . . . [or] make an informed decision about[,] the best-suited lawyer.”<sup>251</sup>

There are substantial counterarguments, however. Corporate ownership may weaken norms of client primacy; a corporate-driven lawyer may feel pressed to drop still-viable cases or skimp on high-effort motions. Corporate-provided lawyering also may be less suited for complex cases than for fee-for-service tasks like wills, evictions, or benefits hearings.<sup>252</sup> Yet these arguments are not dispositive. Fear of a bottom-line focus applies equally to current law practice, given the “economic realities . . . that law practice is a business,” already “pressured . . . by competition and technolog[y].”<sup>253</sup> Further, for complex legal work, corporations can enjoy “economies of scale,”<sup>254</sup> mastering a field like employment litigation with (a) high demand (given the case volume) and (b) high intellectual startup costs for nonspecialists. A corporation could dispatch a few supervisory experts to help a fleet of novices outperform the now-unaided novices who file doomed low-quality briefs.

Full appraisal of the corporate ban is beyond this Article’s scope. But the ongoing litigated and legislative challenges to the ban<sup>255</sup> draw support from this Article’s evidence that the current legal services market serves clients poorly, making any market-expanding reform possibly worth the risk.

*E. Increasing Enforcement of “Competence” Ethics Rules Against the Worst Brief-Writers Litigating Cases Requiring Substantial Briefs*

This Article’s final proposal is that the lawyers who write the worst briefs should be discouraged from litigating employment discrimination cases, which require writing they are unwilling or unable to do. Courts and state bars largely avoid diving into the murk of assessing lawyer “competence,” but this Article shows that the problem is substantial enough to reflect rampant violations of a core legal ethics rule. ABA Model Rule 1.1, “Competence,” requires as

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<sup>250</sup> Knake, *supra* note 243, at 10–11.

<sup>251</sup> *Id.* at 2.

<sup>252</sup> *Id.* at 7–8 (noting corporations would be most drawn to “routine legal assistance such as divorce filings, wills, real estate transactions, and basic contracts, . . . [and] ‘low-end’ legal service[s], such as consumer law and Legal Aid work” (internal quotation marks omitted)).

<sup>253</sup> *Id.* at 42.

<sup>254</sup> *Id.* at 45 (noting economies of scale in simpler forms of legal services).

<sup>255</sup> *Id.* at 9 (documenting litigatory and legislative attacks in four states).

follows: “A lawyer shall provide competent representation . . . [that] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>256</sup>

Employment discrimination has not previously been, but should be, recognized as a field in which nonexperts have heightened obligations either to refer a case to an expert, to co-counsel with an expert, or simply to commit to careful study that may not be billable to the client.<sup>257</sup> “In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field . . . may be required in some circumstances.”<sup>258</sup>

[F]actors include the relative complexity and specialized nature of the matter, the lawyer’s general experience . . . [and] training and experience in the field . . . , the preparation and study the lawyer is able to give the matter and whether it is feasible to refer . . . to, or associate or consult with, a lawyer of established competence . . . .<sup>259</sup>

Sanctions or discipline for incompetent briefing would be a change to present practice, given the lack of punishment for even the worst briefs cited above. But there is support in the professional responsibility caselaw for such sanctions. Just as this Article notes that many of the good brief-writers are experts in the field while the bad brief-writers typically are not,<sup>260</sup> the court in *Attorney Grievance Commission of Maryland v. McClain*<sup>261</sup> found a competent trial lawyer proved an incompetent brief-writer, in violation of Rule 1.1:

While Respondent’s trial performance skirted the bounds of competent representation, his [appellate] representation . . . cannot be deemed to have been competent. . . . [H]e presents nothing more than legal references and conclusions . . . not presented in the context of facts . . . , nor does he make an effort to apply the law, or invoke precedent . . . . [His] reliance on *Dorsey* and *Kelly* is misplaced and the cases inapplicable, . . . and [he] fail[s] . . . to present a lucid and substantial argument . . . . Respondent violated MRPC 1.1.<sup>262</sup>

The problem in *McClain* was not “dishonest or selfish motives, nor . . . intent to hurt” his client; rather, it was—as in many of the briefs cited above—

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<sup>256</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009).

