Writing Right to Promote Legal Ethical Obligations of Competency and Diligence

By Janis L. Kirkland
Director, Legal Analysis, Research, and Writing Program
Regent University School of Law

The Regent Law Legal Learning Festival, presented with the 2021 Law Alumni weekend, is intended for alumni across the country. However, since a number of alumni practice in North Caroling or Virginia, we anticipate seeking continuing legal education (CLE) credit in these two jurisdictions. Thus, these materials present relevant material based on the ABA Model Rules of Professional Conduct (ABA Model Rules), the Virginia State Bar Rules of Professional Conduct (Virginia Rules), and the North Carolina State Bar Rules of Professional Conduct (North Carolina Rules).

Lawyers have a "special responsibility for the quality of justice." ABA Model Rules, Preamble; North Carolina Rules, Preamble; Virginia Rules, Preamble. As lawyers, we need to maintain awareness that the quality of our written work products is an important part of working to improve the quality of our legal process and access to justice. Michael G. Walsh, *The Grammatical Lawyer: The Ethics of Legal Writing (Part I)*, 64 Prac. Law., June 2018, at 5, 6. Although a key focus of legal writing often is limited to clarity and structure, concern for the rules of legal professionalism also should be an integral part of the writing process. Margaret R. Milsky, *Ethics and Legal Writing*, 85 Ill. B.J. 33, 33 (1997). An attorney's failure to be attentive to professional responsibilities as well as basic writing fundamentals can harm the client and produce negative consequences for the attorney, such as disbarment, suspension, a reprimand, or fine. Carol Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing*, 29 NOVA L. Rev. 49, 49 (2004) (hereinafter "Ethical Obligations").

This CLE focuses largely on issues that arise in an attorney's written materials that relate to the ethical obligations of competency and diligence, although it also touches on the duty to disclose adverse authority, as this topic often overlaps the need to provide competent research and analysis.

RULES OF PROFESSIONAL CONDUCT

Client-Lawyer Relationship

COMPETENCE

ABA Model Rule 1.1 – *Competence*

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

Thoroughness and Preparation

Comment [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. …

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North Carolina Rule 1.1 – *Competence*

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. …

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Distinguishing Professional Negligence

Comment [9] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

Comment [10] Repeated failure to perform legal services competently is a violation of this rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive, nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

DILIGENCE

ABA Model Rule 1.3 – *Diligence*

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment [2] A lawyer's work load must be controlled so that each matter can be handled competently.

Comment [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

Virginia Rule 1.3(a) – *Diligence*

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. … A lawyer's work load should be controlled so that each matter can be handled adequately.

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Advocate

DUTY TO DISCLOSE ADVERSE AUTHORITY

ABA Model Rule 3.3 – *Candor Toward the Tribunal*

(a) A lawyer shall not knowingly

…

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Legal Argument

Comment [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

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Misleading Legal Argument

Comment [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

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The need to display competence and diligence (Rules 1.1 and 1.3) impacts multiple aspects of a lawyer's written work products. For example, competence requires that the lawyer do research when needed, including a need to supply appropriate legal research and need to offer quality legal analysis. These two topics, in turn, trigger a need to disclose adverse authority, referenced in Rule 3.3. Need to comply with court rules also raises ethical considerations related to competence and diligence. *Ethical Obligations*, *supra* p. 1, at 50-58, 62. The need to complete work in a timely manner is established by conduct rule requiring a lawyer's diligence.

I. Deficient Legal Research

Based on Rule 1.1, competent representation requires the lawyer to have legal knowledge necessary for the representation. Furthermore, "inquiry into and analysis of … the legal elements" is needed. Rule 1.1, Comment 5. Thus, a lawyer must perform any needed legal research to acquire the necessary legal knowledge and to make sure knowledge is current. This basic requirement includes research to identify and understand the governing law, use of a citator to assure that material is current and remains good law, and citation to authority in the written work product so the reader can locate the supporting material.

A. **Lack of Needed Research**

Although competent representation does not automatically require a lawyer to have past expertise in a particular topic, Rule 1.1, Comment 2, to the extent a lawyer is not an expert in the relevant field, research is needed when required for the attorney to have knowledge of the law.

This principle is displayed in *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003). After pleading guilty on a heroin charge and receiving a lengthy sentence based on mandatory sentencing guidelines, Baldayaque, an illegal immigrant, promptly had his wife hire Attorney Weinstein to file a writ of habeas corpus. Without any research, the attorney advised the wife that time for filing the writ had expired, although in reality many months were still available. Instead, the Attorney filed a motion requesting a change of sentence to permit Baldayaque's deportation; the motion, which cited no legal authority, was denied. Eighteen months later, when Baldayaque filed a motion on a pro se basis to modify his sentence, the court denied that motion but supplied him information about filing a habeas petition, which Baldayaque did on a pro se basis. *Id.* at 147-49. The court ruled that the attorney had violated the state ethics rule (identical to Rule 1.1 of the ABA and Virginia rules and similar to the North Carolina rule). *Id.* at 152. It also ruled that the attorney's behavior was sufficiently egregious to constitute "extraordinary circumstances," which can toll the limitations period for the habeas petition, provided a prisoner has acted with reasonable diligence to protect his rights. *Id.* at 153.

