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## Identifying Inefficiencies: Exploring Ways to Write Briefs More Quickly within the Time Demands of Legal Practice

Jacob M. Carpenter

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## IDENTIFYING INEFFICIENCIES: EXPLORING WAYS TO WRITE BRIEFS MORE QUICKLY WITHIN THE TIME DEMANDS OF LEGAL PRACTICE

*Jacob M. Carpenter\**

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## I. INTRODUCTION

“There can be economy only when there is efficiency.”<sup>1</sup>

I teach a course for the National Institute of Trial Advocacy three times a year called Writing Persuasive Briefs.<sup>2</sup> I have taught this class many times in Washington D.C., Chicago, and Los Angeles. Attendees pay \$2,345 to attend this two-day course. The attendees have come from solo practices and from some of the largest firms in the country. Some have been weak writers, and some have been excellent writers. Some have been in their first couple years of practice, while others have been practicing for more than thirty years. They have come from private practice and governmental practice. They have come from every region of the country, and a few have come from outside the country. When we start each course, we begin by asking each participant what he or she most hopes to learn during the course. Without fail, every time we do this, at least half of the participants answer that they want most to learn how to write briefs more quickly, more efficiently.

The first few times I taught the course, my response (inside my own head) was, “Too bad! That’s somewhat impossible.” To be done well, writing must be an inherently labor-intensive task. It takes time to do it well. There are, or should be, many steps in writing a strong legal brief. Those steps are not linear, but instead are recursive.<sup>3</sup> The bulk of the writing process should actually focus on the revising and editing steps.<sup>4</sup> Rarely can a brief be written quickly and in the first

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<sup>1</sup> CARANI N. RAO, 10 FUNDAMENTAL RULES OF SUCCESS 22 (2011). This quote is often attributed to nineteenth century novelist, essayist, and politician Benjamin Disraeli. *Economy*, PROVERBIA.NET, <http://en.proverbia.net/citastema.asp?tematica=374><http://en.proverbia.net/citastema.asp?tematica=374> (last visited Feb. 8, 2018).

<sup>2</sup> I co-teach this course with its developer, Catharine Dubois, a former clerk, attorney, legal writing professor, and professional development director at a large law firm in New York. I thank Catharine for the conversations we have shared on this topic.

<sup>3</sup> Varying texts discuss different steps to work through in writing a brief, but all acknowledge the process is more recursive than linear. See Teresa Godwin Phelps, *Writing Strategies for Practicing Attorneys*, 23 GONZ. L. REV. 155, 160 (1987–1988) (“Although we must discuss these three stages (planning or prewriting, drafting, and revising) in a linear manner, it is important to keep in mind that in the actual writing process, the three stages overlap and intertwine. Good writers allow themselves to move back and forth among the various activities.”). See also Erika Abner & Shelley Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 363, 369–70 (2010) (citing RONALD T. KELLOGG, *Professional Writing Experience*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 390–91 (K. Anders Ericsson et al. eds., 2006)); Wayne Schiess, *Composing*, AUSTIN LAW. 13 (Feb. 2008).

<sup>4</sup> See Scheiss, *supra* note 3, at 2 (stating that “[e]diting means polishing and perfecting the large-scale organization, the small-scale organization, the sentences, and the word choice. On a major writing project, editing takes up half the time spent on the project—or more. . . . Beyond editing, proofreading (correcting grammar errors and typos) is additional step, too.”).

attempt—at least not effectively.<sup>5</sup> That just is not how legal writing, or writing in general, works. So, the first few years I taught the course, my thought was that we can teach the attorneys to write better briefs, but we cannot really teach them how to write faster. Instead, I felt that one of the most important principles attorneys can learn is that there are no shortcuts to producing well-written legal briefs.<sup>6</sup>

However, that was not what the attendees were paying \$2,345 to hear! And, after listening to the attendees, year after year, express the same concern, I knew that this topic—this concept of writing a well-written legal brief *quickly*—is an important idea to study. It is not good enough to just tell attorneys that “it’s not possible—accept it.” Attorneys do have to write quickly. Many simply do not have the time to spend that is necessary to work through the full writing process, including a first draft, setting down the brief for significant chunks of time between drafts, revising the document several times, etc. Instead, they may only have an hour or two a day to turn their attention to a brief that is due soon. Also, many do not have the luxury of representing clients who can or will pay for them to spend the amount of time needed to work through a fourth, fifth, sixth draft of a brief. I remember all too well struggling with these frustrations when I was in private practice—trying to write the best briefs possible in unrealistically compressed time frames.

Also, that attorneys seemed most concerned about learning how to write briefs more quickly is consistent with studies on attorney satisfaction—or, more accurately, attorney dissatisfaction.<sup>7</sup> Lawyers spend an incredible amount of time working. Two studies indicate over fifty percent of associates bill over 2000 hours per year.<sup>8</sup> But that number does not tell the whole story. As Professor Patrick Schlitz explains, for many attorneys to actually *bill* 2000 hours per year:

will mean leaving home at 7:45 a.m., working at the office from 8:30 a.m. until 6:30 p.m., and then arriving home at 7:15 p.m.—and doing this six days per week, every week. That makes for long days, and for long weeks. And you will have to work these hours not just for a month or two, but year after year after year. That makes for a long life.<sup>9</sup>

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<sup>5</sup> See JUDITH M. STINSON, *THE TAO OF LEGAL WRITING* 28 (2009).

<sup>6</sup> See PETER ELBOW, *WRITING WITH POWER: TECHNIQUES FOR MASTERING THE WRITING PROCESS* 3 (1981) (stating that “[t]here is no hiding the fact that writing well is a complex, difficult, and time-consuming process”).

<sup>7</sup> See *infra* notes 8–13 and accompanying text.

<sup>8</sup> Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *VAND. L. REV.* 871, 891–92 (1999).

<sup>9</sup> Schlitz, *supra* note 8, at 894–95. In 2012, LexisNexis published its results from a survey it conducted on attorneys’ billing efficiency. LexisNexis, *Law Firm Billable Hours Survey*, L. FIRM PRAC. MGMT. (June 11, 2012), [http://www.thenalfa.org/files/LexisNexis\\_Billable\\_Hour\\_Survey.pdf](http://www.thenalfa.org/files/LexisNexis_Billable_Hour_Survey.pdf). The attorneys who responded reported only billing an average of 69% of their time they spent working. *Id.*

Other studies showed slightly lower numbers in average billable hours.<sup>10</sup> An ABA study showed that 45% of attorneys billed 1920 or more hours per year.<sup>11</sup> In 2015, the National Association of Law Placement (NALP) annual survey showed that the average requirement for an associate's billable hours was 1892.<sup>12</sup> Similar to Professor's Schlitz's explanation above, Yale Law School's website estimates that an attorney billing 1800 hours per year is actually "at work" for over 2400 hours.<sup>13</sup> As demonstrated through studies seeking to learn "[w]hy are lawyers so unhealthy and unhappy?," lawyers complain most about the hours.<sup>14</sup>

Writing briefs is an integral part of a litigator's job. Briefs are incredibly important and writing them takes up large chunks of time. Thus, providing some practical solutions to help attorneys write briefs more quickly (which may then allow those attorneys more time to write better) would be extremely valuable for attorneys tasked with representing clients, for clients who pay by the hour, and for judges who must read mountains of otherwise poorly written briefs.<sup>15</sup>

This article attempts to provide practical solutions. First, Part II will explain why, in many ways, it is impossible to simply "write more quickly."<sup>16</sup> This understanding is important for all legal writers to contemplate. Thinking about the writing process, and why there are few shortcuts, may allow attorneys to approach writing briefs with more understanding and less frustration. That said, Part III will then examine twelve important techniques attorneys can use when writing briefs to improve their writing efficiency in significant ways.<sup>17</sup>

## II. MISSION IMPOSSIBLE? WHY WRITING A BRIEF QUICKLY IS SO CHALLENGING

While there are several techniques to increase an attorney's speed and efficiency in progressing from a blank screen to a polished brief,<sup>18</sup> it is crucial, first, to be

<sup>10</sup> See *infra* notes 11–12 and accompanying text.

<sup>11</sup> Schlitz, *supra* note 8, at 891–92 (citations omitted); Altman Weil Pensa, Inc., *The 1996 Survey of Law Firm Economics*, ALTMAN & WEIL PUB., at III-3 (1996).

<sup>12</sup> *Update on Associate Hours Worked*, NAT'L. ASS'N. FOR LAW PLACEMENT BULL. tbl. 3 (2016), <https://www.nalp.org/0516research>. (last visited Jan. 18, 2018). This average is based on the numbers provided by the 757 law offices that responded to the NALP survey, and it encompasses all sizes of law firms. *Id.*

<sup>13</sup> *The Truth About the Billable Hour*, YLS STUDENT LIFE (July 2017), <https://law.yale.edu/student-life/career-development/students/career-guides-advice/truth-about-billable-hour>.

<sup>14</sup> Schlitz, *supra* note 8, at 888–89.

<sup>15</sup> See MARSHALL HOUTS ET. AL., *THE ART OF ADVOCACY* § 24.04 (2013) (noting that "[a]ppellate dockets are overcrowded, requiring judges to read thousands of pages a week").

<sup>16</sup> See *infra* notes 19–94 and accompanying text.

<sup>17</sup> See *infra* notes 97–388 and accompanying text.

<sup>18</sup> See *infra* notes 97–388 and accompanying text.

realistic about writing. It's hard. It's a process. And, it's slow. Attorneys who do not accept these conclusions do not understand or appreciate the writing process, and thus, they may be destined to be mediocre writers for the rest of their careers.

To demonstrate this point, it is helpful to examine how professional writers understand writing: not just lawyers, but people whose job is, primarily, just to write.<sup>19</sup> And, it is helpful to examine this from the point of view of highly successful writers. Writers who set aside time every day to write for hours. Writers who know how to write better than almost all others. Writers who, given that writing is their profession, can be presumed to be experts at the craft.<sup>20</sup> Surely, they are so practiced and have honed their skills so repeatedly and acutely that they can write quickly, right?

Wrong. Professional writers reveal a very different story.<sup>21</sup> The reality: writing is a slow, hard endeavor, no matter who you are, no matter what you write—assuming you care about producing a good product.

In *On Writing Well*, William Zinsser may have summed it up best when he proclaimed that writing is one of the hardest things people do:

Writing is hard work. A clear sentence is no accident. Very few sentences come out right the first time, or even the third time.

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<sup>19</sup> Lawyers are professional writers too. Wayne Schiess, *Lawyers are Professional Writers*, AUSTIN LAW. 11 (Nov. 2012). Legal writing expert Wayne Schiess asserts that lawyers are professional writers because they are paid to write, write about complex topics that affect real-world outcomes, and have their work seriously scrutinized. *Id.* (citing TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* (3d ed. 2016)). However, though attorneys may be considered professional writers, that does not mean all are *expert* writers.

<sup>20</sup> In *Outliers*, Malcolm Gladwell theorizes “that it takes 10,000 hours to develop expertise in a particular area.” Wayne Schiess, *What I Wish I'd Known About Legal Writing* (Dec. 16, 2014), <https://ssrn.com/abstract=2539157> (quoting MALCOLM GLADWELL, *OUTLIERS* (2011)). “If the theory is right, it certainly applies to legal writing,” which means it would take a lawyer ten years to become an expert writer, if the lawyer spent 1000 hours a year writing. *Id.* Others state that “[t]he ‘10-year-rule’ represents . . . [the] minimum, not [the] average” and that this “general rule that it takes ten years of intensive practice to achieve excellence applies to writing.” Erika Abner & Shelley Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 363, 367, 371 (2010) (quoting JOHN HORN & HIROMI MASUNAGA, *A Merging Theory of Expertise and Intelligence*, in *THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE* 587, 601 (K. Anders Ericsson et al. eds., 2006); K. ANDRES ERICSSON, *THE ROAD TO EXCELLENCE: THE ACQUISITION OF EXPERT PERFORMANCE IN THE ARTS AND SCIENCES, SPORTS AND GAMES* (Lawrence Erlbaum Assocs. 1996)). As another measuring stick, literary critic Gorham Munson stated that “professional writers . . . say that nobody can be called a writer until he has written a million words, the equivalent of ten good-sized books.” Bryan Garner, *A Message to Law Students: Effective Writing Takes a Lifelong Commitment*, 85 MICH. B.J. 52, 52 (2006).

<sup>21</sup> See *infra* notes 22–30 and accompanying text.

Remember this as a consolation in moments of despair. If you find that writing is hard, it's because it *is* hard. It's one of the hardest things that people do.<sup>22</sup>

Zinsser is far from alone, even among accomplished writers, in describing writing as hard. Author Paul Graham acknowledged that “[t]he easy, conversational tone of good writing comes only on the eighth rewrite.”<sup>23</sup> Sportswriter and long-time fiction editor at *The New Yorker*, Roger Angell said, “Writing is hard. Writing is hard for everybody,”<sup>24</sup> “even for authors who do it all the time.”<sup>25</sup> Angell compared baseball to writing and said, “They are both intensely difficult. They look easy, but they’re hard.”<sup>26</sup> Exposing part of why writing is so hard, comedian and author Lewis Black says that “[w]riting is thinking and thinking is hard work.”<sup>27</sup> Historian David McCullough, who has won two Pulitzer Prizes and two National Book Awards,<sup>28</sup> admits that he has to “work very hard on the writing, writing and rewriting.”<sup>29</sup> Current editor of *The New Yorker*, David Remnick,

<sup>22</sup> WILLIAM ZINSSER, *ON WRITING WELL: THE CLASSIC GUIDE TO WRITING NONFICTION* 12 (6th ed. 1998). Writing professor Theodore A. Rees Cheney stated that *On Writing Well* “appears on just about every list of Recommended Readings I’ve come across.” THEODORE A. REES CHENEY, *GETTING THE WORDS RIGHT: HOW TO REVISE, EDIT & REWRITE* 208 (1st ed. 1983).

<sup>23</sup> PAUL GRAHAM, *HACKER AND PAINTERS: BIG IDEAS FROM THE COMPUTER AGE* 137 (Allen Noren eds., 2010). “Graham is a programmer, writer, and investor” and he has written three books (“*On Lisp* (Prentice Hall, 1993), *ANSI Common Lisp* (Prentice Hall, 1995), and *Hackers & Painters* (O’Reilly, 2004)”) and publishes many articles on his website, which received 34 million page views in 2015. *Bio*, PAUL GRAHAM, <http://www.PaulGraham.com/bio.html> (last visited Aug. 5, 2017).

<sup>24</sup> Interview with Roger Angell, *This Old Man Looks Back on a Full Life*, NPR (Nov. 14, 2015, 8:19 AM), [http://www.npr.org/2015/11/14/455920045/this-old-man-looks-back-on-a-full-life?utm\\_medium=RSS&utm\\_campaign=books](http://www.npr.org/2015/11/14/455920045/this-old-man-looks-back-on-a-full-life?utm_medium=RSS&utm_campaign=books). Angell has written nine books and over one-hundred published essays on sports, several of which have been included in “The Best American Sports Writing, The Best American Short Stories, The Best American Essays, and The Best American Magazine Writing.” *Contributors Roger Angell*, THE NEW YORKER, <https://www.newyorker.com/contributors/roger-angell> (last visited Aug. 5, 2017). The Baseball Hall of Fame awarded him the J.G. Taylor Spink Award, its highest award for writers. *Id.*

<sup>25</sup> WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 6 (4th ed. 2000) (Foreword by Roger Angell).

<sup>26</sup> Jared Haynes, *An Interview with Roger Angell: “They Look Easy, But They’re Hard”* (May 15, 2013, 3:54 PM), <http://thestacks.deadspin.com/an-interview-with-roger-angell-they-look-easy-but-th-506833869> (quoting Roger Angell).

<sup>27</sup> *Lewis Black Quotes*, GOOD READS, <https://www.goodreads.com/quotes/42567-writing-is-thinking-and-thinking-is-hard-work> (last visited Aug. 5, 2017). On top of his famous comedic career, “[Lewis] Black has written three best-selling books” and over forty plays. *Who is Lewis Black?*, LEWISBLACK.COM, <https://www.lewisblack.com/about-lewis> (last visited Aug. 5, 2017).

<sup>28</sup> William B. McCullough, *David McCullough: America’s Greatest Historian*, <http://www.simonandschusterpublishing.com/davidmccullough/david-mccullough-biography.html> (last visited Feb. 8, 2018).

<sup>29</sup> Bruce Cole, *David McCullough Interview: The Title Always Comes Last*, NAT’L. ENDOWMENT FOR THE HUMAN, <https://www.neh.gov/about/awards/jefferson-lecture/david-mccullough-interview> (last visited Aug. 5, 2017).

said that he “ha[s] to always remember, writing is really hard.”<sup>30</sup> Comedian Amy Poehler admits, “The truth is, writing is this: hard and boring and occasionally great but usually not.”<sup>31</sup>

The best writers in the country should find writing easy, right? Yet, each person quoted above used the word “hard” to describe writing.<sup>32</sup> This is what some of the best novelists, essayists, playwrights, editors—writers—in the country understand.<sup>33</sup> Writing is often frustrating, painstaking, despairing, possibly boring, and always hard. Successfully transferring the ideas from your brain onto paper and into another person’s brain, accurately and persuasively, is extremely difficult for anyone and can almost never be done quickly or on the first try.<sup>34</sup>

Writing is hard for anyone and everyone, even professional writers, but is it even harder for lawyers? Possibly. An attorney’s audience may be nearly the harshest to which any writer must write. Attorneys are writing for a skeptical reader each time they write a brief.<sup>35</sup> The judges are well aware that the attorneys are being paid to persuade them, to zealously advocate for the clients, and to be biased in the briefs.<sup>36</sup> Thus, the judge will question every statement and argument made in a brief.<sup>37</sup> Not only do attorneys have skeptical readers in the judges, but they must also contend with another reader who will not just be skeptical but will be confrontational: opposing counsel.<sup>38</sup> In fact, it is the opposing counsel’s

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<sup>30</sup> Stephanie Clifford, *Making it Look Easy at the New Yorker*, THE NEW YORK TIMES (Apr. 4, 2010), <http://www.nytimes.com/2010/04/05/business/media/05remnick.html?pagewanted=all>. David Remnick has also published six books, including biographies of Muhammad Ali and Former President Barack Obama. *Contributors, David Remnick*, THE NEW YORKER, <http://www.newyorker.com/contributors/david-remnick> (last visited Aug. 5, 2017).

<sup>31</sup> Rachel Toor, *Mamas, Don't Let Your Babies Grow Up to be Writers*, THE CHRON. HIGHER EDUC. (Feb. 2, 2015) <http://www.chronicle.com/article/Mamas-Dont-Let-Your-Babies/151587> (quoting Amy Poehler).

<sup>32</sup> See *supra* notes 22–31 and accompanying text.

<sup>33</sup> Perhaps ironically, many attorneys may even write more than novelists. As Judge William Prosser stated, “Law is ‘one of the principal literary professions. One might hazard the supposition that the average lawyer in the course of a lifetime does more writing than a novelist.’” Phelps, *supra* note 3, at 155 (quoting William Prosser).

<sup>34</sup> DAVID GREY, THE WRITING PROCESS 3 (1972) (quoting Leo Rosten, *The Myths by Which We Live*, VITAL SPEECHES 412 (1965)) (stating that “[t]here is the myth that communication is a fairly common phenomenon which involves a fairly common set of skills. I submit to you that communication is extremely rare; that we really don’t know very much about how to get an idea from one head into another.”).

<sup>35</sup> JOHN C. DERNBACH, ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 216 (5th ed. 2015).

<sup>36</sup> Schiess, *supra* note 19, at 11.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*



responsibility to oppose what you wrote.<sup>39</sup> In most situations, opposing counsel even has an ethical obligation to do so!<sup>40</sup> Clients are paying opposing counsel, often handsomely, to explain to the judge in a response brief why your brief is wrong.<sup>41</sup> With such antagonistic readers, attorneys must be very meticulous in how they frame the issues, synthesize the rules, represent the precedent, support their arguments—i.e., in how they write their briefs.<sup>42</sup>

On top of writing to skeptical and adversarial readers, attorneys are often writing about complex topics.<sup>43</sup> For example, consider a brief written in support of a common Motion for Summary Judgment. First the writer may need to grapple with dozens, or even hundreds, of facts. Some of these facts may help the attorney's client, but some may be harmful. Some facts will be irrelevant to the outcome, but necessary for providing the reader with necessary context. Some facts may be crucial to the desired outcome. But, which facts are irrelevant, contextual, or crucial can fall into gray areas and may be disputed by opposing counsel. If opposing counsel does not dispute that a fact is important, opposing counsel almost assuredly will disagree about why it is important. And, nuanced arguments must be made sometimes about whether the situation presents a question of fact (which would preclude summary judgment) or a question of law (potentially allowing for summary judgment).

Aside from the facts, the writer may have to grapple with various rules, some procedural<sup>44</sup> and some substantive.<sup>45</sup> These rules are often multi-layered: the main

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<sup>39</sup> *Id.*

<sup>40</sup> The Comment to the American Bar Association Model Rule 1.3 for Professional Responsibility states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. (AM. BAR ASS'N. 1983).

<sup>41</sup> Schiess, *supra* note 19, at 11.

<sup>42</sup> Discussing the scrutiny legal writers face, Wayne Schiess states:

Your supervisor, who can hire and fire, promote or demote, gets to inspect your writing. Opposing counsel gets paid to find your mistakes—sort of a professional writing critic. Your client, the one paying you to write, can examine your writing, of course. And in litigation the judge is, well, judging it.

*Id.*

<sup>43</sup> *Id.*

<sup>44</sup> For example, whether the standard for summary judgment has been met (such as Federal Rule of Civil Procedure 56). See FED. R. CIV. P. 56.

