Practicing Reference . . .

When Judges Scold Lawyers*

Mary Whisner**

Since finding cases where judges scold lawyers for incompetent research or writing is a recurring reference question, Ms. Whisner explores techniques to use in the quest and identifies a number of cases that might be useful in a variety of instructional contexts.

¶1 From time to time, professors have asked me to find opinions in which judges chide attorneys for sloppy drafting or research. Professors who teach legal writing and research may hope that a vivid example or two will get the students' attention and motivate them to develop better skills. We librarians use such cases for the same reason.[1] Law students are not the only audience, of course. In fact, the last request I got for cases like this was from a professor who was preparing a speech for paralegals. The cases can also be used in training lawyers—for instance, in continuing legal education programs or in-house training.[2]

** Assistant Librarian for Reference Services, Marian Gould Gallagher Law Library, University of Washington School of Law, Seattle, Washington.

1. The professors who teach other first-year courses seem not to feel a need to use this fear tactic. Students enter law school somehow "knowing" that torts and contracts are important to study, even without hearing an example of a lawyer who got chewed out for misstating a point of law. Of course, student culture does have the brooding omnipresence of the bar exam—the fear of failing certainly contributes to some students' selection and work in "bar" courses.

   When I say that these cases can be used pedagogically, I am *not* suggesting that what legal education needs is more fear.

2. For example, years after a Ninth Circuit judge criticized a federal prosecutor in *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), the U.S. Attorney's office reportedly gives the case to "[e]veryone who is trained there . . . because it really teaches a good lesson." Emily Bazelon, *The Big Kozinski*, LEGAL AFFAIRS, Jan.–Feb. 2004, at 22, 29. (The prosecutor had denied that the government had a plea agreement with an absent witness. So this is an example from outside the realm of legal research and writing—but it is a vivid example nonetheless.) There is an interesting quirk in this case's publication:

   > When I asked why he had used the prosecutor's name, [Judge Alex] Kozinski looked surprised. "We took his name out before we published the opinion," he told me. Informed that the opinion on the popular database Lexis included the prosecutor's name, his eyebrows shot up. "His name is all through it?" The judge winced. "Ouch." He paused and then leapt to his own defense. "Well, I thought that what he did was improper. And I thought that it was really, really important for lawyers, particularly from the government, to ask themselves when they're in the courtroom in the Ninth Circuit, 'Am I going to get that crazy guy Kozinski on appeal, and is he going to quote my words back at me?'"

   Id. at 28. Indeed, the version on LexisNexis does have the attorney's name. *Compare* 8 F.3d 1315 (uses AUSA instead of attorney's name) *with* 1993 U.S. App. LEXIS 23921 (uses attorney's name).

¶2 Judges *can* be quite clever when they scold incompetent lawyers. I think, for example, of the case when an appellate judge explained that the court of appeals would not examine issues that were not raised in the brief with the colorful metaphor of pigs sniffing for truffles.[3] Many of us can find some amusement in a well-turned phrase (particularly if we are not on the receiving end of the barb). Reading these cases, we might experience a bit of schadenfreude—being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we *could*, very easily, have made that very same mistake.[4] And then we wonder: did the judge have to be so very clever in pointing out the lawyer's incompetence? Was the shaming necessary?

¶3 Since finding cases where judges scold lawyers for incompetent research or writing is a recurring reference question, I thought I would explore some techniques for the quest. Along the way, I will share some quotations that will give you a good start the next time you are asked this question—or the next time you want to liven up one of your own presentations with some vivid examples.

Word of Mouth

¶4 Word of mouth is a powerful way to find these cases. Someone stumbles across a case—or finds it through diligent research—and passes it along. E-mail, of course, is a great medium for such sharing. Even as I was working on this piece, for instance, one of our law professors forwarded a news story about a judge who cut an attorney's hourly rate in half for the portion of the attorneys' fees attributable to his written work.[5] Some months ago, a colleague forwarded to me a post from a blog describing a court opinion in which the judge suggested that a famous law professor should have used his school's law library to find a source he needed (a summary of an opinion by the Judicial Conference's Advisory Committee on Codes of Conduct).[6] Other such

3. United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). *See infra* ¶ 22 for discussion of this case.
4. Barrie Althoff, an ethics expert who gives an annual update at the University of Washington's annual Professional Responsibility Institute, does not tell the audience which firms or individuals got chewed out, fined, or disbarred. He says that he wants to emphasize each ethical problem and remind the attorneys in the audience that many of us could tumble into these pitfalls.
5. Shannon P. Duffy, *Judge Slashes Lawyer's Rate for Typos, Careless Writing*, LEGAL INTELLIGENCER, Feb. 25, 2004, at 3, *quoted in* Posting of Lea Vaughn, lvaughn@u.washington.edu, to lawfac@u.washington.edu (Feb. 26, 2004) (copy on file with author).
6. E-mail from Jonathan A. Franklin, Associate Law Librarian, Gallaher Law Library, Univ. of Washington, to Mary Whisner (Sept. 16, 2003) (copy on file with author). The opinion featured the following comment:

