

Why do Legal Research?

Copyright 2003, 2005 by Ronald B. Standler

Keywords

adverse, argument, arguments, attorney, attorneys, authority, authorities, brief, briefs, case, cases, citation, citations, cite, cited, client, competent, conduct, controlling, counsel, court, courts, duty, ethical, ethics, fail, fails, failed, failure, federal, frivolous, inadequate, judge, judges, law, lawyer, legal, Lexis, library, litigant, litigants, malpractice, motion, no, none, poor, procedure, professional, research, responsibility, rule, rules, Rule 11, sanction, sanctions, search, Shepardize, skill, state, support, violation, Westlaw, why

Table of Contents

- 1. Why do legal research? 3
 - preliminary draft 4
- 2. Rules of Practice 6
 - FRCP 11 6
 - FRAP 28 7
 - Professional Responsibility 8
 - Rule 3.3(a) 8
 - Rule 1.1 8
- 3. Introduction to Cases 9
- 4. Judicial Comments on Professional Responsibility 10
 - A. federal courts 10
 - Oximetrix 10
 - need to follow citations backwards 11
 - Northwestern National Insurance v. Guthrie 12
 - Jeffrey A. Dickstein, Esq. 13
 - Oxfurth v. Siemens 14
 - Massey v. Prince George’s County 16
 - Disantis 19
 - Crumpton 20
 - Roeder 21
 - Schoofield v. Barnhart 22
 - Baldayaque 22
 - B. state courts 23
 - must note dissenting opinion 23

preliminary draft

must note plurality opinion	24
Johnson v. Parol Board	25
Robert L. Johnston, Esq.	25
Robinson v. Philadelphia	26
Carlyle Shepperson, Esq.	26
Richard J. Thonert, Esq.	28
Boca Burger	28
Tyler v. Alaska	30
5. Sanctions Under Rules of Procedure	31
A. federal courts	31
Taylor v. Belger Cartage Service	31
Smith v. United Transp. Union Local No. 81	33
SEC v. Suter	34
Central Ice Cream	35
Steven M. Kramer, Esq.	36
Spangler	38
Sheldon v. McGraw-Hill	39
Arthur Jackson, Esq.	40
Hendrix	42
Terminix v. Kay	44
Karonis v. Commercial Union Ins.	45
Boyce v. Microsoft Corp.	45
Samuel A. Malat, Esq.	46
QDS Components	50
B. state courts	51
Fowler v. Conforti	51
Price v. Cole	52
Dace v. Massachusetts	53
6. Judges do no legal research for litigants	53
A. federal courts	53
Brooks	53
Pelfresne	54
Anderson v. Hardman	56
B. state courts	57
Alabama	57
Oklahoma	61
Wisconsin	61

7. Malpractice 62
 Smith v. Lewis 62
 Goebel v. Lauderdale 65
 Stanley v. Richmond 66
 Thomas Lazar, Esq. 66
 Shimer v. Foley, Hoag & Eliot 67
 Cooks v. U.S. 68

8. Why do some attorneys do poor research? 69

1. Why do legal research?

The function of a brief is to briefly recite the facts of the case, explain the applicable law, apply the law to the facts of the case, and explain why the attorney’s client should prevail on this motion or win at trial. Citations to statutes and cases makes the attorney’s explanation of the law credible, by allowing the judge to easily check what the attorney alleges is the correct law. As mentioned later in this essay, beginning on page 53, judges will *not* do legal research for litigants.

An attorney should inform the judge of the controlling law in the jurisdiction. In routine cases with familiar issues, the judge probably already knows the law well, but citations to authorities are still expected. However, in cases involving unfamiliar issues or obscure law, the judge will need the attorneys to explain the applicable law, so citations to statutes and cases are essential.

If there is no case on point in the jurisdiction, one will need to either (1) find a case on point in a foreign jurisdiction, (2) find cases on analogous issues and make a novel argument, or (3) argue from basic principles, such as the federal and state constitutions, maxims of equity, and rules in the *Restatements of the Law*. Some judges are willing to make new law in their jurisdiction by following some persuasive authority that is cited to them in a Brief.

Attorneys who *understand* the law can cite facts that distinguish their case from what might casually appear to be a simple application of precedent from the leading case.

There is another important reason to do legal research: to find *all* viable legal theories to include in the Complaint, and to avoid legal theories that have failed in the past for good reasons that are explained in prior cases.

Personally reading cases is part of the preparation of an attorney for oral arguments in appellate court, where the attorney must be intimately familiar with the relevant cases and instantly able to respond to complicated questions from a judge.

overview of this essay

Beginning at page 6, this essay briefly reviews the relevant rules of civil and appellate procedure and the relevant rules of professional responsibility, then quotes from many cases that show how judges apply these rules. Beginning at page 53, this essay explains that judges have neither the time nor the inclination to do legal research for litigants. At pages 62 to 69, this essay discusses legal malpractice for failure to do legal research. Within each section, I arrange the cases in chronological order, with the oldest first, so the reader can follow the historical evolution of the common law. Finally, beginning at page 69, I have some provocative comments on *why* some attorneys do poor legal research.

When lack of legal research by an attorney is mentioned in a judicial opinion, the mention is usually one or two paragraphs that are buried in a long opinion on other matters. Understanding these isolated one or two paragraphs is complicated by details from the case that make sense only if one reads the entire opinion.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

why this essay is a preliminary draft

I began this essay in October 2003, with the intent to quote judicial opinions that criticized attorneys for *inadequate* legal research and to show the importance of doing good legal research. After working on this essay for 33 hours, my interest and my enthusiasm waned, because there were so few published judicial opinions in which attorneys were significantly sanctioned for *inadequate* legal research.¹ Consequently, this document is mostly a collection of quotations and citations, with little commentary and explanations that are necessary for a coherent essay.

Reading these cases gives me the impression that judges regard legal research as something to be done in *less than a few hours*. Judges seem to believe that it is adequate if the attorney either (1) finds the *one* leading case on a topic, or (2) understands the current law well enough to persuade a client that litigation would be futile.

¹ I have the impression that most sanctions seem to be in the U.S. District Courts and U.S. Courts of Appeals in the 7th Circuit, with a smaller cluster of cases in the 3rd Circuit. Furthermore, I have the impression that in the rare cases in which sanctions are imposed, the attorney who did *inadequate* legal research is typically ordered to reimburse the prevailing party for a mere few hundred dollars of legal fees. Such a small sanction is grossly inadequate to fully reimburse the prevailing party's actual legal expenses for defending against frivolous litigation.

preliminary draft

I find this minimal view of legal research appalling. In my work, I often spend many hours of legal research tracing *one* legal rule back to its historical origin. If the legal rule made sense when it was adopted, I want to know if the rule still make sense, given changes in public policy, society, scientific knowledge, and technology. If the legal rule was wrong when adopted, I want to clearly understand *why* it was accepted as law. And in some of my narrow specialties, I have taken weeks — sometimes months — of my time to collect, read, and critically analyze *all* of the nationwide reported cases on one topic. Given my personal devotion to scholarly legal research, it is easy to see why I would be appalled at a superficial view of research that considers only the *one* leading case.

Most cases have many procedural legal issues, as well as several issues of substantive law on the merits of the case. So if an attorney spends, for example, two hours during a superficial job of legal research on *one* issue, that attorney might easily spend more than thirty hours in legal research during the course of litigation. So even a superficial level of legal research involves more time — and more effort — than judges seem to believe is necessary.

However, recognize that judges enforce *minimum* standards of professional conduct or civil procedure. Such minimum standards are *not* a description of excellent professional practice, and may not constitute effective advocacy by an attorney on behalf of a client.

Finally, this essay is a preliminary draft because I do not have the time to collect, read, and analyze *all* of the reported cases that mention inadequate legal research. There are many such cases that have either no sanctions or weak sanctions for the attorney.

preliminary draft

2. Rules of Practice

FRCP 11

Doing legal research is more than just a professional obligation to do a thorough job. Doing legal research is also a legal *duty* imposed by the Federal Rules of Civil Procedure, to prevent frivolous litigation.

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

...

(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;

....

Federal Rules of Civil Procedure, Rule 11 (as amended 1993).

Several U.S. Courts of Appeal have explained the requirements of Rule 11 for legal research *before* filing papers with any federal court. For example, a court in Philadelphia said:

The rule imposes on counsel a duty to look before leaping and may be seen as a litigation version of the familiar railroad crossing admonition to "stop, look, and listen."

The signature of counsel on a pleading certifies that a reasonable investigation of the facts and a normally competent level of legal research support the presentation. The requirement of reading is to forestall signatories who seek to disclaim the contents of a pleading prepared by either an associate or referring counsel.

Lieb v. Topstone Industries, Inc., 788 F.2d 151, 157 (3rd Cir. 1986).

This remark in *Lieb* about "normally competent level of legal research" was quoted with approval in the following decisions of the U.S. Courts of Appeal:

- *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3rd Cir. 1988);
- *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 847 (1st Cir. 1990);
- *U.S. v. Vastola*, 25 F.3d 164, 168 (3rd Cir. 1994); and
- *Simmerman v. Corino*, 27 F.3d 58, 62 (3rd Cir. 1994).

Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit said:

Rule 11 requires counsel to do legal research before filing, and to be aware of legal rules established by the Supreme Court. E.g., *Sparks v. NLRB*, 835 F.2d 705 (7th Cir. 1987); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080-82 (7th Cir. 1987).

A party may not strike out blindly and rely on its opponent to do the research to make the case or expose its fallacies. See *In re TCI Ltd.*, 769 F.2d 441, 445-47 (7th Cir. 1985).

Frantz v. U.S. Powerlifting Federation, 836 F.2d 1063, 1064 (7th Cir. 1987).

Judge Weis of the U.S. Court of Appeals for the Third Circuit explained Rule 11:

As the Advisory Committee noted, the 1983 revision of Rule 11 was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence. Consequently, an objective test was adopted to determine if, after "reasonable inquiry," the pleading, motion or other paper is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

The standard for testing conduct is reasonableness under the circumstances. *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985). As a commentator has observed, the Rule does not permit use of the "pure heart and empty head" defense. Schwarzer, *Sanctions Under The New Rule 11 — A Closer Look*, 104 F.R.D. 181, 187 (1985). See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) ("Simply put, subjective good faith no longer provides the safe harbor it once did."), *cert. denied*, [484 U.S. 918], 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

The Rule imposes an obligation on counsel and client analogous to the railroad crossing sign, "Stop, Look and Listen." It may be rephrased, "Stop, Think, Investigate and Research" before filing papers either to initiate a suit or to conduct the litigation. These obligations conform to those practices which responsible lawyers have always employed in vigorously representing their clients while recognizing the court's duty to serve the public efficiently. It bears repeating that the target is abuse — the Rule must not be used as an automatic penalty against an attorney or a party advocating the losing side of a dispute.

Possible sanctions include requiring the offending client, lawyer, or both, to pay all or part of the adversary's counsel fees incurred as a result of the violation. This sanction combines the concepts of deterrence and reimbursement for the wronged party.

Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3rd Cir. 1987).

FRAP 28

In the U.S. Court of Appeals, the Federal Rules of Appellate Practice specify:

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

...

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

...

preliminary draft

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

....

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

FRAP, Rule 28 (as amended 2002).

This Rule is derived from Rule 24 of the U.S. Supreme Court.

Professional Responsibility

Rule 3.3(a)

Long-standing rules of the legal profession require that an attorney *not* mislead a judge about the law. For example, the American Bar Association's Model Rules of Professional Conduct state:

A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) ...

(3) 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; or

(4)

Model Rules of Professional Conduct, Rule 3.3(a) (adopted 1983).

Note that a literal reading of this Rule applies only to an attorney who *knows* of an authority, but see the remark in *Massey v. Prince George's County*, 918 F.Supp. 905, 908 (D.Md. 1996), which is quoted at page 18 of this essay, and also see *U.S. v. Crumpton*, 23 F.Supp.2d 1218 (D.Colo. 1998), which is quoted at page 20.

Rule 1.1

The requirement that an attorney do legal research is contained² in another Model Rule of Professional Conduct:

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

Model Rules of Professional Conduct, Rule 1.1 (adopted 1983).

² See *Massey v. Prince George's County*, 918 F.Supp. 905, 908 (D.Md. 1996), quoted at page 18, below, and *Baldyague v. U.S.*, 338 F.3d 145, 152 (2nd Cir. 2003), quoted at page 22, below.

The education in law school, and legal textbooks, concentrate on cases of historic significance in the fundamental principles of torts, contracts, civil procedure, criminal procedure, and other legal subjects. Given the broad scope of law, it is impossible for a law school to teach the current law for every type of dispute, so law schools focus on teaching general principles that are illustrated with a few specific cases. After graduation from law school, attorneys need to do legal research on each of their cases, to find the current controlling law on each legal issue in that case, as well as to find authorities that support a good-faith effort to make new law. Graduating from law school is a beginning, *not* the end, of the requirement to search for cases and learn law.

3. Introduction to Cases

The bulk of this essay quotes from court cases involving:

1. violation of the rules of professional responsibility, including being reported to the bar for discipline (beginning at page 10, below),
2. violation of the rules of procedure, including being sanctioned for frivolous litigation (beginning at page 31, below),
3. statements that judges have neither the time nor the inclination to do legal research for litigants (beginning at page 53, below), or
4. legal malpractice for failure to do adequate legal research (beginning at page 62, below).

Before reading these cases about embarrassment and sanctions of attorneys who did *inadequate* legal research, it is worthwhile to reflect on *why* legal research is desirable.

As explained above at page 3, legal research is necessary to find statutes, cases, and regulations that can be cited in a Brief as authority to support a client's position and to inform the judge of the controlling law in the jurisdiction. Citation of authorities is part of effective advocacy, and it is a duty that an attorney owes to his/her client. Breach of this duty can be legal malpractice, or reason to discipline or to sanction an attorney.

Articles³ on the duty to do legal research often suggest that the reason to do legal research is to *avoid* discipline, sanctions, or malpractice awards. That is a backwards argument, like saying murder is wrong because we put murderers in prison.

I urge that attorneys do legal research for the right reasons: because research is necessary for effective advocacy and because their clients deserve it. And I urge that punishment for violation of rules, or breach of a duty of care, be seen *not as a threat*, but as properly responding to those who fail to meet the minimum standards of a learned profession.

³ For example, Lawrence Duncan MacLachlan, "Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law," 13 Georgetown J. Legal Ethics 607 (Summer 2000); Marguerite L. Butler, "Rule 11 — Sanctions and a Lawyer's Failure to Conduct Competent Legal Research," 29 Capital Univ. Law Rev. 681 (2001).

4. Judicial Comments on Professional Responsibility

A. federal courts

Oximetrix

In a licensing case, the U.S. Court of Appeals for the Federal Circuit sanctioned Oximetrix (Oxco) for appealing a remand to state court by a federal district court.

Oxco's otherwise incredible failure to mention *Gravitt* is dramatized not only by the Supreme Court's clear enforcement of [28 U.S.C.] § 1447(d) in that case, but by Oxco's disregard of the Court's reference in *Gravitt*, 430 U.S. at 724, 97 S.Ct. at 1440, to *Thermtron*, the very case Oxco cites:

Thermtron did not question but reemphasized the rule that § 1447(c) remands are not reviewable.

....

.... Non-reviewability of remands under 1447(c) has been assailed, but it is the established law in the statute and in the decisions of the Supreme Court upholding the statute.

Thus, Oxco entirely ignores *Gravitt*, the very Supreme Court case cited by the district court and most closely on all fours with the present case, and cites cases clearly distinct from that before us, while cavalierly ignoring adverse language in the opinions filed in the cited cases. It said nothing at all about *Gravitt* or *Thermtron* in its reply brief, though the impropriety of its petition in light of 1447(c) and (d) and in light of the Supreme Court's guidance was called to its attention in SA's brief. Oxco's lack of candor is regrettable.

ABA Model Code, DR 7-102(A)(2), DR 7-106(B)(1); ABA Model Rule 3.3(a)(3).

In re Oximetrix, Inc., 748 F.2d 637, 643 (Fed.Cir. 1984).

The appellate court then ordered Oxco to pay the opposing party's attorney's fees in defending this frivolous appeal.

Oxco's present petition confronted this court with a stack of documents more than a foot high and has consumed a substantial portion of the time of the Judges and staff of this court, all to reach a result that the statute and Supreme Court decisions in *Gravitt* and *Thermtron* should have made obvious to Oxco and its counsel from the time at which the thought of mandamus to the district court first occurred.

Oxco's petition, filed in the face of 28 U.S.C. § 1447(d), with no citation of apt authority or even minimally acceptable supporting argument, and in total disregard of the Supreme Court authority relied on by the district court, and by SA, has succeeded, and could from the outset have succeeded, only in diverting substantial judicial resources from other, deserving litigants. Its sole effect is and could only have been to unnecessarily and vexatiously increase delay and costs to SA and to the taxpayers who fund the operation of the judicial process.

Thus, there is not and never was a basis for removal or for the present petition. That circumstance was so clear in fact and law that competent counsel could not possibly have failed to recognize it. We are compelled to the conviction that the filing and maintenance of the present petition was based solely on a hope of delaying further the impact of the state court judgment and that it was therefore frivolous. [citations omitted]

Accordingly, it is ORDERED:

(1) Oxco's petition for mandamus is denied.

preliminary draft

(2) Oxco and its counsel on this petition shall jointly and severally be liable to and shall pay SA [i.e., the opposing party at trial] an amount equal to SA's costs and attorney fees incurred by SA in opposing the present petition.

In re Oximetrix, Inc., 748 F.2d at 644.

need to follow citations backwards

A judge in Federal District Court in Connecticut mentioned two defects in legal research: (1) not citing the leading case in the controlling jurisdiction and (2) citing a holding that was overturned in a subsequent case.

The City of New Haven omitted any reference to *Sestito* in its memorandum, despite the fact that *Sestito* is a leading Connecticut case on the issues raised by the motion and is discussed at some length in *Shore v. Stonington*, upon which the City heavily relies. Moreover, in another part of its memorandum the City represents to the court that the rule in *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969), ought to be followed, yet failed to inform the court that that case was specifically overruled in *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982). The court is unable to discern whether sloppy research or warped advocacy tactics are responsible for these errors of omission, but the Corporation Counsel is admonished that diligent research, which includes Shepardizing cases, is a professional responsibility, *see Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172 (W.D.Mo. 1984), and that officers of the court are obliged to bring to its attention all important cases bearing on the matter at hand, including those which cut against their position. *See Model Rules of Professional Conduct*, Rule 3.3(a)(3).

Cimino v. Yale University, 638 F.Supp. 952, 959, n. 7 (D.Conn. 1986).

Note that this judge was critical of citing a later case, *Shore v. Stonington*, but not also citing the leading case on which *Shore v. Stonington* relied. This makes the point that attorneys are expected to follow citations back to the case that made the original rule of law, which is good scholarship.

The same point is mentioned in an unpublished Ninth Circuit decision:

Because the language of the policy is not ambiguous, we have no occasion to apply the rule that ambiguous insurance policies are construed against the drafter, a rule that this circuit applies in ERISA cases. *See Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.), *cert. denied*, 111 S.Ct. 581 (1990) (alternative holding). We admonish Great-West's counsel for citing out-of-circuit authority, *see Brewer v. Lincoln National Life Insurance Co.*, 921 F.2d 150, 153-54 & n. 2 (8th Cir.), *cert. denied*, 111 S.Ct. 2872 (1991), for the contrary proposition, especially when *Brewer* discusses *Kunin* in footnote 2. *See ABA Code of Professional Responsibility* DR 7-106(B)(1); *ABA Model Rules of Professional Conduct* 3.3(a)(3).

Zumstein v. Great-West Life Assur. Co., 1992 WL 124424, n. 1 (9th Cir. 1992).

This point was made for a third time by a judge in a federal district court in Illinois, who held that *Kennedy* “sets out the controlling law of this circuit”, but *Kennedy* was cited by neither party.