Based on Maryland rules, the Court of Appeals of Maryland upheld indefinite suspension of an attorney's license. *Att'y Grievance Comm'n v. Kane*, 215 A.3d 242, 282-83 (Md. 2019). In one of several representations that formed the basis for this case, Attorney Kane supplied poor advice to a client about the ability to pursue

workers compensation or toxic tort claim if client accepted severance package from employer. The attorney also failed to pursue either workers compensation or toxic tort claim appropriately. *Id.* at 258-59; *see also Att'y Grievance Comm'n v. James*, 870 A.2d 229, 240–41 (Md. 2005) (upholding commission's recommendation of disbarment for an attorney who conducted no legal research, the most cursory of which would show the attorney's advice to client to have been wrong). Maryland Rule 1.1 (competence) is identical to ABA Rule 1.1 and Virginia Rule 1.1. Although North Carolina Rule 1.1 differs slightly, it encompasses the requirements for knowledge and thoroughness addressed in these cases.

The Supreme Court of Virginia has emphasized that competence includes "inquiry into and analysis of the factual and legal elements of the problem" and "adequate preparation." *Livingston v. Va. State Bar*, 286 Va. 1, 11, 744 S.E.2d 220, 224 (2013) (quoting comment 5 associated with Va. Rule 1.1). In *Livingston v. Virginia State Bar*, the state bar charged a prosecutor with incompetent representation following a case in which the prosecutor filed a series of three indictments containing multiple errors, including filing a charge that did not fit the facts, misidentifying crimes charged, arguing applicability of a case he later admitted he had not read prior to presenting the case to the grand jury, and missing deadlines. *Id.* at 5-8, 744 S.E.2d at 221-23. The Supreme Court of Virginia noted "negligence without more" or mere "incorrect legal research alone" does not necessarily display lack of competence. In this circumstance, however, the prosecutor admitted making three mistakes: (1) charging a defendant inappropriately based on an incorrect legal conclusion; (2) filing an indictment for the wrong crime and failing to make correction either at trial or on appeal even after the error had become apparent; and (3) missing the deadline to file for appeal. *Id.* at 12, 744 S.E.2d at 225. The court ruled that this series of errors showed that the prosecutor "failed to provide the 'thoroughness and preparation reasonably necessary for the representation'" required by Rule 1.1. *Id.* It noted that even when an attorney has necessary legal knowledge, Rule 1.1 requires competent handling of each particular manner. *Id.* In this situation, the three indictments were based upon the prosecutor's "failure to analyze the evidence and the elements of the charges he brought against [the defendant]." *Id.* The prosecutor received a public reprimand. *In re Livingston*, No. 10-031-084027 (Va. State Bar Disc. Bd. Dec. 23, 2013).

Other courts also have ruled that although attorneys can make mistakes, an attorney "is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law [that] may readily be found by standard research techniques." *See, e.g.*, *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975) (affirming malpractice award against attorney and observing that although an attorney may make strategic or tactical decisions for client, "[t]here is nothing strategic or tactical about ignorance.") (quoting *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970)); *In re Ekekwe-Kauffman*, 210 A.2d 775, 787 (D.C. 2019) (upholding three-year suspension of attorney in part because failure to conduct factual or legal research prior to filing claim or to make appropriate corrections during litigation showed violation of rule requiring professional competence).

B. Failure to Use Citators

An important component of competent legal research is use of a citator to assure that the authorities relied upon are good law. Bast & Harrell, *supra* p. 1, at 51 n.4. In *Fletcher v. Smith*, 858 F. Supp. 169, 172 (M.D. Fla. 1994), the court criticized plaintiffs' citation of a case that had been overruled and another that had been reversed and warned against future "research failures." In another case, as it dismissed a claim, the court criticized what it characterized as a litigant's failure to use a citator or choice to simply "ignore the body of the law that had developed" over the past twenty years. *Jenkel-Davidson Optical Co. v. Roberts Instrument Co.*, No. 58 C 347 (3), 1961 WL 8150, at *6 (E.D. Mo. Mar. 31, 1961).

C. Missing Citation to Legal Authority

Citation to legal authority, including use of pincites, is recommended to document competent legal research. *See State v. Coxton*, No. COA15–575–2, 2016 WL 4091181, at *3 (N.C. Ct. App. Aug. 2, 2016) (criticizing defendant's failure to cite legal authority for key arguments); *State v. Richardson*, No. COA10–1305, 2011 WL 2462718, at *6 (N.C. Ct. App. June 21, 2011) (ruling that a bare assertion in a brief without citation to legal authority or significant legal argument was insufficient to raise the issue before the court); *Buchanan v. Buchanan*, 14 Va. App. 53, 56 415 S.E.2d 237, 239 (1992) (ruling that "[s]tatements unsupported by argument, authority, or citations to the record do not merit appellate consideration," and that the court will not search the record for errors not explained and analyzed in the brief) (quoted in numerous later cases including *McCallum v. Salazar*, 49 Va. App. 51, 56, 636 S.E.2d 486, 488 (2006); *Boyd v. Cnty. of Henrico*, 42 Va. App. 495, 506, 592 S.E.2d 768, 773 (2004); *Bennett v. Commonwealth,* 35 Va. App. 442, 452, 546 S.E.2d 209, 213 (2001)); *Kahn v. Kahn*, No. 1997-13-4, 2014 WL 1830978, at *3 (Va. Ct. App. May 6, 2014); *Howard v. Oakland Tribune*, 245 Cal. Rptr. 449, 451 n.6 (Cal Ct. App. 1988) (expressing court's annoyance with appellants' failure to provide complete and accurate citations, as well as omission of pincites); *State v. Montano*, 956 N.W.2d 643, 652 (Minn. 2021) (refusing to address claims that lacked legal argument supported by citation to legal authority); *Deede v. Deede*, 2018 WY 92, ¶ 11, 423 P.3d 940, 944 (Wyo. 2018) (awarding attorney's fees when opposition's brief contained only three sentences of substantive argument with no support from any legal authority). Courts also emphasize the importance of pincites to help the court understand how the case supports the argument. *See Grabowski v. Arnold*, No. A-5886-17T2, 2020 WL 3251168, at *4 (N.J. Super. Ct. App. Div. June 16, 2020) (complaining that general citations without pincites were used at times for cases that did not support the proposition).

