Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects

Scott A Moss

Available at: https://works.bepress.com/scott_moss/4/
Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects

Scott A. Moss*

ABSTRACT

For a major field, employment discrimination suffers surprisingly low-quality plaintiff’s 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 won/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” living off quick small settlements. A survey of the worst brief writers’ law firms hints the problem may be a mix of the former (non-specialists in over their heads) and the latter (knowingly litigating cheaply). This Article offers reforms that, while no cure-all for a problem tracing to 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 ethics rules on corporations owning law firms and by rules restricting the standing to sue of discrimination “testers”; and (4) toughening ethics enforcement against the worst offenders, who almost all go unpunished now.

* Associate Professor, University of Colorado Law School. The author thanks, for valuable feedback on presentations, those at the 2011 National Employment Lawyers Association Meeting, 2011 Labor/Employment Scholarship Colloquium at UCLA, Southwestern, and Loyola-Los Angeles Law Schools, and 2012 Midwest Law & Economics Association Meeting at Washington University in St. Louis. For valuable feedback on drafts, the author thanks Professors Michael Dimino, F. Andrew Hessick, Samuel Jordan, Renee Newman Knake, Alexandra Lahav, Adam Muchmore, Laura Beth Nielsen, Nantiya Ruan, Peter Siegelman, and his colleagues at the 2013 Works-in-Progress Series at Colorado Law. For their hard work as research assistants, the author thanks Leah Gould, Jessica Smith, and Genet Tekeste. The author also thanks, for instilling a deep fascination with summary judgment motions, the many district and appellate judges who have ruled against him on such motions.
# TABLE OF CONTENTS

**Introduction** ........................................................................................................................................... 3

**I. Methodology** ......................................................................................................................................... 8

A. The “Same-Actor” Defense: A Case Study in Briefing Quality. ..................................................... 8


   a. Extensive Caselaw Crediting the Defense. ...................................................................................... 8

   b. Criticism of the Defense, Including in the Circuits Crediting It. .......... 9

2. The Hypothesis: Given the Intra-Circuit Split, Plaintiffs Have No Excuse for Omitting Caselaw Rejecting the Same-Actor Defense. ...................................... 14

B. Case Sample and Data Set: Same-Actor Briefings in Selected Districts. ......................... 17

1. Case Sample: Selected Judicial Districts with a High Density of Cases, Quality Lawyers, and Legal Resources. ................................................................. 17

2. Data Set: Summary Judgment Briefs on the Same-Actor Defense. ................................ 18

**II. Findings** ............................................................................................................................................... 18

A. Finding #1: Most Employment Discrimination Plaintiffs’ Briefs (73%) Lack Caselaw and Arguments Any Competent Brief Would Feature. ............ 19

1. Incoherent or Ungrammatical Writing. ............................................................................................ 19

2. Agreeing That Same-Actor “Strongly” Implies Nondiscrimination. .......... 21

3. No Legal Research, Just Boilerplate Lists of Unhelpful Basic Cases...... 21


5. Defaulting Entirely by Failing to Oppose Summary Judgment at All. .... 25

B. Finding #2: Bad Brief Writers Lose on Summary Judgment Over Twice as Often (86%) as Good Brief Writers (42%). ......................................................... 26

C. Finding #3: Bad Briefs Yield More Pro-Defense Caselaw. .................................................. 27

**III. Questions Posed by the Findings – and Possible Answers** ........................................................................... 29

A. Bad Client Choices: Why Do Most Clients Hire Lawyers Who File Bad Briefs and Overwhelmingly Lose, with Little Hope of Reaching Trial? ...... 29

B. Bad Lawyer Choices: How Can So Many Lawyers Litigate Cases They Cannot Handle Competently without Being Driven from the Market? .......... 30

1. Ignorant Optimism: Employment as Siren Call to the Unqualified. .......... 30

2. Lazy Lawyering Pays: A Lawyer’s Troubling Incentive for a Low-Effort “Settlement Mill” Strategy Not Maximizing Case Value..... 31


C. Bad Ethics Enforcement: Why Do the Bar and Judiciary Tolerate Widespread Incompetence in a Major Field of Law? ........................................... 38
1. The Difficulty of Knowing Not Only What Plaintiff’s Counsel Should Have Argued, But Also What Errors Are Harmless. ...............38
2. Bureaucracy and Controversy-Avoidance. ................................................39
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 ..................39

IV. Possible Redress ........................................................................................................39
A. The Caveats: A Degree of Judicial Blame, and a Degree of Intractability. ...39
B. Increasing Lawyer Training with Educational Efforts and Reforms. ............41
1. Supporting Bar Association Outreach. .........................................................41
2. Experiential Learning Targeted to the Writing Lawyers Do Badly ..........42
3. Making Substantive Employment Discrimination Law Simpler and a Bar Examination Topic .........................................................44
C. Increasing Client Information about Lawyers, by Liberalizing Ethics Rules on Marketing and Broadening Public Access to Litigation Filings. ....45
1. Liberalizing Ethics Rules Restricting Lawyer Claims of Expertise ....45
D. Increasing Competent Lawyer Supply, by Liberalizing Ethics Rules on Corporate Ownership of Law Practice and Tester Standing Restrictions.....48
1. Liberalizing Tester Standing .................................................................49
2. Liberalizing Rules Barring Corporate Ownership of Law Practice ..........49
E. Increasing Enforcement of “Competence” Ethics Rules against the Worst Brief Writers Litigating Cases Requiring Substantial Briefs ..................51

Conclusion ..................................................................................................................53

“We Have Met the Enemy, and He Is Us” – Walt Kelly

INTRODUCTION

Employment discrimination features surprisingly low-quality plaintiff’s lawyering for a field that reflects important federal policy and, at 6-10 percent of the federal docket, is one of the most common case types. This Article details a study showing that, on the summary judgment motions that dispose of

1 WALT KELLY, THE BEST OF POGO 224 (1982). The saying classically applies whenever advocates hurt their cause, as plaintiff’s lawyers do with the bad briefs this Article analyzes.
3 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 employment discrimination has been the first to third most common federal case type).
employment cases with “almost Pavlovian frequency,”4 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 their cases were doomed from the start. This finding poses a series of puzzles 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 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 is all employment discrimination defendants’ summary judgment briefs on Westlaw arguing 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 consists of the plaintiffs’ opposing summary judgment briefs, both those on Westlaw and those on only the PACER5 repository of federal court filings. Of 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

---

4 Arthur R. Miller, The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitment?, 78 N.Y.U. L. Rev. 982, 1053 (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. Id. at 1069. For studies of summary judgment grants, see Joe Cecil & George Cort, Estimates of Summary Judgment (June 15, 2007) (https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf, last viewed Dec. 16, 2012) (Federal Judicial Center study finding that, of all summary judgment motions in 2006, in 78 federal districts, “[a]pproximately 60 percent of . . . motions are granted in whole or in part,” while “[o]ver 70 percent . . . [are] in employment discrimination”); Vivian Berger, Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits, 23 HOFSTRA LAB. & EMP. L.J. 45, 53, 55 tbl.1, 57 tbl.3 (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, 559-60 (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).”).

5 PACER, the “Public Access to Courthouse Electronic Records,” lets lawyers e-file documents and lets the public access case files; each district has its own PACER page. E.g., S.D.N.Y. PACER, https://ecf.nysd.uscourts.gov/cgi-bin/login.pl (last visited Sept. 19, 2012).
unreported decision on PACER. Others have studied and criticized brief quality
anecdotal
6
or have noted plaintiffs’ perceptions of poor lawyering.
7
But no studies systematically review a large database of lawyer filings, likely because
that was previously infeasible: only several years after e-filing became universal
by the mid-2000s was a large sample of digitized briefs available for analysis.

Part II details the following three findings. First, as Part II(A) details: 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 admitted by judges concerned about summary judgment practice.8

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.9 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

6
See, e.g., Stephen J. Dwyer et al., How to Write, Edit, and Review Persuasive Briefs: Seven
(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
(1997) (analyzing briefs with a wide range of legal and writing errors).