Although the parties did not cite *Kennedy*, they did discuss *Davidowitz v. Delta Dental Plan*, 946 F.2d 1476 (9th Cir. 1991), in which *Kennedy* is cited and discussed. Therefore the parties — especially the defendants, which relied heavily on *Davidowitz* in their opening brief — had reason to know of *Kennedy*. A lawyer has an ethical obligation to disclose to the court any controlling precedent that is directly adverse to the client's position. See ABA Model Rules of Professional Conduct, Rule 3.3(a)(3). Given the Ninth Circuit's comment in *Davidowitz* that the *Kennedy* court “never reached the question of the non-assignment clause validity,” see *Davidowitz*, 946 F.2d at 1479, perhaps counsel reasonably could have believed *Kennedy* to be not “directly adverse” to defendants' position. But if *Kennedy* is not directly adverse, it is awfully close. In any event, both sides' failure to disclose *Kennedy* rendered their briefs relatively useless. Counsel can and should do better.

Hospital Group of Illinois, Inc. v. Community Mut. Ins. Co., 1994 WL 714598, n. 1 (N.D.Ill. 1994). These three cases, *Cimino*, *Zunstein*, and *Hospital Group* stand for the proposition that attorneys are expected to follow citations in the cases that they cite.

Northwestern National Insurance v. Guthrie

In a 1990 case, a federal judge denied the parties' Motions for judgment on the pleadings. Defendants then submitted a Motion asking the judge to reconsider his denial. After disposing of the merits of Defendants' Motion for Reconsideration, the judge said:

That being said, the Court is deeply troubled by the manner in which defendants-counterplaintiffs' counsel argued this motion for reconsideration. Counsel's memorandum in support of the motion faithfully recites the *Maryland Casualty Co. v. Peppers* line of cases explicating the general rule. Counsel neglects, however, to discuss the exception to that general rule that is directly on point here — a failure that strikes us as something more than mere oversight. For example, counsel quotes a lengthy passage from *State Farm Fire & Casualty Co.*, Defendants' Memorandum at 5, that sets forth the general rule that the court may not look beyond the allegations of the complaint. *State Farm Fire & Casualty Co.*, 176 Ill.App.3d at 866-67, 531 N.E.2d at 919. The *very next sentence*, explaining the exception to the rule in the declaratory judgment context, is not disclosed by counsel. Nor does counsel mention anywhere in the memorandum that such an exception exists. This failure to disclose relevant legal authority borders perilously close to a violation of the legal profession's ethical canons. See Illinois Rules of Professional Conduct 3.3(a)(3) (“In appearing in a professional capacity before a tribunal, a lawyer shall not: ... (3) 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”). We will assume that counsel's glaring omission is the result of sloppy research and writing, and not an intentional effort to mislead or misdirect this Court. We request that the head of the Litigation Department of defendants-counterplaintiffs' law firm write to the Court in response to this concern.

Northwestern Nat. Ins. Co. v. Guthrie, 1990 WL 205945, at *2 (N.D.Ill. 1990).

My search of Westlaw databases in March 2005 found no further opinions on this case.

Jeffrey A. Dickstein, Esq.

The U.S. District Court in Oklahoma revoked the *pro hac vice* admission of Dickstein, an attorney from California, to practice in that Court, and the U.S. Court of Appeals affirmed:

Attorney Jeffrey A. Dickstein made his first appearance on defendant's behalf on April 17, 1989 after being admitted *pro hac vice* by the district court. [footnote about previous misconduct omitted] Defendant apparently retained Dickstein because counsel agreed with defendant's views on the invalidity of federal income tax laws. Rec. vol. IV at 15. Dickstein's obstreperous attitude was first illustrated by his entry of appearance which informed the court that his association with local counsel in compliance with local rules was "under duress." Rec. vol. I, doc. 17. On May 1, 1989, Dickstein filed ten pretrial motions. The first filing was an 84-page motion to dismiss, lavishly larded with citations to the Declaration of Independence, colonial history and a plethora of nineteenth century Supreme Court cases. Rec. vol. IX, doc. 21. Dickstein argued that federal criminal jurisdiction only encompasses acts committed within the District of Columbia, on the high seas or on federal property; consequently the district court lacked jurisdiction over defendant. [footnote omitted] *Id.* at 15, 80. Dickstein also argued that federal income taxes must be direct and apportioned to survive constitutional scrutiny. *Id.* at 37, 81. While acknowledging the "alleged ratification" of the sixteenth amendment, *id.* at 48, he insisted that the amendment only authorizes an income tax within the District of Columbia and the territorial possessions of the United States. *Id.* at 48-49. Finally, Dickstein questioned whether defendant was an "individual" subject to taxation under the Internal Revenue Code.

U.S. v. Collins, 920 F.2d 619, 623 (10th Cir. 1990), *cert. den.*, 500 U.S. 920 (1991).

The federal district court for the Western District of Oklahoma has adopted the Oklahoma Rules of Professional Conduct as the ethical guidelines governing its practitioners. *See* W.D.Okla.R. 4(J)(4)(b). Rule 3.3(a)(3) of the Oklahoma Rules of Professional Conduct requires attorneys to disclose contrary authority to the court when advancing a legal argument. [footnote omitted] Okla.Stat. Ann. tit. 5, ch. 1, app. 3-A (Supp. 1990); *see City of Oklahoma City v. Oklahoma Tax Comm'n*, 789 P.2d 1287, 1298-99 (Okla. 1990) (Opala, J., dissenting). Dickstein violated Rule 3.3 by misrepresenting to the court the law of federal criminal jurisdiction in flagrant disregard for controlling constitutional, statutory, and regulatory authority. He did not advance a good faith argument why two hundred years of federalist jurisprudence should be abandoned; rather, he sought to indulge the court in the fantasy that the arguments he was advancing actually comprised the law of the land. Dickstein also violated Rule 3.3 by citing legal authority concerning third party IRS summonses with constructive knowledge that such authority had been superseded. In addition, Dickstein's motion to strike language from the indictment detailing the essential elements of the charged offense constituted a material misrepresentation of governing legal principles. Such brazen subversion of legal argument has no place in the courts of this circuit.

....

Dickstein's motion to dismiss for violation of the Paperwork Reduction Act was utterly lacking in any arguable basis in law or fact as was his contention that defendant was not an "individual" under the Internal Revenue Code. The only possible purpose behind these motions was to harass the prosecution and the court. Dickstein therefore violated Rule 3.1 by advancing a frivolous argument before the district court. Dickstein transformed legal

preliminary draft

argument from an intellectual process aimed at the derivation of the correct legal principle to a carnival of frivolity aimed at disseminating defendant's political views. When combined with Dickstein's past reputation for hijacking judicial proceedings onto his tax protester bandwagon, the district court legitimately concluded that Dickstein's disregard for governing ethical principles would continue throughout the case, robbing the trial of its elementary truth-seeking purpose and depriving defendant of the effective assistance of counsel.

U.S. v. Collins, 920 F.2d at 632-34.

Some other cases mentioning Mr. Dickstein include:

- *Roat v. C.I.R.*, 847 F.2d 1379, 1384 (9th Cir. 1988) (“... we publish this opinion in part to warn future appellants that the arguments we have rejected here have no place in this court.”)
- *U.S. v. Summet*, 862 F.2d 784 (9th Cir. 1988) (affirming censure by trial court).
- *United States v. Dickstein*, 971 F.2d 446 (10th Cir. 1992) (appeal dismissed).
- *U.S. v. Holland*, 1995 WL 539589 (10th Cir. 1995) (*pro hac vice* admission revoked).
- *U.S. v. Collins*, 1996 WL 180102 (10th Cir. 16 April 1996).
- *U.S. v. Howell*, 936 F.Supp. 767 (D.Kan. 1996), *reconsideration denied*, 936 F.Supp. 774 (D.Kan. 1996) (*pro hac vice* admission revoked).

Oxfurth v. Siemens

Jack N. Frost, an attorney, attempted to plead a civil cause of action arising from perjury, without doing any legal research. A magistrate judge in a federal district court in New Jersey ordered Frost to show why he should not be sanctioned under FRCP 11, but Frost ignored that order and he failed to appear at a hearing on the matter. The magistrate judge wrote:

Frost's conduct during the pendency of this motion as well as his prior dilatory conduct in this litigation [footnote omitted], fall well within the range of sanctionable conduct under Rule 11. First, Frost moved to amend the complaint to add a count against defendant Lederhandler for perjury and/or false swearing. In support of this motion, signed by Frost, dated November 21, 1990 and filed December 6, 1990, Frost filed an affidavit barren of law and facts to support his precedent making motion. In sum, Frost filed a motion asking this Court to overrule existing New Jersey law [FN4] yet failed to cite even one case in support thereof. Before filing opposition papers, defense counsel wrote Frost a letter stating that there is no civil cause of action for perjury and/or false swearing under New Jersey law and gave Frost the opportunity to withdraw the application. Frost did not respond. As a result, defendants filed their brief in opposition to the motion, detailing New Jersey's clear position that there is no civil cause of action for perjury. Seven days *after* the motion was to be heard, Frost filed a brief in support of his motion, and for the first time, gave this Court any case law on the subject — of course, all of it being out of state law.

FN4. Under New Jersey law, there is no private cause of action for perjury and/or false swearing. *Kantor v. Kessler*, 132 N.J.L. 336, 40 A.2d 607 (1945); *Harmon v. Holmes*, 712 F.Supp. 451 (D.N.J. 1989), *N.J.S.A. 2C:28-1*.

....

Frost signed the December 6, 1990, motion to amend, but failed to make a reasonable inquiry into existing case law. Frost admitted at oral argument that he failed to follow the strictures of Rule 11. After being instructed by this Court that New Jersey does not recognize a cause of action for civil perjury, and stating to Frost that the standard for judging a motion to amend is *Fed.R.Civ.P.* 12(b)(6), Frost responded "[I]et me tell you what happened. What happened, I did not know there was a New Jersey law against it when I filed the complaint." See March 22, 1991 transcript, at p. 15. Frost quite clearly didn't *stop*, for he filed a frivolous motion; he certainly didn't *look*, for he failed to do any research and failed to cite any case law on the subject; and he didn't *listen*, for he was given the opportunity by defense counsel to withdraw the motion after being advised by letter and citation to the appropriate cases, that New Jersey does not recognize a civil cause of action for perjury but he failed to pay heed. See *Lieb*, 788 F.2d at 157.

Additionally, courts have held that Rule 11 sanctions are appropriate when a moving party shifts the burden of research to the party opposing the motion. See *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986). This is exactly what Frost did. By filing the motion to amend without any case law, Frost waited to see what the defendants turned up before spending the time to do his own research. This form of motion practice cannot be tolerated.

....

Certainly, Frost's derelictions, were not the result of reliance on his client since it involved a purely legal question, and that legal issue could have been easily gleaned from a quick preview of this State's law--it did not require painstaking delving or research to discern the state of the law. After taking into consideration all of the mitigating factors, the Court concludes that both monetary sanctions and compulsory legal education will best deter Frost from exploiting the federal court system in the future. Defense counsel shall submit an affidavit detailing the fees and costs involved in having to respond to Frost's motion to amend. With this amount as a guidepost, the Court will come up with a reasonable, yet effective, monetary sanction, keeping in mind that Rule 11 should not be viewed as a fee shifting device. Additionally, this Court finds that Frost would reap great benefit by attending four seminars given by the Institute for Continuing Legal Education. See *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988); *United States v. Alexander*, 771 F.Supp. 830 (S.D.Tex. 1991) (Lexis, Genfed library, Dist. file); *Prentiss Smith v. Our Lady of the Lake Hospital, Inc.*, 135 F.R.D. 139 (M.D.La. 1991) (Lexis, Genfed library, Dist. file). One of the seminars must relate to law office management. [FN5] Another seminar must deal with some aspect of the Federal Rules of Civil Procedure, while the other two seminars must relate to federal court practice in general. Frost will have 18 months to complete the four legal seminars.

Oxfurth v. Siemens A.G., 142 F.R.D. 424, 427-28 (D.N.J. 1991), *appeal denied*, 1992 WL 104925 (D.N.J. 1992).

Massey v. Prince George's County

Massey is an exceptionally important, and somewhat complicated, case involving *inadequate* legal research. Plaintiff filed a Complaint in U.S. District Court in Maryland, alleging civil rights violation under 42 U.S.C. § 1983 for alleged excessive force by police dogs. The County's attorney moved for summary judgment. Plaintiff's attorney cited only one case to the court, and that one case was from the Sixth Circuit, which was not binding precedent on the court in Maryland, which is in the Fourth Circuit. The judge granted the County's Motion for Summary Judgment. One issue remained and the judge invited the attorneys to submit Briefs on that one issue.

To the surprise of everyone, Plaintiff's attorney then cited *Kopf v. Wing*, 942 F.2d 265 (4th Cir. 1991) to the court for the first time. Realizing that *Kopf v. Wing* was not only binding precedent but also favorable to the Plaintiff, the judge *sua sponte* reversed his earlier decision granting summary judgment to the County. The judge mildly rebuked Plaintiff's attorney, but the judge was much more concerned about the shortcomings of the County's attorney:

But the fact that *Kopf* has been cited for the first time by Plaintiff's counsel in a supplemental letter — well after the filing of his threadbare initial response to Defendants' Motion for Summary Judgment and his equally scant oral argument on the motion — is a cause for considerable concern. At the same time, the fact that this case has never been cited by defense counsel in his initial pleadings, in oral argument or indeed to this day, gives cause for even greater concern.

....

The parallels between *Kopf* and the case at bar are striking and need little elaboration. The Court accepts without question that, on the authority of *Kopf*, Plaintiff ought to have prevailed as against Defendants' Motion for Summary Judgment. Notwithstanding this, neither Plaintiff's nor Defendants' counsel brought the case to the Court's attention even through oral argument. Thereafter, only Plaintiff's counsel, never defense counsel, cited the case, and then only because the Court had directed briefing on another point of law.

One must assume that had Plaintiff's counsel, in preparing his initial Opposition to the Motion for Summary Judgment, exhibited the same degree of diligence that ultimately permitted him to locate the case in untimely fashion, he could have located the case in timely fashion. Instead, counsel offered only the sketchiest statement of grounds, reflecting a bare minimum of legal research, showing every sign of having been dictated on the run.

Massey v. Prince George's County, 907 F.Supp. 138, 141-142 (D.Md. 1995).

The judge then remarked on the requirement to do legal research:

Counsel appears to have forgotten two of the most fundamental rules of professional conduct. [FN4] First, Rule of Professional Conduct 1.1 provides that:

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

FN4. This Court applies the Rules of Professional Conduct as adopted by the Maryland Court of Appeals. See Local Rule 704.

As a basic treatise has observed, "to provide competent representation, a lawyer must be able to research the law.", *Jacobstein and Mersky, Fundamentals of Legal Research* (5th ed.), p. 13. The Supreme Court of California in *Smith v. Lewis*, 13 Cal.3d 349, 530 P.2d 589, 118 Cal.Rptr. 621 (1975), expanded upon this obligation:

An attorney ... is expected ... 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 which, although not commonly known, may readily be found by standard research techniques.
13 Cal.3d at 358, 118 Cal.Rptr. 621, 530 P.2d 589.

The other Rule of Professional Conduct counsel has apparently misplaced is Rule 1.3 which holds that "[a] lawyer shall act with reasonable diligence and promptness in representing a client". Failure to pursue applicable legal authority in timely fashion may well constitute a violation of this rule. See *Hazard & Hodes, The Law of Lawyering*, Section 1.1:102.

Massey v. Prince George's County, 907 F.Supp. at 142.

These concerns about "competent representation" in Rule 1.1 apply to *both* Plaintiff's attorney *and* the County's attorney, while any concerns about Rule 3.3(a)(3) apply only to the County's attorney, because the holding in *Kopf* is adverse only to the County. Note that judge was much more concerned about the failure of the County's attorney to disclose adverse precedent, than concerned about the poor representation by Plaintiff's attorney (i.e., initially citing only one case and missing the controlling case in the jurisdiction until it was almost too late to save his client's case). The judge then ordered the County's attorney to show cause why he should not be sanctioned.

After the County's attorney filed his response, the judge noted that Prince George's County was the defendant in both *Kopf* and the case at bar, which suggests that the County's attorney should have been aware of *Kopf*. The County's attorney claimed that *Kopf* was factually distinguishable from the case at bar. The court disagreed, saying that *Kopf* was relevant to the case at bar, and then observed:

But Respondents' position is flawed in a more fundamental sense. Even if one assumes for the sake of argument that *Kopf* could be factually distinguished from the case at bar, there is always the possibility that a judge might disagree, that despite Respondents' view he might ultimately find the omitted case on point and directly adverse to their position. Respondents thus undertake a bold and risky gambit. They rely on their mere ipse dixit that the case is distinguishable and therefore unnecessary to call to the Court's attention. But careful lawyering demands greater sensitivity. In this district, whenever a case from the Fourth Circuit comes anywhere close to being relevant to a disputed issue, the better part of wisdom is to cite it and attempt to distinguish it. The matter will then be left for the judge to decide. While Respondents may still in time be judged unsuccessful in their attempt to distinguish the case, they will never be judged ethically omissive for failing to cite it. [footnote condensed here

that gives an additional reason: cites Charles W. Wolfram, *Modern Legal Ethics*, § 12.8 (1986) as saying: "full revelation of adverse authorities, together with arguments distinguishing or criticizing them" is "effective advocacy", because it "both takes the wind from an opponent's sails and instills judicial trust in the quality and completeness of presentation."]

Massey v. Prince George's County, 918 F.Supp. 905, 908 (D.Md. 1996).

The County's attorney also alleged, by way of defending himself, that he did not know about *Kopf*; "possibly because he joined the County Attorney's Office more than a year after the decision was issued." Furthermore, the county's attorney in *Kopf* "did not actually participate in the present case." *Id.* at 906-07. The court rejected this "did not know" defense:

The Court turns to Respondents' further answer to its Show Cause Order, namely that the Assistant County Attorney who filed the Motion for Summary Judgment in this case did not know about the *Kopf* case. That, of course, may well be true, but the question is, ought he to have known? As with Plaintiff's counsel in these proceedings, defense counsel had an obligation under Rule of Professional Conduct 1.1 to provide "competent representation," which includes an ability to research the law. Similarly, Rule 1.3 requires that "a lawyer shall act with reasonable diligence and promptness in representing a client," which includes pursuing applicable legal authority in timely fashion. Case reports are available in hard cover and on-line from computers. [FN4]

FN4. The Natural Language search method on Westlaw allows one to enter a string of concepts that describes one's research issue. Westlaw then retrieves the documents that have the highest likelihood of matching the concepts in the description. Westlaw ranks the documents in descending order as to how often the search terms occur in close proximity to one another. As of March 1, 1996, a search in the Fourth Circuit database with the concepts "EXCESSIVE FORCE POLICE DOG BITE" reveals that the two most frequently referenced cases are (1) *Kopf v. Skyrn*, 993 F.2d 374 (4th Cir. 1993), which is the appeal after remand of *Kopf v. Wing*, 942 F.2d 265 (4th Cir. 1991), and (2) *Kopf v. Wing* itself.

Respondents' further suggestion that more senior County Attorneys were not involved in the *Kopf* case (despite the presence of their names on the brief) or were not actively involved in the present case provides no justification at all. Attorneys who affix their names to a brief have an obligation to know what it is that they are signing. *See* Fed.R.Civ.P. 11(b)(1) (signature of attorney on pleading certifies, after reasonable inquiry, that defense is warranted by existing law). Moreover, Senior County Attorneys ought to be supervising the pleadings of more junior assistants. At the same time, in areas of law such as police excessive force cases in which governmental entities (including Prince George's County) are involved on a recurrent basis, a corpus of applicable law ought to be assembled and made available to all members of the County Attorney's Office at all times. It should never happen that an excessive force case in which Prince George's County itself was a defendant, which went to the Fourth Circuit and is carried in the Federal Reporter, is not pervasively known throughout the County Attorney's Office.

Thus, while it may be true that one Assistant County Attorney did not know about the *Kopf* case and others more senior did not know that attorney did not know, that is not the end of the matter. Individual attorneys may not merit sanctions, but it is clear that the Office of the Prince George's County Attorney overall needs to look to its internal organization. At a minimum, tighter oversight of each attorney's court filings is called for. The Office of

the County Attorney would do well to see that the sort of omission that occurred here does not occur again.