Courts have been particularly disturbed by lawyers who plagiarize. Gerald Lebovits, *Legal-Writing Ethics, Part II*, N.Y. State B.J., Nov./Dec. 2005, at 58. For example, a federal district court reprimanded an attorney that plagiarized large parts of the brief by lifting directly from another court's opinion with only slight modifications to insert facts of the current case. *Pagen Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160 (D.P.R. 2001). The court characterized the lawyer's behavior as "intolerable,"

noting that the brief was a "disservice" to opposing party, the lawyer's client, and the court. *Id.* at 161.

Court rules typically require citation to the record and to legal authorities that support the client's case. Omission of these citations has been criticized and can lead to dismissal or sanctions. For example, the Supreme Court of North Carolina rejected multiple assignments of error, noting that exceptions of error not supported by "reason, argument, or citation of authority, may be treated as abandoned" based on North Carolina Supreme Court Rule 28. *Peek v. Wachovia Bank & Tr. Co.*, 242 N.C. 1, 14, 16-17, 86 S.E.2d 745, 754, 756-57 (1955).

The Court of Appeals of North Carolina affirmed the portion of a summary judgment ruling based on defendants' sovereign immunity because "appellants' argument was limited to declaratory statements unsupported by any citation to authority." *Lopp v. Anderson*, 251 N.C. App. 161, 167, 795 S.E.2d 770, 775 (2016). Based on Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, the court treated these arguments as abandoned. *Id.*; *see also State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 306, 655 S.E.2d 446, 449 (2008) (affirming trial court's decision that it lacked personal jurisdiction because based on Rule 28(b)(6), plaintiff waived its argument that defendant out-of-state corporation was an alter ego of a North Carolina corporation because appellant cited no legal authority supporting its claim).

The Court of Appeals of Virginia noted that "appellate court is not a depository in which the appellant may dump the burden of argument and research." *Fadness v. Fadness*, 52 Va. App. 833, 850, 667 S.E.2d 857, 865 (2008). It noted Virginia Rule of Appellate Procedure 5(A):20(e) requires that the brief contain principles of law, argument, and legal authorities to support the argument. It also noted that ignoring this requirement and attempting to make a decision on the merits would require the court to simultaneously be the advocate for the appellant and to judge the merits of appellant's position. *Id.* The court observed that this litigation had been lengthy and expensive. Both parties made numerous challenges to trial-level decisions without offer of support. The appellate court rejected all arguments, noting that "The 'throw everything at the wall and hope something sticks' approach utilized in this appeal is as unappreciated as it is ineffective." *Id.* at 851, 667 S.E.2d at 866.

In *Ceres Marine Terminals v. Armstrong*, the Court of Appeals of Virginia affirmed an employment commission ruling when appellant's brief failed to provide the "principles of law and authorities" required by Virginia Rule of Appellate Procedure 5A:20. 59 Va. App. 694, 708-10, 722 S.E.2d 301, 308-09 (2012); *see also Gene Forbes Enters. v. Cooper*, No. 2320–14–2, 2015 WL 3549987 (Va. Ct. App. June 9, 2015) (ruling that certain assignments of error raised by employer were waived based on Rule 5A:20 because employer cited no legal authority). The Court of Appeals of Virginia applied Rule 5A:20 again when it ruled that appellant waived an argument challenging constitutionality of mandatory minimum sentencing in a criminal statute because appellant cited no legal authority for his position. *Prekker v. Commonwealth*, 66 Va. App. 103, 122, 782 S.E.2d 604, 613 (2016); *see also Atkins v. Commonwealth*,

57 Va. App. 2, 20, 698 S.E.2d 249, 258 (2010) (ruling that appellant waived claim that due process rights were violated by failure to supply legal authority or argument); *Epps v. Commonwealth*, 46 Va. App. 161, 191, 616 S.E.2d 67, 82 (2010) (rejecting an argument in a civil contempt appeal based on failure to provide argument and authorities required by Rule 5A:20); *Mawyer v. Commonwealth*, No. 1609–05–2, 2006 WL 3589070, at *2 (Va. Ct. App. Dec. 12, 2006) (ruling that appellant waived challenge to trial court's refusal to postpone case by failing to cite any authorities in support of the argument).