7
Ellen Berrey et al., Situated Justice: A Contextual Analysis of Fairness and Inequality in
Employment Discrimination Litigation, 46 L. & Soc’Y REV. 1, 21 (finding from survey data
that roughly one-fourth of employment discrimination plaintiffs “recount serious mistakes
their lawyers made and other forms of incompetence,” and another one-tenth “mention ways .
. . their lawyers disappointed them by giving bad advice [or] making mistakes”).

8
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; “I said that more nicely than the article.” The Interplay of Pleading Standards &
Summary Judgment, SUMMARY JUDGMENT, IQBAL, & EMPLOYMENT DISCRIMINATION,
(comments at 14:16). 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. Id., http://www.youtube.com/watch?v=iA2PorODZk&feature=youtu.be

9
Supra note 4.
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, whether the ensuing decision credits that defense depends on whether the plaintiff rebutted it. Among decisions mentioning the same-actor defense: when the plaintiff rebutted 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 case outcome (the plaintiffs might have lost anyway), it affects future case outcomes by skewing the caselaw toward defendants.

Part III then notes 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 Yugas or exploding Pintos over Hondas or Toyotas? Part III(A) diagnoses the problem as imperfect information: clients are (a) non-repeat players, in a market (b) requiring specialized knowledge, and (c) where performance outcome measures are elusive, given how few cases yield public verdicts and how hard briefs are for laypeople to access 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 product it cannot profitably sell? Part III(B) discusses two competing answers. Part III(B)(1) notes that perhaps bad lawyers do not somehow stay in the field; perhaps the number of experts is swamped by hordes of unqualified lawyers entering briefly, then leaving after losses. On this view, employment cases are a siren’s call for non-experts 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 mandated diligence (heavy discovery, research, writing, etc.) may maximize client recovery yet decrease lawyer profitability. Expending minimal effort on a few wins, many small settlements, and many summary judgment losses may be profit-maximizing for lawyers, despite yielding disappointing average values for clients and yielding an increased pool of pro-defense precedent that decreases the future pool of winnable cases. A principal-agent problem drives a wedge between client and lawyer interests in fields featuring (a) contingency fees, (b) complex issues requiring high effort, and (c) modest recoveries in the five to six, not seven, 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 sanctions-
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 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 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 consequence 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 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 enforcing “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.


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?10

This “same-actor defense,”11 “same-actor inference,”12 or “common-actor”13 defense or inference bases on the logic Judge Richard Posner bluntly explained in the above quotation. Extensive caselaw in most circuits credits the defense as a basis for summary judgment, in appellate14 and district15 decisions alike.

10 Id. 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 Fed. Appx. 312, 318 (6th Cir. 2003).

Davis was hired . . . [and] fired only four years later . . . by Kimzey, . . . giving 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) (quoting Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991)).

11 E.g., Tuttle v. Metropolitan Government 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. . . .”).

12 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.”) (citations omitted).

13 Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 747 (7th Cir. 2002).

14 See, e.g., Antonio v. Sygma Network, 458 F.3d 1177, 1183-84 (10th Cir. 2006) (crediting same actor defense in affirming summary judgment); Herrnreiter, 315 F.3d at 747-48 (same); Grady v. Affiliated Central, Inc., 130 F.3d 553, 560-61 (2d Cir. 1997) (same); EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (same); Wofford, 67 Fed. Appx. at 318-19 (same); Brown, 82 F.3d at 658 (same); Proud, 945 F.2d at 797-98 (same); Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 959-961 (4th Cir. 1996) (same).

15 See, e.g., Blasi v. Bd. of Educ., No. 00-CV-5320, 2012 WL 3307227, *18 (E.D.N.Y. Mar. 12, 2012) (granting summary judgment because “plaintiff has not established a prima facie case” where her “was hired and fired by the same decisionmakers over a short time”); Martin v. State Univ. of N.Y., 704 F. Supp. 2d 202, 225 (E.D.N.Y. 2010) (crediting same-actor defense in
Schechner v. KPIX-TV\textsuperscript{16} 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.”\textsuperscript{17}

This caselaw shows it is no empty verbiage when judges call the inference “strong” and “powerful,”\textsuperscript{18} or a “significant burden” that overcomes “fealty to proof schemes.”\textsuperscript{19} Because same-actor facts are a “recurrent situation,”\textsuperscript{20} the defense, though “largely ignored in the legal academic literature, . . . has been a silent killer” of discrimination claims.\textsuperscript{21} 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[]. . . . [I]t is extremely difficult for a plaintiff to overcome as a practical matter.”\textsuperscript{22} Scholarship documents how commonly the presence of a “same actor” yields dismissal despite strong evidence the employer gave the sort of pretextual explanation that typically lets a claim survive summary judgment.\textsuperscript{23}


The defense has earned mostly unfavorable academic attention – yet the one publication initially mentioning it, in passing, somehow has trumped the wider


\textsuperscript{16} 686 F.3d 1018 (9th Cir. 2012)
\textsuperscript{17} Id. at 1027.
\textsuperscript{18} Evans, 80 F.3d at 959 (“[B]ecause Houseman is the same person who hired Evans, there is a ‘powerful inference’ that the failure to promote” was not discriminatory”).
\textsuperscript{19} Proud, 945 F.2d at 796.
\textsuperscript{20} Id.
\textsuperscript{21} Natasha T. Martin, Pretext in Peril, 75 MO. L. REV. 313, 359 (2010).
\textsuperscript{23} See Stone, supra note 22, at 118 (blaming inference’s “undue strength” for “premature and unjust” summary judgment grants); Julie Northup, 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, . . . conclude[d] that employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing”).
criticism. The origin of the doctrine was a brief mention in a prominent 1991 law-and-economics publication on what Proud v. Stone, 25 “[t]he first case to apply the same-actor inference to dismiss” a claim, 26 turned into a “strong inference”:

“Claims 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.” 27

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 since have argued that a “strong presumption” yields “erratic and unthinking” dismissals of too many claims, 28 especially given “the structure so prevalent in today’s work environments, where several individuals contribute to a decision.” 29 Others attack the psychological assumption of the defense. “[E]mpirical research suggests . . . [t]he 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. 30 Specifically, because “resistance to or unintended reliance on implicit stereotypes varies[,] . . . [s]mall changes in the situation[] . . . give rise to marked behavioral inconsistency” 31

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. . . . Decisionmakers who hold egalitarian beliefs but are affected by implicit bias operate in . . . tension . . . . [C]ross-situational consistency . . . cannot be expected . . .

25 945 F.2d 796 (4th Cir. 1991).
27 Id. at 797 (quoting Donohue & Siegelman, supra note 24, at 1017).
28 Northup, supra note 23, at 193 (arguing that “erratic and unthinking application of the ‘same actor inference’ will discourage . . . valid complaints[.] . . . permit[ting] employers to discriminate”); see Anna Bryant & Richard A. Bales, Using the Same Actor “Inference” in Employment Discrimination Cases, 1999 UTAH L. REV. 255, 257 (1999) (“[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”).
31 Id. at 1050.
to support a... ‘strong inference,’ like the same actor rule.\textsuperscript{32}

Others argue that the same-actor inference, even if justifiable, is misused: “same-actor facts are simply evidence... [but] do not... justify... summary judgment.”\textsuperscript{33} This procedural critique blends with the substantive critique that crediting the defense “reduce[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.”\textsuperscript{34}

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.”\textsuperscript{35} The Eleventh Circuit held the same even where the actor executed multiple actions (not just hiring) in Plaintiff’s favor before firing him:

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... [I]t is important to reiterate that this [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.\textsuperscript{36}

Interestingly, though most courts credit the same-actor defense as a basis for summary judgment,\textsuperscript{37} some circuits – in particular, the Second and Seventh – feature an \textit{intra}-circuit split. Second Circuit cases hold that the defense “strongly suggest[s]... discrimination was unlikely,” not only but “especially... when

\textsuperscript{32} Id. at 1052; see Stone, \textit{supra} note 22, at 114 (noting that because the defense ignores how “ways 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”).