Massey, 918 F.Supp. at 908-909.

In addition to this rebuke of the Prince George's County Attorneys in these two opinions published in the Federal Supplement, the judge wrote to each of the federal or state judges that had decided a police dog bite case from that County, mentioned the County's failure to cite *Kopf*, and let each judge decide whether to reopen the case. *Id.* at 909.

In passing, note that the *inadequate* legal research by attorneys caused the judge to make the wrong decision initially. It is the responsibility of each party to inform the judge of the current law, and — as explained below, beginning at page 53 — judges will *not* do legal research for an attorney or a litigant. How often do judges make wrong decisions based on *inadequate* legal research by a litigant's attorney or by a *pro se* litigant? Apparently, no one knows. One law review article⁴ cites one other case in which a trial court made the wrong decision: *Sarvold v. Dodson*, 237 N.W.2d 447, 449 (Iowa 1976) ("In fairness to the trial court we must note inadequate briefing by plaintiff's counsel contributed to the erroneous ruling.").

Disantis

A federal district court in Pennsylvania in 1996 noted that Plaintiff's attorney cited two cases, *Nayerahamadi* and *Wheeler*, that were no longer good law. Those two cases had been rejected in *Fisher*, a case from the year 1992.

Plaintiffs' counsel's failure to note that *Fisher* rejected those cases cannot be considered an oversight because he cited *Fisher* earlier in his brief. If counsel had simply "Instacited" *Nayerahamadi* and *Wheeler* on Westlaw, he would have learned that *Fisher* "declined to follow" both those cases. Shepardizing these cases the old-fashioned way (*i.e.*, with books) would have revealed the same thing. We must therefore conclude that counsel's disregard of the Rules of Professional Conduct, was an attempt to mislead the Court. See Rule 3.3(a)(3) ("A lawyer shall not knowingly ... 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;").

Disantis v. Allstate Ins. Co., 1996 WL 195387, n. 10 (E.D.Pa. 1996).

The judge apparently did not sanction Plaintiff's attorney.

⁴ Judith D. Fischer, "Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers," 31 Suffolk Univ. Law Rev. 1, 12, n. 83 (1997).

Crumpton

Ellsa J. Moran, the attorney for the defendant, Crumpton, in a criminal trial in U.S. District Court in Denver cited two cases, *Singleton*⁵ and *Lowery*,⁶ in a Motion. However, the controlling legal authority in Colorado was a recent decision in *Dunlap*,⁷ which was not cited in the Motion filed by Moran on 2 Oct 1998.

The motion before me was filed almost two months after Chief Judge Matsch's decision and raises issues identical to those considered in *Dunlap*. In the motion, counsel for Defendant Crumpton makes absolutely no reference to Chief Judge Matsch's decision, which is contrary to the *Singleton* and *Lowery* decisions. D.C. Colo. L.R. 83.6, entitled "Attorney Discipline," adopts as standards of professional responsibility in this Court the Colorado Rules of Professional Conduct. Rule 3.3(a)(3) of the Colorado Rules of Professional Conduct provides that, "[a] lawyer shall not knowingly ... (3) 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." Colo. R. Prof. Conduct 3.3. Since Defendant Crumpton's motion failed to disclose Chief Judge Matsch's decision and there has been no response filed by the Government that disclosed the decision, I conclude that Crumpton's counsel's conduct violates Rule 3.3. Further, I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice.

U.S. v. Crumpton, 23 F.Supp.2d 1218, 1219 (D.Colo. 1998).

Note that this opinion does *not* show that Moran actually *knew* of Judge Matsch's decision in *Dunlap*, less than two months before Moran filed her Motion.

Crumpton expects attorneys to be aware of cases decided only two months ago, which means that attorneys can no longer rely on printed versions of legal encyclopedias, American Law Reports (ALR), and annotated statutes with their *annual* updates via pocket part. *Crumpton* effectively demands that attorneys use online databases, such as Westlaw or Lexis, that are updated daily.

⁵ *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1 July 1998), vacated by the U.S. Court of Appeals on 10 July 1998, in anticipation of their subsequent *en banc* hearing in January 1999.

⁶ *U.S. v. Lowery*, 15 F.Supp.2d 1348 (S.D.Fla. 4 Aug 1998).

⁷ *U.S. v. Dunlap*, 17 F.Supp.2d 1183 (D.Colo. 12 Aug 1998).

Roeder

A federal district court dismissed a case because the Complaint failed to state a claim upon which this Court can grant relief.

Having resolved the controversy presented by this remarkable case, this Court would be remiss not to address what the Court believes are the problematic actions of plaintiffs' counsel throughout this case. While this Court is not inclined to impose sanctions, the applicability of Rule 11 of the Federal Rules of Civil Procedure warrants some discussion. It is not in spite of, but out of respect and concern for the class of plaintiffs in this case that this Court feels it necessary to comment on the repeated ethical failures by class counsel.

Unlike other professions, in the practice of law basic competence and ethical obligations are enforceable and intertwined. Every time an attorney files a document in federal court, she must certify to the Court that the legal arguments contained therein, "to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances* ... 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." Fed.R.Civ.P. 11 (emphasis added). In addition, attorneys practicing in this Court have a corresponding ethical obligation, according to the Rules of Professional Responsibility, to disclose to the Court any and all adverse controlling authority. *See* LCvR⁸ 83.12(b) and LCvR 83.15 (incorporating Rule of Professional Conduct 3.3(a)(3)). [omitted footnote quoting the rule] What these requirements mean in practice is that ignorance is no excuse for an attorney. An attorney can not carry out the practice of law like an ostrich with her head in the sand, ignoring her duty to research and acknowledge adverse precedent and law. Attorneys are not free to assert any and all legal arguments they wish on behalf of their clients, without regard to existing precedent.

Indeed, this requirement serves not only to protect the Court but also to protect the attorney's clients. The plaintiffs in this case, like every other case conducted by an attorney admitted as a member of the Bar of this Court, deserve counsel who will fulfill their ethical obligations and argue passionately and persuasively for their client as possible without making frivolous arguments that lack a basis in law. Such arguments are a waste of the Court's time and the client's time as well.

Plaintiffs' counsel in this case repeatedly presented meritless arguments to this Court, repeatedly failed to substantiate their arguments by reference to any supporting authority, and repeatedly failed to bring to the Court's attention the existence of controlling authority that conflicted with those arguments. The Court will not belabor this point beyond the specific discussion of plaintiffs' arguments in this Opinion. [five specific instances of attorney's misconduct omitted here]

Roeder v. Islamic Republic of Iran, 195 F.Supp.2d 140, 184-185 (D.D.C. 2002).

⁸ "LCvR" appears to be an abbreviation for "Local Civil Procedure Rule".

Schoofield v. Barnhart

A federal court in Maryland rebuked the government's attorneys in a case involving the government's denial of Social Security benefits to a disabled person:

The Commissioner's Memorandum was particularly unhelpful in deciding this issue. She cites *Moon v. Sullivan*, 923 F.2d 1175 (6th Cir. 1990), ignoring the existence of contrary controlling authority on the issue, *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). See, Defendant's Memorandum, p. 12. While an attorney ethically may cite to contrary authority in an effort to persuade a Court to change its previously stated rulings, it is a violation of Rule 3.3(a)(3) of the Rules of Professional Conduct knowingly to ignore controlling precedent, citing only to authority from another jurisdiction. To ignore, as the Commissioner did here, clear controlling authority from this Circuit in favor of contrary authority from elsewhere is evidence either of sloppy research, or, if knowing, a lack of candor to the Court. Neither reflects favorably on the Commissioner. Counsel for the Commissioner should cite first to authority from the Fourth Circuit and this District or, if resorting to authority from other jurisdictions, clearly explain whether it is consistent with or contrary to controlling authority binding on this Court.

Schoofield v. Barnhart, 220 F.Supp.2d 512, 522, n. 10 (D.Md. 2002).

Baldayaque

A recent case in the U.S. Court of Appeals for the Second Circuit mentioned several instances of misconduct by Burton Weinstein, an attorney for a criminal, Baldayaque, who was in prison.

Weinstein had reviewed Baldayaque's sentencing transcript, but he had not done any legal research. At the meeting, Weinstein told Rivera and Marquez it was too late to file a [petition for habeas corpus relief under 28 U.S.C. §] 2255. In fact, at the time of this meeting, Baldayaque still had nearly fourteen months remaining within which he could file a timely petition.

Baldayaque v. U.S., 338 F.3d 145, 148-49 (2nd Cir. 2003).

Weinstein did no legal research on Baldayaque's case. Weinstein failed to comply with Rule 1.1 of the Connecticut Rules of Professional Conduct, which requires a lawyer to "provide competent representation to a client, [which] requires the legal knowledge, skill, *thoroughness* and *preparation* reasonably necessary for the representation." (emphasis added). Had Weinstein made a cursory review of the law, he would have discovered that it was not "too late" to file a section 2255 petition when he met with Rivera and Marquez in 1997; in fact, he would have discovered that he had until May 1998 to file such a petition within the limitations period.

Baldayaque v. U.S., 338 F.3d at 152.

B. state courts
must note dissenting opinion

I have found a few cases that mention in passing that an attorney cited a dissenting opinion, without explicitly noting that it was a dissenting opinion. Such an omission, if uncorrected, could mislead the judge about the controlling law.

In a 1986 case in Nevada, the attorney for Appellee Capital Management Consultants (CMC) misrepresented stipulated facts and also quoted a dissenting opinion as if it were the majority opinion.

CMC also quotes language from *Frederick Gash, Inc. v. Mayo Clinic*, 461 F.2d 1395 (C.C.P.A. 1972), as though it were the holding of the case, when in fact the language comes from the dissent. While vigorous advocacy of a client's cause is expected and encouraged, these representations transcend the outer limits of zeal and become statements of guile and delusion. In light of CMC's disregard of the rules and professional standards established by this court, we have determined that the imposition of sanctions on respondents is warranted. See NRAP 38(b). Accordingly, CMC shall pay the sum of \$5,000.00 to the Clark County Law Library Contribution Fund within thirty (30) days from the date of the issuance of this opinion, and shall promptly provide the clerk of this court with proof of such payment. *Sobol v. Capital Management Consultants, Inc.*, 726 P.2d 335, 337 (Nev. 1986).

During an interlocutory appeal in Texas in the year 2000, the appellate court called each appellant's position frivolous.

She argued, however, their alleged conduct was immaterial under the authority of *Wadewitz* and read the language from the opinion which she asserted supported her contention. Later during argument, it was pointed out that what she had cited as authority was actually language from the dissenting opinion. [FN8]

FN8. Counsel forcefully argued that a rule was *binding* on this court when she knew or should have known it was not. In no way did she try to make the court aware the language was from the dissenting opinion until after she was called to task.

....

We find the deputies' conduct constitutes a frivolous appeal for the following reasons: (1) failure to acknowledge and address extensive contradictory proof; (2) failure to adequately brief the issue of good faith; (3) failure to provide sufficient proof on that issue; and (4) counsel's mis-citation of a dissenting opinion as controlling authority. *Bridges v. Robinson*, 20 S.W.3d 104, 116 (Tex.App.-Hous. (14 Dist.) 2000), rehearing overruled (15 Jun 2000). Appellant's attorney was ordered to pay appellees a total of \$400 for this frivolous appeal. *Id.* at 119.

And during disbarment proceedings against attorney Steven M. Kramer, he cited a dissenting opinion as if it were law. The New Jersey Disciplinary Review Board wrote:

Of more interest was respondent's assertion that the Court in *In re Pena*, 164 N.J. 222, 753 A.2d 633 (2000) refused to disbar an attorney. Respondent quoted the following excerpt from the opinion: "It is utterly unfair to base disbarment on allegations not even charged, much less proven." Respondent's contention was wrong for two reasons: first, the Court disbarred Pena; second, the quotation on which respondent relied appeared in the dissent and did not support respondent's proposition that he could not be disciplined for conduct not specifically charged in the complaint. Respondent's reliance on a dissenting opinion, without disclosing that it was not the majority opinion, displayed careless research at best and duplicity at worst.

In re Kramer, 800 A.2d 111, 128 (N.J. 2002).

More about Mr. Kramer's misconduct is described below, beginning at page 36.

must note plurality opinion

A Pennsylvania state appellate court noted that it was a misrepresentation of law to cite a plurality opinion (which is *not* precedent) without also mentioning that it was only a plurality opinion.

Of the three judge panel in *Couts*, one judge wrote the plurality, one judge dissented and one judge concurred in the result. An opinion offered by one member of a three-member panel, with the remaining two judges either dissenting or concurring in the result, is of no precedential value. *Commonwealth v. Hurst*, 367 Pa.Super. 214, 221, 532 A.2d 865, 869 (1987); *Askew by Askew v. Zeller*, 361 Pa.Super. 35, 39- 40, 521 A.2d 459, 462 (1987). Accordingly, we note for the appellant Harris' benefit that *Couts* has no precedential value.

We feel that it is in the best spirit of our Rules of Professional Responsibility for an advocate to clearly label a plurality decision, either by proper citational form or by otherwise appropriately informing us in some other way of its nonbinding status. See *Rules of Professional Responsibility*, 42 Pa.C.S.A., EC 7-22 & 7-23. Candor to the tribunal would seem to require nothing less, as it is of the utmost importance for a correct disposition that the court not be misled about the precedential nature of a decision. Parenthetically, we note that on at least one occasion, a panel of this court treated *Couts v. Ghion* as authority. See *Speicher v. Reda*, 290 Pa.Super. 168, 172, 434 A.2d 183, 185 (1981) (*Couts v. Ghion* deemed, without comment or analysis of its plurality status, as "very much in point"). *Johnson v. Harris*, 615 A.2d 771, 554, n. 3 (Pa.Super. 1992).

preliminary draft

Johnson v. Parol Board

A Pennsylvania state appellate court criticized inadequate legal research as violating Disciplinary Rule DR 6-101(2), which requirement is now in ABA Model Rule 1.1.

While this Court normally exercises great restraint in criticizing the briefs submitted to it in appellate matters, the briefs submitted by counsel for both the Board and the parolee in this case were so deficient and so lacking in relevant factual arguments and citation to relevant and pertinent case law that criticism is warranted. Pennsylvania Code of Professional Responsibility EC 6-1 requires that a lawyer should act with competence and proper care in representing clients and should strive to become and remain proficient in his or her practice. Pennsylvania Code of Professional Responsibility DR 6-101(2) mandates that a lawyer shall not handle a legal matter without preparation adequate in the circumstances. In our view, adequate preparation includes sufficient legal research prior to the preparation of appellate briefs so that the briefs present relevant and pertinent case law applicable to the factual circumstances presented by the appeal. The failure of counsel to do so here does a disservice both to their respective clients and to this Court. We admonish counsel for both the Board and the parolee to bring their performance up to a level which is acceptable under the Pennsylvania Code of Professional Responsibility.

Johnson v. Com., Pennsylvania Bd. of Probation and Parole, 511 A.2d 894, 899, n. 12 (Pa.Cmwlth. 1986).

Robert L. Johnston, Esq.

Johnston, an attorney in Oklahoma, was suspended from the practice of law for four months for misconduct, including making a false statement of fact to a judge. Because Rule 3.3 prohibits equally both misrepresentations of fact and misrepresentations of law, Johnston's case is relevant in this essay on legal research.

While no "bad or evil intent" is shown by the record, Johnston is not relieved of professional responsibility for his false statement to the court. Any charge of "misrepresentation" to a judge or tribunal also carries with it an included or implied count of making a "false statement" in violation of Rule 3.3(a)(1). [footnote omitted]

....

The fact that the judge in this instance did not seem to rely on the statement is also irrelevant. Under Rule 3.3(a)(1), any incorrect statement of law or fact made to a tribunal by a lawyer having actual knowledge of its falsity, no matter how insignificant, is grounds for discipline. The word "material" was intentionally omitted from Rule 3.3. [footnote omitted] Johnston's false statement, albeit on a non-material point, is a violation that warrants disciplinary sanction.

State ex rel. Oklahoma Bar Ass'n v. Johnston, 863 P.2d 1136, 1143-44 (Okla. 1993).

preliminary draft

Robinson v. Philadelphia

A plaintiff sued the city of Philadelphia in tort and the trial judge granted the City's Motion for Summary Judgment. Plaintiff appealed. The appellate court sanctioned Plaintiff's attorney for misleading the trial court by mentioning a case, *Agresta*, that was later overruled in *Gray*.

The City, in response to Robinson's argument based upon the applicability of Section 21-701, suggests that this Court impose sanctions against Robinson for failing to disclose legal authority that is controlling in the case. The City asserts that the issues which Robinson raises were specifically addressed in *Gray* and *Davis*, neither of which were mentioned in Robinson's brief to this Court. The City directs our attention to the fact that Robinson relied on *Agresta v. Gillespie*, 158 Pa.Cmwlth. 230, 631 A.2d 772 (1993) to support its waiver of immunity argument. Shepardizing *Agresta* leads to the discovery that our opinion of *Peak v. Petrovitch*, 161 Pa.Cmwlth. 261, 636 A.2d 1248 (1994), states clearly that *Agresta* was overruled by the Supreme Court in *Gray*.

In our view, Robinson's omission was not mere inadvertence. The City, in its motion for summary judgment, not only cited to *Gray*, but attached a copy of it to the motion. We must conclude that Robinson knowingly failed to disclose to this Court controlling legal authority in contravention of Rule 3.3 of the Rules of Professional Conduct. This Court finds that Robinson's conduct was irritating and frivolous. An appeal is frivolous if there is no likelihood of success and devoid in merit, *Department of Transportation, Bureau of Driver Licensing v. Moran*, 159 Pa.Cmwlth. 655, 634 A.2d 677 (1993), as are arguments which counter well established rules of law. *Murphy v. Murphy*, 410 Pa.Superior Ct. 146, 599 A.2d 647 (1991), *petition for allowance of appeal denied*, 530 Pa. 633, 606 A.2d 902, *cert. denied*, 506 U.S. 868, 113 S.Ct. 196, 121 L.Ed.2d 139 (1992). Therefore, pursuant to Pa. R.A.P. 2744, Robinson is hereby ordered to pay reasonable attorney fees and costs to the City, which will be determined by Judge Herron, the trial judge.
Robinson v. City of Philadelphia, 666 A.2d 1141, 1143 (Pa.Cmwlth. 1995).

Carlyle Shepperson, Esq.

Carlyle Shepperson, an attorney was suspended from the practice of law in Vermont, as a result of his seven-year history of inadequate legal research and writing incomprehensible briefs. The Vermont Bar's Professional Conduct Board reviewed nine legal Briefs by Shepperson that were submitted to the Vermont Supreme Court between 1985 and 1992, held a hearing, and found the following facts:

7. The briefs in question consistently failed to identify the issues or the rules by which the issues should be resolved; made arguments without explanation as to what constituted the legal error; presented no substantiated legal structure to the argument; and devoted large portions of the narrative to philosophical rhetoric.

8. In addition, on a technical basis, the briefs in question contained many citation errors; legal propositions were not often cited at all; citations were so incomplete or inaccurate that identification of the cases was difficult or impossible; cases were inaccurately represented; cases were cited for reasons that were incomprehensible; cases were cited from other

preliminary draft

jurisdictions that were neither binding, persuasive nor relevant. Further, the briefs were so filled with spelling and grammatical errors as to cast a doubt on the credibility of the respondent.

In re: Carlyle Shepperson, Vermont Professional Conduct Board, Final Report and Recommendation to the Supreme Court (6 Jan 1995),

http://dol.state.vt.us/gopher_root4/prof_conduct_bd/84.pcb

The Professional Conduct Board recommended disbarment of Shepperson.

The Vermont Supreme Court summarized the facts and history of this case:

Respondent Carlyle Shepperson appeals the Professional Conduct Board's recommendation that he be disbarred for violating DR 6- 101(A)(1) (lawyer shall not handle legal matter that lawyer is incompetent to handle) and DR 6-101(A)(2) (lawyer shall not handle legal matter without adequate preparation). We suspend respondent indefinitely until he can demonstrate that he is fit to practice law.