<sup>45</sup> For example, whether the elements for a cause of action have been met (such as fraud, breach of contract, negligence, unjust enrichment, etc.).

rules will likely have sub-rules that need to be addressed, and those may possibly have their own sub-rules. Some rules may be element based, while others may be factor based, with each type of rule often requiring a very different analysis.<sup>46</sup> On top of the rules, the writer must also deal with varying caselaw precedents interpreting those rules based on factual situations that may be similar, but rarely identical, to the current client's facts. Some cases will help the client's arguments, but others will hurt. And remember, every time the attorney explains why a precedent case is analogous to her client's situation, opposing counsel will undoubtedly explain to the judge why that same case is actually distinguishable from the current case. Because the law is rule based, much of legal writing is analytical writing, which requires the attorney "to separate out systematically the component parts" of the law, "to dissect his topic and to put it back together meaningfully for [the reader] by clarifying relationships, explaining, and emphasizing the most important parts."<sup>47</sup> Because the rules are often multi-layered, the attorney "has the added creative challenge of taking several analytical pieces and combining them into one more complex piece."<sup>48</sup> Making accurate decisions about how to organize the analysis in a brief is crucial to the written product, but often complex.

Another layer? Beyond the analytical decisions, nearly countless more decisions challenge a brief writer. When discussing the facts, the writer must decide which techniques would best highlight the helpful facts.<sup>49</sup> Which harmful facts should be included? How do you de-emphasize the harmful facts that you choose to include?<sup>50</sup> When drafting the rules, have you synthesized the rules from various sources accurately and thoroughly?<sup>51</sup> Are similar sounding rules that courts have worded differently actually expressing the same rule, or does the different language communicate nuanced differences in meaning?<sup>52</sup> When discussing

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<sup>46</sup> For a rule with elements, every element of the rule must be met for the rule to apply. CHRISTINE COUGHLIN, ET AL., *A LAWYER WRITES* 60 (2d ed. 2013). Each element can be analyzed individually. *Id.* at 63–66. However, for a rule with factors, the factors are each analyzed and then weighed against each other to determine whether the rule is met or not. *Id.* at 60–61.

<sup>47</sup> GREY, *supra* note 34, at 5.

<sup>48</sup> *See id.*

<sup>49</sup> *See* LOUIS J. SIRICO, JR. & NANCY L. SCHULTZ, *PERSUASIVE LEGAL WRITING FOR LAWYERS AND THE LEGAL PROFESSION* 75–83 (2d ed. 2001); *see also* RUTH ANNE ROBBINS ET AL., *YOUR CLIENT'S STORY* 37–113 (2013).

<sup>50</sup> *See* JOAN M. ROCKLIN ET AL., *AN ADVOCATE PERSUADES* 268–77 (1st ed. 2016); *see also* SIRICO & SCHULTZ, *supra* note 49, at 77–78.

<sup>51</sup> LINDA H. EDWARDS, *LEGAL WRITING PROCESS, ANALYSIS, AND ORGANIZATION* 53, 61–64 (5th ed. 2010); DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 20–23 (1st ed. 1998).

<sup>52</sup> EDWARDS, *supra* note 51, at 53.

precedent cases, how much detail is helpful versus overkill?<sup>53</sup> Did you frame the precedent cases in helpful ways?<sup>54</sup> Are those even the right precedent cases to use?<sup>55</sup> Did you update every authority to make sure it is still good law? Do any of the authorities you are relying on also expose weaknesses in your argument? How many precedent cases are too many to include? Should you string cite to other authorities that you do not rely on?<sup>56</sup> Should you supplement your mandatory authorities with persuasive authorities?<sup>57</sup> Should you explain precedent cases in formal illustrations or more briefly through parentheticals?<sup>58</sup> Beyond the cases you want to include, which precedent cases will opposing counsel likely rely on in her response brief? Should you include those in your brief?<sup>59</sup> How do you overcome them?<sup>60</sup> How much “airtime” do you give harmful cases or arguments when you attempt to overcome them? Or should you leave those cases out and wait to address them in your reply brief several weeks down the road?<sup>61</sup> Should you include every argument in your brief that you can think of, or should you only include your strongest few arguments and leave the rest on the cutting board?<sup>62</sup> Did you provide context before detail?<sup>63</sup> Did you give the reader a roadmap of your argument?<sup>64</sup> Did you use point-headings effectively?<sup>65</sup> Do your point-headings echo your roadmap?<sup>66</sup> Are your paragraphs too long, too short, or easily readable?<sup>67</sup> Are any sentences too long?<sup>68</sup> Is your grammar solid? Beyond grammar, does your writing flow?<sup>69</sup> Is it active? Clear? Concise?<sup>70</sup> Are there any typos over the course

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<sup>53</sup> See COUGHLIN ET AL., *supra* note 46, at 113–15; see also MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 102–19 (3d ed. 2010).

<sup>54</sup> See SIRICO & SCHULTZ, *supra* note 50, at 93–96.

<sup>55</sup> See COUGHLIN ET AL., *supra* note 46, at 113–15.

<sup>56</sup> See BEAZLEY, *supra* note 53, at 129–31; see also SIRICO & SCHULTZ, *supra* note 50, at 158–59; TERESA J. REID RAMBO & LEANNE J. PFLAUM, LEGAL WRITING BY DESIGN 512 (2001).

<sup>57</sup> See SIRICO & SCHULTZ, *supra* note 50, at 92–93.

<sup>58</sup> See MICHAEL R. SMITH, ADVANCED LEGAL WRITING 35–62 (3d ed. 2013); see also BEAZLEY, *supra* note 53, at 108–11.

<sup>59</sup> See SIRICO & SCHULTZ, *supra* note 50, at 158–59.

<sup>60</sup> See *id.* at 93–100.

<sup>61</sup> See Kathryn Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 361 (2008); *supra* notes 49–60 and accompanying text.

<sup>62</sup> See SIRICO & SCHULTZ, *supra* note 50, at 23.

<sup>63</sup> STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING & EDITING 18–22 (2d ed. 2003).

<sup>64</sup> See SIRICO & SCHULTZ, *supra* note 50, at 42–43.

<sup>65</sup> See ROCKLIN ET AL., *supra* note 50, at 191–96.

<sup>66</sup> See ARMSTRONG & TERRELL, *supra* note 63, at 64–65.

<sup>67</sup> See RAMBO & PFLAUM, *supra* note 56, at 517.

<sup>68</sup> See *id.* at 519.

<sup>69</sup> See *id.* at 219–37.

<sup>70</sup> Many legal writing books have chapters devoted to concision at the sentence level. See *id.* at 173–92.

of the thirty-page brief?!<sup>71</sup> Did you develop a theme throughout your brief?<sup>72</sup> If so, is the theme explicit or implied? Is it properly subtle, or too subtle? Would a fact-based theme, a law-based theme, or a policy-based theme be more effective?<sup>73</sup> Did you take into account any idiosyncrasies your particular judge may have? Did you meet specific formatting requirements that the particular court you are filing the brief with has?<sup>74</sup> Etc., etc., etc.

The above questions are just a small sample of the types of questions an attorney must consider when writing a brief.<sup>75</sup> Rarely does an attorney make these decisions easily, and these decisions can affect the strength of the brief immensely.

Further, an essential part of the writing process is the rewriting process—editing; revising; testing what you’ve argued; reading what you’ve written from a reader’s perspective; changing your mind; spotting redundant points, etc.<sup>76</sup> During this rewriting process, the attorney must critically assess her substantive decisions (what to include), her structural decisions (how to organize it), and her stylistic decisions (how to say it). If the writer assesses her brief critically, she likely will make many changes from the first draft to the next. “[A] thorough *revision* is essential to having an effective document. True revision is rarely quick, but this necessary step will make a significant difference in the final product.”<sup>77</sup> This revision process occurs constantly: “In creating any document, research, thought, and writing are interactive: as you write, you realize that you need more research; as you do more research, you change what you have written.”<sup>78</sup>

On top of all these considerations exists the constant pressure under which attorneys write. As legal writing expert Wayne Schiess states:

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<sup>71</sup> See *id.* at 521.

<sup>72</sup> TERRILL POLIMAN ET AL., *LEGAL WRITING: EXAMPLES & EXPLANATIONS* 193–99 (2011); see also ROCKLIN ET AL., *supra* note 50, at 99–107.

<sup>73</sup> See ROCKLIN ET AL., *supra* note 50, at 99–107.

<sup>74</sup> See RAMBO & PFLAUM, *supra* note 56, at 522.

<sup>75</sup> I constructed the list of questions in the preceding paragraph by just brainstorming for a few minutes and jotting down on a blank notepad some of the common questions that I talk with my students about or that I grapple with when writing a brief. See generally *LEGAL WRITING BY DESIGN*, *supra* note 56 (demonstrating that the list could go on for many more pages because the book primarily focuses on raising and discussing the myriad of questions and concerns that attorneys should consider when writing a brief, and the book is more than 600 pages in length). As apparent from the various supporting citations above, scores of other legal writing texts raise similar and additional concerns as well. See *infra* notes 325–47 and accompanying text (providing a sample of such books).

<sup>76</sup> STINSON, *supra* note 5, at 28 (stating that “[f]or most of us, the writing process is how we learn—by attempting to communicate our analysis, we discover where we have confusion, what needs to be changed, etc.”).

<sup>77</sup> *Id.* at 75.

<sup>78</sup> VEDA R. CHARROW, ET AL., *CLEAR AND EFFECTIVE LEGAL WRITING* 203 (4th ed. 2007).

Usually, there's a lot riding on your writing: your client's money, your client's rights and, in the criminal setting, your client's liberty or even life. If writing with that kind of pressure weren't enough, there's the complexity of the subject matter. The law is complicated, and writing about complex topics with a lot at stake is demanding work.<sup>79</sup>

So, does writing a legal brief sound hard? Absolutely. Does it sound like it can be accomplished quickly? Absolutely not. Except in the most simple, routine cases, well-written briefs are not boilerplate documents.

I realize all of this is not news to any attorney who has practiced for years and written many briefs. Perhaps the above may be a more helpful reality check for a different segment of readers—possibly law students. But, the above conversation is still worth having with practicing attorneys because it helps demonstrate why writing a good brief (of any moderate length and that tackles issues with moderate complexity) will never be a quick endeavor.<sup>80</sup> If nothing else, the considerations referenced above may help attorneys accept, appreciate, and maybe even endear themselves to the time it takes to write a brief well.<sup>81</sup>

And yet, the impossible catch: in the real-world practice of law, attorneys often must write briefs quickly! Attorneys have deadlines. Lots of them. Attorneys have multiple open cases—scores of them. And, attorneys have so much more to do than just write briefs. During any particular day, attorneys may be meeting with clients, attending court, preparing for depositions, responding to discovery, negotiating settlements, attending closings, and engaging in multiple phone conversations. And that is just a short sample of *billable* tasks. A more realistic view of an attorney's workday includes non-billable tasks too:

[Y]ou will also not be able to bill for much of what you will do at the office or during the workday—going to lunch, chatting with your co-workers about the latest office romance, visiting your favorite websites, going down the hall to get a cup of coffee, reading your mail, going to the bathroom, attending the weekly meeting of your practice group, filling out your time sheet, talking with your spouse on the phone, sending e-mail to friends, preparing a “pitch” for a prospective client, getting your hair cut, attending a funeral, photocopying your tax returns, interviewing a recruit, playing Solitaire on your computer, doing pro bono work, reading advance sheets, taking a summer associate to a

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<sup>79</sup> Schiess, *supra* note 19, at 11.

<sup>80</sup> See *supra* notes 19–79 and accompanying text.

<sup>81</sup> See *supra* notes 19–80 and accompanying text.

baseball game, attending CLE seminars, writing a letter about a mistake in your credit card bill, going to the dentist, dropping off your dry cleaning, daydreaming, and so on.<sup>82</sup>

Legal Writing expert Bryan Garner acknowledged this time crunch when he observed that “[t]he modern practice of law does not tolerate the type of revisory process necessary to produce a polished product—the ‘well-managed’ law firm has more work to do than it can complete in a given span of time.”<sup>83</sup> As an explanation of why legal writing is not as good as it should be, one author noted the following:

Deadlines, billable hours, and heavy workload all prevent lawyers from taking the appropriate time to polish their writing. For example, even if a lawyer has four weeks to write a brief, that’s not enough. The same lawyer has three other briefs, four memos, and eight letters to write at the same time, not to mention the 150 e-mail messages to read and respond to. Revision, editing, and rewriting are what make mediocre writing good and good writing great, but lawyers don’t seem to have enough time for them.<sup>84</sup>

As alluded to in a study on attorney workloads, lack of sufficient time diminishes both the quality of briefs and attorney job satisfaction:

The most common comment and issue faced by attorneys across all practice areas was the lack of time available to get all job duties completed. During their few hours in the office, attorneys are forced to triage their work and often have time to address only the most urgent matters. This leaves little time for work such as writing motions, trial preparation, correspondence, and client contact. For attorneys, long hours and weekend work are typical strategies to stay on top of their cases.<sup>85</sup>

In the same study, another attorney complained that “[g]iven our short timeline sometimes doing a good job means working nearly 24/7.”<sup>86</sup> Another echoed a similar reality in observing that “[f]requently (almost daily) this [getting

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<sup>82</sup> Schlitz, *supra* note 8, at 894.

<sup>83</sup> BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 518 (2d ed. 1995).

<sup>84</sup> Wayne Schiess, *Legal Writing is Not What it Should Be*, 37 S.U. L. REV. 1, 15 (2009).

<sup>85</sup> THE COMM. FOR PUB. COUNS. SERV., CTR. FOR CT. INNOVATION, ANSWERING GIDEON’S CALL PROJECT (2012-DB-BX-0010) ATTORNEY WORKLOAD ASSESSMENT 21 (Oct. 2004), <https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Attorney-Workload-Assessment.pdf>.

<sup>86</sup> *Id.*

the work done] requires completing work after work hours.”<sup>87</sup> Obviously, long hours and weekend work take attorneys away from their families; they miss family dinners, their kids’ soccer games, etc.<sup>88</sup> These absences add to attorney stress and dissatisfaction<sup>89</sup>—all the more reason to search for ways to write more efficiently. In his article exploring attorney dissatisfaction, Professor Schlitz noted:

In every study of the career satisfaction of lawyers of which I am aware, in every book or article about the woes of the legal profession that I have read, and in every conversation about life as a practicing lawyer that I have heard, lawyers complain about the long hours they have to work. Without question, “the single biggest complaint among attorneys is increasingly long workdays with decreasing time for personal and family life.”<sup>90</sup>

Beyond the attorney’s time demands, financial concerns are part of the equation. Clients often pay attorneys by the hour, and many clients do not have unlimited budgets.<sup>91</sup> A 2013 study by the National Center for State Courts (NCSC) reported that the average hourly rate for a senior attorney in contract dispute litigation is \$290/hour.<sup>92</sup> The average rate for a junior attorney in contract dispute cases is \$185/hour.<sup>93</sup> In real property dispute cases, the average rates are \$300/hour (senior attorney) and \$200/hour (junior attorney).<sup>94</sup> Hourly rates may not be an issue if you are working on a contingency fee or if your client is a Fortune 500 company, but it matters greatly if you are representing smaller,

<sup>87</sup> *Id.*

<sup>88</sup> Respondents in a study on workplace time commitments noted “that prestigious national [law] firms seldom afforded the temporal flexibility to engage in recreational activities or to raise a family.” Timothy Kuhn, *A ‘Demented Work Ethic’ and a ‘Lifestyle Firm’: Discourse, Identity, and Workplace Time Commitments*, 27(9) ORGANIZATIONAL STUDIES, 1339, 1344 (2006), [https://www.researchgate.net/profile/Timothy\\_Kuhn/publication/247734388\\_A\\_%27Demented\\_Work\\_Ethic%27\\_and\\_a\\_%27Lifestyle\\_Firm%27\\_Discourse\\_Identity\\_and\\_Workplace\\_Time\\_Commitments/links/54414bce0cf2e6f0c0f60ce0/A-Demented-Work-Ethic-and-a-Lifestyle-Firm-Discourse-Identity-and-Workplace-Time-Commitments.pdf](https://www.researchgate.net/profile/Timothy_Kuhn/publication/247734388_A_%27Demented_Work_Ethic%27_and_a_%27Lifestyle_Firm%27_Discourse_Identity_and_Workplace_Time_Commitments/links/54414bce0cf2e6f0c0f60ce0/A-Demented-Work-Ethic-and-a-Lifestyle-Firm-Discourse-Identity-and-Workplace-Time-Commitments.pdf).

<sup>89</sup> *See id.* at 1348.

<sup>90</sup> Schlitz, *supra* note 8, at 889–90 (citing twenty articles that all support this sentiment).

<sup>91</sup> In a short bar journal essay, Wayne Schiess noted that he often hears this concern: “Even if I had the time, the client won’t want to pay my fee if I take the time necessary to implement all the writing techniques you recommend.” Wayne Schiess, *Write Better Faster*, AUSTIN LAW. 15 (Feb. 2009).

<sup>92</sup> Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CASELOAD HIGHLIGHTS 1, 5 tbl. 3 (2013), [http://www.ncsc.org/-/media/Microsites/Files/CSP/DATA%20PDF/csph\\_2013\\_tablesv1.ashx](http://www.ncsc.org/-/media/Microsites/Files/CSP/DATA%20PDF/csph_2013_tablesv1.ashx). The 25th percentile is \$200/hour and the 75th percentile is \$400/hour. *Id.*

<sup>93</sup> *Id.* The 25th percentile is \$150/hour and the 75th percentile is \$250/hour. *Id.*

<sup>94</sup> *Id.* The 25th percentile is \$200/hour (senior attorneys) and \$169/hour (junior attorneys). *Id.* The 75th percentile is \$400/hour (senior attorneys) and \$256/hour (junior attorneys). *Id.*

cost-conscious clients on hourly fee arrangements. When you represent a client with limited financial means, spending a long time writing a brief can be stressful, knowing you may have to write off some of your time or frustrate the client with a large bill.

So, with the realities noted above as a caveat, Part III will discuss some real, practical tips, tools, and techniques that can improve your writing speed and efficiency.<sup>95</sup> While they cannot save the time it takes to make the myriad decisions inherent in persuasive legal analysis, they can shorten the time that you spend actually “writing”—trying to craft arguments, paragraphs, and sentences to say what you want the reader to hear. In my experiences working with attorneys around the country, many could benefit from several of the techniques explored in Part III.<sup>96</sup>

### III. MISSION A-LITTLE-MORE POSSIBLE: TECHNIQUES FOR WRITING BRIEFS MORE EFFICIENTLY

Below are twelve suggestions for improving the speed and efficiency with which attorneys write briefs.<sup>97</sup> Some techniques are simple, while others require more effort and practice. Some may seem obvious, while others may seem novel. Some will yield immediate results, while some will gradually lead to increased efficiency in your writing. Some are concrete writing techniques, while others are more conceptual. I chose to order them roughly in the order in which you would apply them while writing a brief. Tips one through nine follow that order. Tips ten through twelve focus on broader tips that are not as concretely applicable to the writing process for any particular brief, but instead emphasize improving the efficiency of your writing process more generally.

#### *A. Plan differently when budgeting your time*

One of the most common reasons why attorneys feel they do not have the time they need to write strong briefs is because they do not plan their writing projects realistically.<sup>98</sup> A crucial reality for attorneys to understand is that editing

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<sup>95</sup> See *infra* notes 96–389 and accompanying text.

<sup>96</sup> See *infra* notes 97–389 and accompanying text.

<sup>97</sup> See *infra* notes 98–391 and accompanying text.

<sup>98</sup> Professor Judith Stinson suggests that:

You will be far more likely to succeed if you expect the writing to take two to three times longer than you would originally estimate. . . . If you think you can conduct all the necessary research and draft a suitable memo in ten hours, plan on spending twenty to thirty. If in fact you overestimate the actual time it will take, you finish early. Celebrate.

STINSON, *supra* note 5, at 22.



and revising should comprise the bulk of the writing process.<sup>99</sup> Many attorneys do not plan appropriately for this step of the writing process. Instead, many attorneys finish the first draft of a brief the week the brief is due. As a result, they end up with much less time to edit and revise than is necessary.<sup>100</sup> They rarely revise the brief in a significant way, and instead they only have time to polish it—fixing typos, grammars errors, and any other glaring mistakes that they see. As a result, attorneys often submit what is basically their first draft, minus obvious typos and grammar errors. Yet, first drafts are rarely very good, at least compared to what the attorney could have submitted if she had rewritten the first draft to improve both its style and substance.

This tip, to plan differently and build in more time, seems oxymoronic: the problem is that you do not have extra time! In some situations, this is certainly true. But, not always. Though attorneys juggle many projects at once, it is easy to get in the routine of surviving day to day, putting out the fires that are hottest, and waiting to do writing projects until that fire gets hot—until the deadline approaches. The problem with this approach, though, is that every writing project then feels rushed, that you never have the time you need to write well, and that you always need to “write more quickly.”

It is possible to readjust your approach to writing projects and plan differently. Do not set a reminder on your calendar to finish your brief a few days before the filing deadline. Instead, set a deadline on your calendar to complete the first draft much earlier—maybe two weeks before the filing deadline (maybe even three weeks). Set the deadline as early as possible. If you have twenty-eight days to file a brief, complete the first draft in fourteen days. This gives you fourteen more days to work through the editing and revising stage, which should be the bulk of the writing process and the part of the process when your brief improves significantly.