In a recent child custody determination, the Court of Appeals of Virginia ruled that the mother waived multiple assignments of error by failing to provide an argument that includes principles of law and citation to legal authorities. *Khakee v. Rodenberger*, No. 1030-19-4, 2020 WL 890398, at *2 (Va. Ct. App. Feb. 25, 2020). The court commented that "statements unsupported by argument, authority or citations to the record do not merit appellate consideration." *Id.*

In *TSC Express Co. v. G.H. Bass & Co. (In re Allen)*, the District of Maine denied summary judgment to both parties, criticizing both parties' failure to provide citations to the record and use of overly long briefs. 176 B.R. 91, 95 n.2 (D. Me. 1994).

Some court rules also require use of pinpoint citations. *E.g.*, Kan. Sup. Ct. R. 6.02. However, the Court of Appeals of Kansas rejected the state's assertion that a pro-se appellant's failure to provide pinpoint citations was a waiver of argument under Kansas Supreme Court Rule 6.02, noting that although the appellant's brief may lack some pinpoint citations and the brief lacked ideal organization, enough citations were provided to permit review. *Davis v. State*, No. 114,436, 2016 WL 5344256, at *6 (Kan. Ct. App. Sept. 23, 2016).

Even though courts are rigorous in demanding that arguments be based on citation to legal authority, an attorney can legitimately use material from a fellow attorney's work product without attribution. A North Carolina legal ethics opinion notes that a lawyer does *not* commit an ethical violation by incorporating material from another attorney's work product such as a brief, contract or pleading into a work product without attributing the other attorney. *Attribution When Using the Written Work of Another*, 2008 N.C. Formal Ethics Opinion 14 (Oct. 23, 2009).

D. Failure to Cite Adverse Authority

A lawyer is required to disclose governing adverse legal authority to a tribunal. ABA Model Rule 3.3(a)(2); North Carolina Rule 3.3(a)(2); Virginia Rule 3.3(a)(3). Although a lawyer is not expected to provide a neutral exposition of the law and needs to serve as an advocate, the lawyer cannot fail to disclose legal authority in the controlling jurisdiction that is directly adverse to the client if opposing counsel has not already identified the authority. Rule 3.3, Comment 4.

In *State v. McNeil*, the Court of Appeals of North Carolina chastised appellant's attorney, reminding her of her duty of candor, because she failed to mention a case

directly adverse to her client's position. No. COA11-708, 2012 WL 1337365, at *7 n.3 (N.C. Ct. App. April 17, 2012). Although the duty to disclose rested on the appellant, the court also reminded the opposing counsel to be more careful regarding the need to be diligent to find all controlling authority, as opposing counsel appeared to have missed the case. *Id.*

This issue also was addressed by the United States District Court for the District of Maryland in *Massey v. Prince George's County*, 907 F. Supp. 138 (D. Md. 1995). This case involved a state law tort claim and an excessive force claim under 42 U.S.C. § 1983 following a situation in which a police dog injured plaintiff. The court granted summary judgment to defendants on the section 1983 claims based on defendants' brief that relied primarily on a case from a different federal circuit and the plaintiff filed only a single-page response that cited nothing other than defendant's case. Oral argument also focused only on this same case. When the court granted summary judgment on the section 1983 claims, it invited parties to submit supplemental statements regarding the remaining state law tort claim. *Id.* at 140. Plaintiff's statement identified a Fourth Circuit case that was directly on point and adverse to defendants on the section 1983 claim, although the case had not been mentioned at any earlier point. *Id.* The court reversed its earlier summary judgment, noting that the directly on-point and adverse authority "mandate[d]" reinstatement of the claim. *Id.* It noted that attorneys on both sides of the dispute had violated professionalism rules. Plaintiff's counsel violated Rules 1.1 and 1.3 because the work products suggested failure to conduct basic research and lack of diligence. *Id.* at 141-42. The court noted that defense counsel's actions raised a "far more serious concern," noting that if overlooking the controlling case was an oversight, it was "glaring and extremely troublesome." *Id.* at 142. Not only was the case directly on point, Prince William County, a defendant here, also was a defendant in the controlling case and at least one attorney on brief for the controlling case still worked for the county. *Id.* The court ordered defense counsel to show cause regarding why the controlling case was omitted. *Id.* In a later supplementary opinion, the court rejected counsel's explanation that the controlling case was not genuinely adverse because it featured slightly different facts that could be distinguished. *Massey v. Prince George's Cnty.*, 918 F. Supp. 905, 907 (D. Md. 1996). The court viewed any distinctions as slight, noting that the case was "very much on point, *i.e.,* 'directly adverse.'" *Id.* Although the court did not sanction attorneys, it chastised them for violation of the professional rules of conduct and stated it will notify judges in every case involving the same issue in which the county failed to cite the governing case. *Id.* at 910.

II. Quality Legal Analysis

Competence also requires adequate legal analysis and basic writing skills. To reach a just resolution, the courts rely on lawyers to present the pertinent law and explain its application to their clients' specific situation. Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal* Writing, 40 J. Legal Educ. 501, 507 (1990). Thus, an important part of a lawyer's professional responsibility is to explain how the law should apply for all issues addressed in a brief. When confronted with inadequate or

incomprehensible legal analysis, a court may simply view an issue as waived, sanction the attorney, or refer the attorney to the governing disciplinary authority.