\textsuperscript{33} Goldman, \textit{supra} note 26, at 1537; see Stone, \textit{supra} note 22, at 116 (“Simplistic narratives such as ‘someone who hires... should be presumed to act without bias’... [have] “no place... [on] summary judgment.”).  

\textsuperscript{34} Martin, \textit{Immunity For Hire}, \textit{supra} note 29, at 1174.

\textsuperscript{35} Waldron v. SL Indus., 56 F.3d 491, 496 (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. \textit{See also} Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 321 (3rd Cir. 2000) (criticizing the defense: “[A]n employer who harbors a discriminatory animus may nevertheless allow one or two females to advance for the sake of appearances.”).

\textsuperscript{36} Williams v. Vitro Servs., 144 F.3d 1438, 1443 (11th Cir. 1998).

\textsuperscript{37} Martin, \textit{Pretext in Peril}, \textit{supra} note 21, 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.”)
the firing . . . [was] only a short time after the hiring,” because “it is difficult to impute . . . invidious motivation . . . inconsistent with the decision to hire.”

Seventh Circuit cases hold that the defense supports “a presumption . . . of nondiscrimination” sufficient for summary judgment even if the hiring was four or seven years before the firing. Yet other cases in those circuits reject the defense, in language rivaling cases in circuits wholly rejecting the defense.

The Seventh Circuit in *Nwanna v. Ashcroft* reversed a summary judgment grant because “resort to the ‘same actor inference’ is premature . . . [I]t ‘is just something for the trier of fact to consider.’” Also reversing summary judgment, *Johnson v. Zema Systems Corp.*, detailed why 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 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] plaintiff is unable to present sufficient evidence . . . .

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

---


39 Chiaramonte v. Fashion Grp., 129 F.3d 391, 399 (7th Cir. 1997) (crediting same-actor defense on summary judgment); see Rand v. CF Indus., 42 F.3d 1139, 1147 (7th Cir. 1994) (same).

40 Id.

41 Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 392, 399 (7th Cir. 1998) (crediting same-actor defense in affirming summary judgment).

42 66 Fed. App’x 9 (7th Cir. 2002)

43 Id. at 15.

44 170 F.3d 734 (7th Cir. 1999).

45 Id. at 745.

46 Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361 (7th Cir. 2001) (affirming summary judgment but rejecting same-actor defense based on *Johnson*).
The Second Circuit in *Carlton v. Mystic Transportation, Inc.*, paralleling the Seventh Circuit in *Johnson*, credited an argument that the same-actor defense does not support summary judgment:47 “the enthusiasm with which the actor hired the employee years before may have waned . . . because the relationship . . . [is] subject to time’s ‘wrackful siege of battering days.’”48 *Feingold v. New York,*49 paralleling the Seventh Circuit in *Nwanna*, declared the defense just a permissive inference, insufficient for summary judgment: “we reject defendants’ argument that because Sullivan and Schulgasser hired Feingold, an inference must be drawn” of nondiscrimination, *Feingold* held, concluding that the “same actor inference” . . . would not necessarily apply here given . . . changes in circumstances during the course of [plaintiff’s] employment.50

For the district court summary judgment briefings this Article studies, district precedents are apt citations,51 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,52 many not only reject it as *Johnson, Nwanna, Carlton*, and *Feingold* did, but use strongly critical language:

[T]his court will not apply the inference, certainly not in the context of a summary judgment motion.53

[T]he inference alone is generally not a sufficient basis to grant summary judgment . . . when the employee has evidence of pretext.54

[Gill] both hire[d] and then fire Stodola. . . . [O]n the cogent analysis in *Johnson*, the Court finds the same actor doctrine unpersuasive. . . . Gill’s role . . . does not persuade the Court that discrimination played no role . . . Should Stodola not have met [Gill’s] expectations due to . . . disability, his decision could [be] discrimination.55

---

47 202 F.3d 129 (2d Cir. 2000).
48 Id. at 132
49 366 F.3d 138 (2d Cir. 2004).
50 Id. at 154-55 (emphases added).
51 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 you seek is consistent with” how district judges have interpreted that authority. *Id.* at 46.
52 See *supra* Part I(A)(1)(a).
The 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 have rebutted any asserted inferences by the evidence offered such that the resolution of the inferences is left to the jury.56

“[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. PLAausible explanations of such “hire-fire” 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 . . . [may] develop a prejudice . . . [after] experiences 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 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 . . . prior to . . . at trial.57

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 counter-arguments 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,58 and it engenders the heated mix of support and criticism noted above.59 Most importantly here, the same-actor defense makes for an unusually good case study of plaintiffs’ brief quality for several reasons.

Holistic evaluation 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 issue in employment cases is whether witnesses partial to the employer can be credited on

58 See supra notes 37-41 and accompanying text.
59 See supra Part I(A)(1).
summary judgment. 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, 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 (eliminating irrelevant ones not actually 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,” one of the more “uniquely evolving areas of law.” 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,” but the intra-circuit split arguably lets defendants off the hook: because competing cases coexist, defendants can argue no “controlling” authority is “directly” adverse to its position that the defense is valid. Some argue that lawyers must disclose even nonbinding contrary caselaw, but there is a powerful counterargument: a strong

60 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[,] . . . giving 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); 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).


62 For the details of the Westlaw search, see infra note 82 and accompanying text.


65 ABA MODEL R. PROF’L CONDUCT 3.3(a).

66 See 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. v. Sioux Ctr., 967 F. Supp. 1483, 1499 (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”) (emphasis in original).

67 See, e.g., Robert Tyler, 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
duty to disclose contrary-to-interest counter-arguments conflicts with the lawyer’s basic duty to be “a representative of clients” who “zealously asserts the client's position.”\footnote{ABA MODEL R. PROF’L CONDUCT, PREAMBLE 2} 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 “ignore[e] controlling authority” cited by opposing counsel,\footnote{Dwyer et al., supra note 6, at 426 (noting that good briefs avoid both “mischaracterizing the holding” and “ignoring controlling authority” of adverse caselaw).} such as the circuit caselaw crediting the same-actor defense;
- a brief writer must “[a]ttack an opposing argument . . . made by your adversary . . . . Otherwise, the court will assume that you have no defense . . . . [A] lawyer who ignores adverse authority throws away the opportunity . . . to give the court reasons for not following it”\footnote{NEUMANN, supra note 61, at 324-35.};\footnote{Smith v. Lewis, 530 P.2d 589 (Cal. 1975), overruled on other grounds by In re Marriage of Brown, 544 P.2d 561 (Cal. 1976). For more detail on this point, see infra Part II(A)(3).} and the “competence” ethics rule requires “briefs . . . [with] citation to pertinent and significant authority on the issues raised”;\footnote{Rowe v. Nicholson, 23 Vet. App. 451 (Table), 2007 WL 1470305, *6 (Vet. App. Apr 26, 2007). For more detail on this point, see infra Part II(A)(3).} and

In sum, rebutting powerful opposing arguments may be the most pivotal, and is certainly not an optional, part of a good brief, as Justice Ruth Bader Ginsburg noted when asked, “what's the most important part of a brief?”: “[A]anticipate what is likely to come from the [opponent] and account for it,” she said; “you know the vulnerable points, so deal with them.”\footnote{Interviews with United States Supreme Court Justices: Justice Ruth Bader Ginsburg, 13 SCRIBES J. LEGAL WRITING 133, 142 (2010).}

Failing to find and cite available caselaw has become especially inexcusable with online research cost having substantially decreased\footnote{Lawrence 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. LEG. ETHICS 607 (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).} from the late 1990s to disclose existence of contrary authority, although not necessarily to cite it.”\footnote{See also infra Part II(A)(3).}
present, basic Lexis or Westlaw for a solo practitioner has cost as little as $100-$175 a month;75 caselaw is also free online, if in less easily searchable form.76

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 cases77 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.