<sup>257</sup> See MODEL CODE OF PROF’L RESPONSIBILITY EC 6-3 (1980) (noting that an attorney’s study in an unfamiliar field of law necessary to a case must not yield “unreasonable delay or expense to his client”).

<sup>258</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (1983).

<sup>259</sup> *Id.*

<sup>260</sup> See *supra* Part III.B.3.

<sup>261</sup> 956 A.2d 135 (Md. 2008).

<sup>262</sup> *Id.* at 141.



submitting arguments “not supported by the case law, cited or otherwise.”<sup>263</sup> The court in *Rowe v. Nicholson*<sup>264</sup> also found Rule 1.1 violated by failure to cite cases:

[Counsel] fails to acknowledge this Court’s en banc decision in *Douglas* and cites no caselaw in support of his position, which is contrary to *Douglas*. He does not make a specific argument . . . [to] overrule *Douglas* and provides no basis for distinguishing *Douglas* . . . . [P]rofessional obligations [include] to provide briefs . . . [with] citation to pertinent and significant authority on the issues raised. . . . R. 1.1.<sup>265</sup>

Various courts’ practice rules are helpfully more specific than Rule 1.1 in detailing brief-writing standards many lawyers violate. Yet only on rare occasion do judges expressly criticize a brief and make clear that incompetence was the basis for the lawyer’s loss. In *Sekiya v. Gates*,<sup>266</sup> a Ninth Circuit panel took the unusual step of publishing a decision declaring as follows: “We strike Sekiya’s opening brief in its entirety pursuant to Ninth Circuit Rule 28-1 and dismiss the appeal. We publish this opinion as a reminder that material breaches of our rules undermine the administration of justice and cannot be tolerated.”<sup>267</sup> The employment discrimination plaintiff’s brief that the *Sekiya* court derided as “a slubby mass of words rather than a true brief”<sup>268</sup> was no worse than the many briefs this Article cites:

[C]ounsel *must* provide . . . “appellant’s contentions and the reasons for them, with citations to the authorities and . . . the record . . . .” [Plaintiff] challenges the district court’s conclusion on summary judgment . . . by asserting that Plaintiff–Appellant disagrees and . . . assert[ing] facts without adequate citation to the record . . . [or] caselaw[,] fall[ing] far short of the requirement [of] . . . “appellant’s contentions and the reasons for them.”<sup>269</sup>

In sum, there is precedent for disciplining attorney writing bad enough to fail basic professional standards.<sup>270</sup> Yet not even the worst briefs this Article

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<sup>263</sup> *Id.* at 144.

<sup>264</sup> No. 05-222, 2007 WL 1470305 (Ct. Vet. App. Apr. 26, 2007).

<sup>265</sup> *Id.* at \*6.

<sup>266</sup> 508 F.3d 1198 (9th Cir. 2007).

<sup>267</sup> *Id.* at 1199–200.

<sup>268</sup> *Id.* at 1200 (quoting *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997)).

<sup>269</sup> *Id.* (quoting FED. R. APP. P. 28) (internal quotation marks omitted).

<sup>270</sup> In addition to the above cases, see, for example, *Gardner v. Investors Diversified Capital, Inc.*, 805 F. Supp. 874, 875 (D. Colo. 1992) for a dismissal without leave to amend plaintiff’s amended complaint that was “replete with misspellings, grammatical aberrations, non sequiturs and solecisms.” See also, e.g., *In re*

studied drew discipline, even though it is impossible to square such briefs with ethical mandates to represent clients competently and know key applicable law.

Bar discipline can disincentivize lawyers from another unethical practice: dropping a case unilaterally by filing a hopeless, low-effort brief. As noted above, one explanation of bad briefs is that some lawyers pursue the litigation-as-option strategy: filing many cases of weak to middling strength; then, during pretrial, dropping all but the few that prove strong after limited-cost discovery.<sup>271</sup> But with civil procedure, court, and ethics rules barring lawyers from unilaterally dropping cases, a low-effort brief on summary judgment is a way of effectively forfeiting cases a lawyer deems unprofitable. Discipline for blatantly low-effort briefs therefore draws support from the reality that knowingly filing a weak, low-effort brief evades multiple rules against unilaterally dropping cases.