Such a timeframe may seem unrealistic. And, in some especially busy months, and with some writing projects, it might be so. But, in general, rethink your approach.<sup>101</sup> Challenge yourself to complete first drafts much earlier. Set early deadlines and force yourself to take those deadlines seriously.<sup>102</sup>

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<sup>99</sup> CHENEY, *supra* note 22, at *Introduction* (stating that “[in] a reader-centered philosophy of writing, the writer must revise, revise, and revise yet again to ensure that his meaning will cross that abyss between his mind and that of his many . . . readers”).

<sup>100</sup> ARMSTRONG & TERRELL, *supra* note 63, at 314 (“An ancient mantra that captures this truth: ‘there is no such thing as good writing. There is only good rewriting’. . . . [Y]ou may still assume only incompetent writing needs heavy editing. This assumption is fatal. Good professional writers take it for granted that they return to a paragraph three times, each time they will find a way to improve it.”).

<sup>101</sup> *See id.* at 302.

<sup>102</sup> MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 111 (4th ed. 2000) (“[B]reak [your paper down] into subsections, [or your process down into subsections], and set interim deadlines for each subsection. Mark [your] deadlines on your calendar, moving backwards from the deadline date and making a special effort to meet each of those interim deadlines.”).

Once you begin meeting earlier deadlines for most of your writing projects, the practice of following these timelines becomes realistic. Over time, your habits and patterns can shift away from starting briefs late and finishing them up against their filing deadlines. Instead, you can begin to consistently start them early and have time to edit and revise them more adequately and efficiently, to file stronger versions, and to work on the next brief without the stress of a pressing deadline.

The above does not mean that you have to *finish* every brief two weeks early. Instead, it emphasizes the effectiveness of attempting to finish the first draft two weeks early. You do not have to have a perfectly polished brief completed weeks before the deadline. But, you do need to strive to have first drafts completed weeks before the deadline. This more disciplined approach then gives you sufficient time to edit and revise your brief to the extent it needs it, not just to the lesser extent that the otherwise looming deadline allowed for. This also allows you to edit and revise in a systematic way, which leads to more productive, effective, and efficient revisions. Further, finishing a first draft earlier allows you to set the brief aside for a few days at a time in between edits. Doing so keeps your mind fresh when you return to edit the brief, allowing you to spot more errors and thus edit it more efficiently:

What you can accomplish in three hours of wrestling with your draft can be accomplished in one hour—and a much less frustrating hour, too—if you first set it aside for a day or two. . . . So make sure that . . . during the thorough revising process you put your writing aside long enough to forget about it—a couple of days or better yet a couple of weeks.<sup>103</sup>

Thus, you will finish with a higher quality brief than if you had not built in time for proper editing and revising. By giving yourself time to work through a systematic approach to editing, you will produce a higher quality brief more quickly than if you edited and revised the traditional way.<sup>104</sup>

Finishing a first draft earlier can ease the feeling that you need to write more quickly, a feeling that causes extra anxiety when a deadline hovers. You will find that your writing will improve. You may also find that writing becomes more enjoyable and more efficient. Professor Judith Stinson has pointed out that “[w]e almost always end up spending more time than we budgeted—suggesting that if we just budget longer from the start, we will feel less pressure and less rushed in the end (while spending the same amount of time we would have anyway).”<sup>105</sup> As with anything, in writing haste causes waste, and stress: “The more we rush,

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<sup>103</sup> ELBOW, *supra* note 6, at 128.

<sup>104</sup> See *infra* notes 261–80 and accompanying text.

<sup>105</sup> STINSON, *supra* note 5, at 23

the less effective we are—and hence, the more we need to rush . . . . Hence, the first trick to becoming more efficient so you don't have to rush is—simply—not to rush.”<sup>106</sup>

Adjusting your approach to writing briefs by forcing yourself to complete first drafts much earlier is the best way to avoid having to rush.<sup>107</sup> You can then write your first drafts without the stress of an immediately impending deadline, and you can edit and revise more efficiently. And, you will always produce better briefs in the end.

### *B. Outline your argument first*

“Minutes invested in outlining will save you hours later.”<sup>108</sup>

Ideally, you will start your brief well before its deadline. But, whether you start early or not, the first step in writing a legal brief (after completing your initial legal research) should be to outline your argument.<sup>109</sup> During our NITA programs on writing persuasive briefs, we always ask the attorneys if they outline their arguments before they begin writing. Some do, but year after year, most admit they do not. If you do not, and if you want to write more quickly, try it.

The initial outline can vary from attorney to attorney and from brief to brief. This outline could be several pages long and include great detail, or it could be one page long and just include general concepts to develop.<sup>110</sup> Your outline could follow a very formal outlining format, or it could be an informal list of bullet points and short reminders to yourself about the points you want to make.<sup>111</sup> You might type up the outline neatly, or scribble it on a legal pad with thoughts

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<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> CHARROW, *supra* note 78, at 142.

<sup>109</sup> *Id.* (stating that “[y]ou should start organizing material into an outline as soon as you have identified the main issues and decided what points you want to make” and that your document will evolve as you write it).

<sup>110</sup> In encouraging attorneys to create outlines before writing briefs, Lawrence Rosenberg, a partner at Jones Day, suggests that the outline could be one to six pages, depending on the length and complexity of the brief, but that an outline exceeding six pages would resemble more of a first draft than an actual outline. Lawrence D. Rosenberg, *Writing to Win: The Art and Science of Compelling Written Advocacy*, 2012 A.B.A. SEC. OF LITIG. 9, [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac\\_2012/34-2\\_writing\\_to\\_win\\_art\\_and\\_science\\_compelling\\_written\\_advocacy.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/34-2_writing_to_win_art_and_science_compelling_written_advocacy.authcheckdam.pdf).

<sup>111</sup> CHARROW, *supra* note 78, at 141 (stating that “[o]ne of the best ways to organize a document is to create a written outline. This can be a simple list or something more elaborate, with many topics and subtopics.”).

crossed out, arrows pointing to new ideas, etc.<sup>112</sup> You may prepare your outline before you research,<sup>113</sup> as a “running” outline that you update as you research,<sup>114</sup> or after you complete your research and have a better, more complete sense of the rules, precedent, arguments, etc. How you outline may vary depending on the importance of the brief, your familiarity with the area of law, the length of the brief, the complexity of the brief, and the amount of time you have to write the brief.<sup>115</sup> More than anything, it will vary based on your own personal preferences.<sup>116</sup> Some people prefer linear outlines<sup>117</sup>, some prefer whirlybird outlines<sup>118</sup>—whatever approach works best for you is fine.<sup>119</sup> The important thing is that you do outline before you start typing the paragraphs and sentences in your argument.<sup>120</sup>

Some attorneys do not outline because it feels like another step delaying the writer from feeling she is actually writing.<sup>121</sup> Some attorneys do not outline

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<sup>112</sup> See *id.* at 141–42 (stating that “[w]hen you create an outline, you give yourself the opportunity to organize and reorganize your ideas to provide the most effective focus for the document. . . . Outlining can in itself suggest new ideas and fresh perspectives.”).

<sup>113</sup> See RAY & RAMSFIELD, *supra* note 102, at 309 (advising writers to “[t]ry to list or outline the important points that you want to make under each issue. Even though this list may be flawed, it will help you focus your research.”).

<sup>114</sup> STINSON, *supra* note 5, at 54 (encouraging writers to “[b]egin with a very general and short outline and, depending on the size of the project, add detail over time”).

<sup>115</sup> CHARROW, *supra* note 78, at 141 (stating that “[t]he complexity of the outline usually depends on the complexity of the document”).

<sup>116</sup> See CATHERINE J. CAMERON & LANCE N. LONG, *THE SCIENCE BEHIND THE ART OF LEGAL WRITING* 25 (2015) (“Outlining does not have to follow the traditional . . . outlining structure you may have been taught in elementary school. Any preplanning of your writing will accomplish, at least, some of the attributes seen in these empirical studies.”); see also Phelps, *supra* note 3, at 159 (“By carefully answering the need to know question, you can generate an outline, although it may not look like a traditional outline with Roman numerals in capital letters all in place. Instead, it may look like a list or clusters of ideas. Both of these, and anything else that calculated planning generates for you, is, for your purposes, an outline.”).

<sup>117</sup> STINSON, *supra* note 5, at 54 (stating that “[i]f you are a nonlinear thinker, beginning with another structure, such as a bubble diagram, may help. But most legal readers are linear thinkers, and they generally expect legal analysis to be conveyed in a linear fashion.”).

<sup>118</sup> RAY & RAMSFIELD, *supra* note 102, at 268 (stating that “[o]utlines can take any form: list, barely legible scratching, flowcharts, webs, Venn diagrams, or traditional outlines. Whatever the form, outlines help the writer make sure any reader can understand the document’s organization.”).

<sup>119</sup> *Id.*

<sup>120</sup> See Schiess, *supra* note 91, at 15 (suggesting that “[a] good outline . . . will make the composing go faster. The more detailed the outline, the faster the composing will go. The better the outline, the less time you’ll have to spend re-ordering. The earlier you start the outline, the more payoff you’ll get from outlining.”).

<sup>121</sup> Phelps, *supra* note 3, at 163 (stating that “although it may appear overly time-consuming to analyze the rhetorical problem and the rhetorical situation before writing, with a little practice it proves to be more efficient”).

because they do not yet really know what they are going to say, but they feel like they need to get going, to say something, and to figure it out as they go. Others may have an outline in their head, so they feel the need to commit an outline to writing is an unnecessary step.<sup>122</sup> Still others just find outlining difficult and thus feel it would slow them down.<sup>123</sup> The truth is, choosing not to outline for any of those reasons will not increase your writing efficiency and will often slow down your overall writing process: “According to many successful legal writers, clear thought and focused effort at the prewriting stage will save hours of time in writing, revising, and polishing.”<sup>124</sup>

One major benefit of outlining is that it forces the writer to think about the analysis,<sup>125</sup> to make decisions about the analysis, and to structure the analysis, all before writing.<sup>126</sup> Yes, this may mean it takes longer to actually start writing.<sup>127</sup> But, this “thinking” is an important part of the writing process, and committing your plan to paper is a wise investment of time. The time it takes to outline will be made up, perhaps several times over, once you begin actually “writing” (converting the outline into paragraphs and sentences).<sup>128</sup> As stated by Professor Judith Stinson, “Outlining as a precursor to actually writing helps you identify areas of confusion before you draft the entire document, saving you time in the end by minimizing the need for substantive review.”<sup>129</sup>

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<sup>122</sup> Schiess, *supra* note 3, at 54 (asking, “[r]emember outlining? Most of us learned to do it in middle school, but some of us think we’re beyond it. Not so. A good outline is an important step in a writing project.”).

<sup>123</sup> STINSON, *supra* note 5, at 54 (stating that “[m]any writers have difficulty outlining and they therefore skip this step. Although some documents are effective even though the writer did not create some form of an outline, chances are good that the document could have even been better if the writer had completed the step. . . . In the end, this step should make your writing process more efficient and more effective.”).

<sup>124</sup> RAY & RAMSFIELD, *supra* note 102, at 309.

<sup>125</sup> Rosenberg, *supra* note 110, at 9–10. Not only does it force the writer to think about the analysis before writing, but if the writer is working on the brief as part of a team, then “circulating an outline is an excellent opportunity to make sure that everyone is reasonably in agreement as to the approach to the brief before you have spent many hours drafting an argument that others may believe is unlikely to be persuasive.” *Id.*

<sup>126</sup> ELBOW, *supra* note 6, at 39 (stating that “[t]here are lots of methods people use for figuring out their meaning before they write. Making an outline is probably the most common and versatile method. An outline, by its nature, almost forces you to figure out what you really mean.”).

<sup>127</sup> See RAY & RAMSFIELD, *supra* note 102, at 317 (noting that the following may get the attorney writing sooner: “Set a time for completing the research and writing an outline. However cursory this outline may be, this step will usually force the procrastinating to end and the organizing to begin. This is the hardest step to take, but you must take it; skipping it can ruin worthwhile incubating.”); *supra* notes 76–126 and accompanying text.

<sup>128</sup> CHARROW, *supra* note 78, at 142 (“Minutes invested in outlining will save you hours later.”).

<sup>129</sup> STINSON, *supra* note 5, at 54.

Creating an outline before writing can help the writer identify areas of confusion and clarify her arguments.<sup>130</sup> When structuring legal analysis, the applicable rules of law should control the organization of a legal brief.<sup>131</sup> Understanding the rules, how they work, how they relate, etc., gives the writer a better understanding of how she needs to address the analysis.<sup>132</sup> Once the writer understands this rule-based structure to outlining, then identifying the important facts, the important points, and the order to work through them, becomes simpler.<sup>133</sup> When this part becomes simpler, the writing can become more focused and thus more efficient.<sup>134</sup> The writer can then get “on a roll” typing because the writer is not trying to accomplish varying difficult tasks simultaneously, such as considering the large-scale aspects of organization and substance and the small-scale sentence level construction simultaneously.<sup>135</sup>

Psychologist Ronald Kellogg addressed the value of a writer working out the organization before beginning to write when he noted that “[subjects wrote essays] faster if they had prepared a linear outline before beginning the writing process or had the outline given to them, a finding that was especially significant for those students who develop their own linear outline.”<sup>136</sup> In addition to increased speed in writing essays, the style and quality of the essays improved as well.<sup>137</sup> The

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<sup>130</sup> CHARROW, *supra* note 78, at 142.

<sup>131</sup> STINSON, *supra* note 5, at 55 (“Generally *organize your outline around the issues*—and if the rule has them, the rule’s elements—rather than around cases or other sources. . . . If your written document is organized around the authorities rather than the issues, it will read like a book report—perhaps interesting, but not very helpful in solving the legal problem.”). Professor Stinson also notes other organization guidelines:

Second, *decide which issues or elements should go first, second, third, and so on*. You generally have some flexibility, with a few exceptions. First, procedural issues should almost always be addressed before substantive issues. Second, legal issues should generally be addressed before factual issues. Third, address threshold issues first (meaning those issues that could eliminate the remainder of the analysis depending on their outcome), but still address the other issues unless there is no chance they will survive. Aside from these general guidelines, if you have a relevant statute, it can often provide a logical structure for your outline. You can follow the ordering of elements by the legislature or regroup them if doing so seems more logical or more persuasive.

*Id.*

<sup>132</sup> *Id.* at 36.

<sup>133</sup> Make it simple. *Id.* (“Legal analysis can be greatly simplified by breaking rules into their requisite elements. . . . [A]ny task is simplified by breaking it into its parts. . . . [B]reaking the rule into elements will simplify and clarify the analysis for the reader, making it more likely your document will be effective.”).

<sup>134</sup> See CAMERON & LONG, *supra* note 116, at 22.

<sup>135</sup> See *infra* note 102 and accompanying text.

<sup>136</sup> CAMERON & LONG, *supra* note 116, at 21–23 (citing the study from Ronald Kellogg, *Effectiveness of Prewriting Strategies as a Function of Task Demands*, 100 3 AM. J. PSYCHOL., 327–42 (1990)).

<sup>137</sup> *Id.*

increased speed and improved quality were attributed to the writers being able to more efficiently use their attention and working memory:

Because a writer is only able to devote a finite amount of attention and working memory to a task, planning the organization and topics to be covered prior to writing takes those tasks off the plate of the writer and allows the writer to focus on drafting coherent sentences that effectively communicate the ideas at hand.<sup>138</sup>

Especially with legal writing, a problem with not outlining is that legal briefs often present tricky, nuanced legal analysis.<sup>139</sup> If the writer does not outline, the writer is holding those thoughts in the writer's head, and only in her head. When conceptualizing complex, multi-step analysis in your head, it is easy not to realize structural flaws, substantive flaws, and organizational flaws. It is hard to catch repetitive points, missing connectors, and missing authority. Especially when it is a complex argument or multi-faceted brief, the analysis in your head may be somewhat murky. It is hard to write solid, crisp, focused, and concise analysis from ideas that are still forming.<sup>140</sup> When writing, it is easy to stray from your mental plan.<sup>141</sup> What often happens is that the analysis appearing on the paper is not sharply focused and often contains repetition in language or arguments.<sup>142</sup> Without an outline, working through the initial draft may take longer because you are working through it slowly, trying to remember, or decide, where to go with the next paragraph, then the next, then the next, and then the next.<sup>143</sup> Writing that way can be slow and exhausting.

Contrast that approach with writing a first draft based on a well-thought-out outline. First, the outline itself is basically a form of shorthand notes framing what the attorney will flesh out with sentences. But, to be able to outline, she

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<sup>138</sup> *Id.*

<sup>139</sup> See ARMSTRONG & TERRELL, *supra* note 63, at 4 (comparing the law to “the Rocky Mountains: convoluted, difficult to map, dangerous to traverse” and stating that legal writers “face a daunting challenge: turning western Colorado into terrain that feels much more like Kansas, without betraying the nuance and complexity of the mountain scenery”).

<sup>140</sup> LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 79 (4th ed. 2015) (stating that “[w]ithout [an outline], you are likely to miss issues and to wander off track as you write”).

<sup>141</sup> See CHARROW, *supra* note 78, at 142 (“A well developed outline will make your writing task easier and will keep you from going off on tangents in research or in writing.”).

<sup>142</sup> STINSON, *supra* note 5, at 71 (stating that “[a] good outline will help avoid structural repetition”).

<sup>143</sup> See EDWARDS, *supra* note 140, at 79 (Professor Edwards states that “[i]f you have carefully prepared the annotated outline, writing the memorandum will flow easily. Your topic headings, thesis sentences, and case citations in support of your explanation and application of the law will already be laid out.”).

has already made decisions about how to organize the argument, which points to make, in what order to work through those points, etc.<sup>144</sup> Now the attorney has a structure to follow as she begins writing—she has a game plan in place.<sup>145</sup> And, she can assess that game plan before writing pages of analysis. By assessing her outline, the attorney can critique her large-scale approach—did she understand the rules, did she organize the analysis based on the rules, did she include important points, did she find and choose helpful cases to illustrate and support her argument with, etc.?

Yes, the attorney could skip the outlining stage and make those assessments after she has written her first draft. But, such a strategy is less efficient for three reasons. First, it is harder to assess the answers to the above questions when trying to analyze the structure and order of ten, fifteen, or thirty-five pages of prose compared to, in the alternative, looking over a one or two page outline of a few hundred words. While reading over twenty pages, it is harder to keep focus and not get distracted by other concerns like poorly worded sentences. Second, correcting those flaws is much more time-consuming when trying to do so by cutting out sections, or paragraphs, or sentences you've already written; moving information around; and trying to tie it all together again in a cohesive way.<sup>146</sup> Instead, crossing out points, adding notes, or moving points around is easier and quicker when making simple adjustments to an outline. Third, if you write without outlining and then you spot larger-scale errors in your draft—repetition, illogical points, illogical order, etc.—the time you spent writing those parts initially was largely wasted time. If you write your draft based on a written outline that you already critiqued, then when you do commit to writing you are much less likely to ramble on, to be repetitive, to work through points in an illogical order, etc.<sup>147</sup> The likelihood of significantly re-working your brief by moving entire sections, cutting out paragraphs, removing unwanted repetition, etc., is reduced.<sup>148</sup>

Even if the initial draft, written without an outline, does not take longer to write, the editing and revising process may become much more labor-intensive.<sup>149</sup>

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<sup>144</sup> CHARROW, *supra* note 78, at 141 (stating that “[y]ou must always impose order on your writing. Legal documents, in particular, demand a tight, logical structure”).

<sup>145</sup> See ARMSTRONG & TERRELL, *supra* note 63, at 102 (stating that “[i]f a complex legal analysis is well organized, it usually includes a series of discrete, clearly demarcated points or topics”).

<sup>146</sup> RAY & RAMSFIELD, *supra* note 102, at 267 (urging attorneys to “[w]ork on the large-scale organization as early in the writing process as you can . . . until it is clear to you. . . . If you wait until revising or polishing, it may be too late and too frustrating to change.”).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 54 (“Many writers have difficulty outlining and they therefore skip this step. Although some documents are effective even though the writer did not create some form of an outline, chances are good that the document could have even been better if the writer had completed the step. . . . In the end, this step should make your writing process more efficient and more effective.”).

<sup>149</sup> *See id.*



It will likely take several revisions for the attorney to clearly articulate a focused argument if the attorney was creating that argument in her head for the first time while she was writing her first draft.<sup>150</sup> It is also likely that the attorney will have to address more frequent instances of repetition that occurred when she was trying to get her ideas, still forming, onto the page.<sup>151</sup>

An initial outline is not a guarantee you will be satisfied with the large- and mid-scale components of your brief. It is also not a guarantee you will not change your mind about how you chose to order points, how you supported points, what cases you chose to use, etc.<sup>152</sup> As you convert your outline into paragraphs and sentences, you will continue to refine your arguments in your head. An argument, a supporting point, a case-choice, etc., that seemed at first like it might work may not pan out when written.<sup>153</sup> These continuous assessments and revisions are all part of the writing process. But, you are more likely to have your first draft structured more closely to your final draft when you outline at the outset than when you do not outline first. The more closely your final draft resembles your first draft, the quicker and more efficient the editing and revising stage of writing will likely be.

### C. *Brief the cases you will use*

This concrete technique may be the simplest: once you have done the bulk of your research and have narrowed down the cases you may use, brief those cases. Just like Law School 101. Just like you did hundreds of times as a law student. Brief your cases.

When writing a legal brief, you will likely return many times to the stack of cases you are using: searching for the rules to include; searching for rules that are worded helpfully; deciding which cases are factually most similar; confirming which cases are helpful and which ones you may need to distinguish; mining out the court's reasoning; re-reading the cases that you choose to illustrate; pulling out the crucial facts from those cases; confirming the holdings in those cases; double-checking to make sure you relayed the important parts of the case accurately; double-checking to make sure you did not miss any nuances in the court's analysis; going back through the cases looking for supporting language to quote; searching to see if any cases provided helpful policy concerns; trying to remember which

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 71.