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: in the Southern District of New York and all districts within the Seventh Circuit, all employment discrimination cases with fully briefed and decided summary judgment motions in which the defendant pressed the same-actor defense. 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.78 Other circuits are not so split; for example, the Third Circuit alone has rejected the same-actor inference,79 and the same-actor defense has been strongly adopted without much contrary caselaw in the Fourth and Eighth circuits.80

Second, the selected jurisdictions have high case volume. The Southern District of New York alone had more qualifying briefings (52) than all districts in the Seventh Circuit (49). The Seventh Circuit has substantial volume in the Chicago-based Northern District of Illinois; the study included the Circuit’s other districts to obtain a sample similar to that of the Southern District of New York.

---


77 See supra notes 37-41 (collecting summary judgment grants based on same-actor defense).

78 See supra Part I(A)(1)

79 Waldron v. SL Indus., 56 F.3d 491, 496 (3d Cir. 1995) (reversing summary judgment grant that had based in part on the same-actor defense, because same-actor facts are “simply evidence like any other and should not be accorded any presumptive value”).

Third, a study scrutinizing and 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. For example, the 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. If plaintiffs’ briefings are poor in even these jurisdictions with a high density of specialists and resources, that bodes poorly for the entire field.


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. 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 as old as 1999, but with many more following the 2003-2005 federal e-filing mandate. 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. 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 simple mess of incoherent writing. Infra Subpart 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. Infra Subpart B.

Third, bad briefs impact judicial reasoning. Among only those decisions

---

81 See infra notes 183-184 and accompanying text.
82 The databases are: All Databases → U.S. Federal Materials → Motions → Federal Trial Filings → District Court Filings → NY-SDCT-FILING, or IL-NDCT-FILING, etc. The following was the “Terms & Connectors” search: ( "same actor" "same decisionmaker" "same decision-maker" "common actor" "common decisionmaker" "common decision-maker" ) +1 ( doctrine presumption inference theory defense ).
84 See supra note 5.
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. *Infra* Subpart C.

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, over twice as many plaintiffs’ briefs do not cite that caselaw (73%) as do (27%). Below, the left column of Table 1 shows that frequency of plaintiffs citing same-actor caselaw; the center and right columns detail the differences in won-loss rates that Subpart (B) discusses next.

![Table 1: Plaintiffs’ Brief Quality & Summary Judgment Outcome](image)

Worse, as noted below, many briefs fail the most basic professional standards.

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 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.85

- The Defendants seeks dismissal of the above mentioned Causes of Action . . . . The Plaintiffs will set forth sufficient facts detailing the Defendant enactment and/or enforcement of a policy designed to permit unlawful discrimination . . . . 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 . . . . Upon presenting such evidence a trial is required, and not,

85 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.
dismissal as sought by the Defendants. . . . [All four of ungrammatical sentences are in just the short “Preliminary Statement,” which also fails to say what kind of discrimination (race, sex, etc.) Plaintiffs claimed.]

- Defendants’ suggestion that because Allegra is also Caucasian [sic] is a red herring [the preceding was a full sentence] . . . . 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.

- [The following two ungrammatical sentences are in a brief consisting entirely of numbered paragraphs – the proper form for affidavits, not briefs.] 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.”

- 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). [Preceding was the first header.] . . . 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. [Much of this list is repeated, verbatim, again with no fact citations.]

---

87 Rinsler v. Sony Pictures Ent’mt, Inc., 02 CV 4096, 2003 WL 23951443 (S.D.N.Y. July 21, 2003) (Plaintiff’s Memorandum of Law in Opposition to Summary Judgment). Both quoted sentences appear as they do in the brief; neither was truncated by the ellipses.
• Moreover, it is questionable whether or not defendant Amy Etheride 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, who hired her but she is not clear as to her authority to hire plaintiff on her own.90

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 case 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.91 [The preceding is the brief’s entire discussion of the same-actor caselaw.]

• Grady does not present an unrebuttable 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.92

• [Defendant] argu[es] that the “same actor” doctrine applies[:]. . . “when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute . . . 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. . . .93

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 34 numbered paragraphs – the format of complaints94 and

94 E.g., Fed. R. Civ. P. 10(b) (“Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs.”).
fact evidence submissions,\footnote{E.g., S.D.N.Y. Loc. Civ. R. 56.1 (requiring on summary judgment that each party file not only a brief, but an evidentiary supported “statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried”).} not briefs – and cited only six cases:

- \textit{McDonnell Douglas Corp. v. Green},\footnote{411 U.S. 792 (1973).} the 1973 Supreme Court case listing each side’s basic evidentiary burdens in a Title VII case;

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 the four pages in that brief:

\begin{quote}
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 nonmoving . . . .

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

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

To establish a prima facie case of discrimination . . . .
\end{quote}

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

- one brief cited only three cases on the discrimination claim – one Rule 56 precedent from 1986 and two basic discrimination precedents;\footnote{Siddiqi v. N.Y. City Health & Hosp. Corp., 07 CV 2740 (Docket #20) (S.D.N.Y. Apr. 15, 2008) (Plaintiff’s Memorandum of Law in Opposition to Summary Judgment).}

\footnote{Parker v. City of Elgin, 03 CV 0171, 2004 WL 2815268 (N.D. Ill. Aug. 25, 2004) (Plaintiff’s Memorandum of Law in Opposition to Summary Judgment) (offering a similarly}
MOSS, BAD BRIEFS, BAD LAW, BAD MARKETS

• one cited five basic cases – three on Title VII, two on Rule 56;\textsuperscript{103} 
• 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);\textsuperscript{104} 
• one cited nine cases – six in the “Summary Judgment Standard” section, then – in an “Argument” section of just 497 words – three cases on basic discrimination and retaliation standards;\textsuperscript{105} 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 argument and summary judgment standards sections.\textsuperscript{106}

Others cited more cases, but in reusable boilerplate reciting basic Rule 56 and Title VII standards not tailored to the particular case.\textsuperscript{107}

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


Some lawyers claim unawareness that courts regularly grant summary judgment in employment cases. The below five briefs cite long-abrogated 1970s to early 1990s cases 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

unhelpful four cases on Plaintiff’s unrelated Due Process claim).


\textsuperscript{104} Aguilera v. Village of Hazel Crest, 01 CV 5913, 2002 WL 32450720 (N.D. Ill. Sept. 6, 2002) (Plaintiff’s Memorandum of Law in Opposition to Summary Judgment).

\textsuperscript{105} Whalen v. Vuteq USA, Inc., 08 CV 009, 2009 WL 3782017 (S.D. Ind. May 13, 2009) (Plaintiff’s Memorandum of Law in Opposition to Summary Judgment) (word count is of just the prose, \textit{i.e.}, excluding headers and citations).


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. Deleado v. Lockheed-Georgia Co., 815 F2d 641, 644 (11th Cir. 1987); see also, demons 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.”). 108

- When deciding whether this “drastic provisional remedy” should be granted, . . . [i]n the context of a discrimination case, “additional considerations should be taken into account.” Id. [Gallo v. Prudential Residential Serv., 22 F.3d 1219 (2d Cir. 1994)] at 1224. When intent is at issue, “a trial court must be cautious about granting summary judgment to an employer.” Id., citing, 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. [1985]) . . .

- [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, are summary judgment is ordinarily inappropriate . . . . 109

- In employment discrimination cases, courts are particularly cautious about granting summary judgment where intent is at issue. 110

This presumption against summary judgment in discrimination is not good law now, and has not been for decades. The Supreme Court's 1986 “trilogy” of decisions expanding summary judgment111 “completely changed the landscape in employment discrimination summary judgment proceedings”. 112

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

111 See supra notes 97-99.
exist questions of fact concerning . . . motive, thereby denying to employment discrimination plaintiffs their “day in court.”\(^{113}\)

Judge Posner even has admitted the view that “docket pressures” require summary judgment dismissals whenever employment discrimination cases are “marginal,” even if “a rational factfinder could return a verdict for the nonmov[ant]”\(^{114}\) – a sentiment surprising to hear a judge admit, but unsurprising for a judge to hold, given the high rate of summary judgment grants.\(^{115}\) Briefs such as the above, still citing obviously out-of-date caselaw declaring summary judgment “especially questionable” in discrimination cases, hint that such lawyers draw caselaw from long-outdated old briefs, never noticing the obvious, decades-long trend in favor of granting summary judgment in most such cases.