A. Missing Legal Analysis

A North Carolina appellate court ruled that an attorney abandoned issues in a disciplinary proceeding for which the attorney's brief provided no argument. *N.C. State Bar v. Burford*, No. COA12–909, 2013 WL 1121360, at *2 (N.C. Ct. App. Mar. 19, 2013). The court noted that, "to review Mr. Burford's issues, we would have to do the research and analysis that he did not bother to undertake—in other words, we would have to create an appeal for him. We decline to do so." *Id.* at *3 (citations omitted). North Carolina's Supreme Court also provided guidance on this topic, noting that "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *see also Goodson v. P.H. Glatfelter Co.,* 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein.").

When discussing poor briefs in the context of specialized employment law litigation, Associate Professor Scott A. Moss of the University of Colorado Law School observed that an attorney generally competent in some areas of legal practice can be an incompetent brief writer. Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, It's Impact on the Law, and the Market Failure It Represents*, 63 Emory L.J. 59, 121 (2013). The Court of Appeals of Maryland observed this principle in *Attorney Grievance Commission v. McClain*, 956 A.2d 135, 140 (Md. 2008), when it ruled that a competent trial lawyer was an incompetent brief writer who violated Rule 1.1 by submitting a brief that ignored mandatory authority and failed to cite caselaw supporting the client's position. *See also Rowe v. Nicholson*, No. 05-222, 2007 WL 1470305, at *6 (Ct. Vet. App. Apr. 26, 2007) (reminding the lawyers that their professional obligations while representing clients include providing legal support for their assertions).

Some courts have treated briefs with poor quality analysis as a violation of court rules. For example, in *Bledsoe v. County of Wilkes*, the Court of Appeals of North Carolina observed that "Rules of Appellate Procedure are Mandatory" and dismissed an appeal characterized by multiple violations. 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). The same court noted that "we are unable to undertake a meaningful review of this appeal" as a result of multiple violations of Rule 28 of the North Carolina Rules of Appellate Procedure, which governs the function and content of briefs. *Smith v. TD Ameritrade, Inc.*, No. COA10–1221, 2011 WL 1900927, at *3 (N.C. Ct. App. May 17, 2011). The brief failed to define the issues clearly, contained numerous typographical errors, didn't state the grounds for appellate review, supplied only a list of isolated facts rather than a complete factual summary, omitted standards of review, and failed to cite legal authorities to support the assertions. *Id.* The court dismissed the appeal, observing that Rule 28(a) explains that "[t]he function of all briefs ... is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their

respective positions thereon." *Id.* at *4; *see also Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999) (affirming a judgment that dismissed defendant's appeal based on failure to comply with Rules 26(g) and 28(b)); *Selwyn Vill. Homeowners Ass'n v. Cline & Co.*, 186 N.C. App. 645, 651 S.E.2d 909 (2007) (dismissing defendant's appeal for numerous violations of the North Carolina Rules of Appellate Procedure, including Rules 28(b)(6) and 26(g), and for failure to amend or correct its admitted violations); *Capps v. NW Sign Indus. of N.C., Inc.*, 186 N.C. App. 616, 622, 652 S.E.2d 372, 378 (2007) (dismissing defendant's brief for failure to follow Rules 10(c)(1) and 28(b)(6)).

In *Tabor v. Kaufman*, the court sanctioned appellant's attorney for gross violations of the Rules of Appellate Procedure, even though it ruled in favor of the appellant and reversed the trial court's decision. 196 N.C. App. 745, 747, 750, 675 S.E.2d 701, 703, 704 (2009). The brief violated the rules by omitting the required statement of the grounds for appellate review, omitting the required procedural history, omitting the required assignment of error, failing to reference the assignment of error and record page numbers, failing to number pages appropriately, and failing to provide an email address for the attorney who signed the brief. Although the court did not grant the appellee's motion to dismiss the appeal, it ordered the appellant's attorney to pay double the appellate costs for these "gross" and "substantial" violations. *Id.* at 747, 376 S.E.2d at 703.

The Court of Appeals of Wisconsin encapsulated the idea well when it acknowledged that "it is unreasonable to expect every attorney in Wisconsin to construct arguments as if they were authored by Learned Hand" but also noted that "a line must be drawn separating adequate from inadequate briefs in order to give some life" to the appellate rules. *Morters v. Barr*, No. 01-2011, 2003 WL 115359, at *3, 2003 WI App 42, ¶ 12 (Jan. 14, 2003). Based on a standard dictionary definition, the court reasoned that an "argument" needs to present "'a coherent series of reasons, statements, or facts intended to support or establish a point of view.'" *Id.* at *3, 2003 WI App ¶ 13 (quoting from *Websters Third New International Dictionary* (unbar. 1993)). The court viewed this definition as requiring "some analysis of the law and the facts of the case as well as an explanation of how the law as applied to those facts yields a certain desired result." *Id.* The brief filed in this case, which contained an argument consisting of extensive block quotations of law, preceded by "one or two vague and directionless sentences concerning appellants' case," fell short of the requirement that the brief contain an argument. *Id.* Based on the brief's violation of the appellate rules, the court awarded costs and fees, including attorney fees, to respondent. *Id.* at *4, 2003 WI App ¶ 16.

Federal courts have repeatedly sanctioned violations of Rule 28 of the Federal Rules of Appellate Procedure, which governs the brief. Generally, courts adopt the view that the "court cannot be called upon to supply the legal research and organization to flesh out a party's arguments." *Smith v. Town of Eaton*, 910 F.2d 1469, 1471 (7th Cir. 1990). For example, in *John v. Barron*, the court ruled that a brief with a one-page argument that failed to cite any caselaw and made only a single erroneous reference to a statute violated Federal Rule of Appellate Procedure 28(a)(4), which requires that

appellant's argument "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." 897 F.2d 1387, 1393 (7th Cir. 1990). The court also expressed concerns about failure to cite the record and misrepresentation of facts. It noted an intent to send a copy of the decision to the attorney disciplinary committee in the attorney's home state. *Id.* at 1394.