<sup>152</sup> GREY, *supra* note 34, at 39 (noting that a serious problem in writing is “when the writer thinks he has set everything up but has not taken enough time to reassess what he has. Not everything can be planned in advance, however; and the “good writer” will” be able to adapt as he is writing.”).

<sup>153</sup> STINSON, *supra* note 5, at 62 (acknowledging that “[o]nce the outline is drafted . . . [t]he “writing” becomes easier—although it still may not be easy”).

case made a particular point you remembered reading that you would like to cite to; etc.; etc. Depending on the type of brief, there may be twenty or more cases that you are incorporating into your brief. Thus, a large amount of time spent during the writing process is often spent re-reading, skimming, and searching through those cases in an inefficient manner.

This situation is particularly likely to occur when you are not able to write a brief in a few temporally close sittings. Attorneys may begin a brief one week, but then cannot finish it before other fires arise, and thus they return to their draft several days later. In those situations especially, you may find yourself re-reading cases to try to remember which ones you were planning to use.<sup>154</sup> Even if you remember which cases you planned to use, you may need to re-read them to remember why and how you were going to use each case. You may re-read the case to remember what facts were crucial, to refresh yourself about what reasoning the court provided, to remember what arguments the court rejected, etc. Because you may have many cases you were considering using, the cases blend together over time, and thus you have to skim entire opinions to locate the relevant information.

After your first draft is complete and you begin the editing and revising stage, you often return to the cases for similar reasons. You may reread any case that you illustrated in your brief to make sure you illustrated it accurately. After you draw an analogy or a distinction to a case, you may reread it to ensure the comparison is supported by the precedent court's reasoning. Finally, when you complete an argument, you may review all the cases you found in your research to satisfy yourself that the cases you chose to use do support your points better than other cases you initially chose not to use.

The point is, when writing briefs, you often spend a large amount of time not actually writing, but instead reading, re-reading, skimming, re-reading, and skimming again the cases you chose to use. Making this process more efficient can lead to a faster writing process. As with outlining, a small investment at the beginning can save hours in the end.

Further, briefing cases can make your writing faster because the process of briefing a case forces you to consider the cases more carefully and distill them down to their most important details before you try to write about them in your brief. Thus, when the time comes to incorporate a case in your brief (often by explaining the case to the reader<sup>155</sup> and then articulating an analogy or distinc-

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<sup>154</sup> Especially if you do not have an outline to work from. *See supra* notes 108–53 and accompanying text.

<sup>155</sup> When a writer “illustrates” a precedent case in a brief, the writer provides the reader with a very short summary of the case, distilling it down to its most important details as they relate to the issue being addressed in the present case. *See COUGHLIN, supra* note 46, at 101–19. A case illustration typically varies from one sentence to one paragraph, in which the writer conveys the case's crucial facts, the court's holding, and the court's reasoning. *Id.*

tion to the case), you will be more efficient. By briefing the case, you will have identified for yourself what is most important about the case, and thus when writing your brief you will be able to explain and compare it in a more focused way. In a short bar journal article on writing quickly, legal writing expert Wayne Schiess noted that “[e]ven though it will take time up front, pay this price because it will save time during composing and editing. . . . Writing cannot be truly clear and effective if you don’t understand what you’re writing about.”<sup>156</sup>

Briefing cases for a legal writing project can be a quick endeavor.<sup>157</sup> These briefs are not really like your briefs from law school. Instead, they are much more focused on just what matters for the particular arguments you are advancing.<sup>158</sup> Your brief will often need to include only four categories:<sup>159</sup> (1) the relevant rules, (2) the important facts, (3) the holding, and (4) the reasoning. List the case name, add a heading for each of these four categories, place the headings in bold, and then fill in the relevant information (using bullet points to make it easy to see each fact, each piece of reasoning, etc.). Because you are trying to capture the information that may wind up in your argument, include any specific information that may be important to your analysis, but omit everything else. Typically, each brief can fit on one or one-half of a page. You can type these up quickly, cutting and pasting the information from the opinion into the relevant categories. Or, you can sketch the briefs quickly on a legal pad.

Say you do this for ten cases. Then, for the next five, ten, or twenty hours you spend drafting your argument, you now have a few pieces of paper to skim or re-read, instead of hundreds of pages of opinions. And, all of the information contained within briefs will be important, relevant information. You will have to say less often “I know it was in here somewhere,” or, after twenty minutes of searching for particular language, say in frustration, “Which case said that?!” Instead, you will have already pulled that information out and placed it in a short, organized summary. If you are trying to remind yourself if the court provided reasoning you could use in your argument, you can pull up the brief, zero in on the reasoning section, skim the bullet points, and quickly find any relevant information. This process avoids the wasted time attorneys often spend with their noses buried in cases, returning to them over and over as they are trying to write.

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<sup>156</sup> Schiess, *supra* note 91, at 15.

<sup>157</sup> In this sub-section, when I refer to “briefs” I am typically referring to your notes about the precedent case, not to the persuasive document you are drafting to be filed with the court. *See infra* notes 158–392 and accompanying text.

<sup>158</sup> As you probably remember, your law school briefs likely included any information you thought your professor might possibly ask about, including dicta, details from a dissent, etc.

<sup>159</sup> These four categories of information typically represent the only pieces of information from the precedent case that would typically make their way into the document you are drafting to the court. *See RAMBO & PFLAUM, supra* note 56, at 126–45. Thus, it’s important to include these four categories of information in your brief, and it is normally unnecessary to include other types of information from the case.

Ideally, you will write each short brief on a separate sheet of paper. When drafting longer arguments, such as in appellate briefs or memoranda of law in support of motions for summary judgment, brief the five to ten cases that you expect to rely on the most. For shorter, less complicated analyses (or for cases that are less important to your argument), you may “cheat” and not actually write a brief out, but instead mark the case heavily in the margins (like you may have gravitated toward doing when preparing for class as a second- or third-year law student). But, if you choose to “book brief” instead, again focus on the four main categories: relevant rules, important facts, relevant holdings, and relevant reasoning. When you come across any of those four pieces of information, highlight the judge’s words, and write “rule”, “facts”, “holding”, or “reasoning” in the margin. Try not to highlight anything else and try not to write much more in the margins.<sup>160</sup> Then, when you need to return to the case, you do not have to re-read it.<sup>161</sup>

This step adds very little time to the initial writing process. You must read the cases carefully the first time or two anyway. So, as you are reading carefully, it is easy to highlight and make quick notes in the margins. Then, once you have highlighted the important information, transferring that information into a brief is a quick process.<sup>162</sup> From that point forward, having either a carefully highlighted case to return to, or even better yet a focused, one-page brief to return to, will save you considerable time in the drafting, editing, and revising process.

Investing time in briefing these cases upfront decreases interruptions in the writing process to look for information in the cases.<sup>163</sup> And, when the writer does need to search for specific information, the interruptions could be much shorter if the writer could skim a handful of short briefs instead of dozens of pages of opinions.<sup>164</sup> If you do not currently brief the cases you expect to use, or if you do not at least highlight and mark up the cases themselves in a deliberate, consistent way, try doing so. You may find that it takes less time than you expected and that it saves you significant time as you are writing. As an added benefit, you may

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<sup>160</sup> Except, instead of just writing “rule,” I might write “statute,” “factors,” “elements,” “purpose,” “exception,” or whatever type of rule I have highlighted.

<sup>161</sup> Regardless of whether I brief cases or not, I will always do this highlighting and adding of margin notes. If I do then brief the case, briefing becomes very quick because I can quickly locate the relevant information and transfer it to my case briefs.

<sup>162</sup> Add page numbers too, so when you later include information from the brief into your argument, you don’t have to stop, pull the case out, and look through it to find the proper page numbers to include in your citations.

<sup>163</sup> See *supra* notes 144–62 and accompanying text.

<sup>164</sup> See *supra* notes 144–62 and accompanying text.

feel more comfortable with the precedent and thus more organized, focused, and efficient as you write.<sup>165</sup>

*D. Begin drafting each argument with a logical structure (start with CREAC)*

Some attorneys scoff at the suggestion of using IRAC<sup>166</sup>, CRuPAC<sup>167</sup>, or CREAC<sup>168</sup>, the basic organizational paradigms taught in law schools.<sup>169</sup> Attorneys sometimes believe that what they learned in their first year of law school is too basic for “real” legal analysis in practice.<sup>170</sup> However, these attorneys may have too narrow a view of CREAC. CREAC can be very flexible,<sup>171</sup> allowing writers to synthesize pertinent rules, illustrate relevant precedent cases, draw analogies and distinctions, add policy points, include counter-analysis, etc.<sup>172</sup> I

<sup>165</sup> As stated by attorney Girvan Peck:

All [brief writers] will be helped if their source materials are ready in front of them—their outline, their relevant notes and memos, and their photocopies of each principal transcript page and exhibit page, each statute or regulation or rule, each pertinent page of court opinions or law review articles, all appropriately marked off and underlined. These sources should be devoured before the writing begins . . . . Before he actually starts to compose he should be ready as a prize fighter is ready in his corner when the bell rings, straining to get at his adversary.

GIRVAN PECK, WRITING PERSUASIVE BRIEFS 180–81 (1984).

<sup>166</sup> Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and its Progenies*, 9 LEGAL COMM. & RHETORIC: JAWLD 351, 364 n.6 (2012) (the “acronym stands for Issue, Rule, Application, Conclusion.”).

<sup>167</sup> *Id.* at 357 (the acronym stands for Issue, Rule, Proof, Application, Conclusion).

<sup>168</sup> CAMERON & LONG, *supra* note 116, at 77 (the acronym stands for Conclusion, Rule, Explanation, Application, Conclusion).

<sup>169</sup> Turner, *supra* note 166, at 357–64. Though IRAC and CREAC are two of the most common acronyms for describing how to organize legal analysis, there are many others. *Id.* In fact, in her article, professor Tracy Turner lists twenty different acronyms. *Id.* Regardless of the acronym, though, they all refer essentially to the same paradigm of first telling the reader the answer, then giving the reader the rules, then applying the facts to the rules, then ending by restating the answer. *Id.*

<sup>170</sup> Contrast that thought to the advice given by Lawrence Rosenberg, a partner at Jones Day, who advised attorneys that “[i]t is generally very effective to use the Issue-Rule-Analysis-Conclusion structure for each issue that you address in your argument. Rosenberg, *supra* note 110, at 32. “This structure is usually the most logical way to construct a legal argument.” *Id.* Rosenberg also stated that many attorneys provide the information in non-IRAC patterns, but “[w]hile in very unusual circumstances such an approach can be effective, it usually is not and instead can cause unnecessary repetition.” *Id.* at 32–33.

<sup>171</sup> See generally Turner, *supra* note 166.

<sup>172</sup> See *id.* at 357–64. This is why there are over twenty variations of the CREAC acronym—each varying acronym is intended to add this flexibility to the basic IRAC or CREAC structure. See *id.* I appreciate that, but when I use “CREAC,” I consider it to be flexible enough to allow for the additional information that other acronyms are designed to include.

agree that the application of CREAC does not work in every analysis you might have to draft in a brief. Most of the time, though, using CREAC to structure your analysis will provide an effective and efficient way to work through a first draft quickly, increasing the speed at which you can write a brief—something all attorneys desire.

It is a good thing that CREAC provides a paradigm through which attorneys can explain complex analysis in a simpler, straightforward way.<sup>173</sup> Legal writers often must explain complex legal analysis.<sup>174</sup> Weak legal writers become mired in this complexity and cannot explain the analysis in a simpler way to a reader.<sup>175</sup> Excellent legal writers, however, are able to take complex analysis, break it down, and communicate it in a way that is easy to understand.<sup>176</sup> The key to communicating complex legal analysis is to simplify it for the reader to the extent possible.<sup>177</sup> Doing this is difficult, but having a logical organizational scheme is the most important first step. CREAC often provides that logical organizational scheme.<sup>178</sup>

The point of this article is not to argue the pros and cons of CREAC—several other articles have covered that topic, from both sides<sup>179</sup> (though most

<sup>173</sup> See CAMERON & LONG, *supra* note 116, at 77, stating:

[R]esearch suggests that since CREAC is a familiar form and an organized (as opposed to unorganized) form of argument, it will likely be more persuasive than an alternative form. The take away for legal writers is that it is probably best to stick with the form of syllogistic reasoning found in a CREAC-type formulation. At the very least, it will be familiar to your reader and therefore more easily followed, and hopefully more persuasive.

<sup>174</sup> See *supra* notes 43, 79 and accompanying text.

<sup>175</sup> See RAY & RAMSFIELD, *supra* note 102, at 261.

<sup>176</sup> *Id.* (stating that “[c]lear and logical organization distinguishes excellent writing from mediocre”).

<sup>177</sup> See STINSON, *supra* note 5, at 53 (stating that “[t]he simplest pattern is the clearest.”).

<sup>178</sup> Paul Wangerin said:

Researchers have discovered, among other things, that audiences tend to think that people who make organized arguments are more credible than people make disorganized arguments. Also, as noted above, credible people tend to be more persuasive than non-credible people. Research on the differences between organized and disorganized arguments has also revealed that audiences tend to have certain relatively clear expectations regarding the organization or structure of arguments. Thus, researchers in this field now think that audiences react more favorably to arguments that are organized and familiar forms than to arguments that are organized in unfamiliar forms.

CAMERON & LONG, *supra* note 116, at 76 (quoting Paul Wangerin, *A Multi-Disciplinary Analysis of the Structure of Persuasive Arguments*, 16 HAR. J.L. & PUB. POL’Y 195, 200–01 (1993)).

<sup>179</sup> Turner, *supra* note 166, at 364 n.2 (listing over forty articles which take a stance either for, or against, the use of acronyms such as IRAC or CREAC). In addition, twenty-five textbooks suggest the use of CREAC-type paradigms. *Id.* Even since Turner’s 2012 article, more articles have

support CREAC-type organizational structures).<sup>180</sup> Instead, the point of this article is to explain how to write briefs more efficiently while still producing high quality work. More importantly for the focus of this article, beginning to draft a legal argument with CREAC as your governing paradigm provides an efficient approach to drafting for several reasons.

First, having a formula like CREAC to follow helps writers get started.<sup>181</sup> The paradigm gives them a path to follow when they are staring at a blank screen wondering how to proceed with explaining an analysis.<sup>182</sup> For attorneys who are not confident, having this CREAC paradigm to work through helps them get started and build momentum. For attorneys who are prone to writer's block, just getting started is so important.<sup>183</sup> As the attorney writes, she occasionally may decide to vary the structure, to tweak it, to move away from a strict CREAC structure. That is fine if the attorney feels another approach may end up working better. But, by starting with a CREAC structure to explain her analysis, the writer more quickly begins typing, thinking, making decisions, writing, and moving forward.

Second, aside from helping attorneys feel comfortable as they begin the writing process, following a game plan like CREAC helps writers work through

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addressed the IRAC topic. *See, e.g.*, Diane Kraft, *CREAC In the Real World*, 63 CLEV. ST. L. REV. 567 (2015); Laura P. Graham, *Why-Rac? Revisiting the Traditional Paradigm for Writing About Legal Analysis*, 63 U. KAN. L. REV. 681 (2015).

<sup>180</sup> *See* CAMERON & LONG, *supra* note 116, at 105 (stating that “[a]dditional support for the CREAC articulation of logo’s reasoning can be gleaned from surveys of judges. Judges seem to like “tried-and-true” organizational schemes. . . . In the same study, the majority of judges said that the organization of the argument was second only to the analysis. Is probably fair to say that logos and CREAC persuade.”); *see also* Turner, *supra* note 166; Wayne Schiess, *Legal Writing is Not What it Should Be*, 37 S.U.L. REV. 1, 13 (2009) (referencing an IRAC format indirectly and stating that the main analytical and structural problems he sees in the written legal analysis of law students and lawyers is as follows: (1) “failure to state a conclusion, prediction, or desired result upfront with reasons,” (2) “failure to express early on the key rule, principle, or concept that will guide the conclusion, prediction, or desired result,” (3) “failure to describe — even in a succinct way — the authorities to support the key rule, principle, or concept,” and (4) “superficial application of the rule, principle, or concept to the specific problem at issue: application that is terse, abstract, general, and shallow instead of specific, thorough, targeted, and convincing”).

<sup>181</sup> *See supra* notes 166–80 and accompanying text.

<sup>182</sup> *See supra* notes 166–80 and accompanying text. Using a CREAC structure for working through each argument in a brief also makes outlining quick and easy. First, when outlining you would break the overall Argument section down so that you have a separate section for each part of the rule that you will address. Then, for each separate section in your outline, you can vertically write CREAC, and then with bullet points (C) fill in your conclusion, (R) list each rule to include, (E) list which precedent cases to explain, (A) note what facts to address and what analogies and distinctions to address, and (C) finish that section by restating the conclusion. You can tweak this outline as you go, but using this paradigm gives you a quick and easy way to outline the authorities and points you plan to address.

<sup>183</sup> *See infra* notes 348–92 and accompanying text for a more comprehensive consideration of writer’s block.

the analysis in a focused, and thus, more often, a quicker fashion.<sup>184</sup> To the contrary, analysis that does not unfold by following a logical structure may be rambling, disjointed, and contain repetitive points.<sup>185</sup> Repetitiveness slows down the writing twice: once while the writer is unnecessarily repeating herself as she writes, and again when the writer later edits the repetition out of the brief.<sup>186</sup>

Beginning a brief by applying a CREAC paradigm does not mean your final version must follow a strict CREAC structure.<sup>187</sup> You can certainly vary the structure, and even within a general CREAC paradigm there is much room for variety. CREAC just stands for Conclusion, Rule, Explanation, Application, Conclusion.<sup>188</sup> It is a shorthand reminder for attorneys to

- (C) tell the reader the point you are about to explain,<sup>189</sup>
- (R) tell the reader the rules that are relevant for that point,
- (E) explain those rules (often by illustrating relevant precedent cases),
- (A) apply those rules to the facts from the present case (often by drawing analogies and distinctions to the precedent cases previously illustrated) (and possibly discussing policy concerns and counter-analysis), and
- (C) restate the conclusion (the point you just proved).

CREAC is just a general concept to follow for what to include and how to order the information in most legal analysis.<sup>190</sup>

What some attorneys who struggle (or avoid) applying a CREAC paradigm do not understand is that CREAC is not a large-scale structure for an entire Brief or

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<sup>184</sup> See *supra* notes 166–80 and accompanying text.

<sup>185</sup> See *supra* notes 166–80 and accompanying text.

<sup>186</sup> See *supra* notes 166–80 and accompanying text.

<sup>187</sup> CHARROW, *supra* note 78, at 154. (“IRAC is merely a framework within which to build your analysis: It should not appear to readers that you have merely plugged information into a rigid formula. Edit your writing to eliminate the mechanical effects of a series of statements that the issue is capital W, the rules X, the analysis is Y, and therefore the conclusion is Z.”).

<sup>188</sup> See *supra* note 166 and accompanying text.

<sup>189</sup> See CAMERON & LONG, *supra* note 116, at 75 (citing RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 103 (5th ed. 2005)).

<sup>190</sup> See CHARROW, *supra* note 78, at 205 (“No matter how you got to your conclusion, you should present it as a rule, application, conclusion – the syllogism. . . . The syllogism serves as the skeleton of a legal argument. Once you have created the skeleton, you must flesh it out.”).



an entire Argument section.<sup>191</sup> This misunderstanding is why some feel CREAC does not work. Rather than using CREAC as a large-scale structure for an entire Argument section, the attorney should first break the argument down into its separate parts.<sup>192</sup> For example, if a rule has four elements that you must address, then the argument should have four sub-parts: one for each element. To prove the main point, the writer must analyze, explain, and prove each of the four distinct sub-issues separately. Thus, the writer's argument would apply CREAC four times in that argument: once for each element.<sup>193</sup> Each step in the overall analysis then has a logical, focused structure to it, making it easier for the reader to follow and also making it easier and faster for the writer to write.<sup>194</sup>

Interestingly, CREAC (or any of the several acronyms used to note the same or similar structure) is taught in nearly every law school across the country, yet many of the practicing attorneys I teach misunderstand the guidance that a CREAC paradigm is intended to provide.<sup>195</sup> When we discuss CREAC during the NITA course on writing persuasive briefs, the attorneys often seem surprised to learn where CREAC fits into a legal analysis (not as a large-scale structure for an entire Argument section). Many admit that they do not consciously apply a CREAC structure because they do not understand it. After we discuss CREAC in-depth (and the flexibility within it), the attorneys routinely and enthusiastically comment that understanding what CREAC actually is and where it can fit into their Arguments will help them with their organization, focus, and clarity in their subsequent briefs.

Providing a thorough explanation of how to work through the CREAC paradigm in your legal analysis is beyond the scope of this article (many other

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<sup>191</sup> STINSON, *supra* note 5, at 43, 55 (“You should use the IRAC framework to think through *each element*. . . . Next, taking one element at a time, move through the IRAC process. . . . Finally, within each section, follow basic IRAC format.”).

<sup>192</sup> Turner, *supra* note 166, at 360.

<sup>193</sup> *Id.* (stating that “it is widely recognized that an analysis addressing multiple issues or elements requires multiple IRAC sequences, one for each separate issue or element”).

<sup>194</sup> CAMERON & LONG, *supra* note 116, at 104 (“CREAC, has been shown by analogy to related studies to be more effective because it places important information first, it is organized rather than disorganized, and it is a familiar format for the reader.”).