> At oral argument of this appeal, [the professor], aware of the Compendium because of Judge Pauley's reference to it during a hearing in the District Court, contended that the *Guide to Codes of Conduct* was confidential and unavailable to the public. We are advised by the Office of the General Counsel of the Administrative Office of the United States Courts that the *Guide to Codes of Conduct*, though not available online, is not a confidential document and in fact is available in many libraries. The library of the Harvard Law School advises that it has a copy.

cases have made their way around our community in discussion lists for law librarians and for legal writing professors.

¶5 Professional reading can also be considered a form of word of mouth. For instance, in a helpful article on teaching students the subtleties of online citators, Kent Olson shared a passage from "what must be the first published instance of a judge chastising a lawyer for overreliance on citator signals."[7] Likewise, legal newspapers and bar journals often pick up these cases and colorful quotations.[8]

Keyword Searching

¶6 Word of mouth only takes you so far. You might find a good quotation in your e-mail in-box or in your pile of professional reading, but then again you might not—or at least not on the day you need it. So you will need to go out and search. But where will you search? Much of this article offers tips for searching case law databases, but I would be remiss to overlook secondary sources. A law review article or two could, in fact, give you all the examples you need to drive home the importance of thorough research and competent writing.[9] Not only can you find

---

United States v. Lauersen, Nos. 01-1526 (L), 01-1600 (XAP), slip op. at 13 n.7 (2d Cir. Sept. 15, 2003). The initial opinion appeared in an advance sheet (343 F.3d 604) but was withdrawn and replaced with a revised opinion, responding to a letter from the professor. The professor's letter included an affidavit from his associate stating that the library lacked the edition that the judge had quoted. United States v. Lauersen, 348 F.2d 329, 335 n.7 (2d Cir. 2003). The court of appeals apparently still believed that the professor should have used the library. The court explained that the library indeed lacked the 2001 edition but that it had the November 2000 release with the passage the district judge had quoted. *Id.* at 336 n.7. The court conceded that the unpublished opinion was not public—but the district judge had only had access to and quoted the summary in the first place. *Id.*

From my desk, across the country, the court's original footnote seemed mild (of course, mine wasn't the name mentioned). It was of interest to me chiefly because of the prominence of the attorney (as well as, of course, the implicit lesson that using law libraries is good). The professor's name was omitted from the revised footnote, but the length (more than twice the original) and the detail suggest that the judges might have been more annoyed than they had been at the start.

7. Kent C. Olson, *Waiving a Red Flag: Teaching Counterintuitiveness in Citator Use*, 9 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 58, 59 (2001) (quoting Lewis v. Paul Revere Life Ins. Co., 80 F. Supp. 2d 978, 990 n.10 (E.D. Wis. 2000)).
8. *See, e.g.*, *Kent Doesn't Mince Words*, TEX. LAW., July 16, 2001, at 5, 5 (quoting order by Judge Kent in Labor Force v. Jacintoport Corp., No. G-01-058 (S.D. Tex. June 7, 2001) ("Manifestly, any person with even a correspondence-course level understanding of federal practice and procedure would recognize that Defendant's Motion is patently insipid, ludicrous, and utterly and unequivocally without any merit whatsoever. Worse it is just plain blatantly wrong in light of the unambiguous language of a decades old federal statute and veritable mountains of case law addressing venue propriety.")). The order was published in the advance sheet of 144 F. Supp.2d 740 but withdrawn from the bound volume at the request of the court. It was also "Removed from the LEXIS Service at the Request of the Court July 18, 2001."
9. *See, e.g.*, Lawrence Duncan MacLachlan, *Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607 (2000); Marguerite L. Butler, *Rule 11—Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U.L. REV. 681 (2001); Wendy B. Davis, *Writing Clinic—An Attorney's Ethical Obligations Include Clear Writing,* N.Y. ST. B.J., Jan. 2000, at 50. *See also* Linda R. Hirshman, *Foreword: Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 204 n. 58 (citing United States v. Devine, 768 F.2d 210 (7th Cir. 1986) (allowing oversize brief but chiding attorney for its length and the timing of motion); United

law review articles that cite cases in which judges criticize lawyers' research and writing, but you might also find articles by judges themselves, using law reviews as a forum to encourage lawyers to improve their research and writing practices.[10]

¶7 Even though secondary sources can be very useful, there might be times when you want to broaden your universe of examples to cases themselves. How best to do this? Full-text searching is a boon, of course, but word searches are tricky. Many of the words relating to the quality of research and writing are far too common to help. Think how many cases have words like "brief," "write," "research," and "lawyer." Moreover, these common concepts can be expressed with many synonyms and related terms: If you want "complaint," search also for "pleading." If you want "write," add "writing," "written," and "wrote" (but be careful with "writ!" because you might not want cases that discuss writs). Don't stop there: consider variants of "draft," "prepare," and "compose," too. And of course, if you want "lawyer," be sure to include "counsel" and "attorney." Nonetheless, searching for these terms alone will overwhelm you with false drops; they will be most useful when combined with other terms.