In June 1991, a justice of this Court not taking part in this decision filed a complaint with the Board concerning the quality of respondent's legal submissions. In March 1993, the Board and respondent entered into a remedial stipulation in which respondent agreed not to engage in the practice of law while he completed a legal writing tutorial. The stipulation provided that respondent would participate in periodic tutoring sessions to develop skills in legal analysis, persuasive writing techniques, writing organization, and use of legal authority, proper citation form, and proper formatting for memoranda and briefs. At the end of the tutorial program, which was to last for a minimum of six months, respondent was to prepare a ten-page legal writing sample and a self-written evaluation of his progress. Respondent was given until September 1, 1993 to report on his progress with the tutor. On September 15, 1993, respondent wrote bar counsel that he would not be completing the tutorial, and that he had left the United States for an indefinite period of time.

Bar counsel filed a petition of misconduct in June 1994, charging respondent with violating DR 6-101(A)(1) and (2). Respondent filed memoranda with the Board but did not appear for the disciplinary hearing held in December 1994. A majority of the Board adopted the hearing panel's recommendation that respondent be disbarred, with two dissenting members stating that they would suspend respondent indefinitely until he proved he was fit to practice law.

All members of the Board agreed with the hearing panel's findings that between 1985 and 1992 respondent repeatedly submitted legal briefs to this Court that were generally incomprehensible, made arguments without explaining the claimed legal errors, presented no substantiated legal structure to the arguments, and devoted large portions of the narrative to irrelevant philosophical rhetoric. The briefs contained numerous citation errors that made identification of the cases difficult, cited cases for irrelevant or incomprehensible reasons, made legal arguments without citation to authority, and inaccurately represented the law contained in the cited cases. All members of the Board also agreed with the hearing panel's conclusions that (1) respondent's briefs were not competently prepared and fell below the minimum standard for brief-writing expected of a practicing attorney in this state; (2) respondent failed to prepare adequately or give appropriate attention to his legal work; and (3) respondent did not use proper care to safeguard the interests of his clients.

A review of the exhibits in this case supports the Board's findings that respondent disserved his clients by preparing inadequate and incomprehensible legal briefs, in violation of DR 6-101(A)(1) and (2). Respondent's brief in this matter is a further example of the deficiencies noted by the Board. In over ninety pages, respondent fails to raise a legitimate legal issue or cite a single authority in support of his arguments. The gist of his harangue against the legal system is that the Board and this Court have violated his freedoms of speech and religion and limited his ability to think in diverse ways by dictating what is and what is not a proper legal argument. If we were to accept this argument, it would preclude any oversight of attorney competence in representing members of the public. Respondent may represent himself as he pleases, but he cannot be permitted to represent others in a manner that, under reasonable and accepted standards, fails to safeguard his clients' interests. Indeed, the primary purpose of the attorney disciplinary system is to protect the public. *In re Berk*, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991); ABA Standards for Imposing Lawyer Sanctions, Standard 1.1, Commentary (1991).

The only real issue on appeal is whether respondent should be disbarred or suspended indefinitely.

In re Shepperson, 674 A.2d 1273, 1273-1274 (Vt. 1996).

The Vermont Supreme Court suspended Shepperson from the practice of law for at least six months “and until he has demonstrated to the satisfaction of this Court, via motion to the Professional Conduct Board, that he is fit to practice law in this state.”

Shepperson. 674 A.2d. at 1275. My search on 12 March 2005 of the Westlaw databases found no subsequent decisions that mention Carlyle Shepperson.

Richard J. Thonert, Esq.

The Supreme Court of Indiana publicly reprimanded and admonished Thonert, an attorney who failed to cite adverse authority to the court, and also failed to inform his client of the adverse precedent. *In re Thonert*, 733 N.E.2d 932 (Ind. 2000). Thonert was obviously aware of the adverse case, because Thonert had represented the defendant in that case.

Boca Burger

Plaintiff sued a food producer, Boca Burger, for deceptive trade practices in state court in Florida. Boca Burger's attorney attempted to mislead the trial court about two issues: (1) the propriety of a second attorney from the same law firm appearing for Plaintiff, and (2) the validity of an Amended Complaint filed by Plaintiff before Defendant had filed an Answer. The trial judge granted Defendant's Motion to Dismiss. The appellate court reversed the trial court and ordered Boca Burger's attorney to reimburse Plaintiff for his legal fees in both the trial court and appellate court proceedings.

Applying the text of the new statute [regarding ordering counsel to reimburse the prevailing party's attorney's fees where there is a “complete absence of a justiciable issue”] to the conduct of Boca Burger and its attorneys in this case, we think an award of fees is

preliminary draft

authorized. There is no possible view of the law that would support defense counsel's attempt to "suggest" that the appearance of new counsel at the hearing was somehow improper, and their equally unsustainable attempt to "suggest" that the court had any power to disregard the filing of the amended complaint — that the original complaint could now be dismissed even though it had been supplanted by an entirely new and different pleading raising several new theories and alleging additional facts. There is no possible view of the law that would sustain the attempt of defense counsel to lead the trial judge to believe that the legal sufficiency of the original complaint was still at issue, or that the motion to dismiss the original complaint had any application to the amended complaint filed earlier that day. Moreover the conduct of defense counsel cannot possibly turn on any representations of their client or for a good faith modification of existing law.

Forum v. Boca Burger, Inc., 788 So.2d 1055, 1061 (Fla.App. 4 Dist. 2001).

The heart of all legal ethics is in the lawyer's duty of candor to a tribunal. [footnote quotes Florida Bar Regulation 4-3.3(3), which is identical to ABA Model Rule 3.3(a)(3)] It is an exacting duty with an imposing burden. Unlike many provisions of the disciplinary rules, which rely on the court or an opposing lawyer for their invocation, the duty of candor depends on self-regulation; every lawyer must spontaneously disclose contrary authority to a tribunal. It is counter-intuitive, cutting against the lawyer's principal role as an advocate. It also operates most inconveniently — that is, when victory seems within grasp. But it is precisely because of these things that the duty is so necessary.

Although we have an adversary system of justice, it is one founded on the rule of law. Simply because our system is adversarial does not make it unconcerned with outcomes. Might does not make right, at least in the courtroom. We do not accept the notion that outcomes should depend on who is the most powerful, most eloquent, best dressed, most devious and most persistent with the last word — or, for that matter, who is able to misdirect a judge. American civil justice is so designed that established rules of law will be applied and enforced to insure that justice be rightly done. Such a system is surely defective, however, if it is acceptable for lawyers to "suggest" a trial judge into applying a "rule" or a "discretion" that they know — or should know — is contrary to existing law. Even if it hurts the strategy and tactics of a party's counsel, even if it prepares the way for an adverse ruling, even though the adversary has himself failed to cite the correct law, the lawyer is required to disclose law favoring his adversary when the court is obviously under an erroneous impression as to the law's requirements.

We are sorry to say that defense counsel here failed in this duty. Defense counsel plainly attempted to lead the trial judge to a result that plaintiff was needlessly forced to appeal. Defense counsel should have immediately advised the trial judge of the legal rule the instant it became apparent that the judge was acting under a misimpression of impropriety in the presence of additional counsel, or that it would be proper to argue the motion to dismiss the original complaint, a motion that was rendered effectively moot by the filing of the amended pleading.

Much is written about "professionalism" today. It is on the agenda at every lawyer and judicial symposium or continuing education conference, and our professional journals are filled with pleas for greater attention to punctilious conduct in all things. But today's case requires that we pass from exhortation to the resolution of a concrete issue. For the disciplinary rule of candor *is* the instrument of professionalism's demand. If in the circumstances of this case the rule of candor cannot be unflinchingly enforced under this 21st century version of section 57.105, then this freshly cast legislation is a vessel as empty as its predecessor was.

preliminary draft

We therefore confront the statute's new command and award fees from defendant and defense counsel for their conduct in this case both in the trial court and in this court where they have persisted in trying to uphold this patently erroneous decision.

Boca Burger, 788 So.2d at 1062-63.

The Florida Supreme Court allowed the review of *Boca Burger* on 22 March 2002,⁹ but no decision has been issued as of 3 Mar 2005, so the case was probably settled.

Tyler v. Alaska

A state court in Alaska fined an attorney \$250 for failing to disclose the only reported Alaska case with issues similar to the attorney's case.

In his opening brief, Mr. [Eugene B.] Cyrus misstated the facts of the case in a way that masked this court's potential lack of jurisdiction to entertain the appeal. Then, after the true facts were revealed and the jurisdictional problem became known, Mr. Cyrus knowingly failed to cite a decision of the Alaska Supreme Court that was directly adverse to his contention that this court had jurisdiction to decide the appeal.

Tyler v. State, 47 P.3d 1095, 1097 (Alaska App. 2001).

We readily acknowledge that appellate litigation is a contest, not a seminar. The lawyers who appear before us do so as adversaries and advocates. Our adversary system is based on the belief that the fairest results and the best rules of law are discovered through vigorous presentation of opposing viewpoints. But attorneys are officers of the court, and they owe a duty of candor to the court:

Although a lawyer's paramount duty is to pursue the client's interests vigorously, that duty must be met in conjunction with, rather than in opposition to, [the lawyer's] other professional obligations.... Implicit in the lawyer's role as officer of the court is the general duty of candor.

American Bar Association, *Annotated Model Rules of Professional Conduct* (4th ed. 1999) (citation and internal quotation marks omitted), Rule 3.3, "Legal Background", p. 315.

....

When a lawyer practicing before us fails to disclose a decision of the Alaska Supreme Court (or one of our own published decisions) that is directly adverse to the lawyer's position, the lawyer's conduct will, at the very best, merely result in an unneeded expenditure of judicial resources — the time spent by judges or law clerks in tracking down the adverse authority. At worst, we will not find the adverse authority and we will issue a decision that fails to take account of it, leading to confusion in the law and possibly unfair outcomes for the litigants involved. This potential damage is compounded by the fact that our decision, if published, will be binding in future cases. [footnote omitted]

Tyler 47 P.3d at 1108.

Professional Conduct Rule 3.3(a)(3) is based on the notion that "[t]he function of an appellate brief is to assist, not mislead, the court." [citing: *Cicio v. City of New York*, 98 A.D.2d 38, 469 N.Y.S.2d 467, 469 (N.Y.App. 1983).] We endorse the words of the Florida Court of Appeal in *Forum v. Boca Burger, Inc.*, 788 So.2d 1055 (Fla.App. 2001):

Although we have an adversary system of justice, it is one founded on the rule of law. Simply because our system is adversarial does not make it unconcerned with

⁹ *review granted*, 817 So.2d 844 (Fla. 2002).

outcomes.... We do not accept the notion that outcomes should depend on who is ... [most] able to misdirect a judge.

...

Much is written about "professionalism" today. It is on the agenda at every [legal] symposium or continuing education conference, and our professional journals are filled with pleas for greater attention to punctilious conduct in all things. But ... we [must now] pass from exhortation to [action].

Id. at 1062.

Tyler 47 P.3d at 1109.

Incidentally, *Tyler* contains a discussion of the history of predecessors of Rule 3.3(a)(3), back to the year 1908.

5. Sanctions Under Rules of Procedure

A. federal courts

When I took the oath as an attorney practicing before the U.S. Court of Appeals for the First Circuit in January 2001, the judge at the swearing-in ceremony sternly admonished the new members of the bar that the quality of briefs submitted to him was poor, and that attorneys specifically needed to do more legal research. As will be seen from the following quotations from court cases, some practicing attorneys did such a poor job of legal research that the judge took the extraordinary step of rebuking them in a published judicial opinion.

Taylor v. Belger Cartage Service

In May 1984, a federal judge in Missouri ordered plaintiff's attorney to reimburse defendants for a total of \$ 14,737 in legal fees expended in defending against plaintiff's frivolous litigation, which "willfully abused the judicial process". Taylor was an employee of Belger Cartage Service, who was laid off for more than 20 days. When union members with less seniority than Taylor continued to work for Belger, Taylor sued both Belger and his labor union.

Understandably, defendants filed motions for summary judgment based in large part on plaintiff's deposition testimony. Before opposing these motions plaintiff's attorney did not even read both defendants' suggestions in support of the motions for summary judgment. He conducted virtually no legal research in preparing his opposition to the motions. He never Shepardized his principle authority, *Baldini v. Local Union No. 1095*, 581 F.2d 145 (7th Cir. 1978). Counsel explained that he felt there was no need to Shepardize *Baldini* because he was confident it was good law. Had he Shepardized *Baldini*, certainly he would have found that later decisions in the Seventh Circuit had restricted *Baldini* to its facts. [omitted footnote citing two cases before Complaint was filed] Counsel did not identify by reference to the record or by affidavit any dispute of material fact. In fact he stated "Roger Taylor is not required to try his lawsuit on paper. He need not divulge the testimony of all witnesses who will be called at trial." Plaintiff's Opposition to Summary Judgment, p. 2.

In summary, Taylor's counsel recommended filing a lawsuit against these defendants without determining the easily ascertainable standard for assessing whether Local 41 had

fairly represented Taylor in processing his grievance. He recommended filing suit before the events had occurred that he had to assess to determine whether Taylor had a claim. After the arbitration procedure and before the suit was filed, plaintiff's counsel again failed to ascertain the proper legal standard and to analyze what had happened in light of this standard. Instead, he attempted to create, almost out of thin air, rationalizations for filing suit. After filing suit he did nothing to determine whether the facts really supported his view that Local 41 had breached its duty of fair representation. Even after Taylor's deposition confirmed what counsel had known for some time about the union's efforts on Taylor's behalf, he blindly and stubbornly opposed the motions for summary judgment. At no time did he counsel Taylor that he should get out of this case on the best terms possible; at no time did he seek to withdraw rather than pursue the claims against Local 41 and Belger, both of which were dependent on establishing that Local 41 failed to fairly represent Taylor. See *Davidson v. Allis-Chalmers*, 567 F.Supp. 1532 (W.D.Mo. 1983). Rather than analyzing the facts available to him in light of the easily ascertainable and clear legal standard for determining whether plaintiff had been fairly represented, counsel relied primarily on his emotional belief that Taylor should have gotten the job because Taylor was a good union and family man.

By so doing, plaintiff's attorney wilfully abused the judicial process and unreasonably and vexatiously multiplied the proceedings by filing and pursuing this case against Belger and Local 41. This conclusion is reached reluctantly and only after searching diligently for some reasonable basis for concluding that plaintiff's attorney met the liberal threshold standard for initiating litigation. Attorneys must be free to assert less than perfect claims on behalf of clients; attorneys must be free to assert claims where the facts and law are less than certain. Attorneys must be free to utilize discovery processes afforded by the Federal Rules of Civil Procedure to explore and develop facts to support established or reasonable extensions of established legal theories.

Nevertheless, attorneys also must pursue some legal and factual analysis before subjecting a person or company to the disruption of defending a lawsuit in federal court. This analysis involves more than merely agreeing with their client's belief that an injustice has been done. As Elihu Root said " '[a]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.' " *McCandless v. The Great Atlantic and Pacific Tea Co.*, 697 F.2d 198, 202 (7th Cir. 1983). At the very least, trained attorneys who are licensed by the state owe their clients, the judicial system and the public a duty to analyze problems brought to them in light of *easily* ascertainable legal standards and to render detached, unemotional, rational advice on whether a wrong recognized by the law has been done. Attorneys should file and pursue on behalf of their clients only those cases which they reasonably believe are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. See Missouri Supreme Court Rule 4, Disciplinary Rules DR 2-110(C) and DR 7-102(A). This duty has been summarized in the August 1, 1983, amendments to Rule 11, Federal Rules of Civil Procedure.

....

When attorneys lose sight of this duty due to laziness, greed, incompetence, or other distracting motives, the party or parties who directly suffer from the attorney's lapse must be compensated both to make them whole and to remind other lawyers that they must continuously be aware of their professional responsibility.

Taylor v. Belger Cartage Service, Inc., 102 F.R.D. 172, 180-181 (W.D.Mo. 1984).

The judge in this case relied on "the inherent power to tax the prevailing party's legal fees 'against counsel who willfully abuse judicial processes.'" *Taylor*, 102 F.R.D. at 175, quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). Rule 11 of the Federal Rules of Civil Procedure became effective after the misconduct in the *Taylor* case. The District Court's grant of summary judgment to defendants was later affirmed. *Taylor v. Belger Cartage Service, Inc.*, 762 F.2d 665 (8th Cir. 1985).

Smith v. United Transp. Union Local No. 81

In May 1984, a U.S. District Court in San Diego, California used the new Rule 11 to sanction attorneys who apparently failed to do adequate legal research.

Rule 11, as recently amended, requires a court to impose sanctions on attorneys who submit arguments which they know, or after "reasonable inquiry" should know, to be "[un]warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." The rule thus requires attorneys to inquire into the state of the law and the facts before making arguments to the court and to offer only those arguments which are supported by the law or a reasonable argument to change the law.

This minimal standard of practice has not been met by the attorneys representing the defendants in this case. Counsel for the Union and the Transit District raised affirmative defenses previously stricken by this Court without a *single word* of explanation as to why these defenses were now sufficient with respect to the amended complaint. The briefs offered in support of these defenses were copies of those submitted the last time the Court ruled on the matter. In this circumstance, it is hard to avoid the conclusion that these defenses were "interposed for an improper purpose, such as to harass [the plaintiff] or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11.

Furthermore, the arguments advanced by counsel for the Union and the Transit District can hardly be characterized as "warranted by existing law" since they rely, for the most part, on labor law cases wholly inapplicable to § 1983 actions such as the one in issue. The attorneys for the Transit District persisted in their defense of choice of remedies even though the plaintiff supplied them with a copy of *McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984), in which the Supreme Court unanimously laid to rest the notion that a grievance procedure can provide an adequate substitute for adjudicating claims under § 1983. These attorneys thus not only failed to make their own "reasonable inquiry" into the state of the law, they also refused to benefit from the work done by their opponents.

The Court's discussion of the merits of the affirmative defenses reveals the frivolous nature of defendants' attempts to ignore the obviously relevant law in favor of cases and arguments wholly unresponsive to those raised in plaintiff's motion. Furthermore, counsel for the Transit District and the Union based their laches arguments entirely on the *Nilsen* case, which had been vacated and was therefore of absolutely no precedential value. Transposing the numerals in a citation and even citing *obiter dicta* as actual holdings are common errors which the Court overlooks. But what we have here is misrepresentation of legal authority.

Rule 11 no longer requires willfulness as a prerequisite for imposing sanctions. Advisory Committee Note on 1983 Amendment. The gross negligence of defendants' attorneys in this case is ample justification. However, the circumstances strongly suggest that

at least counsel for the Union knew the true nature of the *Nilsen* case. Counsel for the Union cited the original panel decision in *Nilsen* as an *en banc* opinion, which reveals that they knew that there had been an *en banc* decision in that case. Yet they did not favor the Court with a citation to the actual *en banc* opinion, which is in fact reported at 701 F.2d 556, and which vacated the panel decision on which defendants relied. This is more than a merely sloppy failure to "Shepardize" a case. When confronted with the correct citations and holdings in plaintiff's reply brief and by the Court during oral argument, counsel for the Union remained unrepentant and declared the plaintiff's motion for sanctions was "the height of arrogance." Although the behavior of other defense attorneys in this matter has been far from exemplary, the conduct of the Union's attorneys stands out as an appropriate case for the imposition of Rule 11 sanctions.

Rule 11 provides that a proper sanction is the "reasonable expense incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Counsel for the plaintiff has submitted an affidavit detailing a portion of his costs in bringing this second motion to strike, and the Court is satisfied that this sum, with an addition for the appearance in court, will constitute a reasonable penalty.

FOR THE FOREGOING REASONS, IT IS ORDERED that:

- (1) The affirmative defenses of failure to exhaust other remedies, choice of remedies and the statute of limitations will be STRICKEN from the pleadings;
- (2) Counsel for the Union will pay to counsel for the plaintiff the sum of \$1,500.00 as a SANCTION for their conduct in this matter.

Smith v. United Transp. Union Local No. 81, 594 F.Supp. 96, 100-101 (S.D.Cal. 1984).

SEC v. Suter

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit was dismayed at a 2½ page brief for appellant that cited only one case, which case was irrelevant.