The same principle was applied in *Smith v. Town of Eaton* when an attorney supplied a lengthy but incoherent argument, as the court noted that both situations the lengthy but incoherent argument and a missing argument, "the court is frustrated in performing its function of review and evaluation of the judgment before it." *Smith*, 910 F.2d at 1471.

Courts adopt the approach that it is not the court's responsibility to research and develop the argument for the litigant. In *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, the Second Circuit commented that "Appellant's Brief is at best an invitation to the court to scour, research any legal theory that comes to mind, and serve generally as an advocate for the appellant. We decline the invitation." 164 F.3d 110, 112 (2d Cir. 1999). In addition to affirming the trial court's dismissal, the court sanctioned the attorney by making him solely responsible for the opposition's attorney fees. *Id.* at 113. Similarly, the Ninth Circuit dismissed an appeal when the appellant had ignored governing rules and "essentially tossed this bankruptcy case in our laps, leaving it to us to figure out the relevant facts and law." *In re O'Brien*, 312 F.3d 1135, 1137 (9th Cir. 2002). The court also commented about the enormous amount of time wasted when attorneys fail to provide proper briefs and excerpts of the record. *Id.*

B. Incomprehensible Writing

Clarity is essential for good brief writing. Numerous attorneys have been sanctioned for submission of briefs containing incomprehensible arguments. Thomas R. Haggard, *Good Writing as a Professional Responsibility*, S.C. Law., May/June 2000, at 11. For example, the Supreme Court of Kentucky ruled that an attorney violated the state competency rule by submitting a brief that was "little more than fifteen unclear and ungrammatical sentences slapped together as two pages of unedited text with an unintelligible message." *Ky. Bar Ass'n v. Brown*, 14 S.W.3d 916, 918-19 (Ky. 2000) (suspending attorney from legal practice for sixty days). The Supreme Court of Illinois placed an attorney on inactive status because the attorney "lacked the fundamental skill of drafting pleadings and briefs," producing work products that were "incomprehensible." *In re Hogan*, 490 N.E.2d 1280, 1281-82 (Ill. 1986). When the attorney applied for reinstatement two years later, the request was denied based on lack of evidence of any basis for improvement and because the petition was "incomprehensible." *In re Hogan*, No. 98-RS-2552, 1999 WL 802922, at *1 (Ill. Att'y Registration & Disciplinary Comm'n Feb. 15, 1998).

An Indiana court suggested that two lawyers "give serious consideration to not practicing" in that court until they had "demonstrably enhanced their practice skills" after noting that the lawyers' writing was "far below" the quality of work the court

was accustomed to receiving from other lawyers. *Vandeventer v. Wabash Nat'l Corp.*, 893 F. Supp. 827, 859 n.43 (N.D. Ind. 1995).

Poor writing can cost money for the lawyers and their client. The Court of Appeals of New York assessed costs against an appellant due to the "poorly written" brief in which the "argument wander[ed] aimlessly through myriad irrelevant matters," thus creating an "unwarranted burden" for the court. *Slater v. Gallman*, 339 N.E.2d 863, 864-65 (N.Y. 1975).

III. Excessive Foundational Writing Errors

An attorney also can be ruled incompetent based on submission of documents with excessive foundational errors such as poor spelling, failure to comply with basic grammar expectations, or typographical errors. The Supreme Court of Minnesota publicly reprimanded an attorney for violation of a state ethics rule when the attorney filed a series of "documents rendered unintelligible by numerous spelling, grammatical, and typographical errors … sufficiently serious that they amounted to incompetent representation." *In re Hawkins*, 502 N.W.2d 770, 770–71 (Minn. 1993). The state rule involved matches ABA and Virginia Rule 1.1 and is similar to the corresponding North Carolina rule.

In the criminal law arena, however, other courts have ruled that an indictment is legally sufficient despite significant grammar errors, provided it identifies the crime. For example, the Supreme Court of North Carolina stated that "neither bad punctuation nor bad grammar vitiate an indictment." *State v. Hammonds*, 241 N.C. 226, 229, 85 S.E.2d 133, 146 (1954); *see also State v. Hill*, 262 N.C. App. 113, 115, 821 S.E.2d 631, 633 (2018) (ruling that grammatical errors were not fatal, provided the indictment's meaning was clear); *United States v. Macedo*, 406 F.3d 778, 787 (7th Cir. 2005) (ruling that typographical errors in an indictment were not fatal because the issue remained clear and accused had sufficient notice of the charges to not be prejudiced); *United States v. Logwood*, 360 F.2d 905, 907 (7th Cir. 1966) (ruling that "unartfully drawn" indictment containing "obvious use of the inappropriate tense" was sufficient because it stated elements of the offence well enough for the accused to be prepared to respond appropriately); *Henderson v. State*, 445 So. 2d 1364, 1368 (Miss. 1984) (ruling that despite being "grammatically atrocious," an indictment was sufficient because it notified the defendant of "the nature and cause of accusation against him.")