¶8 I do not generally turn to natural language searching first. Perhaps it is just because I learned and became comfortable with Boolean searching long before natural language searching was introduced. However, I sometimes do find it useful, particularly when I have a vague issue that is not easily characterized with a few distinctive terms joined by connectors, so I thought I would give it a try in this context. My first searches were fruitless. But then I tried: **lawyer does not write well brief**.[11]

States v. Devine, 787 F.2d 1086 (7th Cir. 1986) (criticizing brief); and In re TCI, Ltd., 769 F.2d 441 (7th Cir. 1985) (awarding fees against firm that inadequately researched case)). Following these leads from Prof. Hirshman, I found some strong language about sloppy brief-writing:

> The brief was desultory in nature; in general a poorly written product with numerous typographical errors. It was obviously never edited by a caring professional. As a panel of judges already overburdened with cases and paper, we find it insulting to have to dutifully comb through a brief which even its author found little reason to give such attention. We condemn this type of shoddy professionalism.

Devine, 787 F.2d at 1089. *TCI* has an interesting discussion of research trade-offs in practice. A firm that filed pleadings without ascertaining whether they had a basis in law defended itself by saying that it "did nothing out of the ordinary," since it was engaged in a practice that was "high-volume, low-margin" and sometimes "this means filing pleadings in advance of doing legal research." *TCI*, 769 F.2d at 446. The court acknowledged that, in some practices, lawyers "may rely on memory or seasoned intuition in place of fresh research," but emphasized:

> An attorney who wants to strike off on a new path in the law must make an effort to determine the nature of the principles he is applying (or challenging); he may not impose the expense of doing this on his adversaries—who are likely to be just as busy and will not be amused by a claim that the rigors of daily practice excuse legal research.

Id. at 447.

10. *E.g.*, Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325 (teaching appellate advocacy in the guise of explaining how to lose an appeal); Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 Tul. L. Rev. 187 (1995).
11. This search, conducted in Westlaw's NY-CS database on Mar. 31, 2004, began as "lawyer does not write well," which is a better English sentence. In a previous search I had required "brief" to appear, so the system prompted me to include it in this search. Of course, the program does not really care if what you type in is syntactically or stylistically smooth, so it accepted "lawyer does not write well brief."

One of the cases that search yielded had a nice discussion of the dangers of writing longer and longer briefs just because you can:

> In addition to considering the merits of this appeal, we feel that this case presents an appropriate opportunity to comment on a matter that concerns us greatly, namely, the quality, length and content of briefs presented to this court. Although this is an extreme example, unfortunately it is not always the rare case in which we receive poorly written and excessively long briefs, replete with burdensome, irrelevant, and immaterial matter. Although counsel candidly admits that his 284-page brief is "unusually long," his claim that it is "meticulously structured, thoroughly documented, exhaustively researched, carefully analyzed and comprehensively presented" seems too self-congratulatory. . . .
>
> . . . [W]e have avoided a specific rule [setting page limits] in the belief that such a rule would be an insult to those appellate counsel who understand the functions of this court and their own role in pursuing appeals to this court, and whose briefs focus on the pertinent issues. Rather than now prescribe such a rule, we prefer to merely point out the problem, fully confident that counsel appearing before us will impose upon themselves a modicum of self-restraint.
>
> We speak now on this matter only with some hesitancy lest counsel in the future be discouraged from vigorously and comprehensively urging their cases and, where appropriate, suggesting novel approaches to complex legal issues. However, in recent years we have witnessed great technological advances in the methods of reproduction of the written word. Too often this progress is merely viewed as a license to substitute volume for logic in an apparent attempt to overwhelm the courts, as though quantity, and not quality, was the virtue to be extolled. As we noted many years ago, for obvious reasons this problem never arose when "every lawyer wrote his points with a pen". . . . Hopefully, the solution to this problem will not require that we return to that system, ignoring decades of technological advances.[12]

Note that this was in 1975, before widespread word processing!