Not only are the appeals frivolous but they cap a long course of frivolous filings by Suter in the district court, and we have decided to impose sanctions under Rule 38 of the Federal Rules of Appellate Procedure. In addition, the quality of Suter's two briefs, filed on his behalf by Gordon James Arnett, a member of the bar of this court, falls below minimum professional standards. The argument portion of the brief in the first appeal is two and a half pages long and contains one case citation (*Lowe*) plus long quotations from an article in the *Harvard Business Review* whose relevance to this case we are unable to fathom. The brief in the second appeal contains a longer argument section (four pages), but most of it is taken verbatim from the first brief; again only one case, the irrelevant *Lowe*, is cited; and the arguments as we have seen are frivolous. The briefs raise a serious doubt whether Mr. Arnett is minimally competent to represent persons in this or any other court, and we are therefore sending them together with a copy of this opinion to the Illinois Registration and Disciplinary Commission. We direct the SEC to submit to the clerk of this court, within 15 days, a statement of its expenses reasonably incurred in defending against Suter's two appeals.

S.E.C. v. Suter, 832 F.2d 988, 991 (7th Cir. 1987).

Central Ice Cream

Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit awarded the appellee reimbursement of attorney's fees in defending a frivolous appeal:

The feature that gives pause is the nature of the Rafel-Kamberos brief in response to the trustee's motion to dismiss. The brief did not cite or distinguish *Carbide Cutoff, Michigan-Ohio*, or the other cases bearing on the propriety of separate litigation. Parties who want to distinguish or alter existing law must acknowledge its force; they may not pretend that the law favors their view and impose on the court or their adversaries the burden of legal research to uncover the basic rule. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081-82 (7th Cir. 1987); *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986). In our case, however, the trustee had to make the first move because a notice of appeal does not contain citations. The Rafel-Kamberos brief in opposition to the trustee's motion referred to the governing cases by citing the portion of the trustee's memorandum relying on them, and it proceeded to offer arguments about why the stockholders nonetheless should be allowed to appeal in this case. The district court was entitled to consider this sufficient — if barely — to satisfy Rule 11.

The district court found that a portion of the Rafel-Kamberos brief violated Rule 11 by representing that the bankruptcy court had allowed the shareholders to intervene. Manos does not contest this conclusion, which is beyond serious challenge. Counsel may not present as a fact what counsel thinks should have occurred. *In re Kelly*, 808 F.2d 549 (7th Cir. 1986); *In re Curl*, 803 F.2d 1004 (9th Cir. 1986). The misrepresentations occupied about ten pages of the brief in opposition to the trustee's motion to dismiss. The district court also found that Manos's motion for sanctions violated Rule 11; again Manos does not defend his motion. *Matter of Central Ice Cream Co.*, 836 F.2d 1068, 1073 (7th Cir. 1987).

The attorneys' fees reasonably necessary to puncture ten pages of transparently incorrect assertions in the motion in opposition, and to respond to a featherweight motion for sanctions, cannot exceed \$10,000 and probably are lower — unless the limit to "reasonable" fees be abandoned. Manos's costs in responding to the request for \$172,000 — costs that include the hiring of Jenner & Block as outside counsel, which must have required a thorough review of the trustee's voluminous documentation — must have been in the same range. It is inappropriate to subject the parties and the district court to the costs of a remand, when the outcome of that remand is foreordained.

....

We award attorneys' fees as damages under Rule 38 in No. 86-2116. The trustee has 14 days to submit an itemized, and fully explained, statement of the attorneys' fees reasonably incurred in defending that appeal.

Matter of Central Ice Cream Co., 836 F.2d at 1074-76.

Steven M. Kramer, Esq.

Mr. Kramer represented a plaintiff in civil rights litigation. Defendants filed a motion to dismiss.

One month after it was due, Mr. Kramer filed plaintiff's memorandum in opposition to the motion to dismiss. [A copy of plaintiff's memorandum is attached as Appendix A to this opinion]. This memorandum, consisting of less than two pages, addressed none of defendants' contentions concerning the untimeliness of plaintiff's Title VII claims; nor did it rebut defendants' contention that the Fourteenth Amendment claims should be dismissed for lack of state action. Instead, plaintiff's counsel chose to address but one issue: that of the Thirteenth Amendment. Argued Mr. Kramer: "[i]t has long been established that a victim of racial discrimination has a claim under the Thirteenth Amendment...." Plaintiff's Memorandum re motion to dismiss. In support of this "long-established" proposition, he cited one case, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) — an opinion of the Supreme Court which stands for the inapposite proposition that a plaintiff may pursue Title VII claims simultaneously with independent claims under the Civil Rights Act of 1866, 42 U.S.C. 1981. [footnote omitted]

Matthews v. Freedman, 128 F.R.D. 194, 196 (E.D.Pa. 1989); *aff'd without opinion, sub nom. Appeal of Kramer*, 919 F.2d 135 (3rd Cir. 1990).

After the judge dismissed plaintiff's claims, the defendants filed for sanctions under FRCP 11.

At bar, plaintiff's counsel has now pressed the Thirteenth Amendment claim on this court in two separate briefs, and he has yet to offer a single authority which supports his position. Rather than offer any supporting authorities of his own, Mr. Kramer, like a broken record, simply persists in repeating his assertion that the validity of plaintiff's independent cause of action for racial discrimination and harassment under the Thirteenth Amendment "is not at all free from doubt." Brief in Opposition to Award of Counsel Fees. However, had counsel conducted even the most fleeting review of Thirteenth Amendment caselaw, he would have soon discovered an unbroken line of cases to the contrary. [footnote citing more than twenty cases omitted] Although this line of cases contains no controlling decisions by the Court of Appeals for this circuit, the sheer volume of uniformly contrary decisions from other courts, as well as dictum from leading Supreme Court opinions, constituted more than adequate authority to put plaintiff's counsel on notice that his Thirteenth Amendment assertions were not well grounded in law and that sanctions would be in order unless counsel bolstered his assertions with at least a modicum of argument for extension, modification, or reversal of existing law. See *Lieb v. Topstone Indus., Inc.*, 788 F.2d at 157 (to meet reasonable-inquiry-into-existing-law requirement of Rule 11, counsel must conduct a "competent level of legal research to support [his argument]"); *Doering v. Union County Board*, 857 F.2d at 195; *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d at 94; cf. *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987) (reversing district court's refusal to impose Rule 11 sanctions where "weight of existing law overwhelmingly favored defendants" and where record was "devoid of any factual or legal investigation conducted by plaintiff's counsel ... to formulate a [good faith] argument [for reversal of existing law]"); see also *Sanders v. A.J. Canfield Co.*, 635 F.Supp. 85, 87-88 (N.D.Ill. 1986) (imposing Rule 11 sanctions where plaintiff's attorney brought frivolous Thirteenth Amendment claim in an employment discrimination case).

preliminary draft

The record, therefore, leads me to conclude that Mr. Kramer failed to make a reasonable inquiry into any of his client's federal claims before filing the complaint. Mr. Kramer's actions in the course of this suit were not, however, limited to filing the complaint, and I find that Mr. Kramer committed two additional violations of Rule 11 when he filed his briefs in Opposition to Defendants' Motion to Dismiss and in Opposition to Defendants' Motion for Attorney's Fees. In both of these briefs, attorney Kramer propounded a Thirteenth Amendment claim without making any attempt to support this claim with an argument for modification, extension, or reversal of existing law. When attorney Kramer filed the first of these two papers, he was in receipt of defendants' brief, which included citations to two relevant Thirteenth Amendment opinions; by this time, Kramer's conduct in filing additional papers in pursuit of this suit could no longer be attributed to good faith errors in judgment or legal research. Either he deliberately refused to conduct relevant legal research before he filed these briefs, or he filed them knowing that they contained frivolous legal assertions. In either case, he was guilty of bad faith.

Matthews v. Freedman, 128 F.R.D. 194, 201-202 (E.D.Pa. 1989); *aff'd without opinion, sub nom. Appeal of Kramer*, 919 F.2d 135 (3rd Cir. 1990).

The judge in the trial court noted that Mr. Kramer had been previously sanctioned by other judges for violations of the Federal Rules of Civil Procedure:

Review of public court orders and opinions reveals that attorney Kramer, individually or jointly with his clients, has been sanctioned on numerous occasions for violations of the Federal Rules, including Rule 11. *See Rubin v. Buckman*, 727 F.2d 71, 72-73 (3d Cir. 1984) (affirming district court finding by Fullam, J., that plaintiff's attorney, Steven Kramer, had committed "a flagrant violation" of Rule 11); *Flip Side Productions, Inc. v. JAM Productions, Ltd.*, 843 F.2d 1024 (7th Cir. 1988) (affirming award of Rule 11 sanctions where attorney Kramer offered "no theory or evidence" in support of frivolous contract claim); *Schwartz v. Hospital of the University of Pennsylvania*, C.A. No. 88-4865, slip opinion, 1989 WL 64286, U.S. Dist. LEXIS 6645 (E.D.Pa., June 12, 1989) ("[t]his court concludes that plaintiffs' counsel, Mr. Kramer ... acted in bad faith") (J.M. Kelly, J.); *Seiffert v. Green*, C.A. No. 81-1956, slip opinion, 1987 WL 26670, U.S. Dist. LEXIS 11594 (E.D.Pa., Dec. 8, 1987) (sanctioning attorney Kramer under Fed.R.Civ.P. 37 for failure to comply with discovery requests and a court order); *Caplan v. Fairchild Publications Corp.*, C.A. No. 84-6039, slip opinion, 1986 WL 10782 [available on LEXIS] (E.D.Pa., Sept. 30, 1986) (dismissing complaint under Fed.R.Civ.P. 37 where plaintiff and his counsel, attorney Kramer, repeatedly failed to comply with court's discovery orders) (Lord, J.); *see also Kravinsky v. Wolk*, C.A. No. 86-4820, slip opinion, 1988 WL 84748, U.S. Dist. LEXIS 9134 (E.D.Pa., August 11, 1988) ("[Attorney Kramer's] failure to comply with orders and rules of this court would fully justify imposing sanctions") (VanArtsdalen, J.).

Matthews v. Freedman, 128 F.R.D. at 203.

The judge reprimanded Mr. Kramer and reported him to the "Disciplinary Board of the Supreme Court of Pennsylvania for possible further disciplinary proceedings". *Id.* at 204. The judge also ordered Mr. Kramer to reimburse the opposing party \$9404 for their legal fees to respond to Mr. Kramer's frivolous litigation. *Id.* at 207-208.

See also *Kramer v. Tribe*, 156 F.R.D. 96, 104-108 (D.N.J. 1994) (summarizing “36 publicly reported instances of violating rules of professional conduct” by Mr. Kramer), *aff’d without opinion*, 52 F.3d 315 (3rd Cir. 1995), *cert. den.*, 516 U.S. 907 (1995).

In 1997, Mr. Kramer was suspended for six months from the practice of law in New Jersey, then failed “to comply with the reinstatement rule in numerous respects”, and was permanently disbarred in New Jersey on 25 June 2002, for reasons other than inadequate legal research. *In re Kramer*, 800 A.2d 111 (N.J. 2002); *In re Kramer*, 691 A.2d 816 (1997). During the disciplinary proceeding, Kramer cited a dissenting opinion without noting that it was a dissenting opinion, as noted above in this essay at page 24.

Mr. Kramer was also disbarred in New York. *Matter of Kramer*, 677 N.Y.S.2d 576 (N.Y.A.D. 1 Dept. 24 Sep 1998), *leave to appeal denied*, 711 N.E.2d 639, 689 N.Y.S.2d 425 (N.Y. 1999), *cert. den.*, 528 U.S. 869 (1999).

Spangler

A Federal District Court in Indiana wrote in 1990:

The mere denial of defendants' motion to strike plaintiffs' claim for punitive damages, however, is insufficient in light of the egregious conduct of defendants' counsel in briefing this issue. Not only is it quite clear that defendants did not have a meritorious argument that all references to punitive damages should be stricken, but defendants' counsel's briefing was clearly inadequate regarding the controlling precedents on this issue.

This court intends to express no opinion concerning whether defense counsel's performance was intentionally deceptive or grossly negligent and in heedless disregard of the appropriate conduct of a member of the bar; however, this was not a case where the applicable law was difficult to uncover. By merely researching the citations to his own cases defendants' counsel would have located the controlling Indiana Supreme Court cases, all of which were decided more than two years before defendants' motion to dismiss was filed.

Rule 3.3 of the Rules of Professional Conduct as adopted in Indiana requires a lawyer "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." Rule of Prof.Cond. 3.3(a)(3). This duty continues to the conclusion of the case. Rule of Prof.Cond. 3.3(b). Defendants' counsel's failure to locate controlling authority and bring it to the attention of this court and his intransigence in adhering to his incorrect legal opinion in the face of contrary controlling authority could lead this court to conclude that defendants' counsel was less than diligent in the effort he made to adhere to the Rules of Professional Conduct.

Defendants' counsel's representations regarding "the correct rule of Indiana law" were clearly erroneous and have remained unchanged throughout the briefing in this case despite plaintiffs' citation of contrary controlling authority. Furthermore, defendants' citation of the *Bud Wolf* case in defendants' reply brief indicates that counsel read a decision of the Indiana Supreme Court which flatly contradicted counsel's representations to this court concerning the state of Indiana law. Counsel had ample opportunity to correct any research deficiencies that

may have manifested themselves in defendants' initial brief; indeed, he was led to the correct rule of law by plaintiffs' counsel. Instead, however, counsel looked the other way and made statements that, depending on counsel's actual knowledge, bordered on misrepresentation.

The gross negligence or willful misrepresentations of defendants' counsel were not harmless. This court is concerned about whether defendants' counsel has thwarted plaintiffs' entitlement to have their claims heard in a timely fashion [footnote omitted], wasted the time of this court and imposed needless effort and expense upon plaintiffs and plaintiffs' counsel. [FN15] Moreover, this court questions whether the conduct of defendants' counsel was below that reasonably to be expected of members of the bar and whether defendants' motion to strike the request for punitive damages from plaintiffs' complaint was based upon a "belief formed after reasonable inquiry" as required by Federal Rule of Civil Procedure 11. Nevertheless, this court sees no benefit in reaching conclusions on these issues while the merits of the underlying litigation are still at issue.

[FN15] In addition to defendants' counsel's misleading briefing on the punitive damages issues, the detriment to plaintiffs and this court has been exacerbated by counsel's other failures including his imprecise briefing of the open and obvious danger rule, *see supra* at p. 1443, and his failure to withdraw motions to dismiss that were rendered non-meritorious by recent Indiana Supreme Court precedents. *See supra* at p. 1444 n. 11

Accordingly, this court reserves its decision as to whether sanctions under Rule 11 should be imposed against counsel for the defendants until this case has been concluded. [footnote omitted] Counsel will have the opportunity to address this question, as well as the type and amount of sanctions, if any, before this court will set sanctions. *Spangler v. Sears, Roebuck and Co.*, 752 F.Supp. 1437, 1447-48 (S.D.Ind. 1990).

Sheldon v. McGraw-Hill

Plaintiff filed a complaint January 14, 1991, alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the following four state law claims: breach of contract, tortious interference with a profitable business contract, defamation, and intentional infliction of emotional distress. *Sheldon v. McGraw-Hill, Inc.*, 777 F.Supp. 1369, 1371 (E.D.Mich. 1991).

Ten months later, a judge in Federal District Court in Michigan granted summary judgment to defendants on *all* claims, quoted part of Rule 11, and then applied Rule 11 to the facts of this case:

Plaintiff's age discrimination claim is swiftly conceded in the response after defendants briefed the issue at length in their motion for summary judgment. Clearly, plaintiff's counsel had failed to perform a reasonable inquiry as to whether the claim was well grounded in fact and was warranted by existing law before filing the complaint.

Plaintiff's response brief entirely misstates Michigan law regarding the presumption of at-will employment contracts.

As [d]efendants so accurately point out on page 2 of their brief, the [p]laintiff could not recall conversations with anyone at C.J. Tower[,] Inc., including but not limited to Peter Tower, the owner of the company with whom he signed the contract, about the termination or the circumstances under which he could be terminated[] because that was never discussed[.] [I]t was just implied that he would continue until there was something put in writing [.] [E]ach side could give the other ninety days' notice as it regards any

preliminary draft

termination procedures. BUT, [sic] as case law in Michigan has consistently held, where there is no mention of the fact that an employee is an at will employee, the person is considered an employee with a contract of employment under which he would not be terminated without cause.

Plaintiff's Resp. at 6-7.

Following such a statement of the law in Michigan, the reader would reasonably expect at least one case citation; however, no citation is provided. In fact, no citation could be provided, as the law is exactly the opposite of what is presented in plaintiff's brief. It is clear that plaintiff's counsel failed to perform a reasonable inquiry as to existing law.

The court also concludes that plaintiff's counsel failed to perform a reasonable inquiry as to existing law regarding plaintiff's claims for tortious interference with contract. In addition, it is clear that plaintiff's counsel disregarded his client's own deposition testimony in proceeding with this action after plaintiff testified that the first element of any defamation case, a false statement, was lacking. Finally, plaintiff's response brief fails to address and distinguish much of the case law presented in defendants' motion for summary judgment.

The court finds that plaintiff's counsel has violated Rule 11 of the Federal Rules of Civil Procedure by failing to perform a reasonable inquiry to determine whether this action was warranted by existing law.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that plaintiff's counsel PAY to defendants the amount of FIVE HUNDRED DOLLARS (\$500.00) as a reasonable expense incurred, including legal fees, and that such sanction shall be fully borne by plaintiff's counsel and not by plaintiff. *Sheldon v. McGraw-Hill, Inc.*, 777 F.Supp. at 1373-74.

Arthur Jackson, Esq.

A case in Federal District Court in Philadelphia found a young attorney with "weak" legal research skills.

I find plaintiff's argument that its exhaustion of state remedies supports federal court jurisdiction to be violative of Rule 11 as well. As mentioned above in my discussion of the motion to dismiss, plaintiff asserts that it has exhausted all state remedies available to it without success, and that, accordingly, it may automatically proceed to federal court to vindicate its constitutional rights. I found this proposition to be thoroughly unsupported by legal research. Like the discussion of his constitutional claim, Jackson cited one case in support of his exhaustion theory, which, upon examination, proved to be completely inapposite to the case at bar.

....

In sum, I conclude that attorney Jackson has violated Rule 11, because the Second Complaint, which bears his signature, is founded upon jurisdictional theories that are not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

Total Television Entertainment Corp. v. Chestnut Hill Village Associates, 145 F.R.D. 375, 384 (E.D.Pa. 1992).

preliminary draft

I find no indication in the record now before me that attorney Jackson's violation of Rule 11 was in any way willful. Rather, this violation appears only to be the result of incomplete or negligent legal research. In addition, my own research of publicly reported decisions reveals no prior findings of Rule 11 violations against Jackson.

My research did, however, reveal judicial statements suggesting that Jackson's reputation for legal research is weak. On this point, I rely first on my prior decision dismissing plaintiff's first complaint. See *Total Television Entertainment Corp. v. Chestnut Hill Village Assoc., et al.*, No. 91- 4285, 1992 WL 70395, 1992 U.S. Dist. LEXIS 3892 (E.D.Pa. Mar. 30, 1992). There, I found that plaintiff had failed to negate the possibility that defendant Chestnut Hill, a limited partnership, had members who were citizens of Pennsylvania, and consequently, concluded that plaintiff could not invoke the diversity jurisdiction of this Court. *Id.* 1992 WL 70395, at *4, 1992 U.S. Dist. LEXIS 3892, at *9-*12.

My research has also revealed that despite the fact that Jackson was admitted as an attorney in Pennsylvania in 1989, and has only been a member of the Bar of the Eastern District of Pennsylvania since 1990, he is currently serving, or has served, as attorney of record in at least eleven (11) cases in this district. The first of these cases was filed in February 1991. The frequency with which Jackson has appeared as counsel in this district, a frequency I assume will continue, reinforces the need for him immediately to take steps to rectify the poor legal research ability he has demonstrated in this case, the prior case he filed on behalf of plaintiff, and, as I will now discuss, several other cases as well.