IV. Failure to Comply with Court Rules

Failure to follow court rules may suggest incompetence. Bast & Harrell, *supra* p. 1, at 52. In *Henning v. Kaye*, the Supreme Court of South Carolina observed that appellate court rules are not "mere technicalities" but instead provide "an orderly mechanism through which to guide appeals." 415 S.E.2d 794, 794 (S.C. 1992). A wide variety of rules violations have drawn criticism.

A. **Improper Brief Organization**

The Supreme Court of South Carolina noted in *Henning v. Kaye* it would be justified in dismissing an appeal based on a brief with numerous violations, including failure to organize the brief's components appropriately, inappropriate labeling, failure to alphabetize the table of authorities, and omission citations to the record. *Id.* The court also criticized the insertion of contested material in the statement of the case. *Id.*

B. Exceeding Length Limitations

Many techniques have been criticized as the basis for ignoring length limitation imposed in court rules. In addition to simply ignoring the word or page limitation in court rules, attorneys have tried reducing font or margins, moving text from the double-spaced body of the brief into footnotes, moving material into appendices, and incorporating other documents by reference rather than putting the argument into the current brief.

In *Kornegay v. Aspen Asset Group., LLC*, No. 04 CVS 22242, 2007 WL 2570840, at *3 (N.C. Super. Ct. Feb. 28, 2007), the court observed that the brief violated both the length limitation and rule requiring the attorney to certify compliance with the word count limitation. The court suggested that the "lawyers read carefully this Court's rules, as future violations will result in sanctions." *Id.*

Another court granted appellate attorney fees to the appellee based upon the appellant's procedural bad faith by filing a brief that failed to comply with appellate rules in multiple respects including an exceedance of the length limitation and use of an impermissibly small font. *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 79 (Ind. Ct. App. 1998).

In *Allen v. G.H. Bass & Co. (In re TSC Express Co.)*, 176 B.R. 91, 95 n.2 (D. Me. 1994), the court denied motions for summary judgment filed by both parties as both briefs failed to comply with local rules, stating that "[t]he briefs of both sides are prolix, verbose, and full of inaccuracies, misstatements and contradictions. The lawyering on behalf of both parties falls woefully short of the standards to which attorneys practicing before this court have been traditionally held."

In *Insulated Panel Co. v. Industrial Commission*, 743 N.E.2d 1038, 1040 (Ill. App. Ct. 2001), an Illinois appellate court ruled that a trial court had not abused its discretion by refusing to use more than first ten pages of a fifty-page brief when the court had explicitly directed litigants to confine briefs to no longer than ten pages. The court reasoned that a court has inherent power to control own docket. *Id.*

In another Illinois appellate case, the court cited a rules violation based on an attorney's use of single-spaced footnotes for material that should appear in the double-spaced main text. *Van Winkle v. Owens-Corning Fiberglas Corp.*, 683 N.E.2d 985, 989 (Ill. App. Ct. 1997). The court observed that this technique of "[u]sing footnotes to circumnavigate the page limitation violates 'the spirit and probably … the letter of the law.'" *Id.* The court observed that appellate rules imposing page

limitation and allowing only sparing use of footnotes were "not inconsequential" and noted that the guidance "facilitates the clear and orderly presentation of arguments." *Id.* at 990. The court noted that in the future, it may simply ignore such footnotes used to ignore the intended length limitation. *Id.* Numerous other courts also have criticized use of footnotes to evade length limitations.

Some courts have stricken briefs or imposed other consequences for use of footnotes to violate length limitations. For example, in *TK-7 Corp. v. Estate of Barbouti*, 966 F.2d 578, 579 (10th Cir. 1992), the Tenth Circuit granted a motion to strike a brief that brief containing more than 100 footnotes when attorneys responded to the court's refusal to grant their motion to file a sixty-page brief by simply moving nine pages of text into footnotes and reducing type size. The court referenced the techniques use as an "undergraduate gambit." *Id.*; *see also Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995) (denying award of costs when the brief violated length limitation by using single-spaced footnotes that contained significant amounts of substantive argument); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512 (8th Cir. 1988) (characterizing use of 189 footnotes to comply with length limitation as violative of the "spirit, if not the letter" of Federal Rules of Appellate Procedure and noting that court permission is required to exceed length limitation); *Westinghouse Elec. Co. v. NLRB*, 809 F.2d 419, 424-25 (7th Cir. 1987) (imposing $1000 fine to be paid by an attorney who used slightly reduced font, slightly reduced margins, and slightly reduced line spacing in an attempt to hide the effect of stuffing a seventy-page brief into the allotted fifty pages); *Cheverez v. Commn'r*, Slip op., No. 18-CV-0711MWP, 2020 WL 561036, at *2 n.1 (W.D.N.Y. Feb. 5, 2020) (observing that use of extensive single-spaced footnotes to achieve compliance with the page limitation was inappropriate and cautioning attorney against future use of this technique); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 Ct. Int'l Trade 1906, 1931 n.20 (2009) (noting that attorney's use of footnotes to evade length limitation was inappropriate and that attorney instead should have filed motion to exceed page limitation).

Numbering tricks also have been criticized as a means of evading length limitation. *See Fleming v. Cnty. of Kane*, 855 F.2d 496, 498 (7th Cir. 1988) (characterizing choice to use alternate numbering such as roman numerals for certain brief parts such as question presented or statement of the case as violative of rules that impose a length limitation on *total* brief, which includes all brief parts).