Shepard's and KeyCite As Search Terms—and What They Turn Up

¶9 Not all words related to research are as common as "brief" and "lawyer." For example, it would be unusual for a judge to use "shepardizing" in any context other than discussing the importance of checking the subsequent history of a case or other authority,[13] so searching for variants of that word should turn up some good cases for our purposes. KeyCite is a newer product, but **keycit!** is also a useful search term.[14] And, indeed, we find many cases reminding attorneys of the importance of using this basic tool. For instance, here is a trio of cases written by Judge Milton I. Shadur of the United States District Court, Northern District of Illinois.

---

12. Slater v. Gallman, 339 N.E.2d 863, 864–65 (N.Y. 1975) (footnote omitted) (citations omitted).
13. There's one exception: more than sixty cases cite a law review article with "shepardized" in the title: Robert M. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L.REV. 579 (1968). Many cases concern prisoners' access to law libraries and to *Shepard's Citations*. Since I want to look at what judges say about the quality of *lawyers'* research and writing, I have not explored those.
14. There's no significant research lesson here, but I imagine the holders of the Shepard's trademark react strongly when they see statements like this one (from a legal assistant's bill): "6/27/00 Shepardize our cases on Keycite." Blair v. Ing, 31 P.3d 184, 192 (Haw. 2001). Would they Xerox the passage to pass around? Do they wipe their tears with a Kleenex?

> It is really inexcusable for any lawyer to fail, as a matter of routine, to Shepardize all cited cases (a process that has been made much simpler today than it was in the past, given the facility for doing so under Westlaw or LEXIS). Shepardization would of course have revealed that the 'precedent' no longer qualified as such.[15]
>
> DeMyrick's motion is particularly distressing under the circumstances. It is not simply that DeMyrick's counsel are highly experienced in Illinois personal injury practice and might therefore be expected to keep themselves current on such issues that are of importance to the conduct of such practice and that arise with some frequency. Beyond that expectancy, no counsel ought to cite a case (such as *Comastro* in this instance) without Shepardizing that case (or without conducting the equivalent electronic search via Westlaw or Lexis). And any such search would immediately have revealed the decision in *Roth*, which expressly explains *Comastro* as holding that 'defendants owed plaintiff ordinary, reasonable care to protect him from criminal attack' and as negating any notion of the "highest degree of care."[16]
>
> [E]xperienced counsel such as Mazur's should know better than to cite *Geise v. Phoenix Co. of Chicago*—and if they did not know better to begin with, they should have learned better by the simple act of Shepardizing *Geise* (as every lawyer should do before citing any case). That 1994 decision was expressly distinguished just three years later by *Maksimovic v. Tsogalis*, which upheld such common law tort claims as assault and battery as outside the scope of the exclusive remedy provision of the Illinois Human Rights Act.[17]

The list could go on and on, but I have a modicum of self-restraint.[18]

¶10 Beyond reinforcing the basic lesson—that using a citator is essential to good legal research—some cases found through these searches can illustrate the subtleties of using citators. The first one I'll mention does not actually involve a judge pointing out a lawyer's research error—the judge herself had missed an important development. In *Niebur v. Town of Cicero*,[19] Judge Bucklo made a ruling based on a particular case, which was good law according to KeyCite. Moreover, tracking the case's key numbers did not show other cases stating a different rule. Later, however, the judge granted a new trial when the plaintiffs pointed out a statute that legislatively overruled the case she had relied on.[20] We law librarians know that citators do not show legislation affecting a case (unless a later case points out the effect)—but this limitation of citators is easy to forget, as this case so wonderfully illustrates.

¶11 Here is another subtlety of using citators, this time with respect to checking a statute. A pro se litigant shepardized a statute and found nothing to indicate that it had expired. Sounds good, doesn't it? But the court said that that was not enough:

---

15. Gosnell v. Rentokil, Inc., 175 F.R.D. 508, 510 n.1 (N.D. Ill. 1997).
16. DeMyrick v. Guest Quarters Suite Hotels, 1997 U.S. Dist. LEXIS 4377, at *3–4 (N.D. Ill. 1997).
17. Horaitis v. Mazur, 2004 U.S. Dist. LEXIS 3066, at *2 (N.D. Ill. 2004) (citations omitted).
18. In contrast to the lawyer with the 284-page brief. *See supra* note 12 and accompanying text.
19. No. 98 C 4157, 2002 WL 485695 (N.D. Ill. Mar. 29, 2002), *amended and superseded by* 212 F. Supp. 2d 790 (N.D. Ill. 2002).
20. 212 F. Supp. 2d 790, 798 (N.D. Ill. 2002) ("Although *Bovinette* shows up as good law on Westlaw's Keycite, and the relevant headnotes keyed to the pertinent propositions do not disclose the references to the contrary cases plaintiffs cite, I conclude that plaintiffs are correct. . . .").