5. Defaulting Entirely 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\(^{116}\) nor to withdraw as plaintiff’s counsel,\(^{117}\) one plaintiff’s lawyer defaulted without explanation.\(^{118}\) Another defaulted repeatedly after a series of extensions he sought and won with varied 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 office move; then he defaulted, filing nothing for almost three months after the twice-extended deadline.\(^{119}\) Whatever their reasons, these lawyers are in unequivocal disregard of multiple ethical rules


\(^{114}\) 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.”).

\(^{115}\) See supra note 4.

\(^{116}\) Plaintiffs can dismiss a claim or entire case voluntarily, either unilaterally before any defendant answers, with consent of all parties, or with leave of court. FED. R. CIV. P. 41(a).

\(^{117}\) 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. Loc. Civ. R. 1.4, Accord N.D. Ill. Loc. Civ. R. 83.17 (requiring same).

\(^{118}\) Robinson v. New York City Dep't of Educ., 08 CV 10293 (S.D.N.Y.) (Docket #30, Dec. 23, 2010, decision 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.”).

on serving clients competently and diligently.\textsuperscript{120}

**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 (59 of 69), while good brief writers lost in only 42\% of cases (11 of 26) – a highly statistically significant difference.\textsuperscript{121} While a good brief does not assure success, it at least buys a spin of what legendary District Judge Charles Brieant called the “fair roulette wheel” of trial that, win or lose, leaves even the losers feeling they got a fair shake.\textsuperscript{122} In contrast, bad brief writers are essentially doomed to lose, their clients never enjoying the trial so critical to a sense that, win or lose, they had a fair day in court. High rates of summary judgment grants draw criticism for “denying to employment discrimination plaintiffs their ‘day in court,’”\textsuperscript{123} because “a legal representative’s motions and questions are no substitutes for the victim’s own day in court,”\textsuperscript{124} 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.”\textsuperscript{125}

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\textsuperscript{126} and (b) scholarship interpreting courts’ increased dismissals of such cases as broad-based “hostility to litigation as a tool of dispute resolution” (in the prior words of this author).\textsuperscript{127} 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

\footnotesize
\textsuperscript{120} E.g., ABA Model R. Prof’l Conduct R. 1.1 (“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]ct 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.”).

\textsuperscript{121} The difference in loss rate between good and bad briefs is significant at the p<0.0001 level; i.e., the probability is less than one in ten thousand that the difference in loss rate is random.

\textsuperscript{122} The judge so warned – “I run a fair roulette wheel” – at the start of the author’s first trial for a discrimination plaintiff; the jury found for the defense, making the quote memorable.

\textsuperscript{123} McGinley, supra note 113, at 207.


\textsuperscript{125} Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 183 (2004).

\textsuperscript{126} See supra note 4 (collecting studies showing high defense win rate on summary judgment, especially in employment discrimination cases).

\textsuperscript{127} Scott A. Moss, Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts, 76 Fordham L. Rev. 981, 982 (2007) (citing, and applying to employment litigation, 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 (2006)).
somewhat lesser 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) in courts unquestionably have increased use of both summary judgment and pre-discovery dismissal motions to terminate cases before trial.\textsuperscript{128} 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.\textsuperscript{129} Because case merit is not objectively discernible or quantifiable 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 bad briefs impact the summary judgment caselaw: when a plaintiff loses on summary judgment, the judicial decision is much more likely to credit the same-actor defense after a bad plaintiffs’ brief than after a good one.

\textbf{C. Finding #3: Bad Briefs Yield More Pro-Defense Caselaw.}

Do bad writers lose on summary judgment because they write bad briefs or because they choose bad cases, with their lack of legal acumen leaving them prone to taking cases savvier lawyers reject? The causation of their high loss rate

\textsuperscript{128} See Miller, supra note 4 (noting increased summary judgment rates, starting with, and since, the 1986 trilogy of summary judgment precedents); Joseph Seiner, \textit{The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination}, 2009 U. ILL. L. REV. 1011, 1014 (2009) (studying all Rule 12 dismissal motions in Title VII cases the year before and year after \textit{Twombly}, and finding after \textit{Twombly} “a higher percentage of decisions that granted a motion to dismiss”); Moss, supra note 127 (noting judicially created doctrines from late 1990s to late 2000s increasing grounds for dismissing discrimination cases).

\textsuperscript{129} 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 Kim, \textit{Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World}, 83 CORNELL L. REV. 105, 110-11 (1997) (reporting survey finding that although 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).
is hard to pinpoint because bad briefings and bad case selection trace to the same lack of knowledge. But the data do disclose another, clearer causal relationship.

Of the 31 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.

<table>
<thead>
<tr>
<th>Brief:</th>
<th>Decisions Denying Defendant SJ:</th>
<th>Decisions Granting Defendant SJ:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total #Cases: 15</td>
<td>Total #Cases: 12</td>
</tr>
<tr>
<td>Good Brief</td>
<td>- #Decis. Crediting S-A Def.: 0 (0%)</td>
<td>- #Decis. Crediting S-A Def.: 3 (25%)</td>
</tr>
<tr>
<td></td>
<td>- #Decis. Rejecting S-A Def.: 7 (47%)</td>
<td>- #Decis. Rejecting S-A Def.: 0 (0%)</td>
</tr>
<tr>
<td>Bad Brief</td>
<td>Total #Cases: 10</td>
<td>Total #Cases: 59</td>
</tr>
<tr>
<td></td>
<td>- #Decis. Crediting S-A Def.: 0 (0%)</td>
<td>- #Decis. Crediting S-A Def.: 18 (31%)</td>
</tr>
<tr>
<td></td>
<td>- #Decis. Rejecting S-A Def.: 2 (13%)</td>
<td>- #Decis. Rejecting S-A Def.: 1 (2%)</td>
</tr>
</tbody>
</table>

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 10-15 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 consistent: whether a decision credits the defense depends on the plaintiffs’ 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 Gartner’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 . . . serves to justify prodefendant outcomes and thereby exacerbate the one-sided development of the law.” This Article, like Gartner’s in a different way, is an “account of employment discrimination law’s skewed evolution”: the caselaw is path-dependent, skewing in favor of defendants because (a) a pro-defense skew in the precedent yields more pro-defense caselaw (Gartner’s analysis), 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 should not impact judges’ rationales. But this argument goes too far in deeming briefs irrelevant. The same-actor defense, though a “recurrent situation,”130 arises 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” (1049) or “hostile work environment” (3400) 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.”131 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”132 – explaining how even judges well-versed in summary judgment and discrimination fundamentals may depend on lawyers’ briefs as to 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 litigation133 and “vindicat[es] a policy that Congress considered of the highest priority, advanc[ing] the public interest . . . [against] discrimination”?134 Subparts (A)-(C) discuss each riddle and suggest answers, focusing on how, for most actors in a major market to be fatally subpar, there must be a broad range of market failures.

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.

130 Supra note 20.
131 NEUMANN, supra note 61, at 307.
132 Id.
133 See supra note 3.
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 non-repeated 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 re-invest 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, and not citing caselaw is a failing discernible to far from all clients. Neither is researching won-loss records feasible: case outcomes are generally unavailable to find, because far more cases end in confidential settlements than in verdicts; and won-loss records in the few cases reaching verdicts are uninformative because the best lawyers may litigate riskier cases, may 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 “other forms of incompetence.”

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 by contingency fees 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 as Siren Call 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 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.