<sup>195</sup> By this comment, I do not intend in any way to suggest that law schools are not teaching CREAC properly. Instead, students get so overwhelmed in all of the writing they do when they practice, and in all the weak legal writing that they read, that over time they forget some of what they learned several years prior in their legal writing classes. When they are so busy writing, under stressful deadlines and without reminders about core legal writing concepts, it is easy to forget or stray from what they learned as students. However, in my observations of practicing attorneys, strong legal writers often follow a CREAC structure in their analysis, and weaker legal writers often do not. Both to write more effectively and confidently, and to write more efficiently, it would be worth the time investment for attorneys to refresh themselves in CREAC. *See* Turner, *supra* note 179, at 364.

articles and books do this).<sup>196</sup> The point central to this article is that beginning your writing by consciously and confidently applying a CREAC-type format can be a tool that provides a more efficient, streamlined approach, both in the planning stage and in the writing stage.

*E. Turn off the internet, social media, and email for blocks of time*

If you've adopted the above suggestions, then you (1) started early, (2) outlined your arguments, (3) briefed the cases you plan to rely the most on, and (4) followed a CREAC-based structure when outlining each argument or subsection of your argument. You have already invested some time and effort—perhaps more than you normally would—before actually writing. But, that investment in time will likely be made up, plus some, in the efficiency it will create as you now begin writing. So, now it is time to start writing. At this point, unplug!

In theory, this may be the easiest way to write more efficiently. In reality, for many it may be one of the hardest. Studies show that many workers are addicted to checking their social media sites.<sup>197</sup> In fact, studies show that people spend, on average, one-fourth to one-third of their work day on the internet and social media sites for non-work-related reasons.<sup>198</sup> Explanation as to why that would slow you down when writing a brief seems so obvious that it is unnecessary.

To be fair, some studies note that workers feel taking time to check social media gives them needed mental breaks, and thus does not hurt their overall productivity.<sup>199</sup> However, this justification falls short when you are trying to

<sup>196</sup> See *id.* at n.2, n.7 (listing dozens of articles and books discussing IRAC-type paradigms in detail); CHRISTINE COUGHLIN, ET AL., *A LAWYER WRITES* (2d. ed. 2013) (explaining CREAC very well in a recent textbook).

<sup>197</sup> The University of Maryland, in collaboration with Total DUI (a non-profit group), recently released a compilation of reports and statistics on social media addiction in the United States. John Boitnott, *Social Media Addiction: The Productivity Killer*, INC.COM, (July 7, 2014), <https://www.inc.com/john-boitnott/social-media-addiction-the-productivity-killer.html>. It revealed that “18 percent of users cannot go beyond “a few hours” without checking Facebook.” *Id.*

<sup>198</sup> Press Trust of India, *Social Media Affecting Workplace Productivity, Says Study*, NDTV.COM (Oct. 18, 2016, 2:48 PM), <http://www.ndtv.com/world-news/social-media-affecting-workplace-productivity-says-study-1475746> (“The unrestricted usage of social media is having a negative impact on workplace productivity, as employees spend more than 32 percent of their time on social media every day for personal work, says a study. According to TeamLease World of Work Report, an average of 2.35 hours is spent accessing social media at work every day and 13 percent of the total productivity is lost owing to the social media indulgence alone.”); see also Boinett, *supra* note 197 (“It’s estimated that the average American spends nearly one quarter of their work day browsing social media for non-work related activities.”).

<sup>199</sup> Ray Williams reported:

A new study just published by Australian scientists found that taking time to visit websites of personal interest, including news sites and YouTube, provided workers a mental break that ultimately increased their ability to concentrate and

write productively. Writing complex legal analysis is not like many other routine work tasks. Flow within your writing is crucial. When writing legal analysis, you cannot just quickly pick up where you left off. Instead, every time a writer returns to her brief after checking the news, checking social media, or updating fantasy football rosters, the writer must back up, re-read a bit, and refocus on how to connect her next sentences with her prior sentences. Each time, this effort wastes time and energy. If you need the mental break, reward yourself with one when you finish a section, an argument, a one-hour block of straight writing time, etc. Use it in between tasks, not in the middle of writing.

Here, too, it is informative to consider what writers suggest for improving writing productivity. Not surprisingly, many writers' advice is to unplug from the internet and to turn the phone off. When asked what advice he would give to aspiring authors, Nathan Englander said: "Turn off your cell phone. Honestly, if you want to get work done, you've got to learn to unplug. No texting, no email, no Facebook, no Instagram. Whatever it is you're doing, it needs to stop while you write."<sup>200</sup>

#### *F. Note citations in short form at every stage, but complete them last*

Attorneys know that in legal writing, maybe more so than in any other type of writing, they must include citations after many sentences. Partners and judges expect citations to be accurate, both in form and substance.<sup>201</sup> As you draft an argument, typing in citations as you complete each sentence is a tedious and time-consuming process. But, it does not have to be.

When first drafting an argument, do not take time to construct your citations properly. Instead, after any sentence that requires a citation, simply provide a short-hand reference to yourself about the source (and page or section number)

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was correlated with a 9% increase in total productivity. The study was performed by researchers at Australia's University of Melbourne and coined the phrase "workplace Internet leisure browsing," or WILB. The activity helps keep the mind fresh and helps put you in a better place when you come back to working on topic, the scientists said. "People who do surf the Internet for fun at work - within a reasonable limit of less than 20% of their total time in the office - are more productive by about 9% than those who don't," said Dr Brent Coker, from the Melbourne Department of Management and Marketing.

Ray Williams, *Social Media: Does it Help or Hinder Productivity?*, PSYCHOLOGY TODAY (Nov. 29, 2009), <https://www.psychologytoday.com/blog/wired-success/200911/social-media-does-it-help-or-hinder-productivity>.

<sup>200</sup> Noah Charney, *How I Write: Nathan Englander*, THE DAILY BEAST (Mar. 31, 2013, 5:00 PM), <https://www.thedailybeast.com/how-i-write-nathan-englander>.

<sup>201</sup> Douglas Abrams, *10 Tips for Effective Brief Writing*, 88 WIS. LAW. 14, 16 (2015) (quoting Judge Michael: "Check your cites. Make sure they are accurate. . . . There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong.").

to which you will then cite. So, when writing a first draft, if you cite to a case for the first time after the sentence, do not write *Smith v. Jones*, 497 N.E.2d 738, 741 (Ill. 1986). Finding the case, looking up the citation information<sup>202</sup>, typing it in, and then checking to make sure it is formatted properly can easily take 30 seconds, a minute, or more. If the case name is long and unique, you could spend several minutes checking to see what words to omit, what words to abbreviate, etc. Not only does this process take time, but it also takes energy and it steals your attention and focus away from the argument. Then, after constructing the citation, you must refocus your attention on what you were trying to say—what the next sentence should be, how it builds on the prior sentence, etc. This refocusing also takes time and energy. If you had not taken the 30 seconds, or considerably longer, to type up the citation, your mind could have stayed focused and your writing could have continued to flow without interruption. Thus, working through and drafting the paragraph would have been faster. Drafting citations is like hitting speed bumps: it always slows you down and takes you longer to get back up to speed. The problem is, a legal brief can have more than a hundred of these speed bumps.

Yet, omitting your citations altogether would be a bad idea.<sup>203</sup> If you do not reference your sources while writing your early drafts, you may not remember from which case a particular rule came. When that happens, you will waste time later trying to find which case provided that rule. Therefore, the best approach is to type in a short-hand reference. For example, for the citation mentioned above, just type in “Smith 741” at the end of the sentence. That takes less than five seconds and barely takes your focus away from the sentences and paragraph itself.

Later you will have to return to these short-hand references and replace “Smith 741” with the properly formatted citation.<sup>204</sup> But, you can do this near the end of the writing process when you are satisfied with the section and only need to proofread it for typos. At this point, you can replace the short-hand references with properly formatted citations without interrupting the flow of your writing. You will not have to refocus to be able to type the next sentence. Instead, you can just skim from citation to citation and correct each one as you go.

Beyond the time you will save using this approach by not interrupting the flow of your writing, it also helps to prevent time-consuming errors. For example,

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<sup>202</sup> Per Rule 10 of the Bluebook, the citation information you would need to find and include, includes the case name, the Reporter, which volume, the first page of the case, the specific page the information is on, the jurisdiction, the court, and the date of the opinion. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 10 at 94–118 (Colum. L. Rev. Ass’n et al. eds., 20th ed. 2015). Though not every jurisdiction follows the Bluebook strictly, all jurisdictions have citation format rules, and most include the same information listed above. *See id.*

<sup>203</sup> Abrams, *supra* note 201, at 16.

<sup>204</sup> *THE BLUEBOOK*, *supra* note 202, R. 4 at 78.

if you format every citation correctly as you write your early drafts, a majority of your citations will use a shortened form of the cite. After citing to a case in full, each subsequent time you cite to that case, you will use a short citation form.<sup>205</sup> If the preceding citation was to the same authority, the short citation form will simply be *id.*<sup>206</sup> However, as you edit and revise, you may take some sentences out, cut and paste a sentence elsewhere, insert a new sentence, etc. When doing so, it is easy to forget to check the citations to the preceding and subsequent sentences. If you are not careful, it is very easy for the *id.* after a sentence to no longer refer to the correct authority.

For example, you may have three sentences. The first sentence ends with a citation to the *Vogt* case. The second sentence ends with a citation to the *Smith* case. The third sentence also ends with a citation to the *Smith* case, so you use an *id.* after the third sentence. A simple illustration of this example follows:

**Sentence 1.** *Vogt v. Bartelsmeyer*, 636 N.E.2d 1185, 1189 (Ill.App. Ct. 1994).

**Sentence 2.** *Smith v. Jones*, 497 N.E.2d 738, 741 (Ill. 1986).

**Sentence 3.** *Id.*

However, when revising, you delete the middle sentence. So, now the *id.* that remains, which was supposed to refer back to *Smith*, actually refers back to the *Vogt* case (because that is now the prior citation). It is possible that you might not even notice this error, and thus you would submit a brief with an inaccurate citation.<sup>207</sup> Or, if you are lucky, you *might* notice this as you edit and revise.<sup>208</sup> However, though you might realize the *Vogt* case didn't include the proposition that the *id.* follows, you might not remember which of the twenty other cases you read did state that proposition. So, with an impending deadline, you are now wasting precious time going through the other cases and trying to find which case supports the point you made in that sentence. If *Smith* is the sixth case

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<sup>205</sup> *Id.* R. 10.9 at 115–16.

<sup>206</sup> Or, "*Id.* at 345" if the specific page on which the information is found is different than the page on which the information from the prior sentence was found. *Id.* R. 4.1 at 78–79.

<sup>207</sup> This could be very damaging. The judge will not be excited to try to figure out which case the *id.* was supposed to refer to. This incorrect citation will look sloppy to the judge. Or, worse, the judge could assume that your citations were inaccurate and misleading. Besides your credibility being damaged, the judge could disregard what you said in the sentence if you haven't supported it with accurate proof through proper citations.

<sup>208</sup> If the page numbers were similar in *Vogt* and *Smith*, you likely would never notice this error. If the page numbers were drastically different, you might. For example, if the prior cited was to page 1189 in *Vogt*, and then the next cite said "*Id.* at 741," such a wide page difference may alert you that the *id.* was not supposed to refer back to *Vogt*. But, if the page numbers were close to each other, it would be very difficult to spot and realize the mistake.

you skim before finding the rule, you have wasted a significant amount of time. Even if *Smith* was the first case you pulled up and skimmed, you still wasted time and effort.

The solution is simple. Do not write out the full cites when working on early drafts. Do not use “*id.*” when working on early drafts. Just use a short-hand reference like “Anderson 442” and “Smith 458” every place a citation is necessary. Then, when your argument is nearly finalized—when you are done editing and revising the text—one of the final steps is replacing each short-hand reference with whatever the appropriate citation should be. This process can be done quickly, and you can be confident you are citing accurately when you use *id.* Such an approach for noting citations can increase the speed at which you write your early drafts, and it can save you large amounts of time in situations when you realize you revised an earlier draft without immediately checking to see if the prior or subsequent citations were inadvertently affected.

### *G. Accept that less may be more*

Writing shorter briefs is an approach that judges preach, though practicing attorneys do not always heed. The old adage, “Less is more,”<sup>209</sup> can apply to legal writing and, for many attorneys, can shorten the time it takes to write a brief.

Writing a short brief can take courage. In noting that “the most effective briefs are ‘models of brevity,’”<sup>210</sup> United States Supreme Court advocate John Davis referred to those who write short briefs as having the ‘courage of exclusion.’<sup>211</sup> The easier default is to include every possible argument in the brief. Because a good attorney should be competent and thorough, some attorneys feel compelled to raise every possible argument. Attorneys sometimes fear that if they leave an argument out, and that argument could have helped, then they have exposed themselves to potential malpractice. The safer bet, some feel, is to be over-inclusive rather than under-inclusive in deciding which arguments to include. That approach is logical. But, it is not always appropriate or effective.<sup>212</sup> And, it makes writing the briefs an even more time-intensive process.

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<sup>209</sup> This proverbial phrase, which generally means “simplicity and clarity leads to good design,” has been used since at least the mid 1800’s, when the poet Robert Browning used it to end his poem, *Andrea del Sarto*. *The Meaning and Origin of the Expression: Less is More*, THEPHRASEFINDER, <https://www.phrases.org.uk/meanings/226400.html> (last visited Feb. 8, 2018).

<sup>210</sup> Abrams, *supra* note 201, at 16 (quoting John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 898 (1940)).

<sup>211</sup> *Id.* (quoting George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 407 (1955) (quoting John Davis)).

<sup>212</sup> Damon Thayer, *The Ten Commandments of Writing an Effective Reply Brief*, 20 PRETRIAL PRAC. & DISCOVERY 8, 9 (2012).

Rather than considering what writers say about this, let's consider what our readers say. As stated by Judge William Eich, "In brief writing, as in any art, the writer makes his or her points most tellingly with quality, not quantity."<sup>213</sup> United States Supreme Court Chief Justice John Roberts Jr. stated that he has "... yet to put down a brief and say, 'I wish that had been longer.' ... Almost every brief I've read could be shorter."<sup>214</sup> United States Supreme Court Justice Stephen Breyer also believes that most briefs are too long.<sup>215</sup> United States Supreme Court Justice Wiley B. Rutledge advised advocates to be "... as brief as one can consistently [be] with adequate and clear presentation of the case."<sup>216</sup> In a very entertaining view of the legal writing process, the Honorable Mr. Justice Joseph W. Quinn stated the following:

Strive for quality, not quantity, in the issues that you raise or the points that you argue. The strength of your strongest arguments is diluted by the weakness of your weakest arguments. Avoid the shotgun approach. Shotguns are for those with a poor aim. When you raise, for example, ten grounds for your argument, you are saying to the court, "Because I am unsure of the validity of my first three grounds, I am adding seven more, hopefully, to confuse you in the event that I can get lucky in the fog of battle." If you cannot succeed on your best three arguments, you are not likely to prevail on the rest. Offer a select menu to the court, not a buffet.<sup>217</sup>

So, to attorneys wanting to write briefs more quickly, judges encourage many of them to accomplish this objective by writing shorter briefs when possible.<sup>218</sup>

Writing shorter briefs is not novel advice—scores of legal writing books and articles advise attorneys to write concisely.<sup>219</sup> However, most of the literature focuses on how to develop a concise writing style, advising attorneys to write in the active voice, to avoid nominalizations, to use simpler words, to avoid wordy phrases, etc. These are all important techniques for clear and concise writing,

<sup>213</sup> William Eich, *Writing the Persuasive Brief*, 76 WIS. LAW. 20, 57 (2003).

<sup>214</sup> Bryan Garner, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEG. WRITING 5, 35 (2010).

<sup>215</sup> See Bryan Garner, *Interviews with United States Supreme Court Justices: Justice Stephen G. Breyer*, 13 SCRIBES J. LEG. WRITING 145, 167 (2010).

<sup>216</sup> Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A. J. 251, 254 (1942).

<sup>217</sup> Joseph W. Quinn, *A Judge's View: Things Lawyers Do That Annoy Judges; Things They Do That Impress Judges*, 23 at ¶¶ 84–86, <http://www.oba.org/en/pdf/JudgesView.pdf> (last visited Jan. 16, 2018). Justice Quinn is a Justice on the Ontario Superior Court of Justice. *Id.* at 44.

<sup>218</sup> See *supra* notes 190–217 and accompanying text.

<sup>219</sup> See Mark Osbeck, *What is "Good Legal Writing" and Why Does it Matter?*, 4 DREXEL L. REV. 417, 437 n.79 (2012).

and they shorten briefs as well. The problem is, though, that revising briefs to accomplish those goals often increases, rather than decreases, the time investment required to write well. To effectively revise briefs by improving their clarity and concision through stylistic devices requires careful editing and revising.<sup>220</sup>

Thus, though it is good advice to improve your briefs by writing with concision stylistically, that advice does not aid in the focus of this article: to write more efficiently. Instead, below are several approaches that can lead to shorter briefs and shorten the time it takes to write the brief.<sup>221</sup>

First, as you outline your argument before you begin writing, be judicious about which arguments to make.<sup>222</sup> As United States Supreme Court Justice Oliver Wendell Holmes advised, “Strike for the jugular, and let the rest go.”<sup>223</sup> Typically, a judge only has thirty to sixty minutes to read most briefs.<sup>224</sup> Be confident in your strongest arguments and allow the judge to also focus on them without also having to focus on other, weaker arguments too.<sup>225</sup>

If you feel compelled to include every potentially relevant argument, do not give them all equal “air time.” Focus on your strongest arguments. Develop those fully. Then, using less space in the brief, quickly explain the weaker arguments. But, do not waste your time and energy fleshing those out as fully as the stronger arguments. And, do not waste the judge’s time and energy by writing long, complex explanations of weaker points either.<sup>226</sup> Doing so can distract the judge

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<sup>220</sup> See *supra* note 22 and accompanying text.

<sup>221</sup> See *infra* notes 222–33 and accompanying text.

<sup>222</sup> Believing “that most briefs are too long,” United States Supreme Court Justice Stephen Breyer “urges advocates, ‘Don’t try to put in everything.’” GARNER, *supra* note 215, at 167 (quoting Justice Stephen Breyer).

<sup>223</sup> Thayer, *supra* note 212 (quoting OLIVER WENDELL HOLMES, JR., SPEECHES 77 (1934)).

<sup>224</sup> See John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 Sw. L. J. 801, 801 (1976), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=76&Issue=2&ArticleID=614> (“Bench and bar are learning to get to the bare bones of disputes with less concern for the fat. The discursive or repetitious brief and the hyperbolic argument are no longer welcome.”).

<sup>225</sup> See Leslie A. Gordon, *Legal Writing Tip: Writings of Briefs Should be “Short but Dense”*, BAR ASS’N S.F., <https://www.sfbar.org/basf-bulletin/2012/sept-2012/legal-writing-briefs.aspx> (last visited Jan. 16, 2018).

<sup>226</sup> Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A. J. 801, 803 (1951) (“Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. . . . [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one.”). Robert H. Jackson was a United States Supreme Court justice. *Id.*



from your stronger arguments.<sup>227</sup> You do not win a motion by making the most points—you win by making the best points (or point).<sup>228</sup>

Second, avoid string citations, unless you are doing so for a very specific purpose.<sup>229</sup> A string citation is a group of citations to several different authorities, each supporting the same point.<sup>230</sup> For example, attorneys will sometimes state a rule, and then include citations to four or five cases. Such a strategy is often a waste of everyone's time. If the first case to which the writer cites is mandatory authority, then there is often no need to provide further support for the rule.<sup>231</sup> Citing to five cases that state the same rule does not make the rule any more valid. As long as one mandatory authority stated the rule, that is enough. Listing the additional four cases lengthens your brief, and it takes unnecessary time to type up and format each citation properly.<sup>232</sup>

Third, along with choosing the best arguments (and possibly omitting weaker arguments), attorneys should take the same approach when deciding which authorities to illustrate and compare in their briefs.<sup>233</sup> If the attorney finds four helpful cases, and all are factually similar, the attorney need not include lengthy explanations of all four cases. Instead, the attorney may be better served by choosing one or two of those cases, explaining them appropriately, and omitting the remaining two or three as being redundant.

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<sup>227</sup> Abrams, *supra* note 201, at 16 (citing Michael, *supra* note 201, at 2).

<sup>228</sup> *Id.* (“Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case[?] Weak arguments detract from the entire presentation.”).

<sup>229</sup> Sometimes string cites are helpful. For example, if you are making an argument that your jurisdiction's courts have not addressed in precedent cases, but several other states' courts have, you might string cite to show your judge that this argument has been addressed by several courts. Or, if you are in state court and cite to a mandatory case from your jurisdiction, you might string cite to several federal court cases that support your point. Those federal cases may be persuasive instead of mandatory, but there may be value in demonstrating that other respected courts have ruled favorably when considering the argument you are making.

<sup>230</sup> RAY & RAMSFIELD, *supra* note 102, at 63.

<sup>231</sup> *Id.*

<sup>232</sup> There are times when string cites are appropriate. For example, if you are trying to get the court to adopt a rule, and you want to demonstrate that the rule has been adopted by several other courts (either in lower courts or courts in other jurisdictions), it may be persuasive to include citations to all (or several) of the cases in which the rule has been adopted. Or, as another example, you may be citing to a policy statement. You would want to include a citation from a court in your state agreeing with the policy concern, and you may want to string cite to federal appellate court cases also agreeing with that policy concern. Other examples exist as well. String cites can be an effective persuasive tool if used in the proper situations. However, attorneys often use them when they do not serve any effective purpose. See generally *String Citations and Explanatory Parentheticals*, UCHASTINGS, <http://www.uchastings.edu/academics/pro-skills-team/writing-resource-center/LWRC%20Documents/lwrc-citationparen.pdf> (last visited Feb. 8, 2018).

<sup>233</sup> RAMBO & PFLAUM, *supra* note 56, at 118–19.