Use of an appendix as a means to evade the length limitation also has been tried and rejected. *See, e.g.*, *State v. Bolton*, 896 P.2d 830, 838 (Ariz. 1995) (striking text in several appendices that presented additional argument that would not fit into length limitation as a violation of appellate rules and also ruling those issues in these materials had been waived).

The technique of incorporating by reference analysis from earlier documents also has been criticized as a means of violating court rules. In *Guerrero v. Tarrant County Mortician Services*, 977 S.W.2d 829, 832-33 (Tex. Ct. App. 1998), the court refused to consider arguments regarding official immunity that appellants incorporated by

reference from their earlier motion for summary judgment. The same technique also was rejected in *Glover v. Columbia Fort Bend Hospital*, in which a pro se litigant initially filed a brief almost double the allowable length and then submitted a shortened brief that incorporated numerous arguments by reference to the originally rejected brief. No. 06-01-00101-CV, 2002 WL 1430783, at *5 (Tex. Ct. App. July 3, 2002).

C. Violations of Appellate Rules Violations Via Poor Quality Brief.

As noted earlier, numerous courts have expressed frustration with briefs that either lack appropriate reliance on legal authority or that are incomprehensible. Among the cases discussed in that earlier material, occasionally, the court will characterize the poor brief as an inappropriate violation of procedural rules that require citation to the record or to legal authority. *See infra* at 9-10.

V. Failure to Do Timely Work to Display Required Diligence

Although diligence arises in many circumstances, this CLE focuses on ethical issues associated with writing. Diligence issues related to legal writing most often seems to arise when an attorney fails to make timely submission of a document. Compliance with deadlines is a required part of diligence under Rule 1.1.

The Supreme Court of Virginia ruled that an attorney's failure to timely file a notice of appeal, combined with other failures to complete undertaking for which he had been hired, violated Rule 1.3 and warranted a temporary suspension of the attorney's license to practice law. *Green v. Va. State Bar ex rel. Seventh Dist. Comm.*, 274 Va. 775, 797, 782, 652 S.E.2d 118, 121, 129 (2007).

The Court of Appeals of Maryland recently disbarred an attorney who failed to file an opening appellate brief or appendix before the court's deadline. *Att'y Grievance Comm'n v. McCarthy*, No. 72, Sept. Term, 2019, 2021 WL 2150202, at *1 (Md. May 27, 2021). The attorney also falsely told the client he was working with the court to have the case reinstated and failed to notify the client his license had been suspended. The court ruled that the attorney violated diligence requirements as well as other rules of professional conduct. *Id.* at *16-18.

The Supreme Court of Ohio also upheld attorney disbarment when the attorney missed a statute of limitations and misappropriated client funds. *Disciplinary Counsel v. Burchinal*, 2021-Ohio-774, ___ N.E.2d ___, at ¶¶ 1, 48.

The Wisconsin Supreme Court imposed a one-year suspension, fines, and a restitution requirement against an attorney who displayed multiple episodes of misconduct including repeated missed deadlines over a series of eight representations. *Matter of Disciplinary Proc. Against Davis*, 2020 WI 48, ¶¶ 11. 14-21, 392 Wis. 2d 21, 27-29, 33-34, 943 N.W.2d 885, 887-88, 891-92. *But see Iowa Sup. Ct. Att'y Disciplinary Bd. v. Tindal*, 949 N.W.2d 637 (Iowa 2020) (imposing public reprimand rather than board's recommended suspension for attorney who had been issued default notices by the supreme court in twenty-nine cases,

reasoning that many (but not all) defaults already had been punished by a 2018 temporary suspension and because the attorney had subsequently put in place measures to avoid future missed deadlines).

In *Idaho State Bar v. Tway*, an attorney was suspended from practice for five years when she missed a statute of limitations, displayed some irregularities with the client's trust account, and had poor client communication. 919 P.2d 323, 324-26 (Idaho 1996). The attorney was hired to handle a police brutality case. Based on the state code and annotations, the attorney believed the governing statute of limitations was three years. However, because he failed to use a citator, he missed a more recent case in which the state supreme court held that a civil rights action was subject to a shorter, two-year statute of limitations. As a result, when the attorney filed the complaint based upon his incomplete research, the limitations period already had expired. *Id.* The Supreme Court suspended the attorney for five years and required the attorney to return his client's deposit and reimburse the state bar for costs. *Id.*

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- Va. Rules of Pro. Conduct (Va. State Bar 2018), https://www.vsb.org/pro-guidelines/index.php/main/print_view
- N.C. Rules of Pro. Conduct (N.C. State Bar 2021), https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/

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- *Atkins v. Commonwealth*, 57 Va. App. 2, 698 S.E.2d 249 (2010).
- *Bennett v. Commonwealth,* 35 Va. App. 442, 546 S.E.2d 209 (2001).
- *Boyd v. Cnty. of Henrico*, 42 Va. App. 495, 592 S.E.2d 768 (2004).
- *Buchanan v. Buchanan*, 14 Va. App. 53, 415 S.E.2d 237 (1992).
- *Ceres Marine Terminals v. Armstrong*, 59 Va. App. 694, 722 S.E.2d 301 (2012).
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- *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954).
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- *Howard v. Oakland Tribune*, 245 Cal. Rptr. 449 (Ct. App. 1988).
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