Total Television, 145 F.R.D. at 385.

Based upon the foregoing analysis, I conclude that a written admonishment is the appropriate Rule 11 sanction in this case. Despite my finding that attorney Jackson has developed a generally weak reputation for legal research, and that the jurisdictional theories he relies upon here bear a high degree of frivolousness, his relatively recent admission to the bar, the absence of any evidence of willfulness in connection with the conduct in question, and the fact that he does not appear to have been found in violation of Rule 11 before, militate against any stronger sanction. In short, the sting of this opinion should be punishment enough. Accordingly, I find that the sanction sought by defendant Chestnut Hill, the reimbursement of legal fees and expenses, is not warranted.

The practice of law remains among the highest callings in our society. I encourage attorney Jackson to continue plying his noble trade in this court and elsewhere, but only if he immediately embarks upon a course to correct the deficient legal research skills he has exhibited in this case and others. I believe I must assist Jackson in deciding upon the remedial steps required to be undertaken. In this regard, attorney Jackson shall contact my chambers no later than Friday, January 15, 1992 with dates and times during which he is available for an *in camera* meeting to determine what corrective steps will best enable him to provide this court and others with adequate legal research in the future.

Total Television, 145 F.R.D. at 386-87.

This young attorney apparently did *not* learn his lesson, because another federal judge subsequently sanctioned him for poor legal research.

Applying the principles set forth in *Matthews* and *Total Television*, we conclude that Jackson's position on the matter of claim preclusion is completely contrary to settled law. Moreover, Jackson's arguments are replete with "dubious legal propositions unsupported by legal research." [*Matthews v. Freedman*, 128 F.R.D. 194, 200 (E.D.Pa. 1989), *aff'd* 919 F.2d 135 (3d Cir. 1990).] Although he attempts to support his positions with relevant legal

authority, and with prior orders of this Court, he completely misinterprets or mischaracterizes the cases and orders on which he purportedly relies.

....

We conclude, however, that in the present action an award of attorney's fees and costs is the next appropriate step to deter Jackson's propensity for engaging in frivolous litigation, since he has previously been sanctioned in the Eastern District of Pennsylvania with a written reprimand and has been offered tutoring in the law, apparently to no avail.

In *Total Television*, Judge Reed found that Jackson had violated Rule 11 but noted that he felt that a deficiency in legal research skills was responsible for Jackson's unsupportable position concerning the scope of federal court jurisdiction in that case. The only sanction imposed, therefore, was a written reprimand contained in the Court's opinion and the scheduling of a meeting with Judge Reed to review the rules. Judge Reed believed this sufficient to deter Jackson from similar behavior in the future stating, "In short, the sting of this opinion should be punishment enough." *Id.* at 23.

Apparently, however, the sting of the written word was either not sufficient, or not sufficiently long-lasting, to remind attorney Jackson of his obligation to "look before leaping," since the present action was filed well after the opinion in *Total Television* was issued. The positions espoused in this case indicate that Jackson insists on continuing in his haphazard and reckless practice of law even after being sanctioned.

Hence, our conclusion that the only sanction that might deter Jackson from persisting in his penchant for baseless litigation is an order to pay attorney's fees and costs. *Ophhof v. Ashland Chemical, Inc.*, 1993 WL 452121, at *8-*9 (E.D.Pa. 1993), *aff'd without opinion*, 31 F.3d 1173 (3rd Cir. 1994).

My quick search of Westlaw on 5 March 2005 for

(Arthur /2 Jackson) & ("legal research" sanction! reprimand! disciplin!) found no further cases involving sanctions of attorney Arthur Jackson.

Hendrix

Judge Posner of the U.S. Court of Appeals for the Seventh Circuit held that an insurance company had made a frivolous appeal, in which *Schondel*¹⁰ was the controlling authority, but cited by neither party in Briefs filed before a hearing at the Court of Appeals in December 1992.

We recur in closing to the parties' failure to cite *Schondel*. Although the cases are not identical, this appeal could not succeed unless we overruled *Schondel*. Needless to say, the appellant failed to make any argument for overruling *Schondel*, for it failed even to cite the case. This omission by the Atlanta Casualty Company (the real appellant) disturbs us because insurance companies are sophisticated enterprises in legal matters, *Schondel* was an insurance case, and the law firm that handled this appeal for Atlanta is located in this circuit. The Pages' lawyer, a solo practitioner in a nonmetropolitan area, is less seriously at fault for having failed to discover *Schondel* — and anyway his failure could not have been a case of concealing adverse authority, because *Schondel* supported his position. At all events, by

¹⁰ *Matter of Schondel*, 950 F.2d 1301 (7th Cir. 18 Dec 1991).

appealing in the face of dispositive contrary authority without making arguments for overruling it, Atlanta Casualty filed a frivolous appeal.

This conclusion may seem questionable because, given the intrinsic difficulty of the issues presented by the appeal, and the fact that *Shondel* is the only case on point, the appellant, although it would still have lost, would not have risked sanctions had it urged us to overrule *Shondel*. But that is true in a great many cases in which sanctions are imposed under Fed.R.App.P. 38 for filing a frivolous appeal. The court does not ask whether the appeal might have been nonfrivolous if presented differently, with arguments and authorities to which the appellant in fact never alluded. If the appeal is blocked by authorities that the appellant ignored, the appellant is sanctioned without inquiry into whether the authorities if acknowledged might have been contested. *Brooks v. Allison Division*, 874 F.2d 489 (7th Cir. 1989).

There is a further point. Although as we noted in *Thompson v. Duke*, 940 F.2d 192, 196 n. 2 (7th Cir. 1991), the circuits are divided (and we have not taken sides) on whether a failure to acknowledge binding adverse precedent violates Fed.R.Civ.P. 11, if Atlanta Casualty's counsel knowingly concealed dispositive adverse authority it engaged in professional misconduct. *ABA Model Rules of Professional Conduct Rule 3.3(a)(3)* (1983). The inference would arise that it had filed the appeal for purposes of delay, which would be an abuse of process and thus provide an additional basis for imposition of sanctions under Fed.R.App.P. 38 ("damages for delay"). A frivolous suit or appeal corresponds, at least approximately, to the tort of malicious prosecution, that is, groundless litigation; a suit or appeal that is not necessarily groundless but was filed for an improper purpose, such as delay, corresponds to — indeed is an instance of — abuse of process. *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1202 (7th Cir. 1987); *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1436 (7th Cir. 1987); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982). Both, we hold, are sanctionable under Rule 38. We direct Atlanta Casualty's counsel to submit within 14 days a statement as to why it or its client, or both, should not be sanctioned under Rule 38 for failing to cite the *Shondel* case to us.

We are not quite done. Rule 46(c) of the appellate rules authorizes us to discipline lawyers who practice before us. In deciding whether a lawyer has engaged in conduct sanctionable under that rule, we have looked not only to the rules of professional conduct but also to Rule 11 of the civil rules, *Mays v. Chicago Sun-Times*, 865 F.2d 134, 139 (7th Cir. 1989), which makes it sanctionable misconduct for a lawyer to sign a pleading or other paper, including a brief, if he has failed to make a reasonable inquiry into whether his position "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Reasonable inquiry would have turned up *Shondel*. The lawyer who signed Atlanta Casualty's briefs in this court is therefore directed to submit a statement within 14 days as to why he should not be sanctioned under Rule 46(c).

Matter of Hendrix, 986 F.2d 195, 200-01 (7th Cir. 1993).

Terminix v. Kay

A Federal District Court in Pennsylvania found that a company's attorney had violated Rule 11 when he filed for a preliminary injunction without being aware of the controlling case.

The second issue, whether it was reasonable under the circumstances for plaintiff's counsel to have signed and filed pleadings in this action without considering the controlling authority, is also not a difficult one to decide. Plaintiff's counsel admitted that he was unaware of the *Willing-Kramer* authority until it was pointed out by the Court at the hearing on the motion for a preliminary injunction. A party's position, even if superficially plausible, cannot be accepted as a good faith argument for the extension of the existing law if, in framing the pleadings, the party ignores the controlling authority. See *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194, 205 (7th Cir. 1985); see also *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th Cir. 1987) (failure to cite leading authority suggests cursory or minimal legal research).

Nor is plaintiff's counsel's inadequate legal research justified by the press of obtaining a temporary restraining order. Even assuming that the time required to research the cause of action asserted was not available at the time that the initial complaint was filed, there is no justification for the failure to take into account the controlling authority in the proposed findings of fact, conclusions of law, and supporting memorandum, which were not filed until two months after the initial action had been commenced.

Plaintiff now argues that, in any event, *Willing* and *Kramer* are distinguishable from the instant case in that in those cases movants were seeking a permanent injunction, while here plaintiff was only seeking a temporary one. Plaintiff's *Supplemental Memorandum of Law* (Document No. 20) at 2. Plaintiff cites no authority for the proposition that the apparent unconditional prohibition contained in the Pennsylvania Constitution barring "a judge from enjoining future libelous speech," *Kramer v. Thompson*, 947 F.2d at 670, is applicable only to permanent injunctions and not to temporary ones. More fundamentally, this argument is specious. Rule 11, of course, is not intended to curtail robust advocacy for an extension of existing law, but such argument must be made in the pleadings that are filed. Therefore, it is irrelevant whether counsel can, in retrospect, and upon reflection or further research, distinguish the controlling authority or even make a good faith argument for an extension of the law. The point of Rule 11 is to require "a normally competent level of legal research," *Lieb v. Topstone Indus.*, 788 F.2d at 157, prior to the signing and filing of pleadings, not afterwards. Therefore, the Court concludes that plaintiff's counsel's ignorance of the controlling authority was not reasonable under the circumstances.

Terminix Intern. Co., L.P. v. Kay, 150 F.R.D. 532, 537-38 (E.D.Pa. 1993).

The judge ordered the company's attorney to pay defendant \$ 5043 as sanctions for violation of Rule 11.

Karonis v. Commercial Union Ins.

A judge in Federal District Court in Illinois found an attorney who apparently did no legal research.

Plaintiff provides no authority for this proposition. This is not surprising; it is contrary to well established law. [quotation of law and citations omitted]

Plaintiff's motion to remand appears to be based on unsupported arguments and irrelevant authority. Research into the relevant law would have shown Karonis' attorney that its position was groundless. *Burda*, 2 F.3d at 774. The motion caused the defendant to file a response and caused the court to expend considerable time to decide the motion. The additional efforts by the defendant and by the court boil down to simple legal research that plaintiff's attorney should have undertaken prior to filing the motion. *See Thornton*, 787 F.2d at 1154. The misrepresentations of law in the motion were plaintiff's central arguments for remand: that multiple claims of a single plaintiff could not be aggregated to form the jurisdictional amount, that 28 U.S.C. § 1441(c) provided a basis for remand, and that the court had discretion to remand.

The court therefore notifies Attorney Konewko of the foregoing conduct considered to be a violation of Rule 11(b)(2). Konewko is directed to show cause why this conduct was not in violation of the rule. If the court subsequently finds the rule was violated, it will consider the question of appropriate sanctions.

Karonis Enterprises, Inc. v. Commercial Union Ins. Co., 1994 WL 722025, at *9 (N.D.Ill. 1994).

Boyce v. Microsoft Corp.

A judge in Federal District Court in Illinois ordered plaintiff's attorney to reimburse US\$ 33,125 in legal expenses incurred by Microsoft Corporation in defending plaintiff's groundless litigation, under FRCP 11.

In addition, it appears that counsel filed his client's lawsuit without sufficient legal authority. He cites no case, makes no argument, and provides no evidentiary support for the position taken in this lawsuit. As indicated above, the doctrine of promissory estoppel has no place in this lawsuit. This problem is exacerbated by the fact that counsel was confronted with dispositive contrary authority by opposing counsel before the [motion for summary judgment] was filed. Sanctions are therefore justified.

Boyce v. Microsoft Corp., 1995 WL 153281, at *1 (N.D.Ill. 1995).

This case is remarkable as, so far as I can find, it is the largest reimbursement of attorney's fees awarded under Rule 11 for *inadequate* legal research.

Samuel A. Malat, Esq.

A public high school in New Jersey suspended – and excluded from graduation ceremonies – some pupils for drinking alcohol while on senior class trip. These pupils and their parents hired an attorney, Samuel A. Malat, who sued the school on a variety of constitutional claims and infliction of emotional distress, as well as filed a retaliation claim under the New Jersey's Conscientious Employee Protection Act (CEPA) on behalf of the hockey coach. The Federal District Court dismissed most of the claims and sanctioned Plaintiff's attorney for failure to do legal research that would have shown that the claims were statutorily barred.

The Amended Complaint, which was signed by Samuel A. Malat, Esq., and verified by all of the Plaintiffs, contains three "patently frivolous" claims that are statutorily barred, namely, the two claims for emotional distress (Counts Four and Five) and the CEPA claim (Count Six). *See id.* Thus, these "claims [were not] warranted by existing law." *See Fed.R.Civ.P. 11(b)(2)*. Nor have the Plaintiffs made any argument suggesting that these claims are "warranted ... by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." *Id.* Mr. Malat has not provided any explanation for his failure to conduct any legal investigation before filing these claims.

Moreover, the Order to Show Cause, issued by this Court, provided Mr. Malat with clear notice that he had to conduct legal research, yet, he failed to do so. *See Fed.R.Civ.P. 11, adv. cmt.* notes (noting that Rule 11 "subject [s] litigants to potential sanctions for insisting upon a position after it is no longer tenable" and "provid[es] protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention"). Mr. Malat's signature on Plaintiffs' Response in Opposition to [the] Court's Order to Show Cause, which argues in support of these claims, clearly demonstrates that Mr. Malat has conducted absolutely no legal research whatsoever regarding these claims at any time before *or during* the pendency of this litigation. "Even a casual investigation, let alone the reasonable inquiry required by Rule 11, *see Fed.R.Civ.P. 11(b)*, would have revealed" that the New Jersey Statutes Annotated prohibit both emotional distress claims and the CEPA claim. Such a flagrant failure to conduct any legal research violates Mr. Malat's obligations under Rule 11(b). [footnote omitted]

Furthermore, Plaintiffs' equal protection and due process claims trivialize the civil rights that those bedrock constitutional principles are designed to protect. Student Plaintiffs have admitted that they violated school regulations by drinking during their Senior Class Trip. Now these same students seek legal redress to avoid the punishment they were warned they would receive for such conduct. In addition, the suggestion that Parent Plaintiffs would suffer severe emotional distress as a result of their inability to see their children graduate is preposterous. Nonetheless, Rule 11(c) precludes the imposition of monetary sanctions upon a represented party for a violation of Rule 11(b), as I have found exists here. I also find that it would be inappropriate to sanction the Plaintiffs in this case, because they do not have the legal training to understand the frivolousness and triviality of their claims. The Plaintiffs relied on their lawyer, Mr. Malat, to perform the legal research. Mr. Malat has clearly failed to discharge this obligation to his clients.

Moreover, Mr. Malat has also failed to discharge his obligations to the legal profession and this Court. The "Principles of Professionalism for Lawyers and Judges," adopted by the New Jersey Commission on Professionalism in the Law, requires:

preliminary draft

"Clients should be advised against pursuing a course of action that is without merit....

A lawyer must avoid frivolous litigation and non-essential pleading in litigation."

While these Principles of Professionalism are purely aspirational, and do not serve as the basis of this Court's decision to sanction Mr. Malat pursuant to Rule 11, my colleague, Judge Bassler, eloquently explained why members of the legal profession must conform to standards of professional responsibility when he wrote:

The practice of law requires respect for, and adherence to, standards of conduct.

It is compliance with those standards that serve to define what it means to be a member of a profession. It is the obligation of every attorney to ensure that the public's trust in the judicial process is maintained.

Kramer v. Tribe, 156 F.R.D. 96, 110 (D.N.J. 1994). By filing such patently frivolous claims, Mr. Malat has not only violated Rule 11; he has failed to adhere to these Principles of Professionalism.

Mr. Malat filed three claims that are patently frivolous. The CEPA claim is precluded by the very statute under which it was filed and the two emotional distress claims are clearly barred by other statutes. With just a few minutes of legal research, Mr. Malat could easily have discovered this information, however, despite ample opportunities to conduct legal research and in the face of an Order to Show Cause, Mr. Malat chose to file and continue to litigate what can only be described as patently frivolous claims, in violation of Rule 11(b). Further, Mr. Malat filed claims that, although not frivolous, trivialized cherished constitutional rights and the federal civil rights statute that was enacted to protect those rights. As a result, I conclude that, by filing and continuing to prosecute the Amended Complaint, Mr. Malat has violated Rule 11.

....

In this case, I find that the combination of a monetary and a nonmonetary sanction would best deter future similar conduct. Accordingly, I will order Mr. Malat to attend two continuing legal education courses within the next 18 months. He must attend one course which addresses attorney professionalism and the rules of professional conduct. The second course must cover federal practice and procedure. These two courses must be offered by a law school accredited by the American Bar Association, or a reputable provider of continuing legal education. See *Thomason*, 182 F.R.D. at 132 n. 4. Mr. Malat shall file an affidavit with the court certifying that he has completed both courses and describing the content of each course. Additionally, I will require Mr. Malat to pay a fine of \$500 to the Clerk of the Court within 30 days. I can only hope that the imposition of these two sanctions will educate Mr. Malat about his duties under Rule 11 and his professional obligations to his clients, the legal profession, and this Court.

Carlino v. Gloucester City High School, 57 F.Supp.2d 1, 37-39 (D.N.J. 1999),
aff'd, 44 Fed.Appx. 599, 601, 2002 WL 1877011 at *1 (3rd Cir. 2002).

About one month after the U.S. District Court's opinion in *Carlino*, attorney Malat filed a Complaint in another case that violated FRCP 11, because Malat had done no legal research.

When an attorney, in response to the Court's concern that his 34-page Complaint on behalf of multiple plaintiffs alleging various civil rights violations against various local police departments cannot be understood, responds nonetheless with a 160-page Amended Complaint compounding the difficulties and asserting claims that are legally and factually nonsensical, there will be consequences.

Leuallen v. Borough of Paulsboro, 180 F.Supp.2d 615, 616 (D.N.J. 2002).

preliminary draft

The Second Amended Complaint and its predecessors, signed by Samuel A. Malat, Esquire, contain several clearly frivolous claims which cannot arguably be supported by the law or facts of this case, namely, the 42 U.S.C. § 1981 claims, the Thirteenth Amendment claims, and all state tort law claims against public employees. As discussed below, this Court finds that Mr. Malat's submission of the Complaint, Amended Complaint, and Second Amended Complaint constituted a violation of Rule 11(b)(2) and 11(b)(3). [footnote omitted]

All three of the types of claims identified in this Court's December 5, 2001 Order to Show Cause are frivolous, legally unreasonable, and without factual foundation. Nowhere in any of his pleadings or submissions does Mr. Malat offer any statutory, case law, or factual support for the 42 U.S.C. § 1981, Thirteenth Amendment, or state tort law claims against public employees on behalf of any plaintiff.

Leuallen, 180 F.Supp.2d at 618-619.

Even the most cursory review of Section 1981 itself or a case involving that statute would have informed Mr. Malat of these requirements. There is no conceivable way that Mr. Malat had any rational basis to believe that he could assert a non-frivolous claim pursuant to 42 U.S.C. § 1981 on behalf of any of the named plaintiffs. [FN6] His proffered excuse, that the deficient Section 1981 claims slipped by him, is simply not good enough for this Court, particularly following Judge Orlofsky's then-recent sanctions [in *Carlino*] against such carelessness. Further, if it "slipped by," it did so several dozen times as the same Section 1981 claim was asserted and reasserted in the Complaint and First and Second Amended Complaints on behalf of non-minority plaintiffs who had no contract with any of these defendants. This conduct constitutes a violation of Rule 11(b)(2).

FN6. The Court again notes that Mr. Malat similarly could not have reasonably believed that the 42 U.S.C. § 1985(3) or § 1986 claims, which involve a conspiracy against racial minorities or disadvantaged classes, were feasible. Had Mr. Malat conducted any legal research into those claims he would have realized that the claims he asserted had no basis in fact or law. The only reason that these claims were not also noticed in the Order to Show Cause is because this Court gave Mr. Malat the benefit of a doubt that such claims, while unlikely to succeed, were not frivolous. As revealed at oral argument by Mr. Malat himself, that courtesy should not have been extended.