Perhaps the attorney feels uncomfortable leaving out helpful authority. Or, perhaps the attorney wants to demonstrate there are several cases supporting the same point. Rather than explaining all four cases in depth, the more concise approach would be to explain the first one in detail, and then string cite to the remaining cases with a short parenthetical after each citation. The short parenthetical demonstrates there are other similar cases and briefly identifies or confirms the significance of each case (in less than a complete sentence). But, this convention keeps the brief shorter (compared to if each case was fully explained) and allows you to focus the reader's attention on the main case you chose to explain. More importantly for purposes of this article, it saves significant time (both in the drafting and in the editing and revising) to explain one case fully rather than to do so for two or three additional cases as well.

#### *H. Do not write and polish in one step*

[T]he goal here [in the writing stage] is not to get it right, but to get it written. Do not revise as you write. It takes too much time, is too painful, and distracts you from your main task at this stage, which is to get all your ideas down on paper.<sup>234</sup>

As stated earlier, editing and revising should comprise the bulk of the writing process.<sup>235</sup> Soon this article will discuss editing and revising efficiently in more detail.<sup>236</sup> But, before you edit and revise, you need to write a first draft. To write efficiently, avoid blending these two steps: (1) writing the first draft and (2) editing and revising.<sup>237</sup>

In the years of teaching legal writing seminars, I have had the opportunity to ask attorneys of all ages and practice areas about their writing habits. When I've done this, another habit many attorneys admit to is trying to compose and polish at the same time when writing their first drafts.<sup>238</sup> In other words, writing a sentence, re-reading it, revising it, re-reading it again, tinkering with it a little more, etc., until the sentence is "perfect", then writing the next sentence, and repeating that process for each new sentence.<sup>239</sup> Then, when the writer ends a

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<sup>234</sup> RAY & RAMSFIELD, *supra* note 102, at 113.

<sup>235</sup> See *supra* notes 99–234 and accompanying text.

<sup>236</sup> See *infra* notes 245–80 and accompanying text.

<sup>237</sup> CHENEY, *supra* note 22, at *Introduction* (stating that "[t]he advice from most writers is to 'write in haste, revise at leisure.' . . . [I]f not exactly 'at leisure,' then simply after completing the first draft.").

<sup>238</sup> ELBOW, *supra* note 6, at 39 ("[M]ost people instinctively try to write this way.").

<sup>239</sup> *Id.* at 125 ("Learn when not to revise. . . . For if you try to revise everything you write you will use up too much time that you could spend on new writing. After all, you can write thirteen new pages in the time it takes to revise three pages well.").

paragraph, the writer will re-read the paragraph and revise it, perhaps several times before beginning to write the next paragraph.

The most common mistake many writers make, *one that costs hours*, is to write, rewrite, and revise simultaneously. Some writers even try to polish while writing the first draft. This approach forces the id of creative thought to clash with the superego of correction, an impossible and insufferable pairing. The result is often writer's block. No wonder.<sup>240</sup>

In practice, it is challenging for attorneys to resist the impulse to edit as they write. Writing and revising simultaneously is a natural inclination more than a conscious choice.<sup>241</sup> It is also a logical approach: why not get a sentence "perfect" now while what you are trying to express is fresh in your mind?<sup>242</sup> This dual approach seems efficient: though it may take more time to write the first draft, wouldn't there be much less time spent editing later?<sup>243</sup> Despite what may seem logical, if you are trying to progress from first words to final product more quickly, then this approach is not helpful for several reasons.<sup>244</sup>

First, writing and editing are two distinct skills that require your mind to focus in opposing ways. This process can stunt your writing process:

Writing calls on two skills that are so different that they usually conflict with each other: creating and criticizing. In other words, writing calls on the ability to create words and ideas out of yourself, but it also calls on the ability to criticize them in order to decide which ones to use. It is true that these opposite mental processes can go on at the same time. When they do, you find yourself writing words that are at once inventive and rich, yet also shrewd, toughminded, and well ordered. But such medical sessions are rare. Most of the time it helps to separate the creating and criticizing processes so they don't interfere with each

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<sup>240</sup> RAY & RAMSFIELD, *supra* note 102, at 353 (emphasis added).

<sup>241</sup> ELBOW, *supra* note 6, at 39.

<sup>242</sup> *Id.* In a chapter titled "The Dangerous Method: Trying to Write it Right the First Time," Professor Elbow agrees. *Id.* (saying that most people would ask, "Why keep on writing when you know something is wrong and it will have to be changed? It feels obvious that you should stop and cross out now and not go on to the next bit until you get this bit right."). Though, Professor Elbow then asserts that that approach is inefficient. *Id.*

<sup>243</sup> *Id.* Professor Elbow acknowledges that "[t]here are obvious attractions to a writing process where you . . . try to get your piece right the first time." *Id.* ("You don't have to make such a mess with thrall writing, you don't have to write in the dark without knowing where you are going, you don't have to engage in extensive revising—just a little tidying up, perhaps, at the end."). However, Professor Elbow continues on to explain why this approach is inefficient. *Id.*

<sup>244</sup> See *infra* note 245 and accompanying text.

other: first write freely and uncritically so that you can generate as many words and ideas as possible without worrying whether they are good; then turn around and adopt a critical frame of mind and thoroughly revise what you have written—taking what's good and discarding what isn't in shaping what's left into something strong. You'll discover that the two mentalities needed for these two processes—an inventive fecundity and a tough critical-mindedness—flower most when they get a chance to operate separately.<sup>245</sup>

Thus, allow your writing and your ideas to flow freely<sup>246</sup> before reigning them in or stunting them<sup>247</sup> by critically analyzing every sentence you write.<sup>248</sup>

Second, when writing and editing simultaneously, the time you hope to save later by not having to edit as heavily will not make up for the longer time it took to complete a first draft. It is logical that writing and editing simultaneously slows your initial writing down.<sup>249</sup> Of course, if you are going to

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<sup>245</sup> ELBOW, *supra* note 6, at 7.

<sup>246</sup> RAY & RAMSFIELD, *supra* note 102, at 283 (“Try not to perfect each sentence as you go, but rather try to write the entire paper without revising. This will allow your ideas to flow as you focus on content, not form. Then go back to perfect your paper in the [rewriting], [revising], and [polishing] stages. In those stages, let your perfectionism work within your time restraints.”); see also Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION AND COMM. 365, 380–81 (1981) (stating that approaching first drafts with the mindset of “just writing it out” in a free-wheeling way and “edit[ing] it later” is an “earmark[] of sophisticated writers,” while poorer writers seem obsessed with perfecting the first draft as they are writing it.).

<sup>247</sup> Schiess, *supra* note 3, at 13 (recommending when writing a first draft to “try to get your writing out without a lot of stops and starts. When you interrupt the writer inside you, it stifles creativity and slows down the process.”).

<sup>248</sup> Scholars have noted that writing and critiquing must be separate endeavors:

Like a breath, a heartbeat, or a footstep, both subprocesses are needed to complete the task, but those subprocesses cannot be undertaken simultaneously. A breath requires both expansion, to take in air with its needed oxygen, and contraction, to expel carbon dioxide and unneeded components of the air. Similarly, writing requires expensive act of creation, considering and laying out various possibilities, and the contracting act of critiquing, which eliminates possibilities that are not workable. Many writers have problems writing because they are either trying to complete these contradictory tasks simultaneously or they are alternating too frequently between the two tasks, which add stress to the writing process. These two aspects of the writing process must alternate efficiently, at a pace that is optimal for the individual writer.

RAY & RAMSFIELD, *supra* note 102, at 312.

<sup>249</sup> ELBOW, *supra* note 6, at 43 (cautioning that “[t]rying to write things right usually means writing very slowly and carefully. Long pauses between sentences and paragraphs to make sure of your bearings. This often leads to overwriting and over intricacy.”).

stop and re-read and tinker and revise and labor over every sentence as you first write it, it will take you much longer to work through your first draft.<sup>250</sup> But, the expectation that you will make that time up with less editing is inaccurate. When analyzing each sentence, your focus shifts from large-scale and substantive issues to small-scale writing concerns: sentence structure, grammar, modifiers, etc. Once your mind begins focusing on the small-scale, it struggles mightily to simultaneously consider the larger-scale aspects. Thus, by the time you finally finish a significant chunk of writing, the large-scale aspects of your writing may have been sacrificed significantly.

If you do carefully edit your brief later, you may notice that the focus in a section wandered; that two paragraphs, several pages apart, included repetitive information; or that you left out a helpful point, etc.<sup>251</sup> Each of these issues requires additional revision of the work it took so long to write in the first place. Also, anytime you edit and revise your own work, one of the more common problems to fix is repetitious words, sentences, and points. First drafts commonly contain repetition.<sup>252</sup> Points may have seemed a little different in your head, but as you edit critically you realize they are the same, or at least similar enough to combine. So, you have to re-write to cut out the repetition.<sup>253</sup> You may have to move the similar points closer together, or consolidate two sub-sections into one, or simply delete redundant points. Part of the process of editing and revising typically involves a significant amount of deleting. Unless you think of new points as you revise, a subsequent draft for a good writer is almost always shorter than the previous draft.<sup>254</sup> Thus, the extra time you spent reworking those sentences in your first draft was wasted time that slowed down your writing process from start to finish.<sup>255</sup>

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<sup>250</sup> See RAY & RAMSFIELD, *supra* note 102, at 177.

<sup>251</sup> This is another reason to outline—as you write and begin focusing on various aspects of writing, your outline will help keep you focused and remind you of all the points you were planning to make, all the facts you wanted to raise, and the policy concerns you wanted to address. If all of that information is in your head or in disorganized notes, it is very easy to forget some of that information over the course of writing fifteen to forty pages of a brief.

<sup>252</sup> See *supra* notes 124–34 and accompanying text.

<sup>253</sup> See *supra* notes 124–34 and accompanying text.

<sup>254</sup> ELBOW, *supra* note 6, at 10 (stating that “[m]ost people start shaping and revising what they have written once they get one pretty good idea. . . . That’s terrible. You shouldn’t start revising until you have more good stuff that you can use. (And it won’t take long to get it if you make your early writing into a free brainstorming session.)”).

<sup>255</sup> Professors Ray and Ramsfield explain the inefficiency of revising while you write:

Trying to combine both tasks slows down both the writing and the revising processes. When you are writing, concentrate solely on expressing your ideas, no matter how unpolished writing may seem. Revise later. Do not revise while you rewrite. Rewriting involves adding, deleting, and moving content. Revising before you rewrite often means you spend time refining a passage you later end

In addition to the reality that polishing as you write is not quicker in the long run, writing in reliance upon such a method can cause psychological fatigue. You may get up from your computer after spending three hours working on your brief and feel angry and frustrated that you only finished three pages, not getting half as far as you expected. These experiences make the writing process feel even more slow and despairing, and can also add stress to the process, which does not improve the experience or the brief.

Even more importantly, when you know you invested so much time and effort into “perfecting” your language as you wrote it, it becomes much more difficult, psychologically, to actually edit and revise effectively.<sup>256</sup> Your brain resists cutting out arguments, points, paragraphs, or sentences that you remember laboring over. Thus, your final draft very well may contain organizational problems and repetition. But when you review the brief in its late stages, your brain—knowing the work you already put into perfecting the small-scale writing—may subconsciously refuse to acknowledge the weaknesses. Or, it may subconsciously resist mustering up the courage and energy to revise the brief in substantial, substantive ways.<sup>257</sup>

To improve your writing speed and efficiency, train yourself not to rehash each sentence as you write it. Use the first draft to flesh out the arguments that you earlier outlined. Aside from obvious typos, spelling errors, or grammatical errors that you notice immediately upon typing them, do not re-read your sentences and tinker with them—yet.<sup>258</sup> That is what the editing and revising step of the writing

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up deleting. Work out your organization and get everything in place before you start revision. Revise in stages. It is exhausting and inefficient to try to revise on every level at once.

RAY & RAMSFIELD, *supra* note 102, at 351.

<sup>256</sup> ELBOW, *supra* note 6, at 43 (stating that “[w]riting slowly and carefully, you also invest too much love and effort into that draft—after all, those intricacies *are* clever—so it becomes too hard to throw those cute gems into the garbage”).

<sup>257</sup> See *id.* at 9. When you separate these two writing processes into two stages (fast writing early and then tough critical-mindedness as you later revise) “[w]hat you’ll discover is that these two skills used alternately don’t undermine each other at all, they enhance each other.” *Id.*

<sup>258</sup> Others do not insist on waiting until your first draft is complete to begin critiquing the editing. RAY & RAMSFIELD, *supra* note 102, at 312 (“Some writers will perform better when they write a complete rough draft of the section before stopping to revise any details within the section. Other writers will perform better stopping to revise after a few paragraphs or sentences.”). I agree that waiting at least until the end of the paragraph is better than editing each sentence as you write. And, as long as you are not too critical and do not set out to fix all errors, it is not a bad idea to read a paragraph after writing it just to make sure it was cohesive and comprehensible. However, for all of the reasons noted in this section, the less you stop and start (by critiquing as soon as you write), the more efficient you will be.

process is for.<sup>259</sup> Separate those steps, and you will likely increase your efficiency when writing.<sup>260</sup>

### *I. Edit in separately focused stages*

When presenting at legal writing CLEs, I ask attorneys how they go about editing and revising their briefs. Most admit to using the same approach: they edit and revise by reading their brief from beginning to end, looking for any errors to correct or improvements to make. In other words, they read it sentence by sentence, hoping to catch any mistakes. These mistakes could be anything: an ineffectively organized section; lack of a roadmap; missing point-headings; inaccurate statements of the rules; missing rules; repetitive rules; inaccuracy or missing details in how a precedent case is explained; use of less helpful cases; incomplete analogies or distinctions; repetition in points made; overly long paragraphs; overly long sentences; missing topic or thesis sentences; missing transitions; improperly formatted citations; missing citations; lack of flow; misplaced modifiers; overuse of passive voice; unnecessary wordiness; misspelled words; improper punctuation; missed opportunities to emphasize important information; etc. The quantity of potential errors, the types of potential errors, the number of ways to improve the brief—there is so much to consider when editing and revising that it is nearly impossible to focus on all of it at once.

In fact, it may be impossible to do so. Just like how your eyes cannot focus on something in the distance and something up close at the same time, your brain struggles to focus simultaneously on the plethora of potential problems with your brief as well.<sup>261</sup> An apt comparison for trying to fix large-scale and small-scale problems simultaneously “is like trying to look simultaneously at a window frame and the mountains in the distance.”<sup>262</sup> As you begin reading your draft, your brain may start to identify large-scale problems, such as a disjointed organization, or repetitive points, or insufficient authority to support a point.<sup>263</sup> However, as

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<sup>259</sup> Schiess, *supra* note 3, at 13 (stating that “[t]he main idea is to get a complete draft quickly, so resist the urge to edit as you go. Editing is the next step.”).

<sup>260</sup> Mary Jaksch, #1. *Mary Jaksch*, THE CREATIVE COPYWRITER, <http://www.creative-copywriter.net/blog-productivity/writing-productivity/> (last visited Aug. 2, 2017) (“To be more productive, you need to learn how to write faster. The key point is to separate the actions of creation and editing. This means embracing bad first drafts! When you try to write your first draft well, you are creating and editing at the same time (activities which activate different areas of the brain). This is like being in a car and stepping on the accelerator and the brake at the same time. You won’t get anywhere fast!”).

<sup>261</sup> See ARMSTRONG & TERRELL, *supra* note 63, at 298–99.

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

<sup>263</sup> *Id.* (stating when a writer starts to focus on “smaller-scale issues like word choice and sentence structure [ , then o]nly by an act of will can you draw back from the details and identify the draft’s larger problems”).

you focus on that concern, your brain will lose focus on other, different problems that may also exist. Similarly, if you start to notice that you are using too much passive voice and many of your sentences are too long or confusing, your brain will begin to focus on those smaller-scale concerns and may not even notice larger-scale concerns like missing topic sentences or overly long paragraphs. If you start to notice citation errors, your brain may begin to focus on citations and no longer catch the misplaced modifiers in your sentences. It is exceedingly difficult to edit and revise your brief effectively, and efficiently, if you are trying to spot and correct all types of errors at the same time. In their book *Thinking Like a Writer*, attorneys Armstrong and Terrell also encouraged writers to use this multi-stage approach:

Editing should be methodical . . . If you simply attack the text with a vague desire to make it better, you'll try to do too much at once: checking for flaws in analysis, testing the organization, copyediting for stylistic and grammatical problems, and proofreading. You cannot do a good job with all of them at once, especially since they require different types of attention. . . . The moral: good editors are organized editors. They attack a draft not just with a passionate but vague desire to make it better, but with a mental checklist of the problems for which they should be looking. And they break the edit into stages so they can focus on one type of problem at a time.<sup>264</sup>

The former approach—reading the brief and looking for any and all improvements that can be made—is the default to which nearly all attorneys I teach and consult with turn. It seems like the most efficient approach: catch all the errors at once. Also, it seems like the most realistic approach given the time constraints attorneys work under.<sup>265</sup>

However, in reality this approach is often not very effective and not at all efficient.<sup>266</sup> As attorneys Armstrong and Terrell have noted, trying to fix everything at once is “badly misguided. No matter how brilliant any particular change, the process is so inefficient that it will only produce useful results when the editor has unlimited time to squander. Even then, the results are likely to be superficial.”<sup>267</sup> Editing by trying to fix all mistakes at once is inefficient for the same reason it is ineffective. As you brain spots certain types of errors, it will begin to focus

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<sup>264</sup> *Id.* at 299.

<sup>265</sup> I have heard attorneys explain that they do not have time to revise their brief over and over. They have to just read it a few times and correct whatever problems they find.

<sup>266</sup> See *supra* notes 261–65 and accompanying text.

<sup>267</sup> ARMSTRONG & TERRELL, *supra* note 63, at 301.



on those errors and often miss other errors. To actually spot all the errors or opportunities for improvement, you would have to re-read the brief over and over and over again. The second time you revise it you may spot a few more errors that you missed the first time. And on and on. If you have the time and stamina to revise it a tenth time, you may still be identifying errors that you are surprised you missed the first nine times. Each time you revise it, that is a slow process. It is also a tiring and tedious task to reread the same thing over and over, tinkering with it in different ways every time you reread it.

Further, it is inefficient because it often leads to needless revisions. You may spend a half hour on just one paragraph—shortening long sentences, moving misplaced modifiers, wordsmithing to make a sentence “just sound better,” struggling over how to paraphrase a rule or piece of reasoning from an opinion, etc. Then, after spending a significant amount of time and effort improving those small-scale concerns during early edits, on the third edit you may realize that the point being made in that paragraph is repetitive and needs to be cut—perhaps some of the sentences, or perhaps the entire paragraph. Perhaps even an entire sub-section needs to be cut. Or, you may decide the point made in the section is fairly weak, yet the section is relatively long, so the entire section needs to be shortened to avoid over-emphasizing a weak point. Ultimately, you cut out much of the work that you spent a large amount of time and energy “perfecting” during earlier edits.

To be more effective, instead of reading the brief and trying to identify any and all areas for improvement simultaneously, break the editing process down into several separate stages. During each stage, identify a short list of specific “problems” to look for, and then focus on only those problems. Ignore any other problems you notice. Start with large-scale concerns and work, stage by stage, down toward the smallest-scale concerns.

The following is a series of six editing stages that any legal writer could follow, and in doing so would likely produce a final draft more effectively and efficiently.<sup>268</sup>

(1) **FIRST EDIT—LARGE-SCALE ORGANIZATION:**

- **Complete:** Did I address all the major points I wanted to make to support my argument?
- **Logical:** Did I order the points in a logical way?
- **Roadmaps:** Did I provide a clear roadmap that identified for the reader each point I addressed?

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<sup>268</sup> Though I drafted these six steps from scratch, attorneys Armstrong and Terrell also suggest a similar six-step approach. *Id.* at 300.

- **Point headings:** Did I include point-headings at the beginning of each new point? Do my point-headings echo the language used in my roadmap?
- (2) **SECOND EDIT—INDIVIDUAL ARGUMENTS:** For each point...
- **Authority:** Did I choose effective authority to best support my point?
  - **Amount:** Do I need more authority? Did I use too much authority (overkill)?
  - **Rules:** Are my rules accurate? Did I over quote? If I paraphrased, are the paraphrases accurate?
  - **Illustrations:** Did I explain the precedent cases sufficiently? Did I include unnecessary facts? Did I leave out important reasoning?
  - **Analogies and Distinctions:** Did I effectively compare and/or contrast the present case to the precedent cases?
  - **CREAC:** Did I follow a logical progression (like CREAC), to explain and prove this point?
- (3) **THIRD EDIT—PARAGRAPHS:** For each paragraph...
- **Topic sentences:** Did I include a topic sentence?
  - **Flow:** Does it logically build on the prior paragraph?
  - **Length:** Is it about 3/4 of a page or less?
  - **Unity:** Do all the sentences connect to the topic?
- (4) **FOURTH EDIT—SENTENCES:** For each sentence...
- **Length:** Is the sentence less than 20 words? If not, could it be?
  - **Variation:** Do the sentences vary in length to avoid a monotonous rhythm?
  - **Transitions:** Does the sentence connect clearly to the prior sentence, either through an explicit transition (word or phrase), through dovetailing, or through obvious context?
  - **Grammar:** Any grammar errors, overuse of the passive voice, misplaced modifiers, etc.?
- (5) **FIFTH EDIT—CITATIONS:**
- Is each citation formatted properly?

(6) **SIXTH EDIT—FINAL TOUCHES:**

- Are there any remaining typos or formatting errors?