Disciplinary measures likely depend on the judges adjudicating these cases, because other actors lack the ability to make credible reports: bar authorities lack information on court filings absent a credible report of malfeasance; clients too often lack knowledge of poor writing performance; and opposing counsel, though well positioned to spot an adversary's malfeasance, would risk looking tactical or manipulative by filing a complaint that an opponent was unethical. Judges, moreover, are lawyers facing the Rule 8.3(a) ethical duty to "inform the appropriate professional authority" upon learning "that another lawyer has committed a violation of the [ethics] Rules . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer."<sup>272</sup> Based on this Article's findings, judges should consider fulfilling that duty more aggressively when presented a litigation filing like the worst of the briefs this Article studies.

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Hawkins, 502 N.W.2d 770, 770–72 (Minn. 1993) (reprimanding publicly a lawyer and ordering him to attend remedial instruction given "his repeated filing of documents rendered unintelligible by numerous spelling, grammatical, and typographical errors"); *In re Marriage of Green*, 213 Cal. App. 3d 14, 29 (1989) (ordering appellant to pay appellee's legal fees because of "the slap-dash quality of [his] briefs"); *Slater v. Gallman*, 339 N.E.2d 863, 864–65 (N.Y. 1975) (imposing costs for filing "an extreme example" of a "poorly written and excessively long brief[], replete with . . . irrelevant[] and immaterial matter").

<sup>271</sup> See *supra* notes 166–72 and accompanying text.

<sup>272</sup> MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2009).

## CONCLUSION

This Article's finding, that employment discrimination plaintiffs' briefs are overwhelmingly low-quality, adds to several lines of scholarship. First, it helps explain why plaintiffs have such a high loss rate on summary judgment. Without taking sides as to other causes, one cause is plaintiffs' defaults on key issues (like the same-actor defense), which generate more pro-defense caselaw (like the summary judgment grants crediting the defense that follow bad plaintiffs' briefs).

Second, this Article's findings provide support to controversial reform proposals that had not previously focused on briefing quality. In pinpointing work lawyers do badly, this Article supports expanding experiential learning and bar efforts to educate lawyers in specialty areas. In concluding that clients make poorly informed choices among lawyers, this Article supports liberalizing ethics rules on lawyer expertise claims and improving access to searchable dockets. In diagnosing a disturbing prevalence of incompetent lawyers, this Article supports liberalizing restrictions on who can practice in the field, including "tester" standing restrictions and rules barring corporate ownership of law practices. Finally, in finding that even the worst briefs go unredressed, this Article supports strengthened enforcement of "competence" ethics rules.

Third, this Article exploits a novel methodology not previously available to legal scholars. With federal court adoption of e-filing by the mid-2000s only very recently yielding enough years of textually searchable filings for a large sample size, scrutiny of the content of court filings is a potentially substantial new field for academic study. Future potential work includes studying the following:

- other employment discrimination filings (e.g., complaints);
- *defense* briefs, which (as noted above) are harder to assess objectively than whether *responsive* briefs (like plaintiffs') fail to rebut a point;
- briefs in other areas of law (e.g., antitrust) or on other types of motions (e.g., class action certification motions); and
- lawyer filings in criminal defense, in which the ineffective assistance of counsel defense<sup>273</sup> long has sparked debate about

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<sup>273</sup> See *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (holding that an objective standard of reasonableness and of impact on outcome apply to ineffective assistance of counsel claims).

the cause, the prevalence, and even the definition of low-quality lawyering.<sup>274</sup>

More broadly, legal work has become easier to search and study, allowing reform prescriptions tailored to identified problem areas—such as researching and writing briefs on complex topics like employment discrimination.

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<sup>274</sup> See, e.g., Jahaan Shaheed, *The “Amorphous Reasonable Attorney” Standard: A Checklist Approach to Ineffective Counsel in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 905, 905 (2011).