> *Shepard's* would not contain a notation that a statute had expired. *Shepard's* lists changes in statutes which result from affirmative acts of the legislature, not changes which result from the language of the statute itself. . . . [The section in question] expired by its own terms. It was not repealed, revised, superseded, suspended or supplemented by a subsequent act of the Congress. Consequently, Mr. Brown's argument that his inquiry into the law was reasonable is not persuasive.[21]

The litigant was sanctioned under Rule 11 of the Federal Rules of Civil Procedure.[22]

¶12 Another case teaches the lesson that the editors who describe the treatment of cases in citators do not have the final word: "West Publishing Company's Keycite electronic database contains a flag warning that *Collins* was 'abrogated' by the United States Supreme Court's opinion in *Dickerson*. No published Arizona opinion, however, has so found, and we think the observation overstates the effect of *Dickerson* on *Collins*."[23]

¶13 Some cases that turn up from searches for **shepardiz!** discuss other aspects of research—or the whole research enterprise. For instance, in *Blake v. National Casualty Co.*,[24] the plaintiff's attorney faced Rule 11 sanctions for making a claim that was not supported by the law. The court did not need to determine whether the attorney had made a "reasonable inquiry" into the law, because defense counsel had written a letter to him citing the controlling case. Still, the court pointed out in a footnote the ways that a competent researcher could have found that controlling case:

> [I]f plaintiff's attorney had shepardized the three cases *Tyson* [the case he relied on] cites in support of the narrow definition, he would have found *Beckham* [a controlling case contrary to his position]. *Beckham* could also be found easily by using an annotated United States Code, a digest, or a computer search. All of these, with the possible exception of the computer search, are basic methods of researching a point of law. To have done none of them is not "reasonable inquiry," especially when the attorney must know that his position is the minority position.[25]

---

21. Brown v. Lincoln Towing Service, Inc., 1988 WL 93950, at *2 (N.D. Ill. 1988) (citation omitted).
22. Under Rule 11, attorneys (and pro se litigants) certify—by submitting pleadings and motions to a court—that
    > to the best of the person's knowledge, information, and belief, formed after *an inquiry reasonable under the circumstances*,—
    > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
    > (2) *the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law*;
    > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
    > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

    FED. R. CIV. P. 11(b) (emphasis added). Courts may impose sanctions—including monetary sanctions—"upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." FED. R. CIV. P. 11(c). For more on Rule 11, see Butler, *supra* note 9.
23. State v. Valle, 996 P.2d 125, 128 n.2 (Ariz. App. 2000) (citation omitted).
24. 607 F. Supp. 189 (C.D. Cal. 1984).
25. *Id*. at 191 n.4.

(Note that this case was decided twenty years ago. Would we still see today the qualifier that a computer search might not be a "basic method" of researching a point of law?)

¶14 Another case from the 1980s[26] both illustrates a limitation of citators and reminds attorneys of the wide range of research tools at their disposal. The defendant's lawyer failed to cite *Burger King Corp. v. Rudzewicz*,[27] a United States Supreme Court case decided four months before he filed his motion, and the plaintiff asked that Rule 11 sanctions be imposed. The lawyer acknowledged that he should have cited it, but explained his omission by noting that he shepardized the Ninth Circuit cases he relied on, and the Supreme Court case did not explicitly overrule any of them.[28] So there's another lesson about citators: they will only pick up the later cases that cite the cases you type in, but there might be controlling cases out there that never mentioned those—for example, a Supreme Court case that arose in another circuit. The court was not persuaded by the lawyer's excuse and offered research instruction:

> By any objective standard, the duty of reasonable inquiry on an issue of constitutional law (here, the due process limits of the exertion of personal jurisdiction) must include, at the least, inquiry to ascertain whether or not and when the United States Supreme Court has ruled on the issue. Here, the Supreme Court had spoken on the issue four months before the motion was filed. *Burger King* received at least the "average" amount of attention a Supreme Court opinion receives, *i.e.*, it was widely reported by the legal press. It was old enough to have been printed in the advance sheets. Counsel fell below the required standard of reasonable inquiry in not knowing of the existence of *Burger King*.[29]

The court also was unimpressed by the lawyer's excuse that he lacked resources:

> This is so notwithstanding counsel's representation at oral argument that his firm did not have Lexis or Westlaw and did not subscribe to *U.S. Law Week*. These research tools may be helpful in discovering the more obscure or the very recent cases not yet generally reported. Their aid seems unnecessary in researching Supreme Court cases from the prior term.[30]

The court thought the lawyer should have done better—but it denied the request for sanctions on this issue, because the motion was still not frivolous.[31]

Other Word Searches

¶15 Fruitful as the searches for **shepardiz!** and **keycit!** are, they are not the only searches to try. The trick, again, is finding search terms that are more distinctive than

26. Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986).
27. 471 U.S. 462 (1985).
28. *Continental Air Lines*, 109 F.R.D. at 596–97. Actually, the Supreme Court would only "overrule" its own precedents, although it might reverse or criticize Ninth Circuit cases.
29. *Id.* at 597 (footnotes omitted).
30. *Id.* at n.3.
31. *Id.* at 597. The court did award sanctions on another issue—the factual inquiry. *Id.* at 597–98.

brief and **write**. One professor asked our reference staff to find a case she recalled in which a judge scolded the attorney for submitting briefs that looked like they had been written on the back of a napkin. Well, now, **napkin** shows promise—you get a lot fewer hits with that than with **brief**. I ran a number of searches and skimmed the results. (An aptitude and tolerance for skimming is very helpful.) I saw more cases than I care to think about that involved death threats written on napkins. I found a case where a prisoner who did not have access to office supplies actually did create his brief from notes on napkins and other scrap paper.[32] Eventually, I broadened my search to include **drafting** a **complaint** (as well as **writing** a **brief**) and found: "Plaintiffs have taken the notice pleading of the federal rules quite seriously and have submitted a complaint that could have been drafted in crayon on the back of [a] napkin."[33]

¶16 Searches like this can work, but not every search will pay off. For instance, after I found something with "back of a napkin," I thought I'd try for "back of an envelope," but got nowhere.[34] Other similarly inspired searches have also left me with nothing to show for my time online.

¶17 On the other hand, searching for other cases that used **crayon** in proximity to **counsel**, **lawyer**, **brief**, or the like,[35] did turn up something else:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.[36]

This opinion, by Judge Samuel B. Kent, of Galveston, Texas, turns out to be a rich lode of judicial scolding, including such remarks as this: "The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts

---

32. Hart v. Henshaw, 8 F.3d 818 (Table), 1993 WL 430989 (4th Cir. Oct 26, 1993) (granting in forma pauperis status). When ordered by a magistrate to provide copies of his brief for service on defendants or to provide funds for the court to copy it, the prisoner stated "that he did not have a copy of the brief, as his brief had been written over a period of several months from a compilation of notes written on napkins, envelopes, backs of forms, and other papers. He stated that he could not afford to pay duplication costs, and requested that the brief be returned to him so that he could attempt to photocopy or draft by hand the additional copies." *Id.* at *1.
33. Castro v. City of Chicago, 1998 WL 801814, at *2 (N.D. Ill. 1998).
34. The search, performed Mar. 8, 2004, in LexisNexis Federal & State Cases, Combined, was: **back pre/2 envelope w/15 brief or complaint or pleading or memorandum**.
35. The search, performed Mar. 15, 2004, in LexisNexis Federal & State Cases, Combined, was: **crayon w/20 lawyer or brief or complaint or pleading or attorney or counsel**.
36. Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

at the Federal Reporter (remarkably enough hitting a nonexistent volume!)."[37] Judge Kent came up with so many put-downs of the lawyers, chiding them for the poor quality of their work, that his opinion has been circulated widely. It has appeared on Web sites critical of lawyers,[38] in law firm newsletters,[39] on law blogs,[40] and in course materials for legal writing courses.[41] It was even offered as an example of good opinion-drafting by a justice from the Supreme Court of Queensland.[42] Usually it is offered either as a piece of humor[43] or as a cautionary tale (in the legal writing materials). But it has also been criticized as mean-spirited abuse that could harm the parties—not just the lawyers who are belittled, but their clients—as well as the civility of legal practice and the quality of advocacy.[44]

Search Terms Based on Legal Concepts

¶18 In addition to trying to construct word searches based on words the judges might use in discussing lawyers' research and writing (from **shepardizing** to **crayon**), researchers can look for these cases by thinking of how they might

37. *Id.* at 671.
38. *E.g.*, Citizens for Legal Responsibility, *at* http://www.clr.org/ (last visited Mar. 15, 2004) ("Does your attorney write with crayons?").
39. *E.g.*, *There Is a Judge Down in Texas*, WASH. INS. L. LETTER, Summer 2001, at 29 (newsletter of Reed McClure law firm of Seattle, Washington), *available at* www.rmlaw.com/newsletters/summer2001.pdf.
40. *E.g.*, J. Craig Williams, *Zounds! Briefing in Crayon*, MAY IT PLEASE THE COURT: A WEBLOG OF LEGAL NEWS & OBSERVATIONS (Dec. 12, 2003), *at* http://www.mayitpleasethecourt.net/journal.asp?blogId=166.
41. *E.g.*, Georgia State Univ., Research, Writing & Advocacy I & II (Fall 2003), *at* http://law.gsu.edu/orientation/RWAfirstassignment.pdf (last visited Mar. 15, 2004) (requiring *Bradshaw* for orientation).
42. Roslyn Atkinson, Judgment Writing: Address Before Magistrates Conference of the Australian Institute of Judicial Administration 7 (Sept. 13, 2002), *available at* www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf ("As for being entertaining, not all of us can aspire to the wit and directness of by now famous Samuel B. Kent, United States District Judge of the Southern District of Texas in Galveston.").
43. One writer thought it must be a put-on. Christine Baker, *"It Is So Ordered . . ."—as Funny as it Gets!* 2004 CREDIT SUIT (Nov. 7, 2003), *at* http://www.creditsuit.org/blog/archives/000218.html ("While the headers look like real companies and law firms, this just can't be for real.").
44. *See* Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11 (2001). While assuming that the attorneys' work was "thoroughly dismal," Lubet points out that "a federal judge has many decent, reasonable ways of dealing with inadequate lawyers. He can chew them out in court, he can call them into chambers, he can require them to rewrite their briefs, he can sanction them under 28 U.S.C. § 1927. Any one of those steps could have been taken with a far greater remedial effect than can be achieved through public shaming." *Id.* at 12–13. He notes that he has "no quarrel with embarrassing lawyers when it is necessary to the outcome of a case—as obviously happens in Rule 11 decisions and in *Habeas Corpus* petitions based on inadequate representation, for example." *Id.* at 13.