If you do not break your editing down into stages, it would be virtually impossible to focus on each of those concerns at the same time. Yet, all of those concerns noted above are very important ones in writing a strong brief.<sup>269</sup> So, an attorney does have to consider all of the above when editing and revising. Doing so is much more effective and efficient when you edit in stages.

The six stages above are just one example of a multi-level approach to editing. You could easily break down the stages further and identify ten stages through which to work.<sup>270</sup> Or, you could consolidate the stages and work through three stages.<sup>271</sup> Depending on your own strengths and weaknesses as a writer, you can decide how many stages are most optimal, and what content to focus on in each stage. However you break down your approach, your editing will be more effective and efficient if you work through separate stages when you edit and revise.<sup>272</sup>

I briefly explained why this technique is more effective,<sup>273</sup> but the focus of this article is writing briefs more quickly. So, why does editing in stages increase your efficiency? As noted above, the “catch all the mistakes at once” approach to editing and revising is inefficient because it is nearly impossible.<sup>274</sup> You cannot catch all the mistakes at once, so you end up having to revise it, and revise it again, and revise it again—each time making corrections you missed the prior time. To compose a well-edited, polished brief, you would have to go through the process

<sup>269</sup> See *supra* note 268 and accompanying text.

<sup>270</sup> Similarly, attorneys Armstrong and Terrell note that you could further break down some of the steps they recommend. ARMSTRONG & TERRELL, *supra* note 63, at 300.

<sup>271</sup> RAY & RAMSFIELD, *supra* note 102, at 313. The authors suggest three stages: (1) rewriting (large-scale concerns), (2) revising (small-scale concerns), and (3) polishing. *Id.* The book then suggests what to look for in each of those three stages. *Id.*

<sup>272</sup> See *supra* notes 261–71 and accompanying text.

<sup>273</sup> Attorneys Armstrong and Terrell note that this provides another benefit of editing in stages:

[A]side from its effects on the draft in front of you, when you are editing your own drafts this technique is one of the best ways to improve your writing. After you have concentrated on a specific problem through several documents, it will start to appear less often in drafts. You will have retrained your mental muscles in the same way a tennis player, after much practice, internalizes the techniques of a powerful ground stroke and no longer must think specifically about foot placement, backswing, and so on.

ARMSTRONG & TERRELL, *supra* note 63, at 300; see *supra* notes 261–73 and accompanying text. In the long run, these improvements in your own writing would lead to better first drafts, and thus less revisions during the edit stages, ultimately leading to quicker brief writing.

<sup>274</sup> See *supra* notes 259–73 and accompanying text.

of revising many times, eventually working through all the concerns listed above. Keeping your eyes open for so many potential errors or improvements every time you revise is time-consuming and tedious.<sup>275</sup> Ultimately, it is a slow way to get to the finish line of having a well-edited brief.

If instead, you edit in focused stages, you will get to the point where you have worked through all the listed concerns more efficiently. Each separate editing step can be done fairly quickly, focusing on a small number of similar concerns. This will help you become more efficient because you are narrowly focused, you are not getting distracted by other concerns, and you are more likely to spot the particular types of mistakes you are looking for during that editing stage. If you start with large scale concerns, you can largely skim the brief looking for just those large-scale concerns. You do not have to read every sentence closely. First, you just need to check and confirm that you are satisfied with the organizational aspects. If there are few large-scale problems, then this stage will proceed quickly. On the other hand, if there are significant structural problems, you can fix those now as you focus on just those problems. Additionally, you do not have to deal with the angst that comes from cutting out sentences, paragraphs, or sections that you already spent significant time revising at the smaller-scale level.

Now you are on to the next stage in the editing process: examining the strength of each argument. With just this focus, you can make any improvements to the paper at that level without getting distracted by other concerns. Once you complete the stage-two revisions, then you can move on to the next stage, again confident that your paper is improving in focused and important ways. You can then continue to fine-tune it based on whatever smaller-level concerns you look for in that next stage.<sup>276</sup>

Working in stages also has the advantage of keeping your mind a bit fresher, which can improve your efficiency. When you attempt to fix every concern at once, you become mentally exhausted. By the third or fourth revision, you may grow tired of reading the same arguments, paragraphs, and sentences over and over. Additionally, you become frustrated that you are catching new mistakes that you “somehow” missed before. When editing in stages, you are almost reading the brief with “fresh eyes” each time you revise it because your eyes and mind are

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<sup>275</sup> See RAY & RAMSFIELD, *supra* note 102, at 268 (“The revision for small-scale organizations should take place after writing and rewriting, so that you are not struggling with fundamental ideas at the same time you are straightening out the expression of those ideas.”).

<sup>276</sup> See ELBOW, *supra* note 6, at 170 (“Try as hard as you can to put off until the end of the revising process any attention to grammar. It may take you months to learn to put aside your grammar itch as you write, but it’s worth the effort.”).

focusing on something new and different than the prior time you sat down to edit and revise—even if the prior time was earlier that day.<sup>277</sup>

Finally, this “stages” approach reduces the likelihood that you waste hours making small-scale corrections to sentences that you may delete altogether if you later notice larger-scale problems:

[R]ewrite before you revise . . . Look at the writing with a telescope, not a microscope. For example, avoid editing for tone, wordiness, or other small-scale concerns, which lead you to appropriate the text and alienate the reader. Editing extensively at the stage would be inefficient, in any event, because some of the sentences and you edit will disappear in later drafts.<sup>278</sup>

To edit in separate, focused stages requires patience and discipline. Doing so requires patience because it is natural to want to just jump in and fix all errors at once.<sup>279</sup> Editing in stages takes discipline because many attorneys have not used this approach in their legal writing careers.<sup>280</sup> As a result, it may take some practice to get comfortable with. But, for attorneys who want to complete briefs more efficiently, editing in stages may help considerably. Remember, editing is the bulk of the writing process. No attorney’s goal is to just get the *first* draft done quickly—it is to get the *final* draft done more quickly. Editing in stages may improve your efficiency in moving from a completed first draft to a completed final draft.

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<sup>277</sup> Attorneys Armstrong and Terrell note that editing in separate, focused stages can also help you obtain some of the benefits of editing with a “fresh eyes approach” (setting the paper aside for a few days between edits) even when you do not have the time to actually wait days in between edits:

Develop the knack of treating your own drafts as if they were the work of a casual acquaintance you do not trust much. [There is] one way to accomplish this difficult feat. Recall the last time you wrote something, then put it aside for a couple of days. Recall what a savage editor you were when you return to the draft, compared to all the situations in which you edit immediately after throwing down a first draft.

ARMSTRONG & TERRELL, *supra* note 63, at 302. Being methodical helps create this distance when you do not have the time to literally set it aside for a few days. *Id.*

<sup>278</sup> RAY & RAMSFIELD, *supra* note 102, at 221–22; *see supra* notes 254–77 and accompanying text.

<sup>279</sup> Attorneys Armstrong and Terrell note that:

[I]n reality, even the most organized editors usually begin by taking one or two passes through a draft simply looking for whatever catches their eye. And, with shorter documents or rush edits, some of the stages can be handled at the same time. The moral is not that the same method always works best, or that freeform intelligence is to be avoided. It is just that we become better editors if we become more methodical ones.

ARMSTRONG & TERRELL, *supra* note 63, at 300–01.

<sup>280</sup> *Id.* at 301 (“To be both efficient and effective, an editor must learn to replace her Strangeloveian urges [to fix everything at once] with a different set of attitudes [to edit in stages].”).

*J. Learn when your writing “zone” is*

Scientific research suggests that the time of day in which you choose to write can significantly affect how productive and efficient you are in your writing. Unfortunately, the studies do not definitively establish the time at which it *is* best to write. First, some studies about time-of-day effects on human performance reach contradicting results from other studies.<sup>281</sup> Second, what time during the day a person is most productive is idiosyncratic to the individual—when one person writes most efficiently may not be the same for the next person.<sup>282</sup> Various factors can affect time-of-day performance, such as a person’s level of intelligence,<sup>283</sup> whether a person is impulsive,<sup>284</sup> or whether a person is an introvert.<sup>285</sup> Further, the most productive time for a writer to write may not be the same time as that writer believes is her most productive time.<sup>286</sup> In the conclusion of her article on time-of-day effects on human performance, psychologist Dr. Carolyn Hines states, “[D]etermining ones’ preferred time of day should probably not be done . . . solely by a self-report method. . . for what people think, especially about themselves, and what can be supported by evidence often differs.”<sup>287</sup> However, it seems clear that the timing of when a person tackles certain tasks during a day affects performance, productivity, and efficiency.<sup>288</sup>

Many studies have documented how time of day can affect performance.<sup>289</sup> “[One study] from the University of California, Irvine, shows[, in general,] productivity rises in the late morning around 11 a.m. and peaks between 2 and 3 p.m.”<sup>290</sup> Another recent study demonstrates that people suffer from cognitive fatigue as a day progresses, and thus, generally, most people perform better

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<sup>281</sup> Carolyn B. Hines, *Time-of-Day Effects on Human Performance*, 7 J. CATH. EDUC. 390, 390 (2004), <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1262&context=ce>.

<sup>282</sup> *Id.* at 392.

<sup>283</sup> *Id.* at 391–92. Studies indicate that people with higher intelligence may be able to “override” their natural circadian influences. *Id.*

<sup>284</sup> *See id.* Studies indicate that highly impulsive people tend to be most productive in the evenings. *Id.* However, the studies also indicate that there is great variability in when highly impulsive individuals are most productive. *Id.*

<sup>285</sup> *Id.* at 393. Studies indicate that introverts tend to be more productive in the mornings than extroverts. *Id.*

<sup>286</sup> *Id.* at 409.

<sup>287</sup> *Id.*

<sup>288</sup> *See supra* notes 281–87 and accompanying text.

<sup>289</sup> *See infra* notes 290–96 and accompanying text.

<sup>290</sup> Ilya Pozin, *4 Surprising Truths About Workplace Productivity*, FORBES.COM (Apr. 17, 2015, 1:52 PM), <https://www.forbes.com/sites/ilyapozin/2014/04/17/4-surprising-truths-about-workplace-productivity/#496289273abf>.

during the morning.<sup>291</sup> This study analyzed two million test scores from Danish students between 2009 and 2013, tracking when the students took tests during the day.<sup>292</sup> The research revealed that for each hour after 8:00 a.m. that a test was taken, the scores lowered by 0.9%.<sup>293</sup> The researchers concluded that the lower scores result from mental fatigue that occurs as a day progresses.<sup>294</sup> In the study, the authors noted that “[p]ersistent cognitive fatigue has been shown to lead to burnout at work, lower motivation, increased distractibility, and poor information processing,” all of which could obviously impair a person’s production and efficiency when sitting down to write a brief.<sup>295</sup> Though this study focused on students, the authors observed that cognitive fatigue also affects experts, noting that judges’ decisions can become lazier as the day progresses, especially if they do not give themselves breaks when moving from decision to decision.<sup>296</sup>

The studies above involved the general population and studied one variable, the time of day, without studying any correlations between the time of day and the individuals’ unique characteristics.<sup>297</sup> However, other studies have drilled down further to correlate the relationship between time of day and individuals’ unique performance metrics.<sup>298</sup> The “optimal time” for an individual to complete particular tasks can vary from one person to the next.<sup>299</sup> Effectively matching when an individual tackles certain tasks during the day with that individual’s “preferred time” can make a significant difference in performance.<sup>300</sup> A 1979 study showed that “students having difficulties in mathematics and who preferred learning in the afternoon, but who had been scheduled into morning mathematics classes, were able to turn their achievement in mathematics toward a significantly more positive trend when they were rescheduled into afternoon classes.”<sup>301</sup> A 1981 study

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<sup>291</sup> See Hans Henrik Sievertsen, Francesca Gino, & Marco Piovesan, *Cognitive Fatigue Influences Students’ Performance on Standardized Tests*, 113 PROC. NAT’L ACAD. SCI. USA 2621, 2623 (2016).

<sup>292</sup> *Id.* at 2621–64.

<sup>293</sup> *Id.* at 2623.

<sup>294</sup> *Id.* at 2621.

<sup>295</sup> See *id.*

<sup>296</sup> *Id.* at 2621 (citing Shai Danziger, Levav Avain-Pesso, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. USA 6889, 6889–92 (2011) (concluding that “cognitive fatigue is detrimental to individuals’ judgments and decisions, even those of experts. For instance, in the context of repeated judicial judgments, judges are more likely to deny a prisoner’s request and accept the status quo outcome as they advance through the sequence of cases without breaks on a given day.”)).

<sup>297</sup> See *supra* notes 291–96 and accompanying text.

<sup>298</sup> For example, while the Henrik study analyzed a huge number of results (two million tests), the authors noted that it did not take individual factors, such as individuals’ different circadian rhythms, into account. Sievertsen, *supra* note 291, at 2623.

<sup>299</sup> See *supra* notes 274–79 and accompanying text.

<sup>300</sup> See *supra* notes 275–80 and accompanying text.

<sup>301</sup> Hines, *supra* note 281, at 402.

“revealed that gains in achievement in both mathematics and reading resulted from matching students to their preferred learning times for those subjects.”<sup>302</sup> In fact, the “[r]esults showed that more than 98% of the students achieved statistically significantly higher scores when taught at the best time for them and did worse when taught at the nonpreferred time.”<sup>303</sup> In another example, college students were tested at 9:00am, 2:00pm, and 8:00pm. The “[r]esults showed that the success rate of those classed as morning types decreased throughout the day, while the performance of the evening types improved at later test times.”<sup>304</sup> The authors concluded that “memory performance is critically dependent on matching time-of-day preference with the time the task is administered.”<sup>305</sup> In yet another study, the performance efficiency of “morning types” decreased throughout the day, and morning types suffered a post-lunch dip in performance that evening types did not suffer.<sup>306</sup>

To add another layer of complexity, a different study demonstrated that some cognitive tasks are best performed during a person’s “optimal time,” while other tasks may be best performed when a person is not in his or her optimal time.<sup>307</sup> The study found people perform attention-demanding tasks best during their optimal time because their brains are able to ignore distractions.<sup>308</sup> Thus, they can stay on task and be more effective and efficient.<sup>309</sup> The author noted attention-demanding tasks include things that “require strong focus and concentration[,] like balancing spreadsheets or reading a textbook.”<sup>310</sup> Though writing was not addressed, it would certainly seem reasonable to extend these empirical observations to the processes involved when composing and evaluating complex legal analyses. Careful concentration while editing and revising would also fall into this category. However, the author noted that people may be most successful at finding creative and diverse solutions to problems when they are

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 403.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 404. Not all performance is affected by time of day. *Id.* Some studies have shown “no interaction between morningness-eveningness and time of day on perceptual-motor tasks, but a significant effect for cognitive tasks.” *Id.* at 405.

<sup>307</sup> Cindi May, *The Inspiration Paradox: Your Best Creative Time is Not When You Think*, SCIENTIFIC AMERICAN (Mar. 6, 2012), <https://www.scientificamerican.com/article/your-best-creative-time-not-when-you-think/>.

<sup>308</sup> *Id.* (citing studies conducted by Lynn Hasher, Rose T. Zacks & Cynthia P. May, *Inhibitory Control, Circadian Arousal, and Age*, ATTENTION AND PERFORMANCE XVII: COGNITIVE REGULATION OF PERFORMANCE: INTERACTION OF THEORY AND APPLICATION, 653–75 (Daniel Gopher & Asher Koriat eds., 1998)). *Id.*

<sup>309</sup> *See id.*

<sup>310</sup> *Id.*



not in their “optimal” time of day cognitively.<sup>311</sup> Other studies have supported these conclusions.<sup>312</sup>

To write more efficiently, attorneys should experiment to see if a particular block of time during the day seems to lead to more productive writing. But, whatever you assume your most productive time to write to be, you might be wrong. If this time ends up being a different time than when you typically write, you may find that writing during this new time is easier, more enjoyable, and more efficient. You may get more done in less time on your first drafts, and your first drafts may be better, also leading to less time editing and revising.<sup>313</sup>

*K. Invest time in learning about legal writing (legal writing books, CLEs, and reading briefs or opinions by good writers)*

To become a better, more efficient writer, learn more about legal writing. Investing in time to continue learning how to write well will not yield as immediate of results as some of the suggestions provided above. However, over the long run, such an investment will make you a more knowledgeable writer, a better writer, and a more efficient writer. Attorneys may write hundreds of pages a month. Attorneys may read thousands of pages a month—some of which might be well written, but some of which will likely be poorly written.<sup>314</sup> Because much legal writing is mediocre or worse, you will not likely become a better writer unless you commit to studying good legal writing throughout your career.<sup>315</sup> The more you study good legal writing, the more likely you are to improve your own writing. You will be better able to identify strengths in your writing that will give you confidence. You will learn what your particular weaknesses are, and

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<sup>311</sup> *Id.*

<sup>312</sup> Stephanie Vozza, *The Best Time of Day to Do Everything at Work*, FASTCOMPANY (June 23, 2015), <https://www.fastcompany.com/3047586/the-best-time-of-day-to-do-everything-at-work> (stating that “[w]hile it seems counterintuitive, the study [from Albion College and Michigan State University] found that creative thinking requires people to approach problems from a different angle. If you’re clear-headed, your mind will jump to the most logical solution. While it’s important to use your time of best focus for tasks that require concentration, a distracted and fatigued brain comes up with the most innovative ideas.”).

<sup>313</sup> Unfortunately, the time demands of law practice may prevent you from writing during your optimal time. For example, litigators spend most mornings in the courtroom, rather than at their computer. But, if you find you write most efficiently in the morning, try whenever possible to block mornings off for working on your briefs. When I was able to do this, I often felt that I wrote more, better, and faster compared to when I worked on my briefs after lunch.

<sup>314</sup> Osbeck, *supra* note 219, at 420 (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 64 (1993)) (lamenting about the legal writing he sees, one judge stated, “[i]n my twelve years on the bench . . . I have seen much written work by lawyers that is quite appalling. Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing.”).

<sup>315</sup> *See id.* (“One empirical study found that approximately 94% of both federal and state judges surveyed reported that basic writing problems routinely marred the briefs they read.”).

thus you'll be able to avoid or correct those weaknesses in your early drafts, which will make your subsequent editing and revising more efficient. You may learn various, concrete approaches to organizing and crafting arguments you can apply early in your writing process, saving you time you may otherwise waste struggling for ways to organize difficult analysis. You can learn techniques for creating emphasis, to be more concise, to avoid common grammar mistakes, etc. The better you are as a writer, the better your first drafts become. Though even great writers will always have to edit and revise early drafts, you can edit and revise your drafts more quickly because you will be more confident, you will have less to edit and revise, you will more easily be able to decipher between what is good and bad in your own writing, and you will be better at spotting errors (or avoiding them in the first place) and correcting them.

The opportunities to learn how to improve your legal writing are plentiful. First, attend seminars on legal writing<sup>316</sup>—given the role and value of legal writing in law practice, legal writing seminars and CLEs are provided by bar associations, firms, law schools, and private CLE providers across the country.

Second, read briefs by excellent legal writers.<sup>317</sup> As noted above, because legal writing is difficult, and many attorneys do not give themselves enough time to edit and revise their briefs effectively, attorneys routinely read mediocre to poorly-written briefs. Studies show writers can improve their writing by reading others' writing, but only if the other writing is better than their own.<sup>318</sup> Though it may not sound exciting, print out a brief from a great legal writer once or twice a month and read it while eating lunch, or while on the train or bus. Become accustomed to reading great legal writing, noticing what the writer is doing organizationally, format-wise, and stylistically. Notice when the writer quotes versus paraphrases. Consider how a writer massages rule language so that the

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<sup>316</sup> Schiess, *supra* note 180, at 1 (stating that “[i]ndividual lawyers must take more responsibility for their own legal-writing skills and must constantly seek to improve. Lawyers should read a book on writing or legal writing once a year, open themselves up to honest critique, consult the best sources in writing, and attend a continuing-legal-education course on legal writing.”).

<sup>317</sup> See *supra* notes 298–300 and accompanying text; Schiess, *supra* note 20, at 2. In her article on improving legal writing, Professor Kathleen Elliott Vinson noted an informal survey of “650 lawyers, judges, law professors, instructors of legal writing, and legal journalists unanimously agreed that most lawyers write badly.” Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 *TOURO. L. REV.* 507, 515–16. (2005). In her article, Vinson also quoted Professor Stephen Stark from his Harvard Law Review Article:

If you don't need a weatherman to know which way the wind blows, you don't need a literary critic to know how badly most legal prose is written. You need only turn to any page of most legal briefs, judicial opinions, or law review articles to find convoluted sentences, torturous phrasing, and boring passages filled with active voice.

*Id.* at 520 n.55 (quoting Steven Stark, *Why Lawyers Can't Write*, 87 *HARV. L. REV.* 1389, 1389 (1984)).

<sup>318</sup> CAMERON & LONG, *supra* note 116, at 127.

rules are accurate yet seem to support her client's position. Examine the ways the writer emphasizes favorable precedent. Notice how the writer raises and dismisses adverse authority without overly emphasizing it. Look for techniques the writer applies that you also try to use (but that you may not execute as effectively). On the other hand, look for techniques the writer applies that you do not do use. Take note of these things so that you can adopt them into your own writing style and approach.

Third, read books on legal writing,<sup>319</sup> or just writing in general.<sup>320</sup> As with legal writing seminars, it is easy to find recent books and articles on legal writing, and there are many excellent ones to be read. Even if you do not learn anything new when reading a particular article or book, you will likely be reminded of something important that you had once learned but have since forgotten:<sup>321</sup> tips for writing concisely; what CREAC actually is; the difference between rule-based and analogy-based arguments; how to effectively illustrate cases; etc. Every time you learn, or remember, a new tip about legal writing, you will improve a little—especially if you put that tip into practice and it becomes part of your writing style or approach. The more tools you develop, the more efficient you will become in producing stronger first drafts, editing and revising subsequent drafts, and reaching a strong final version.<sup>322</sup> If you just churn out the same level of briefs over and over, based on the same, un-evolving skill set, you will struggle to improve your writing efficiency.<sup>323</sup>

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<sup>319</sup> JOSEPH KIMBLE, *LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAY ENGLISH* 98 (2006) (suggesting to “[c]are enough to work at your craft. Become critical minded about words. Read the best books on writing. Pay attention to models.”).