---

135 See infra Part IV(C)(2) (detailing infeasibility of researching lawyers with court dockets).
136 See id. (discussing how some but not all clients can assess brief quality).
138 Berrey, supra note 7, at 21.
139 See infra note 146 (noting how contingency fees predominate plaintiff’s lawyering).
140 Jane Goodman-Delahunty et al., Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes, 16 Psych., Pub. Pol., & L. 133, 133 (2010). Even judges, specially tasked to assess relevance, are only mildly less susceptible to bias. Andrew Wistrich et al., Can Judges
Employment “is complex for those who do not regularly practice in this field,” making it “a relatively specialized field, between the complicated proof structures and the complex theoretical foundation.” 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.” Such lawyers may be ignorant of key pitfalls and legal issues in the field.

Consequently, bad 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. In short, 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’s call – 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,\textsuperscript{146} incentivize lawyers to minimize hours worked, unless more hours increase not just case value, but the lawyer’s 33-40\% share of the value, enough to outweigh the opportunity cost.\textsuperscript{147} This is a principal-agent problem with no perfect solution, because hourly pay poses the opposite problem: incentivizing lawyers to maximize their hours,\textsuperscript{148} subject to the constraint of minimizing other costs of working excessive hours, such as opportunity costs and upsetting the client.\textsuperscript{149} Full analysis of contingency fee effects and incentives is a complex matter beyond the scope of this Article,\textsuperscript{150} 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 20-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 research 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);\textsuperscript{151} (b) low to mid-five-figure average settlements, ranging from four-figure

\textsuperscript{146} With employment litigation typically costing six figures in fees, \textit{infra} note 153, 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. \textit{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.

\textsuperscript{147} Nora Engstrom, \textit{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 clients”).

\textsuperscript{148} Dana \\& Spier, \textit{supra} note 146, at 350 (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”).

\textsuperscript{149} \textit{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 attorneys “greater incentive to invest in her reputation” by avoiding overbilling such clients).

\textsuperscript{150} For an illustrative analysis of how contingency fees unintuitively can incentivize lawyers to file even claims with negative expected values, \textit{see, e.g.,} Grundfest \\& Huang, \textit{infra} note 154 and accompanying text (modeling contingency-fee litigation based on “real options theory”).

\textsuperscript{151} \textit{See, e.g.,} Kuper v. Empire Blue Cross and Blue Shield, No. 99 CV 1190, 2004 WL 97685, *1-2 (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,
“nuisance-value” to six figures;¹¹² and (c) losses in the vast majority of non-settled cases (12 of 13) given low effort, but in three-quarters given high effort.¹¹³

<table>
<thead>
<tr>
<th>Strategy</th>
<th>#Losses ($0 for P)</th>
<th>#Small ($5K) Settlements</th>
<th>#Large ($100K) Settlements</th>
<th>#Full Verdicts ($1 million)</th>
<th>Value of Portfolio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low Effort</td>
<td>12</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>$1,230,000</td>
</tr>
<tr>
<td>High Effort</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>2</td>
<td>$2,630,000</td>
</tr>
</tbody>
</table>

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

$7,230.50); Detje v. James River Corp., 167 F. Supp. 2d 248, 251 (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 argument that fees must be proportional to the verdict, City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality joined in part by Justice Powell, id. 585); 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. E.g., Kuper, supra; Sherry v. N.Y. Med. Coll., No. 99 CV 2310, 2000 WL 781867, *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 pre-trial settlement entered as judgment for $175,000). Cf. Dodge v. Hunt Petro. 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).

¹¹² Because most cases end on confidential terms, supra note 137, “[e]mpirical research in this area is extremely difficult.” ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 20 (2003). Three studies exist, each showing low to mid-five-figure average settlements. See 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 LEG. STUD. 175, 187 (2010) (finding in sample of 945 cases, median settlement was $30,000, with a median of $40,000 for a small number of post-summary judgment settlements); Minna Kotkin, Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements, 64 WASH. & LEE L. REV. 111, 144 (2007) (finding average settlement of $54,651 in a 1999-2005 database of confidential employment discrimination settlements in the Chicago federal court); Berrey, supra note 7, at 26 (finding average settlement of $30,000 in a national but more limited 1998-2003 sample).

¹¹³ 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 a bit over half of all cases (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, 25 J. LEGAL STUD. 233, 251-52 (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).
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 (fact 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: 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 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 1/3 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 the early effort proves strong. 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. 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

---

155 Id. at 1267-68 (modeling litigation with “options” theory).
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.\textsuperscript{156}

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\textsuperscript{157} and either the court or opposing counsel (either of whom may refuse to drop the case if, for example, there is a counter-claim or an argument the suit is frivolous enough to warrant sanctions);\textsuperscript{158} nor can a lawyer simply quit a litigation mid-stream without permission from the client or the court.\textsuperscript{159}

The tension between the appealing “option” strategy (file many middling cases but 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 or voluntarily dismiss a case.\textsuperscript{160} 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’ incentive to maximize their case-dropping freedom may explain how 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.”\textsuperscript{161} 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 meritorious claims

\textsuperscript{156}See generally id.
\textsuperscript{157}ABA MODEL R. PROF’L CONDUCT 1.2(a) (“[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.”)
\textsuperscript{158}Fed. R. Civ. P. 41(a)(1)(A)(ii) (permission of all counsel suffices to allow voluntary dismissal); id. 41(a)(2) (permission of judge suffices to allow voluntary dismissal).
\textsuperscript{159}See supra note 117 (detailing requirement of court permission for attorney to withdraw).
\textsuperscript{160}See infra note 120 (detailing such rules)
\textsuperscript{161}Engstrom, supra note 147, at 1491.
who are seriously injured likely fare relatively poorly,”¹⁶² their lawyers’ low-effort strategy yielding no credible threat of trial, and thus pooling them together with unmeritorious claimants to receive nuisance-value settlements.¹⁶³ 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.


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; or a lawyer’s website may claim expertise in a field in which the lawyer merely aspires 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 of the bad briefs) broke down as follows by practice area:¹⁶⁴

<table>
<thead>
<tr>
<th>Practice Area</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Practice</td>
<td>7 of 16</td>
</tr>
<tr>
<td>Employment Law</td>
<td>4 of 16</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>3 of 16</td>
</tr>
<tr>
<td>Unknown</td>
<td>2 of 16</td>
</tr>
</tbody>
</table>

TABLE 4: The Worst Briefwriters, by Reported Practice Area

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

¹⁶² Engstrom, supra note 147, at 1490.
¹⁶³ Id. at 1527 (noting low sizes of settlements at settlement mills, typically $2,000 to $6,000).
¹⁶⁴ 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.
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: “we 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.”

- General practice firm whose brief was pervasively ungrammatical: “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.”

- General practitioner whose brief cited only three boilerplate cases on the discrimination claim: “Ours is not a cookie-cutter practice,” but a “practice promot[ing] visionary tenacity, flexibility, [and] creativity.”

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.

This review of lawyers’ practice areas does not conclusively pinpoint the problem. The prevalence of general practitioners could show that overoptimism

166 See supra note 86 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).
168 See supra note 102 and accompanying text (citing and quoting brief).
170 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 LLP, http://www.outtengolden.com/lawyer-attorney/kathleen-peratis (last visited Mar. 1, 2013). L. Steven Platt, a Chicago law firm partner, is a regular CLE speaker and author who is on the Board of Directors, and Illinois chapter President, of the National Employment Lawyers Association. L. Steven Platt, Clark Hill PLC, http://www.clarkhill.com/Attorney/splatt (last visited Mar. 1, 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 Chicago-Kent Coll. of Law, http://www.kentlaw.iit.edu/faculty/full-time-faculty/carolyn-shapiro (last visited Mar. 1, 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 (last visited Mar. 1, 2013).
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 (a) that 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 (b) that overoptimism is likely a key explanation for bad briefings.