Leuallen, 180 F.Supp.2d at 619.

Mr. Malat would have discovered these deficiencies if he had conducted any legal research on this issue. Because there was no factual support for the state law tort claims, because none of these plaintiffs came forward with evidence of any cognizable bodily injury, this conduct represents a violation of Rule 11(b)(3).

Leuallen, 180 F.Supp.2d at 621.

The judge in *Leuallen* then imposed sanctions on attorney Malat:

The appropriate sanction in this case poses difficulties for the Court on a number of levels. *First*, Mr. Malat failed to improve his conduct after Judge Orlofsky sanctioned him for similar conduct in August, 1999. Neither the continuing legal education courses nor the \$500.00 fine ordered by Judge Orlofsky deterred Mr. Malat from filing the offensive complaints in this case that give rise to the instant need for sanctions. *Second*, Mr. Malat is not an inexperienced attorney, and therefore his repeated violations cannot be attributed to lack of experience or knowledge of what is expected from attorneys who practice in this Court. Mr. Malat has been admitted to practice law in New Jersey since 1989, he has participated in continuing legal education classes, he has previously litigated cases in federal court, and, he

has been recently sanctioned for similar conduct just one month prior to filing this complaint. Yet, it does not appear that Mr. Malat conducted any legal research prior to filing this complaint and he cites almost no case law in his submissions. Formulating a sanction that will prevent such behavior in the future has required that this Court expend more time and more effort to remedy the problems caused by Mr. Malat's carelessness or laziness. *Third*, Mr. Malat has represented that he would be unable to pay a monetary fine without terminating an employee or incurring another similar hardship. Thus the Court would have to limit the amount of monetary sanctions, if any, that are imposed in this case. Mr. Malat's Rule 11 violation recidivism and failure to respond to traditional sanctions require that this Court impose a more severe sanction, tailored to remedying his deficient performance, than ones previously imposed.

In light of these complicating factors, this Court will impose four sanctions on Mr. Malat, three non-monetary and one monetary. *First*, by publication of this Opinion and for the reasons stated herein, the undersigned hereby admonishes Mr. Malat for his second recorded Rule 11 violation in this Court in less than three years. *Second*, in an attempt to protect the rights of his clients, this Court directs Mr. Malat to send a copy of this Opinion to each and every plaintiff ever named in this case. [footnote omitted that cites authority for this "unusual and serious sanction"] This includes current plaintiffs, plaintiffs who were voluntarily dismissed, and plaintiffs whose claims were dismissed by this Court on summary judgment, and is intended to protect the rights of clients who are not familiar with the procedural and substantive requirements of their legal claims. Mr. Malat will certify his compliance with this sanction within twenty (20) days. *Third*, Mr. Malat shall submit to the undersigned, within thirty (30) days of the filing of this Opinion, a well organized and thorough summary of the requirements that Rule 11, Fed.R.Civ.P., places upon attorneys, specifically the requirements of Rule 11(b)(1)-(3), and also discussing how the courts, specifically the Third Circuit, have interpreted that rule. This summary shall be at least twenty (20) pages in length and may not paraphrase hornbook law and must be researched and written by Mr. Malat himself, not an associate or an assistant. Perhaps this sanction will enlighten Mr. Malat to the requirements placed upon him by Rule 11 and prevent future violations.

Fourth, Mr. Malat is ordered to pay \$1,000.00 to the Clerk of this Court within one year of the filing of this Opinion. At his hearing, Mr. Malat represented that he would be unable to pay a monetary fine. However, it is the belief of this Court that Mr. Malat's repeated violations require some kind of payment to the Clerk of Court, in light of the exorbitant amount of time that has been wasted on his frivolous claims. It is further noted that his frivolous pleading practices cause undue harm to the public officials whom he has sued, since public money must be spent to defend the frivolous claims. Mr. Malat has a busy law practice and should be able to pay \$1,000.00 to the Clerk of Court over the course of a year. His mode of practice in violation of Rule 11 carries economic consequences to his adverse parties and to the Court and must be met with an economically deterrent sanction. Although this Court will not award attorney's fees, which may only be granted sparingly and upon the motion of the opposing party, this small but hopefully meaningful monetary fine of \$1,000.00 shall be remitted to the Clerk of Court within one year from the date of this Opinion. If necessary, Mr. Malat may make equal quarterly installment payments, beginning in ninety (90) days.

Leuallen, 180 F.Supp.2d at 621-622.

In an opinion issued 21 days after the opinion in *Leuallen*, the same federal district judge who presided in *Carlino* called attorney Samuel A. Malat “a recidivist violator of Rule 11 of the Federal Rules of Civil Procedure.”¹¹

Counsel for the State Defendants warned Malat that, in their opinion, his [42 U.S.C.] § 1983 claims against certain state entities and officers acting in their official capacities, as well as his § 1983 claims against all of the federal Defendants, were frivolous. [cite to exhibit omitted] Malat made no response at all. Because I agree with the State Defendants, Rule 11 sanctions are warranted in this case.

As an experiment, I directed one of my legal interns, a third-year law student, to conduct appropriate legal research in order to determine whether or not the challenged § 1983 claims are valid. He needed only seventeen minutes to confirm what every responsible practitioner in this field already knows: they are not.

Mendez v. Draham, 182 F.Supp.2d 430, 434 (D.N.J. 2002).

The judge admonished attorney Malat in this opinion and struck Malat’s Complaint.

Attorney Malat was later suspended from the practice of law in New Jersey for three months for violation of Rule 3.3 and several other rules. *In re Malat*, 817 A.2d 316 (N.J. 12 Mar 2003). This opinion mentions neither the facts nor name of the case in which the misconduct occurred. Subsequently, Malat was suspended from the practice of law in Pennsylvania for two consecutive three-month terms. *In re Malat*, 847 A.2d 662 (Pa. 8 Mar 2004); *In re Malat*, 839 A.2d 180 (Pa. 24 Nov 2003).

QDS Components

A judge in bankruptcy court noted in passing that one party had done inadequate legal research.

U.S. Bancorp's second procedural argument — that Lakin should have been required to commence an adversary proceeding or an "independent contested matter" to seek recharacterization of the Lease Agreements (*see* U.S. Bancorp Reply Brief at 6) — is equally specious. U.S. Bancorp fails to cite a single authority to support this proposition. And even a modest investment in legal research would have revealed that the lease versus disguised security interest dispute is frequently litigated outside the context of an adversary proceeding or an "independent contested matter." *See, e.g.,* [citations omitted]

In re QDS Components, Inc., 292 B.R. 313, 345 (Bankr.S.D.Ohio 2002).

¹¹ 182 F.Supp.2d at 431.

B. state courts*Fowler v. Conforti*

A judge in a New York State trial court imposed the maximum permissible sanction against an attorney who had repeatedly filed frivolous litigation arising from one initial case. Specifically, the attorney sued the opposing counsel for alleged defamation for a statement made by the opposing counsel in open court. Anyone familiar with defamation law knows that such statements by attorneys are absolutely privileged and can not be defamatory.

At oral argument, plaintiff stated on the record that he had researched the law on this point prior to commencing litigation. He cited *Murphy v. Klein*, 9 N.Y.2d 754, 214 N.Y.S.2d 734, 174 N.E.2d 608 (1961) as providing support for his claim. This decision merely dismissed leave to appeal to the Court of Appeals. The underlying case, *Murphy v. Klein*, 12 A.D.2d 683, 207 N.Y.S.2d 794 (3d Dept. 1960) has only been cited for authority once in more than 30 years. To the extent that the case places a restrictive, narrow view on the absolute privilege, it has been, sub silentio, overruled by *Toker, supra* and *Park Knoll, supra*. *Grasso, supra* illustrates the current longstanding appellate authority for a broad reading of the absolute privilege. Plaintiff had an obligation to undertake a meaningful review of the case law prior to commencing this lawsuit. He could have discovered the above-cited authorities by looking under the same West Key digest numbers under which *Murphy, supra*, is catalogued. Defendant Conforti in his letter of January 22, 1992 clearly placed plaintiff on notice of the absolute privilege and offered him an opportunity to withdraw the action to avoid an application for sanction. Plaintiff failed to avail himself of this opportunity or the opportunity to withdraw his action after being served with defendant Conforti's moving papers. Defendant Conforti's memorandum of law cited the authoritative governing authority that this Court has followed in granting defendant's motion for summary judgment.

The plaintiff's research of the applicable law was grossly inadequate. The clarity of the applicability of the absolute privilege rule and the inadequate nature of plaintiff's legal research warrant the imposition of sanctions, see *Grasso, supra*. The prior history of the related *Parks v. Greenberg* litigation and its progeny establish the plaintiff's bad faith. This action is an attempt to harass the successful counsel and to retaliate in the form of a meritless lawsuit. Sanctions in the maximum amount of \$10,000 to be paid defendant's counsel is warranted, see *Winters v. Gould*, 143 Misc.2d 44, 539 N.Y.S.2d 686 (Sup.Ct., N.Y.Cty. 1989). *Fowler v. Conforti*, 583 N.Y.S.2d 789, 792 (N.Y.Sup 1992), *aff'd*, 598 N.Y.S.2d 782 (N.Y.A.D. 1 Dept. 1993).

Price v. Cole

Price sued Cole in a Massachusetts state court for negligence that caused injuries to Price in a motor vehicle collision. Before closing arguments in this tort case, Cole informed the trial court that Cole had filed for bankruptcy, which put an automatic stay on the execution of all judgments, and then Cole moved for a mistrial. The judge in the tort case properly denied the Motion for a mistrial, directed counsel to make their closing arguments, then submitted the case to the jury. The jury awarded Price \$ 5500. Price then successfully petitioned the bankruptcy court to annul the stay, which validated the \$ 5500 judgment. Cole then filed an appeal in state court, with the frivolous argument that the judge in the tort case should have granted a mistrial and, therefore, the judgment was unlawful. The Massachusetts appellate court ordered Cole to pay sanctions of \$ 4194 to Price, in addition to paying the original \$ 5500 judgment:

The plaintiff has asked for an award of counsel fees on appeal under Mass.R.A.P. 25, as amended, 378 Mass. 925 (1979). See the discussion in *Allen v. Batchelder*, 17 Mass.App.Ct. 453, 458-459, 459 N.E.2d 129 (1984). The defendant answers that his appeal was not frivolous because it reaches new ground in two areas: (1) no Massachusetts decision has dealt with the retroactive effect of the annulment of an automatic stay; and (2) no Massachusetts case has previously spoken to the question whether special questions should be asked about intoxication in a motor vehicle accident case so as to preserve the resolution of that issue in pending bankruptcy proceedings.

Considering first the issue of the effect of an annulment order under 362 of the Bankruptcy Code, although the question, indeed, had not been the subject of discussion in Massachusetts opinions, that is hardly to be wondered at. The topic is one of Federal law (see note 4, *supra*). In the Federal cases, as we have seen, the point had been decided. This could not have been a mystery to the defendant because the order of the Bankruptcy Court judge cited to *In re Albany Partners, Ltd.*, 749 F.2d at 675, and the act of "Shepardizing" that opinion would have revealed that it had been followed in other circuits and in the bankruptcy courts. Modest inquiry would have educated the defendant that the question he was presenting was not "novel, unusual or ingenious." *Allen v. Batchelder*, 17 Mass.App.Ct. at 458, 459 N.E.2d 129. The appeal from the Superior Court judgment on the ground that it could not be validated *after* the Bankruptcy Court had acted, against the background of the retreat into bankruptcy in the first instance, bespeaks the use of judicial process to delay. Turning to the special questions issue, a cursory consideration of 523(a)(9) clarifies the utility of obtaining a finding on intoxication when bankruptcy is in the wind. While the content of 523(a)(9) is not necessarily in the intellectual inventory of the average informed Massachusetts lawyer, it had certainly been called to the attention of the defendant before he took this appeal.

We conclude that the appeal is frivolous and that the plaintiff may have her legal fees on appeal. Her counsel have submitted an affidavit of time and charges that aggregates 168.9 hours and \$597.01 in out-of-pocket costs and disbursements. The hourly charges range from \$175 per hour for lead counsel to \$90 per hour for an associate and \$60 per hour for a paralegal and law clerks. The rates are reasonable. It is less clear that it was necessary to unleash more than five persons on the appeal. We do not presume to second guess how a law firm chooses to marshal its resources on a case, but, when a party other than the one who

hired the lawyer is required to pay the fee, conservative criteria are in order. *Grimes v. Perkins Sch. for the Blind*, 22 Mass.App.Ct. 439, 440, 494 N.E.2d 406 (1986). We, therefore, establish \$3,000 plus double the disbursements of \$597.01 as the fees and costs to be assessed against the defendant. See generally *Mulhern v. Roach*, 398 Mass. 18, 24-31, 494 N.E.2d 1327 (1986); *Olmstead v. Murphy*, 21 Mass.App.Ct. 664, 666-668, 489 N.E.2d 707 (1986); *Bird v. Bird*, 24 Mass.App.Ct. 362, 370-371, 509 N.E.2d 289 (1987).

The judgment is affirmed, and the plaintiff shall have from the defendant an additional sum of \$4,194.02 on account of legal fees and costs incident to the appeal. *Price v. Cole*, 574 N.E.2d 403, 406-407 (Mass.App.Ct. 1991).

Dace v. Massachusetts

A professor filed frivolous litigation against the university that employed her, alleging defamation, retaliation for filing a gender discrimination claim, and violation of her civil rights. At the end of the opinion, the judge stated:

I conclude that the claims made by Dace against Hickock and UMD were wholly insubstantial, frivolous and not advanced in good faith. I will therefore award reasonable counsel fees and expenses against the plaintiff under G.L. c. 231, 6F.

The claims are transparently without merit, a fact that was or should have been obvious to plaintiff and her counsel. "You have a conflict of interest," followed by Hickock's statement of non-defamatory reasons is non-actionable pure opinion. Were that not clear from the outset, a minimum of legal research would have revealed it.

Dace v. Commonwealth of Massachusetts, 1999 WL 1487590 at *4 (Mass.Super. 1999).

The judge then ordered Plaintiff to pay \$ 4100 to Defendants, as reimbursement of their legal fees in responding to Plaintiff's frivolous litigation. Note the judge's remark that "a minimum of legal research" would have avoided this frivolous litigation.

6. Judges do *no* legal research for litigants

A. federal courts

Brooks

Judge Posner of the U.S. Court of Appeals for the Seventh Circuit, in a case decided in 1989, dismissed the appeal of a *pro se* litigant:

His appeal brief neither cites any legal authorities nor specifies any error in the district court's decision. The argument section of the brief is a one-page narrative of the events leading up to Brooks's discharge by General Motors. There is no argument. So naked a submission is frivolous per se. See *Mays v. Chicago Sun-Times*, 865 F.2d 134, 138 (7th Cir. 1989); *Mitchel v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982).

Brooks v. Allison Div. of General Motors Corp., 874 F.2d 489, 490 (7th Cir. 1989), rehearing denied 16 June 1989.

Pelfresne

Judge Posner of the U.S. Court of Appeals for the Seventh Circuit, in a case decided in 1990, criticized the attorneys for the plaintiff-appellant:

The defendants point out that the constitutionality of that statute has been upheld by both this court and Wisconsin's supreme court. *Baker v. Mueller*, 222 F.2d 180 (7th Cir. 1955); *City of Appleton v. Brunschweiler*, 52 Wis.2d 303, 190 N.W.2d 545 (1971). Pelfresne replies only that "defendants' arguments that plaintiff's Constitutional claims are barred by prior precedent requires [sic] this Court to shut its eyes to the developments concerning due process and equal protection rights which have emanated from this Court and the United States Supreme Court since the federal court's [sic] last visited the Wisconsin demolition statute some thirty-five years ago [citing *Baker v. Mueller, supra*]." What developments? Pelfresne does not say. He cites no cases, and presents no other ground for our reexamining our decision in *Baker*. A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 795 (7th Cir. 1989);¹² Fed.R.App.P. 28(a)(4). We will not do his research for him. *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986).¹³

As Pelfresne has offered no reason to doubt that a challenge to the constitutionality of the Wisconsin statute should be considered barred by *stare decisis*, the motion for leave to file an amended complaint was properly denied. Nevertheless the case must be remanded for a determination of whether

Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990), *cert. den.*, 506 U.S. 985 (U.S. 1992).

Pelfresne was subsequently cited by in several decisions of the U.S. Courts of Appeals, for example:

- *Phillips v. Calhoun*, 956 F.2d 949, 953-954 (10th Cir. 1992) ("Plaintiff's appellate position has not been even minimally supported by legal argument or authority, *see Pelfresne*")
- *Matter of Maurice*, 21 F.3d 767, 774-775 (7th Cir 1994) ("Maurice raises several other footless issues in his brief for which he fails to cite any relevant authority. Many arguments are simply verbatim statements from earlier briefs which the district court did not even find worthy of discussion. Even though our circuit rules allow the parties to file briefs of up to fifty pages in length, we expect litigants to submit only concise and substantiated arguments. *See* Model Rule of Professional Conduct 3.1 ("A lawyer shall not ... assert or controvert an issue ... unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.") Federal Rule

¹² *Bob Willow Motors* concludes: "This plainly requires more than a single summary sentence unsupported by any authority whatever." and then rules that the argument was waived.

¹³ *Sanchez v. Miller* says tersely: "It is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel. *See May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1118 (7th Cir. 1986); *Libertyville Datsun Sales v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985)."

of Appellate Procedure 28(a)(5) requires the appellant, Maurice, to cite to authorities and to adequately describe his arguments. This court will not do his legal research and analysis. See *Pelfresne v. Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990); *BNT Terminals*, 125 B.R. at 977-78. Accordingly, we dismiss the following arguments: [seven arguments omitted here]. In the words of the district court, these arguments are "too hypertechnical and wholly groundless to justify discussion." Dist.Ct. op. at 3-4").

- *Capps v. Cowley*, 63 F.3d 982, 984 (10th Cir. 1995) (“(issue forfeited when litigant fails to support it with argument or legal authority”).
- *U.S. ex rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669, 673 (7th Cir. 1995) (“Even pro se litigants, particularly one so familiar with the legal system, must expect to file a legal argument and some supporting authority.”).
- *Mathis v. New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998) (pro se appeal).
- *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (“Rule 28 applies equally to pro se litigants, and when a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research, see *Pelfresne*”).
- *Phillips v. Hillcrest Medical Center*, 244 F.3d 790, 800, n. 10 (10th Cir. 2001).

Pelfresne has also cited by many federal trial courts, for example:

- *In re BNT Terminals, Inc.*, 125 B.R. 963, 977-978 (Bankr.N.D.Ill. 1990) (“The Seventh Circuit has warned litigants against making general allegations without support and explanation; otherwise they will forfeit their point. *Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990). The Court need not do the moving party's research.”).
- *Pautlitz v. City of Naperville*, 1994 WL 22963, *4 (N.D.Ill. 25 Jan 1994) (District Judge Plunkett appears to have been the first to say: “This court has neither the time nor the inclination to do Plaintiffs’ research for them.”).
- *In re Karras*, 165 B.R. 636, 637 (N.D.Ill. 1994) (“As an initial matter, the way in which the arguments have been briefed requires comment. Though both parties' papers suffer on a rather slim diet of supporting authority, the Appellants are particularly guilty of a failure to support their arguments with valid authority. This court has neither the time nor the inclination to do the parties’ research for them.”).
- *Betts v. Attorney Registration and Disciplinary Com'n*, 1994 WL 285061, *1, *3 (N.D.Ill. 1994) (Sanctioning attorney Kenneth Kozel \$1000 for frivolous pleadings. He was ordered to show cause why he should not be sanctioned. “His Response, which is fourteen pages long, fully cites only a single, irrelevant case in support of the myriad of arguments made therein. Though Mr. Kozel rants about many things, he supports none of them.”), *aff’d*, 1995 WL 108940 (7th Cir. 1995), rehearing and suggestion for rehearing en banc denied (11 Apr 1995), *cert. den. sub nom. Betts v. Attorney Registration and Disciplinary Com'n of Supreme Court of Illinois*, 516 U.S. 1012 (1995).
- *John Deere Health Ben. Plan for Salaried Employees v. Chubb*, 45 F.Supp.2d 1131, 1136, n. 8 (D.Kan. 1999).