<sup>320</sup> In addition to suggesting attorneys attend legal-writing CLE courses and reading books on legal writing, Wayne Schiess encourages attorneys to “study the best sources on English and legal usage.” Schiess, *supra* note 91, at 15.

<sup>321</sup> Or, you may learn that you remember past advice incorrectly. As one lawyer admits:

[L]awyers don't consult writing sources enough. For three years in law practice, and for my first three years as a legal writing teacher, I owned no books on the subject of legal writing other than the textbook I used my course. I owned no legal writing style guides. I did not use a usage dictionary. I often relied on half-remembered platitudes from junior high and high school to deal with the demands of legal writing. I was not alone. In seminars I teach, I regularly ask participants what writing guides they own or use. . . . [T]he vast majority of lawyers do not own and never consult a writing source.

*Id.* at 21.

<sup>322</sup> *Id.* at 15 (“Your goal is to speed up both composing and editing. The more you know, the fewer writing slips you'll make and the more time you can save on editing. Although you'll never consider a first draft a final product, your first drafts will get better and better.”).

<sup>323</sup> *Id.* (“[D]o the work necessary to produce a well-polished product. If you do it right every time, you'll get faster at doing it right. If you never or rarely do it right, you won't get faster.”).

Below is a sampling of books that I have found helpful and that I have heard my colleagues suggest as well.<sup>324</sup>

### Excellent books on writing

- Advanced Persuasive Writing, by Michael Smith<sup>325</sup>
- The Art of Advocacy, by Noah Messing<sup>326</sup>
- Garner's Dictionary of Legal Usage, by Bryan Garner<sup>327</sup>
- The Elements of Legal Style, by Bryan Garner<sup>328</sup>
- The Elements of Style, by William Strunk & E.B. White<sup>329</sup>
- How to Write Plain English, by Rudolf Flesch<sup>330</sup>
- Just Writing, by Oates and Anne Enquist<sup>331</sup>
- A Lawyer Writes, by Christine Coughlin, Joan Malmud, and Sandy Patrick<sup>332</sup>
- Legal Writing and Analysis, by Linda Edwards<sup>333</sup>

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<sup>324</sup> I thank my fellow legal writing professors at Marquette University Law School for offering their suggestions of helpful books, as well as suggestions from legal writing professors elsewhere. This list is certainly not comprehensive, as there are many other helpful books as well. For a longer list of recommended legal writing books, see Joseph Bazan, *The Three Best Books About Writings - Are They on Your Shelf?*, LAW PROFESSOR BLOGS NETWORK (Mar. 18, 2009), <http://lawprofessors.typepad.com/legalwriting/2009/03/the-three-best-books-about-writing-are-they-on-your-shelf.html>.

<sup>325</sup> MICHAEL R. SMITH, *ADVANCED PERSUASIVE WRITING* (3d ed. 2012). This is a textbook for upper-level legal writing classes, but it would be interesting and helpful for practitioners too. See *id.*

<sup>326</sup> NOAH A. MESSING, *THE ART OF ADVOCACY* (2013).

<sup>327</sup> BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* (2d ed. 1995) (recommended by Wayne Schiess in his article, *What I Wish I'd Known About Legal Writing*); Schiess, *supra* note 20, at 2.

<sup>328</sup> BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* (2d ed. 2002) (recommended in Susan Barranco, *Recommended Legal Writing Reads From Judge Easterbrook*, MARQUETTE UNIV. LAW SCH. FACULTY BLOG (Jan. 4, 2011), <http://law.marquette.edu/facultyblog/2011/01/04/recommended-legal-writing-reads-from-judge-easterbrook/>).

<sup>329</sup> WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (4th ed. 2000) (recommended by Judge Easterbrook); Barranco, *supra* note 328.

<sup>330</sup> RUDOLF FLESCHE, *HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS & CONSUMERS* (1979) (recommended by Wayne Schiess in his article, *What I Wish I'd Known About Legal Writing*); Schiess, *supra* note 20, at 2.

<sup>331</sup> ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION AND STYLE FOR LEGAL WRITERS* (2d ed. 2005) (recommended by Wayne Schiess in his article, *Lawyers Are Professional Writers*); Schiess, *supra* note 19, at 11. I agree with nearly all writing advice Professor Schiess provides, and I trust any writing suggestions that he offers.

<sup>332</sup> CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES* (2013). This is a textbook for 1L students, but it would still be an excellent book for attorneys who want to review and refresh themselves with core legal writing principles. See *id.* It is focused on writing predictive memos, but almost everything in it would also be helpful for brief writing. See *id.*

<sup>333</sup> LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* (4th ed. 2015); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION* (2014). Both are very popular legal writing

- Legal Writing in Plain English, by Bryan Garner<sup>334</sup>
- Legal Writing: Sense and Nonsense, by David Mellinkoff<sup>335</sup>
- Making Your Case, by Antonin Scalia and Bryan Garner<sup>336</sup>
- On Writing Well, by William Zinsser<sup>337</sup>
- The Party of the First Part: The Curious World of Legalese, by Adam Freedman<sup>338</sup>
- Plain English for Lawyers, by Richard Wydick<sup>339</sup>
- Point Made, by Ross Guberman<sup>340</sup>
- A Practical Guide to Appellate Advocacy, by Mary Beth Beazley<sup>341</sup>
- Readings in Persuasion: Briefs that Changed the World, by Linda Edwards<sup>342</sup>
- The Redbook, by Bryan Garner<sup>343</sup>
- Style: Lessons in Clarity & Grace, by Joseph Williams<sup>344</sup>
- The Texas Law Review Manual on Usage and Style<sup>345</sup>
- Typography for Lawyers, by Matthew Butterick<sup>346</sup>
- The Winning Brief, by Bryan Garner<sup>347</sup>

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textbooks for first year law students and would also provide a helpful general review of core writing principals for practitioners. *See id.*

<sup>334</sup> BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2d ed. 2013).

<sup>335</sup> DAVID MELLINKOFF, LEGAL WRITING: SENSE & NONSENSE (1982) (recommended by Wayne Schiess in his article, *Lawyers Are Professional Writers*); Schiess, *supra* note 19, at 11.

<sup>336</sup> ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE (2008) (recommended by Chief Judge Frank H. Easterbrook, United States Seventh Circuit Court of Appeals); Barranco, *supra* note 328.

<sup>337</sup> WILLIAM ZINSSER, ON WRITING WELL (6th ed. 2001) (recommended by Wayne Schiess in *Lawyers Are Professional Writers*); Schiess, *supra* note 19, at 11.

<sup>338</sup> ADAM FREEDMAN, THE PARTY OF THE FIRST PART (2007) (recommended by Judge Easterbrook); Barranco, *supra* note 328.

<sup>339</sup> RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (1979).

<sup>340</sup> ROSS GUBERMAN, POINT MADE (2d ed. 2014).

<sup>341</sup> MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY (4th ed. 2014).

<sup>342</sup> LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (2012).

<sup>343</sup> BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (3d ed. 2013) (recommended by Wayne Schiess in *Lawyers Are Professional Writers*); Schiess, *supra* note 19, at 11.

<sup>344</sup> JOSEPH M. WILLIAMS & JOSEPH BIZUP, STYLE LESSONS IN CLARITY AND GRACE (13th ed. 2016).

<sup>345</sup> UNIV. OF TEX., MANUAL ON USAGE & STYLE (13th ed. 2015) (recommended by Wayne Schiess in *Lawyers Are Professional Writers*); Schiess, *supra* note 19, at 11.

<sup>346</sup> MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS (2d ed. 2015).

<sup>347</sup> BRYAN A. GARNER, THE WINNING BRIEF (2014).

*L. Understand and overcome writer's block*

“Writer’s block is generally considered to be a stress reaction that paralyzes the ability to put thoughts into words.”<sup>348</sup> Overcoming writer’s block can be difficult, though writer’s block is a common problem: “Virtually every writer experiences it sooner or later, to a greater or lesser degree. . . .”<sup>349</sup> Obviously, experiencing writer’s block significantly slows the writing process. If you are facing writer’s block and can learn how to overcome it, you will become a more efficient brief writer.

Studies indicate there are several potential causes of writer’s block.<sup>350</sup> First, writer’s block can be caused by apprehension, such as feeling that writing is difficult, demanding, and complicated.<sup>351</sup> Second, writer’s block may be caused by procrastination.<sup>352</sup> Third, writer’s block may be caused by “dysphoria[—] burnout, anxiety, panic, or groundless worries.”<sup>353</sup> Fourth, writer’s block may be caused by impatience.<sup>354</sup> Impatience can include trying to do too much at once, in too little time. Impatience can also include skipping pre-writing steps, such as outlining.<sup>355</sup> Fifth, perfectionism can cause writer’s block.<sup>356</sup> For example, a writer may not be able to move past the first paragraph until the writer feels it is perfect, thus wasting hours (and sometimes days) getting past that first paragraph. Sixth, evaluation-anxiety can also cause writer’s block.<sup>357</sup> Seventh, writer’s block can be caused by writers feeling bound by writing rules, such as formulas (such as how to organize an essay) or formal processes for writing (such as separating editing from drafting).<sup>358</sup> While the above causes stem from cognitive origins,

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<sup>348</sup> Patricia Huston, *Resolving Writer’s Block*, CAN. FAM. PHYSICIAN 92, 93 (1998).

<sup>349</sup> *Id.*

<sup>350</sup> Robert Boice, *Cognitive Components of Blocking*, 2 SAGE J. 91 (1985).

<sup>351</sup> *See id.* at 97.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *See id.* at 97–98.

<sup>356</sup> *Id.* at 98; *see also* Huston, *supra* note 348, at 94.

<sup>357</sup> *See* Boice, *supra* note 350, at 98.

<sup>358</sup> *See id.*; Mike Rose, *Rigid Rules, Inflexible Plans, and the Strifling of Language: A Cognitive Analysis of Writer’s Block*, 31 C. COMPOSITION & COMM. 389, 390–91 (1980). I realize that elsewhere in this article, writers are encouraged to use CREAC (a type of formula) and to separate drafting from editing. *See supra* notes 166–97 and accompanying text. For most, those approaches can increase efficiency. However, it is possible that, for some, it could cause writer’s block. However, two things to consider. First, not everyone suffers from writer’s block. If you typically do not, then it would be unwise to discard using CREAC and to discard the advice of drafting and editing in separate steps. Second, in a study of the seven listed causes of writer’s block, the adherence to rules was reported as the least common of the seven causes. Boice, *supra* note 350, at 100.

some studies are beginning to examine various areas of the brain and point to chemical and physiological causes as well.<sup>359</sup>

Physician Patricia Huston provides a helpful analysis for treating writer's block. Dr. Huston breaks writer's block into three categories: (1) mild blockage; (2) moderate blockage; and (3) recalcitrant blockage.<sup>360</sup> For mild writer's block, the cause may be sitting down to write with unrealistic expectations—thinking you can write the entire brief in one sitting, or trying to write the brief perfectly in one draft.<sup>361</sup> Then, when the brief writing is not flowing perfectly in the first draft, writers can get frustrated and suffer writer's block moving forward.<sup>362</sup>

One way for an attorney to avoid mild writer's block may be to have a more realistic understanding of the writing process. The writer should not plan for the first draft to be perfect, or even good. It just has to be written as a starting point. Every writer should expect that the editing and revising process will comprise a significant part of the writing process, both in the time spent revising and in the way the revisions will transform the brief. Writers who do not accept this reality become susceptible to a mild form of writer's block. Applying some of the approaches already discussed in this article, such as viewing editing as the bulk of the writing process,<sup>363</sup> getting your first draft done early enough that you know you will have time to edit properly,<sup>364</sup> and not trying to edit and perfect as you write the first draft,<sup>365</sup> may help in this regard.

To overcome writer's block caused by perfectionist tendencies, Chief Justice Rebecca Berch of the Arizona Supreme Court offered the following advice:

[S]it down at the computer, turn off the monitor, and start typing. Type for at least 15 minutes before turning on the screen. For those of us who are perfectionists, this allows us to write without second-guessing—and deleting—every word. Much of writer's block can be eliminated this way.<sup>366</sup>

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<sup>359</sup> See generally ALICE W. FLAHERTY, *THE MIDNIGHT DISEASE: THE DRIVE TO WRITE, WRITER'S BLOCK, AND THE CREATIVE BRAIN* (2005). Dr. Weaver is a writer and a neurologist. *Id.*

<sup>360</sup> Huston, *supra* note 348, at 93–94.

<sup>361</sup> *Id.* at 93.

<sup>362</sup> *Id.*

<sup>363</sup> See *supra* notes 262–80 and accompanying text.

<sup>364</sup> See *supra* notes 98–106 and accompanying text.

<sup>365</sup> See *supra* notes 234–60 and accompanying text.

<sup>366</sup> STINSON, *supra* note 5, at 63.

This advice follows the theory of “automaticity” for curing writer’s block.<sup>367</sup> After looking at 100 years of literature, psychologist Robert Boice observed that automaticity is the oldest strategy for initiating the writing process: “[T]he practice of inducing momentum and ideas by writing quickly, without stopping to edit, whatever comes to paper or screen . . . In its modern-day form, usually called free writing, automaticity continues to be the most popularly prescribed remedy for blocking.”<sup>368</sup>

Additional techniques for overcoming mild writer’s block exist. For example, consider starting with a part of the brief with which you are most comfortable.<sup>369</sup> Though the Introduction section would be the first section after the Caption, save writing the Introduction for later if you are not yet comfortable with what you want to say in it. Instead, you might skip over it and start writing the Statement of Facts section.<sup>370</sup> Within the Argument section, start writing whatever argument you feel most comfortable with, even if it is not the first argument that will appear in the section. When confronting writer’s block, it is important to just start writing and to start seeing words fill up the page.<sup>371</sup> Witnessing such progress builds confidence, eases anxiety, and establishes momentum that can help the writer’s block fade away.<sup>372</sup>

Also, if you suffer from mild writer’s block, evaluate the environment you are writing in.<sup>373</sup> Is your office too cold or too hot? Is it too noisy? Is the phone ringing too often?<sup>374</sup> Are you just not “feeling it” because the room is stale and you are bored? Removing these environmental impediments can help you start writing. For example, taking your laptop out of your office and finding a quiet conference room with a better view out the window, or taking your laptop to the corner of a cozy coffee shop for a few hours, could help.<sup>375</sup>

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<sup>367</sup> See Robert Boice, *Combining Writing Block Treatments: Theory and Research*, 30 BEHAV. RES. THER. 107, 108 (1992)

<sup>368</sup> *Id.*

<sup>369</sup> STINSON, *supra* note 5, at 63.

<sup>370</sup> *Id.* (noting that the Statement of Facts is often a good place to start writing because the attorney often knows the facts well, and thus can more easily start getting words on the page).

<sup>371</sup> Huston, *supra* note 348, at 94.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 95.

<sup>374</sup> *Id.*

<sup>375</sup> Note, though, that for individuals with severe writing block, this “solution” may be part of the problem. Robert Boice, *Increasing the Writing Productivity of ‘Blocked’ Academicians*, 20 BEHAV. RES. THER. 197, 206 (1982) (“Another thing that can be said of writers who complain of an inability to write is that they may suffer from a common misperception about the necessary conditions for writing. Their problem may lie, in part, in waiting for inspiration and motivation before getting started.”).



If the above approaches do not help, you may have moderate writer's block.<sup>376</sup> Moderate writer's block often occurs in those who do not have confidence in themselves as writers.<sup>377</sup> Thus, when trying to write, they suffer from "imposter's syndrome."<sup>378</sup> One strategy for overcoming moderate writer's block is to pretend you are somebody else writing the brief,<sup>379</sup> somebody whom you believe to be a good writer.<sup>380</sup> For example, you may pretend you are the judge writing the analysis, or you may pretend you are a colleague whose writing you admire. If you are an associate, you may pretend you are one of the firm's partners. This technique can be effective because it "pull[s] you[] out of your usual perspective, you can sidestep your preoccupation with the writing block and start thinking directly about the subject again."<sup>381</sup>

Similarly, instead of envisioning yourself as someone else, it may help to pretend the reader will be somebody different from your actual audience.<sup>382</sup> Instead of thinking about the learned judge whom you are writing your brief to, write it with your mother in mind, or your golfing buddy, or your hairdresser.<sup>383</sup> Thinking about writing to people whom you are comfortable with can help ease your anxiety, which can then help you start putting words on paper.<sup>384</sup> Remember, this is just about getting your first draft done quickly. Your first draft does not need to be, and never will be, perfect. If you follow a proper writing process, you will revise it multiple times. The judge will never read your first draft. Thinking about the intimidating judge while you write your first draft may lead to writer's block, which slows the writing process down tremendously.

Another potential solution for moderate writer's block is to simply take a break.<sup>385</sup> As Dr. Huston notes,

You could simply need a break. Turn off the computer and call it a day. Go for a walk. Listen to music. Seek out a friend and share a few jokes. Laugh at yourself. Lighten up. Then the next

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<sup>376</sup> Huston, *supra* note 348, at 95.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* (citing JACK RAWLINS, *THE WRITER'S WAY* 6, 73 (1992)).

<sup>379</sup> *Id.* (citing PETER ELBOW, *WRITING WITH POWER: TECHNIQUES FOR MASTERING THE WRITING PROCESS* 59–77 (1961)).

<sup>380</sup> Psychologist Robert Boice notes that this approach "of dealing with internal events such as building confidence or setting an imaginary context while writing," is the third oldest strategy for treating writer's block. Boice, *supra* note 375, at 108. This is a cognitive-based therapy approach. *Id.*

<sup>381</sup> Huston, *supra* note 348, at 95.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 94.

day, try again. By then things might have unconsciously worked themselves out.<sup>386</sup>

Dr. Huston's advice highlights another benefit of setting earlier deadlines for completing first drafts: if you start your first draft early but then encounter mild or moderate writer's block, you've given yourself the opportunity to walk away from your brief for a couple of days.<sup>387</sup> When you return to writing your brief with a different mindset, your writing may flow better and more efficiently. On the other hand, if you wait to complete your first draft until a few days before the brief is due, you no longer have the time to clear your head if writer's block creeps in. Then, real stress and panic may set in as the clock ticks towards the looming deadline.

If none of the above approaches help, then you may be suffering from recalcitrant writer's block. For this, there is not necessarily a simple technique for overcoming the writer's block. Recalcitrant writer's block is more of a chronic problem that halts writers in their tracks repeatedly, and in devastating ways.<sup>388</sup> Possible solutions to recalcitrant writer's block include cognitive therapy<sup>389</sup> or behavioral therapy.<sup>390</sup> Psychologists have conducted experiments that show therapy can help writers overcome major writer's block.<sup>391</sup> However, the therapy can be extensive—some experiments even had subjects participate in therapy every week for a year.<sup>392</sup> While therapy would not be a quick fix for severe writer's block, in the long run it could improve an attorney's writing efficiency in incredible ways.

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<sup>386</sup> *Id.* at 95.

<sup>387</sup> *Id.* at 94–95. Just do not procrastinate, though, which can cause writer's block.

<sup>388</sup> *Id.* at 95–96.

<sup>389</sup> An example of cognitive therapy includes “dealing with internal events such as building confidence or setting an imaginary context while writing.” Robert Boice, *Combining Writing Block Treatments: Theory and Research*, 30 *BEHAV. RES. THER.* 107, 108 (1991); see also Matthew D. Haar, *The Efficacy of Cognitive-Behavior Therapy and Writing Process Training for Alleviating Writing Anxiety*, 14 *COGNITIVE THER. & RES.* 513 (1990).

<sup>390</sup> Huston, *supra* note 348, at 95. One common behavioral therapy “remedy” for writer's block is called “regimen.” Boice, *supra* note 368, at 108–10. Psychologist Robert Boice noted that this is the second oldest approach for treating writer's block. *Id.* at 108. Regimen therapy involves writers forcing themselves into a regimen of “writing on a schedule, regardless of mood or readiness.” *Id.* While this approach has been successful, research shows that writers often fail to sustain their writing regimen over the long run, and thus relapse into blocks. *Id.* at 110–14.

<sup>391</sup> Richard H. Passman, *A Procedure for Eliminating Writer's Block in a College Student*, 7 *J. BEHAV. THER. & EXP. PSYCHIATRY* 297 (1976) (detailing a study where a student overcame recalcitrant writer's block over the course of five therapy sessions by learning to break writing projects down into short discrete tasks, such as completing one or two paragraphs, and not pushing beyond completing one or two short writing tasks per day).

<sup>392</sup> See Boice, *supra* note 375, at 197.

#### IV. CONCLUSION

Given the time constraints practicing attorneys face, it is important to consider one writing expert's words: "Good writing must simply be defined as your best effort under the conditions of stated purposes and specific audiences, available resources and energies, constraints of time and space, and honest self-evaluation."<sup>393</sup> No matter what, an attorney will often feel that she does not have enough time to write a brief. But, that is all the more reason to experiment with the techniques discussed in this article. Writing is hard. There is no getting around that. Fortunately, most attorneys can learn how to write more efficiently. If you are able to complete briefs more efficiently, you can reduce some of the stress inherent in writing briefs, and you can produce higher quality briefs in the time you do have.

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<sup>393</sup> GREY, *supra* note 34, at 5.