    Another district judge seems to have quite a different attitude toward putting down lawyers for research errors:

    > The court notes with disapproval the tone adopted by the plaintiff and GMAC in their briefs on the motion to dismiss. In making such statements to the court as "Defendant apparently failed to shepardize [Jaramillo]" (Doc. 39), and "plaintiff simply disregarded what the courts have said" (Doc. 56), the parties do not advance the interests of their clients.

    Riley v. Gen. Motors Acceptance Corp., 226 F. Supp. 2d 1316, 1322 n.6 (S.D. Ala. 2002).

arise—that is, their legal context. Obviously, a lawyer could potentially mess up in dealing with any issue. But are there certain contexts when the lawyers' errors are particularly relevant? Sure there are. We have already seen a couple of cases involving Rule 11 sanctions for failure to investigate the law before filing a pleading. So one could include **rule 11** in a word search—or use a treatise or annotated code to find cases interpreting that rule. Likewise, one could look for cases under similar rules in other jurisdictions.[45]

¶19 The quality of lawyers' work also arises in malpractice cases, so one might search for cases where research or writing was a factor.[46] The quality of work can also come up in disciplinary cases. Even if a case is not a disciplinary case, a judge might cite an ethical rule when discussing an attorney's conduct—for instance, the rule requiring an attorney to notify the court of adverse authority.[47] One other context is when prisoners seek to have their convictions reviewed because they were denied the effective assistance of counsel. Any of these could provide leads for research, particularly in combination with other terms.

Key Number Searches

¶20 Using the Key Number system can help with the problem of words like "brief" being too common to search efficiently. (One still needs to be willing to skim through a lot of passages that are not as vivid as one might wish.) For example, when responding to a professor's request, I searched in Westlaw's ALLFEDS database for **170BK712 170BK713 170BK714 170BK15 170BK716 % "pro se"**. What did that string of numbers and letters do for me? It got me cases that West editors had assigned to this range in the key number hierarchy:

> 170B FEDERAL COURTS
> (H) BRIEFS, k712—k720
> k712—Briefs in general
> k713—Statement of case or facts; appendix
> k714—Specification of errors; points and arguments
> k715—Defects, objections and amendments; striking briefs
> k716—Failure to file or serve, or to file or serve in time

45. *E.g.*, 10th Cir. R. 46.5(B)(2) (empowering court to impose sanctions on an attorney who files a brief without "reasonable inquiry" to ensure that "the issues presented are warranted by existing law or a nonfrivolous argument"); N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (2003) (empowering court to impose sanctions for "frivolous conduct"; determination whether conduct "frivolous" considers "the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party").
46. A landmark case in this area is Smith v. Lewis, 530 P.2d 589 (Cal. 1975), *overruled on other grounds* In re Marriage of Brown, 544 P.2d 561 (Cal. 1976). For a discussion, see MacLachlan, *supra* note 9, at 614–21.
47. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2004).

¶21 This search yields many cases where the appellate courts decline to address arguments that the attorneys did not brief adequately. Here is one example from the Ninth Circuit, recent and beautifully stated:

> Our circuit has repeatedly admonished that we cannot "manufacture arguments for an appellant" and therefore we will not consider any claims that were not actually argued in appellant's opening brief. . . .
>
> The art of advocacy is not one of mystery. Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court. Particularly on appeal, we have held firm against considering arguments that are not briefed. But the term "brief" in the appellate context does not mean opaque nor is it an exercise in issue spotting. However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their argument in order to do so. It is no accident that the Federal Rules of Appellate Procedure require the opening brief to contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." We require contentions to be accompanied by reasons.
>
> It is [the appellant's] burden on appeal to present the court with legal arguments to support its claims. Absent argument, we decline to pick through the many detailed sections and subsections in an effort to match the statutes and regulations with a preemption theory not articulated to us. Therefore, we do not address any statute or regulation that was not accompanied by legal argument in [appellant's] opening brief.[48]