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. Yet the 73% of briefs failing to cite same-actor caselaw fail this basic duty, 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. 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. 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 Plaintiff’s 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. Even where an error is purely legal and therefore is apparent (e.g., failure to make readily available arguments against a same-actor defense): nobody ever wrote the competent version of the brief, so it is hard to know if the error was harmless; perhaps the plaintiff would have lost anyway. Unprofessional lawyering should

171 Supra Part I(A)(2) (detailing legal writing treatises, cases, and ethics rules so instructing).
172 Supra Part II(A).
173 Supra Part II(A)(1)-(5).
174 See In re Amgen, No. 10 MC 249, 2011 WL 2442047, *20 (E.D.N.Y. Apr. 6, 2011) (noting “sanctions such as holding [attorneys] in contempt or referral to the state bar for disciplinary proceedings”) (quoting United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993)).
175 See supra note 61 and accompanying text.
not be tolerated even if a “harmless error,” because future clients may suffer at the hands of the unprofessional lawyer – but the more an error is harmless, the easier it is to understand judicial reluctance to initiate sanctions or disciplinary proceedings, which can be burdensome, as detailed below.

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,’” and with sanctions or discipline inflicting permanent stains on attorneys’ records, such inquiries are hotly disputed and subject to appeal,176 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 finding is that it does not prove plaintiffs’ lawyers 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 net, harm plaintiffs: increasing the risk and attorney time of a case disincentivizes filing suit.177 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.

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

176 Martens v. Thomann, 273 F.3d 159, 175 (2d Cir. 2001) (reversing sanction of order removing attorney from case, where order was imposed without adequate briefing and hearing) (quoting Nuwesa v. Merrill Lynch, Fenner & Smith, Inc., 174 F.3d 87, 92 (2d Cir. 1999) (holding same for monetary sanction).

177 See generally David M. Trubek, The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 74 (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, supra note 7, at 21-22 (noting that plaintiffs’ out-of-pocket expenses disincentivize them from filing suit).
56 standards too established to blame the lawyers. For example, *Nagle v. Village of Calumet Park*\(^{178}\) dismissed a claim that a Police Chief retaliated against an officer who filed a discrimination charge. On summary judgment, plaintiffs merit favorable inferences from uncertain facts, yet *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” . . . [F]rom this evidence[,] . . . no jury could reasonably conclude that Chief Davis was aware of the EEOC charge . . . [as] of the February 2005 suspension.\(^{179}\)

*Nagle* next 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. . . . [But] [t]his fact arguably cuts both ways: the senior liaison position had to be filled by someone and an employer is entitled to fill the position.\(^{180}\)

The *Nagle* panel was not particularly ideologically identifiable: two of the judges were Democratic appointees, and none had a reputation as unusually hostile to plaintiffs. *Nagel* 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.\(^{181}\) In short, stretching summary judgment standards to dismiss cases is a broad-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 . . . .’”\(^{182}\)

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 writing quality differences among lawyers (Part III(A));
- many lawyers lack sufficient information, until after years of losing cases, on how employment law requires more research and writing than many other fields of small-firm practice (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 (III(B)(2)); and
- judges and bar authorities feel ill-positioned to discipline lawyers due to heavy dockets, information limitations, and fear that a crackdown would harm plaintiffs by increasing litigation risk (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 a mix of 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 the students who will become the future lawyers (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 most positive and easy 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.183

---

183 See, e.g., NAT’L EMP’T LAWYERS ASS’N, http://www.nela.org/NELA/ (last visited Feb. 6, 2013) (“NELA is the country’s largest professional organization that is exclusively comprised
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, polluting the caselaw for all, justifying collective prevention effort. Second, associations should expand mindsharing 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 trial court motions. Listservs, powerful means for sharing research and enlisting motion guidance, exist in active large-state and big-city chapters; they could more actively invite participation from smaller neighboring states lacking a large plaintiff’s bar.

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, such as 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 Targeted to the Writing 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,” including numerous

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.”

See, e.g., Advocates for Employee Rights, NAT’L EMP’T LAWYERS ASS’N / N.Y., http://www.nelany.com/EN/index.cfm?event=showPage&pg=whoweare (last visited Feb. 6, 2013) (“NELA/NY, the local affiliate of the National Employment Lawyers Association[,] ... has more than 400 members. . . . NELA/NY ... advances and encourages the professional development of its members through networking, educational programs, publications and technical support[, and] . . . legislation, a legal referral service, and other activities.”).

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); New York’s listserv draws some participation neighboring states; and Colorado’s does not draw participation from the handful of members in the more sparsely populated neighboring states.

recommendations for law schools to do better at making graduates “well-trained ... to practice law competently and professionally.” 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.’” 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.”

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. Such offerings have proven popular with students, and while it is hard to assess educational efficacy, there is evidence experiential learning not only imparts useful skills, with lawyers giving high marks to the usefulness (of most forms) years later, but may even improve “abstract thinking skills”: in one study comparing before-and-after student aptitudes, “the data ... support the notion that an experiential approach in the classroom may impact student learning in a positive way,” and “particularly among students who began their law school careers with relatively undeveloped analytical skills,” the data indicate experiential learning “may have some salutary effect in developing and encouraging the use of law students’ abstract thinking skills.”

---

187 Id. at 125.
191 Karen Sloan, Recent Graduates Report Satisfaction with 'Real World' Training in Law School, THE NATIONAL LAW JOURNAL (ONLINE), April 19, 2011 (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”).
192 Debra Cassens Weiss, Associate Survey Gives Low Marks to Law School Pro Bono, Props to Legal Clinics, ABA JOURNAL (Apr 19, 2011), 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”).
194 Id. at 284.
Experiential learning draws criticism as well. Legal education requires “not only the acquisition of knowledge, skills, and values, but also theory and policy,” and adding skills training can “put pressure on law schools to teach this set of skills, regardless of the opportunity costs,” yielding a “risk of ‘McDonalds-ization’” of law schools. Further, given the varied “capability and resources of law faculties to offer it,” 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 less on appeals, and more on trial court motions: “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.”

Second, and more specifically, 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.” 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 easily can deride as un-intellectual, 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.


As noted above, employment discrimination law is “a relatively specialized field, between the complicated proof structures and the complex theoretical foundation,” making it “complex for those who do not regularly practice in this field.” But it does not have to be so: many call for reforming employment

---

195 Loh, supra note 189, at 513.
196 Id.
198 NEUMANN, supra note 61, at 325 (emphases in original).
199 Chemerinsky, supra note 197, 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 should emphatically reject. ... [L]aw is inherently interdisciplinary and must be shaped by understanding fields such as economics, philosophy, and psychology.”).
200 McCormick, supra note 142.
201 Abrams & Winter, supra note 141.
discrimination law, replacing its labyrinthine “seven-step inquiry”\textsuperscript{202} and “definitional incoherence”\textsuperscript{203} with a streamlined focus on simply whether discrimination caused a challenged action.\textsuperscript{204} Such proposals draw support in this Article’s finding that employment discrimination 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.\textsuperscript{205}

Additionally, the growth of employment discrimination into one of the truly major federal practice areas supports making it a bar examination topic. Most states do not, but Pennsylvania does.\textsuperscript{206} What topics bar examinations should cover is a question 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 one of the top fields of litigation, yet include topics such as “Trusts & Future Interests,”\textsuperscript{207} “Guardianship,”\textsuperscript{208} “Workers’ Compensation,”\textsuperscript{209} “Suretyship,”\textsuperscript{210} and “Bulk Transfers.”\textsuperscript{211}


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


\textsuperscript{203} 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”).

\textsuperscript{204} See, e.g., id.; Chin & Golinsky, \textit{supra} note 202.

\textsuperscript{205} See \textit{supra} Part II(C) (finding that even among only defense grants of summary judgment, whether judges credit same-actor defense depends on whether plaintiff briefed the defense).


\textsuperscript{208} Id. (listing of Texas bar subjects).

\textsuperscript{209} Id. (listing of Illinois bar subjects).

\textsuperscript{210} Id. (listing of Montana bar subjects).