¶22 Many other cases address the need for counsel to cite evidence from the record in the brief. *United States v. Dunkel* made the point with a porcine metaphor: "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as Dunkel's did. Judges are not like pigs, hunting for truffles buried in briefs."[49] I am not the only reader who appreciates the pigs and truffles sentence: it has been quoted more than a hundred times in other cases.[50] The judge quoted above, who said that the art of advocacy is not one of mystery, adds pasta to the literature of inadequate briefing:

> Instead of making legal arguments, [the appellant] provides a five page laundry list of the challenged regulations and their titles, leaving the court to piece together the argument for preemption as to each regulation. Indeed, a quarter of [its] twenty-one page brief is simply a bullet point listing of statutes. . . .
>
> When reading [the] brief, one wonders if [the appellant], in its own version of the "spaghetti approach," has heaved the entire contents of a pot against the wall in hopes that something would stick. We decline, however, to sort though the noodles in search of [the appellant's] claim.[51]

---

48. Independent Towers of Wash. v. Washington, 350 F.3d 925, 929–30 (9th Cir. 2003) (citations omitted).
49. 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) (citation omitted).
50. A Westlaw search in ALLCASES for **pigs /s truffles /20 dunkel**, conducted Mar. 18, 2004, yielded 104 cases.
51. *Independent Towers of Wash.*, 350 F.3d at 929. I have no quarrel with the judge using multiple metaphors, moving from "laundry list" in one paragraph to "spaghetti" in the next. Each illustrated the problem with the brief quite well.

The more I think about it, the more I like the image of judges poking through cold spaghetti noodles. Legal writing students presented with this image might remember the lesson that their arguments need to be developed in their briefs, because the judges really don't want to deal with cold noodles.

¶23 Of course, that range of key numbers is not the only one that could turn up useful cases. Others to consider include:

> 45 ATTORNEY AND CLIENT
> III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT, k105—k129.5
> k107—Skill and care required
> k112—Conduct of litigation
> k112.50—Research and knowledge of law

And (remember that the search for issues relating to briefs, above, was only for *federal* courts):

> 30 APPEAL AND ERROR
> XII. BRIEFS, k755—k774
> k756—Form and requisites in general
> k757—Statement of case or of facts
> k758—Specification of errors
> k761—Points and arguments
> k774—Failure to set out points and arguments

And:

> 110 CRIMINAL LAW
> XXX. POST-CONVICTION RELIEF, k1400—k1669
> (B) GROUNDS FOR RELIEF, k1450—k1560
> k1511—Counsel
> k1519—Effectiveness of counsel

Search Advisor Searches

¶24 I have used key number searches to find cases on research and brief-writing many times. I recently tried a similar approach using LexisNexis' Search Advisor—a service with which I am, frankly, much less familiar. I followed the hierarchy: Civil Procedure > Appeals > Briefs. I chose Federal Civil Procedure Cases, and then selected the option to "retrieve all headnotes and additional cases." That turned up 722 cases.[52] Skimming, I found many cases similar to ones I have found using key numbers. I used the Focus feature to look for "truffles" and found eight cases. Going back to the list of 722 cases, I clicked on "In-Depth Discussions," which gave me fifteen cases. That group did not seem to include any particularly noteworthy cases.

¶25 The hierarchy in the Search Advisor (Civil Procedure > Appeals > Briefs) does not have the fine-tuning of the various key number breakdowns listed above.

---

52. Search performed Mar. 18, 2004.

On the other hand, some searchers who want to find cases about the requisites of briefs might not want to differentiate between, say, the statement of facts and the setting out points and arguments. Or, if they do, they could use the option of adding more search terms. So this could be one more avenue to pursue.

Conclusion

¶26 Cases in which judges point out weaknesses in lawyers' research and writing provide vivid examples of the "real-world" impact of lawyering skills (or the lack thereof). Some of the cases also show judges losing their tempers or instructing attorneys through humiliation. Students might draw from those not only the lesson that research and writing are serious business, but also that abuse and ridicule are appropriate in professional discourse. The more temperate judicial opinions might not get the class to explode in laughter, but they might be more effective teaching vehicles, especially when the judges not only fault the attorneys for their failings but explain what the attorneys should have done differently.

¶27 Since finding these cases can be a challenging reference question, I have offered a sample of research techniques that can turn them up. I am sure there are other fruitful techniques I have not tried yet. Along the way, I quoted an assortment of cases, so if you are asked for—or want for your own work—just a few cases, you have a good start.