\textsuperscript{211} Id. (listing of Tennessee bar subjects).
specialists in their areas of law. Following is the relevant ethics rule:

Rule 7.4 Communication of Fields of Practice and Specialization . . . (d)
A lawyer shall not state or imply . . . certificat[ion] 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.212

The unhelpfully narrow exceptions are that a lawyer may communicate (a) the
mere fact that s/he “does or does not practice in particular fields” at all,213 and (b)
two highly specific expertise, “Patent Attorney”214 or “Proctor in Admiralty.”215

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
concerning a lawyer’s services.”216 Yet states such as Florida hold the opposite:
“A lawyer shall not state or imply that the lawyer is . . . a ‘specialist.’”217

This Article’s finding that many non-specialists simply cannot file competent
briefs supports the more permissive side of the divide. Massachusetts’ 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 [it] . . . 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) Lawyers 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 . . .

Admittedly, advertising a specialty risks misleading; and even accurate
claims may not maximally draw clients to the best lawyers. But many lawyers
litigating cases in which no well-informed client would hire them, a problem

212 ABA MODEL R. PROF’L CONDUCT 7.4.
213 Id. R. 7.4(a).
214 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”).
215 Id. R. 7.4(c) (allowing “the designation . . . ‘Proctor in Admiralty’ or a substantially similar
designation” if “engaged in Admiralty practice”).
216 Id. R. 7.4 comment.
217 Florida R. of Prof’l Conduct 4-7.2(c)(3). The only exception to this Florida bar is where the
lawyer is certified by a state bar and displays the name of the certifying organization. Id.
218 Mass. R. of Prof’l Conduct 7.4.
worsened by rules preventing actual specialists from informing clients of the expertise that substantially improves the effectiveness of their representation.


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; an incomplete portion of such PDFs are textually searchable, 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 represented non-English-speaking and uneducated clients unable to read briefs, but also professionals quite able to spot good and bad writing, in between are non-college-educated clients savvy enough to read both sides’ briefs and spot whether a brief tells a persuasive story, rebuts the other side’s arguments, etc.

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 for even 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 all those this study required finding on PACER). Searching court dockets requires a subscription to PACER that is publicly available, though not quite free; downloads are ten cents a page, 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 93 federal districts has a separate PACER site, making cumbersome a search for all filings by a lawyer or firm; and the basic search


process is not terribly feasible 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.

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 needs to spot the following as “the brief”:


Such a labyrinthine and jargon-filled process makes PACER possibly the internet’s least user-friendly digitized database, less a “Public Access” system (the “P” and “A” in “PACER”) than a virtual world’s Rube Goldberg machine.223 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 than now to provide online reviews.

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

Because part of the problem is insufficient supply of competent lawyers, this

---

222 Marini et al v. Adamo et al., #02-4788 (Docket Sheet on Feb. 9, 2012).

223 “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. 8, 75 (2009)
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 practice (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 discrim[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.  

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[].”

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 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 with the party's stake in the outcome”; thus the “traditional rules” restricting standing reflect “belief that only injury will adequately assure the personal stake necessary for vigorous advocacy.” 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 Practice.

“Under rules effective throughout the United States, corporations are prohibited from law practice ownership,” which is why law firms typically are partnerships or individuals, and why corporations offering financial and personal services offer no legal services. In Europe, the supermarket Tesco has offered legal services, including “will writing, do-it-yourself divorce kits, rental

---

227 Renee N. Knake, Democratizing Delivery of Legal Services, 73 Ohio St. L.J. 1, 5 (2012).
agreements, and forms for setting up a small company.” 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.”

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.”

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.” Notably, some legal ethicists agree, calling “indefensibly lawyer-centered” the corporate bar that “suppress[es] competition,” serving only “the interests of ABA control groups.”

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

There are substantial counterarguments, especially in employment law. First, 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. Second, corporate-provided lawyering may be less suited for complex cases than for fee-for-service tasks like wills, evictions, or benefits hearings. Yet these arguments are not dispositive. First, 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].” Second, for complex legal work, corporations can achieve “economies of scale” mastering a field, like employment litigation, with (a) high demand

---

228 Knake, supra note 227, at 40.
229 Id. at 7.
231 Knake, supra note 227, at 43 (surveying benefits noted by various scholars).
233 Gillers, supra note 232, at 266-68.
234 Id. at 10-11.
235 Knake, supra note 227, 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”) (citation omitted)
236 Id. at 42.
237 Id. at 45 (noting economies of scale in simpler forms of legal services).
(given the case volume) and (b) high intellectual startup costs for non-specialists. 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 ban238 draw support from this Article’s evidence that the current legal services market serves clients extremely 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 cases requiring 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 follows: “A lawyer shall provide competent representation . . . [that] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”239

Employment discrimination has not previously been, but should be, recognized as one of the fields in which non-experts 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 entirely billable to the client.240

In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field . . . may be required in some circumstances. . . . [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.

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 sanctioning incompetent brief writers. Just as this Article notes how many of the good brief writers are experts in the field, but the bad brief writers typically are not,241 Attorney Grievance Commission of Maryland v. McClain242 found a competent trial lawyer proved an incompetent brief writer, in violation of Rule 1.1:

238 Id. at 9 (documenting litigative and legislative attacks in four states).
239 ABA MODEL R. PROF’L CONDUCT 1.1.
240 See E.C. 6-3 (noting that attorney’s study in an unfamiliar field of law necessary to a case must not yield “unreasonable delay or expense to his client”).
241 See supra Part III(B)(3).
242 956 A.2d 135 (Md. 2008).
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 1.1.243

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 – submitting arguments “not supported by the case law, cited or otherwise.”244 Rowe v. Nicholson 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. 1.1.245

Various courts’ practice rules are helpfully more specific than Rule 1.1 in detailing briefing standards many lawyers violate. Yet only on rare occasion do judges expressly criticize a brief and make clear the incompetence was the basis for the lawyer’s loss. In Sekiya v. Gates,246 a Ninth Circuit panel took the unusual step of publishing a decision declaring: “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.”247 The employment discrimination plaintiff’s brief Sekiya derided as a “a slubby mass of words rather than a true brief”248 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[,] fail[ing] far short of the requirement [of] "appellant's contentions and the reasons."249

In sum, there is precedent for disciplining attorney writing bad enough to fail

243 Id. at 141 (Md. 2008).
244 Id., 406 Md. at 1, 956 A.2d at 144.
246 508 F.3d 1198 (9th Cir. 2007).
247 Id. at 1200.
248 Id. (quoting N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997)).
basic professional standards. Yet not even the worst briefs this Article 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-ascension strategy: filing many cases of weak to middling strength; then, during pretrial, dropping all but the few that prove strong during early discovery. 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 prospect that knowingly filing a weak, low-effort brief evades multiple rules against unilaterally dropping cases.

Disciplinary measures, moreover, 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 is well-positioned to spot an adversary’s malfeasance but would risk looking tactical or manipulative 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.” Based on this Article’s findings, judges should fulfill that duty more aggressively when presented a litigation filing like the worst of the briefs this Article studies.

**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

---

250 In addition to the above cases, see, e.g., Gardner v. Inv. Diversified Capital, Inc., 805 F. Supp. 874, 875 (D. Colo. 1992) (ordering sanctions where plaintiff’s amended complaint was “replete with misspellings, grammatical aberrations, non sequiturs”); In re Hawkins, 502 N.W.2d 770, 770-72 (Minn. 1993) (publicly reprimanding lawyer and ordering him to attend remedial instruction given “his repeated filing of documents rendered unintelligible by numerous spelling, grammatical, and typographical errors”); Green v. Green, 261 Cal. Rptr. 294, 302 n. 11 (Cal. App. 1st Dist. 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, 865 (N.Y. 1975) (imposing costs for filing “an extreme example” of a “poorly written and excessively long brief[,] replete with . . . irrelevant and immaterial matter”).

251 See supra notes 154-160 and accompanying text.

252 ABA MODEL R. PROF’L CONDUCT 8.3(a).
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 access to truly searchable dockets. In diagnosing a greater supply of incompetent than competent 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 long has sparked debate about the cause, the prevalence, and even the definition of low-quality lawyering.

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.

---