- *Marco Realini v. Contship Containerlines, Ltd.*, 143 F.Supp.2d 1337, 1343 (S.D.Fla. 1999).
- *Keeling v. Schaefer*, 181 F.Supp.2d 1206, 1222, n. 17 (D.Kan. 2001).

Anderson v. Hardman

A prison inmate, Anderson, filed a *pro se* civil rights litigation, which was dismissed by the Federal District Court in Illinois for failing to state a claim upon which relief can be granted.¹⁴ The U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal:

... we must be able to discern cogent arguments in any appellate brief, even one from a *pro se* litigant. Rule 28 of the Federal Rules of Appellate Procedure so requires — a brief must contain an argument consisting of more than a generalized assertion of error, with citations to supporting authority. Fed. R. App. P. 28(a)(9)(A); *Mathis v. New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998) (per curiam); *United States ex rel. Verdone v. Circuit Court*, 73 F.3d 669, 673 (7th Cir. 1995) (per curiam). Yet Anderson offers no articulable basis for disturbing the district court's judgment. Instead, he simply repeats certain allegations of his complaint and cites one irrelevant case.

We are cognizant of the unique challenges facing *pro se* litigants and are generally disposed toward providing a litigant the benefit of appellate review. But we must also insist on compliance with procedural rules such as Rule 28 to promote our interest in the uniform administration of justice. *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) ("[I]n the long run, experience teaches that strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." (internal quotations and citation omitted)); *Members v. Paige*, 140 F.3d 699, 702 (7th Cir. 1998) ("[R]ules apply to uncounseled litigants and must be enforced."). Rule 28 applies equally to *pro se* litigants, and when a *pro se* litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research, *see Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990). Indeed, we have previously warned that *pro se* litigants should expect that noncompliance with Rule 28 will result in dismissal of the appeal. *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984). Anderson points us to no error, and we see no obvious errors. The appeal is therefore DISMISSED.

Anderson v. Hardman, 241 F.3d 544, 545-46 (7th Cir. 2001).

The same issues occurred in a subsequent Illinois case, in which Melara sued his former employer for racial discrimination. Melara did his appeal *pro se*.

Melara raises a variety of other unsubstantiated arguments in his brief, but none of these takes particular issue with the district court's decision or contains supporting citations to legal authorities or documents in the record. We are aware of the "unique challenges facing *pro se* litigants," but if a *pro se* litigant fails to comply with Rule 28 of the Federal Rules of Appellate Procedure, "we cannot fill the void by crafting arguments and performing the necessary legal research." *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001). We "construe *pro se*

¹⁴ *Anderson v. Hardman*, 1999 WL 1270692 (N.D.Ill. 1999).

filings liberally" and will analyze any "cogent arguments" that can be discerned from an appellate brief, but here we can discern no other arguments from Melara's brief. *See id.* The judgment of the district court is AFFIRMED.

Melara v. Carmichael Leasing Co., 58 Fed.Appx. 652, 653-54, 2003 WL 721718 at *1 (7th Cir. 2003).

B. state courts

The rules of practice in most state courts are either identical to, or similar to, the rules in federal court. When an appellant's brief contains no citations, the reported judicial opinion unusually tersely denies the appeal, showing the disdain of judges for parties that submit such briefs. Many state courts, some of which are cited below, have explained that judges will *not* do legal research for litigants.

Alabama

The Alabama Rules of Appellate Procedure specifically require¹⁵ citations to cases, statutes, or other authorities. Alabama appears to have a plethora of reported appellate cases that affirmed the decision below, because appellant failed to cite any cases or statutes in support of appellant's arguments. Ten of these Alabama appellate cases since 1980 are quoted below. The cases in which a party was *pro se* (i.e., represented himself without an attorney) are identified.

We note in the beginning that defendant has failed to provide the court with any authority in support of the issue presented and thus is not in compliance with Rule 28, Alabama Rules of Appellate Procedure. We find its brief insufficient to support the appeal for such failure. Defendant, as authority for its argument, cites as follows: "Alabama Digest, Key No. 94 and cases cited thereunder." Perhaps the obvious failure to provide the subject of the cited key number of the Alabama Digest was mere oversight. However, even had we been given the subject of Key No. 94, such citation would not be a proper authority as contemplated by Rule 28, ARAP. Providing a key number in the digest requires that this court find the probably numerous cases listed thereunder in the reporter and determine which of them, if any, supports the contention of the appellant. We decline to assume that task.

William Wilson Enterprises, Inc. v. Napier, 395 So.2d 89, 89-90 (Ala.Civ.App. 1981).

In a case in which the plaintiff-appellant appeared *pro se*, the appellate court wrote:

This court is committed to a policy of reaching the merits of every appeal where possible. However, appellant has failed to furnish this court with any legal issues to review and has not cited to any authority for reversal. Thus, this appeal falls squarely within the rule set forth in *Davis v. Hartford Accident and Indemnity Co.*, 335 So.2d 688, 690 (Ala.Civ.App. 1976):

In a recent decision, *Thoman Engineers, Inc. v. McDonald*, 57 Ala.App. 287, 328 So.2d 293, this court held that in the interest of reaching the merits, certain formal defects in the

¹⁵ ARAP Rule 28(a). This rule in Alabama is similar to the Federal Rule 28 of Appellate Procedure that was quoted above at page 7.

statement of issues will not prevent review if the true issues can be readily determined from the remainder of the brief or if the appellee suffers no prejudice. That is as liberal a construction of ARAP as this court intends to make. To attempt an ascertainment of the actual issues presented by this appeal would require that we delve into the realm of speculation, for the remainder of the brief confuses the issues rather than clarifying them, and this would cause us to exceed the limits of review established in *Thoman Engineers*. This we do not intend to do. Where, as here, the statements present no reviewable issues based on rulings below and the remainder of the brief is not helpful in amplifying the issues, this court will not take upon itself the task of legal research and writing necessary to organize appellant's contentions. It is incumbent on appellant to submit a brief containing clear and succinct issues based on rulings of the trial court. *Wetzel v. Hobbs*, 249 Ala. 434, 31 So.2d 639.

Since our review is not sufficiently invited to any ruling below, the judgment of the trial court is affirmed.

Welch v. Turner, 411 So.2d 143 (Ala.Civ.App. 1982).

In a case in which the plaintiff-appellant appeared *pro se*, the appellate court wrote:

Here, the original appellant's brief was filed on March 12, 1983. He was notified by the clerk of this court on March 16, 1983 that his brief was defective under several specified appellate rules, and he was granted seven days within which to correct it. His subsequent brief was filed on March 21, 1983. The unsigned brief, as to those particular subsections, consists solely of an argument which is only based upon the facts. The only citation of any legal authority or precedent by the appellant was "Section 35, Code of Alabama." Such is an inadequate legal citation and is the equivalent of no citation. *William Wilson Enterprises, Inc. v. Napier*, 395 So.2d 89 (Ala.Civ.App. 1981). There are hundreds of sections numbered "35" in the latest code of this state. Where an appellant fails to cite any authority, we may affirm for it is neither our duty nor function to perform all of the legal research for an appellant. *Welch v. Turner*, 411 So.2d 143 (Ala.Civ.App. 1983); *William Wilson Enterprises, Inc. v. Napier*, *supra*; *Blair v. York Engineering Co.*, 380 So.2d 878 (Ala.Civ.App. 1980).

Shory v. Peavy, 431 So.2d 1319, 1319-20 (Ala.Civ.App. 1983).

The second obstacle we face in considering the plaintiffs' arguments on appeal is that the only citation of authority or precedent in the plaintiff's brief is one case involving the ore tenus rule. There is no authority given for the plaintiffs' contentions that the damages award was inadequate. An appellant's contentions must be supported by authority and the reasons for the contentions. *Blair v. York Engineering Co.*, 380 So.2d 878 (Ala.Civ.App. 1980); Rule 28, A.R.A.P. Where an appellant fails to cite any authority, we may affirm, for it is neither our duty nor function to perform all of the legal research for an appellant. *Shory v. Peavy*, 431 So.2d 1319 (Ala.Civ.App. 1983). Indeed, we are required to affirm this case, because the brief does not contain the citation of any authority in support of the argument made in the brief. *Neal v. First Alabama Bank of Huntsville*, 440 So.2d 1111 (Ala.Civ.App. 1983). Therefore, the case is affirmed.

Gibson v. Nix, 460 So.2d 1346,1347 (Ala.Civ.App. 1984).

In a case in which the defendant-appellant appeared *pro se*, the appellate court wrote:

The defendant argues other matters, but has cited no authority in support of such argument. Where an appellant fails to cite any authority as to an issue raised by him, we may affirm, for it is neither our duty nor our function to perform the legal research for an appellant.

preliminary draft

Shory v. Peavy, 431 So.2d 1319 (Ala.Civ.App. 1983). Accordingly, we affirm as to the remaining issues which were raised by the defendant because of those deficiencies in his brief. *Guyton v. Guyton*, 469 So.2d 640, 641-42 (Ala.Civ.App. 1985).

The *entire* opinion of the Alabama Supreme Court in one case was the following:

Neither appellant nor appellee cites any authority in support of their appellate arguments. "Where an appellant fails to cite any authority, we may affirm, for it is neither our duty nor function to perform all the legal research for an appellant." *Gibson v. Nix*, 460 So.2d 1346, 1347 (Ala.Civ.App. 1984); Ala.R.App.P. 28(a). *See also, Stover v. Alabama Farm Bureau Insurance Co.*, 467 So.2d 251 (Ala. 1985); *Guyton v. Guyton*, 469 So.2d 640, 641 (Ala.Civ.App. 1985).

Henderson v. Alabama A & M University, 483 So.2d 392 (Ala. 1986).

In a case in which the plaintiff-appellant appeared *pro se*, the Alabama Supreme Court wrote:

In his brief on appeal, McConico has failed to cite any authority for the proposition that the law gives a litigant a cause of action for damages against his opponent or his opponent's lawyers for alleged violations of the Alabama Rules of Civil Procedure. In fact, the Rules themselves provide several vehicles, other than separate civil actions, for correcting procedural deficiencies in civil suits, none of which McConico availed himself of during the pendency of the prior litigation.

The law is settled that "[w]here an appellant fails to cite any authority, we may affirm, for it is neither our duty nor function to perform all the legal research for an appellant." *Henderson v. Alabama A & M University*, 483 So.2d 392 (Ala. 1986) (quoting *Gibson v. Nix*, 460 So.2d 1346, 1347 (Ala.Civ.App. 1984)); *see also* Ala.R.App.P. 28(a). McConico cites several cases supposedly for the proposition that Alabama law recognizes such a cause of action. However, after review of the cited cases, we conclude that they do not support his claim. The trial court's judgment of dismissal is due to be affirmed.

McConico v. McKibben, 581 So.2d 829 (Ala. 1991).

In a case in which the plaintiff-appellant, Mary Spradlin, appeared *pro se*, the Alabama Supreme Court wrote:

We have stated that it is not the function of this court to do a party's legal research. *See Henderson*, 483 So.2d at 392. Similarly, we cannot create legal arguments for a party based on undelineated general propositions unsupported by authority or argument. Ala.R.App.P. 28(a)(5); *Brittain v. Ingram*, 282 Ala. 158, 209 So.2d 653 (1968) (analyzing the predecessor to Ala.R.App.P. 28); *Ex parte Riley*, 464 So.2d 92 (Ala. 1985). In the present case, we would be hard pressed to even glean the general proposition.

We conclude that, for purposes of review, Spradlin has not adequately presented any issues relating to due process. Thus, she has waived any argument relating to such issues. *See* Ala.R.App.P. 28(a)(5); *Brittain*; and *Riley*.

Spradlin v. Spradlin, 601 So.2d 76, 78-79 (Ala. 1992).

The Spradlins did not learn their lesson, because seven months later David Spradlin was before the Alabama Supreme Court. The *entire* opinion in David's case was:

The plaintiff, David Spradlin, appeals from a denial of his application for a preliminary injunction against the Birmingham Airport Authority.

The appellant fails to cite any authority in support of his arguments concerning the injunctive relief. "Where an appellant fails to cite any authority for an argument, this Court may affirm the judgment as to those issues, for it is neither this Court's duty nor its function

to perform all the legal research for an appellant. Rule 28(a)(5), Ala.R.App.P.; *Henderson v. Alabama A & M Univ.*, 483 So.2d 392 (Ala. 1986)." *Sea Calm Shipping Co., S.A. v. Cooks*, 565 So.2d 212, 216 (Ala. 1990).

Spradlin v. Birmingham Airport Authority, 613 So.2d 347, 348 (Ala. 1993).

A disbarred attorney, Julia McCain Lampkin Asam, sued the chairperson of the disciplinary board of the Alabama State Bar Association. Asam appeared *pro se* in both the trial court and in the appellate court. The appellate court wrote:

In her brief, Asam's attempts to raise several issues are chaotic and unintelligible. Her brief is filled with jumbled, unclear, disorganized, and incoherent babblings interspersed with occasional legal terminology and misspelled words. Her brief and other filings contain an array of unsupported allegations and a plethora of unrelated and irrelevant photocopies of documents, including photocopies of news articles, Asam's campaign literature, and some of her medical records. Although she cites numerous legal authorities in her brief, those general authorities simply do not support her disjointed contentions. Rule 28, A.R.App.P. Inapplicable general propositions are not supporting authority, and an appellate court has no duty to perform a litigant's legal research. *Legal Systems, Inc. v. Hoover*, 619 So.2d 930 (Ala.Civ.App. 1993); *Lockett v. A.L. Sandlin Lumber Co.*, 588 So.2d 889 (Ala.Civ.App. 1991); and *Moats v. Moats*, 585 So.2d 1386 (Ala.Civ.App. 1991). Similarly, appellate courts do not, "based on undelineated propositions, create legal arguments for the appellant." *McLemore v. Fleming*, 604 So.2d 353, 353 (Ala. 1992). This court will address only those issues properly presented and for which supporting authority has been cited. *Simonton v. Carroll*, 512 So.2d 1384 (Ala.Civ.App. 1987).

Asam's failure to properly raise or argue issues places her in a perilous position on appeal because she has provided nothing suitable for appellate review. Her brief fails to comply with Rule 28, A.R.App.P., in numerous aspects. She fails to properly present any issue, she fails to properly argue any issue, and she fails to cite any supporting authority. Although her brief contains vague references to legal authority, she fails to indicate how that authority supports her position, and she fails to provide any indication as to how the trial court erred. Asam does not argue that she presented substantial evidence in opposition to Devereaux's summary judgment motion, nor is there any evidence in the record indicating that the summary judgment was improper.

When an appellant fails to properly argue an issue, that issue is waived and will not be considered. *Boshell v. Keith*, 418 So.2d 89 (Ala. 1982). This court is not unsympathetic to a pro se litigant; however, the rules governing the operation of the courts of this state are no more forgiving to a pro se litigant than to one represented by counsel. *Bowman v. Pat's Auto Parts*, 504 So.2d 736 (Ala.Civ.App. 1987). Thus, a party acting pro se must comply with legal procedure and court rules and may not avoid the effect of the rules because of unfamiliarity. See *Hines v. City of Mobile*, 480 So.2d 1203 (Ala. 1985). In view of Asam's failure to substantially comply with the rules, we pretermitt a discussion of any issue she attempted to raise.

For the foregoing reasons, the judgment of the trial court is due to be affirmed. *Asam v. Devereaux*, 686 So.2d 1222, 1224 (Ala.Civ.App. 1996).

An appeal to the Alabama Supreme Court by an attorney for the city of Birmingham failed to cite any authority for one argument.

The City next argues that BRIC's claims of negligent supervision and breach of implied warranty are irreconcilably inconsistent. However, it offers no authority to support its

argument. When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research. Rule 28(a)(5); *Spradlin v. Birmingham Airport Authority*, 613 So.2d 347 (Ala. 1993).
City of Birmingham v. Business Realty Inv. Co., 722 So.2d 747, 752 (Ala. 1998).

Oklahoma

A plaintiff who lost at trial appealed to the Oklahoma Supreme Court with a brief that cited no cases. The Oklahoma Supreme Court simply affirmed the trial court:

The plaintiff in error urges four propositions for reversal. Two propositions refer to a statute; no proposition is supported by citation of decisional law. The assignments of error are not supported by convincing argument. Promulgating an opinion by the court would require extensive independent research. The time required for independent research by this court necessarily results in delaying the disposition of other appeals. While independent legal research is often necessary and justified, the administration of justice, as reflected by the disposition of the appellate caseload, must discourage the practice to do equity to the other appeals. Assignments of error will not be considered favorably on appeal when unsupported by convincing authority or argument, and it does not appear without further research that they are well taken. *Irwin v. Irwin*, 416 P.2d 853 (Okla. 1966); *O.K. Iron & Metal Company v. Sandoval*, 434 P.2d 247 (Okla. 1967); *Bradley v. McCabe*, 438 P.2d 468 (Okla. 1967).
Abla v. State ex rel. Alcoholic Beverage Control Bd., 463 P.2d 968, 968-69 (Okla. 1970).

Wisconsin

A Wisconsin appellate court declared that courts do not provide legal research for litigants.

It is not the job of the court of appeals to supply argument and legal research for an appellant who raises unsupported claims. *Cf. State v. Waste Management of Wisconsin*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("[a]n appellate court is not a performing bear, required to dance to each and every tune played on an appeal."). Therefore, we do not consider Etmanczyk's unsupported claims of defect any further.
Etmanczyk v. Etmanczyk, 1992 WL 140613, at *2 (Wis.App. 1992).

A later Wisconsin case makes the same point:

However, Daniel V. fails to substantiate his arguments with citations to the record or to law.
[FN1]

FN1. Other than vague constitutional catch phrases, Daniel V. fails to identify any legal source for his contentions. Further, despite his constitutional arguments, he fails to cite any particular constitution or constitutional section.

It is not the job of the court of appeals to supply argument and legal research to an appellant who raises unsupported claims. *Cf. State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("[a]n appellate court is not a performing bear, required to dance to each and every tune played on appeal"). In addition, we will

generally not consider arguments unsupported by legal authority. *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct.App. 1980). Finally, an appellate argument unsupported by proper cites to the record does not comply with 809.19(1)(e), Stats., and this court will refuse to consider it, or will summarily affirm on this issue. Rule 809.83(2), Stats; *Shaffer*, 96 Wis.2d at 546, 292 N.W.2d at 378.

Daniel V. v. Debie M., 1996 WL 549740 at *1 (Wis.App. 1996).

A third Wisconsin case has the same holding:

Miesen also argues that the appraisal is intellectual property and that therefore the DOT cannot take the property without just compensation. Miesen fails to support this assertion with legal authority, and we decline to supply legal research for him. See *State v. Waste Management*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

Miesen v. State Dept. of Transp., 594 N.W.2d 821, 824, n. 3 (Wis.App. 1999).

7. Malpractice

Cases in New York state provide a terse explanation of legal malpractice that, since 1985, explicitly includes *inadequate* legal research. Under the common law of New York State, an attorney can be liable for malpractice for the occurrence of any of the following:

- “ignorance of the rules of practice,”
- “failure to comply with conditions precedent to suit,”
- “neglect to prosecute or defend an action, or”
- “failure to conduct adequate legal research.”

Grago v. Robertson, 370 N.Y.S.2d 255, 258 (N.Y.A.D. 3 Dept. 1975)(listing first three items);

Saveca v. Reilly, 488 N.Y.S.2d 876, 877-78 (N.Y.A.D. 3 Dept. 1985)(“legal research”);

Gardner v. Jacon, 538 N.Y.S.2d 377, 379 (N.Y.A.D. 3 Dept. 1989)(“legal research”);

McCoy v. Tepper, 690 N.Y.S.2d 678, 679 (N.Y.A.D. 2 Dept. 1999)(listing all four items);

Shopsin v. Siben & Siben, 702 N.Y.S.2d 610, 612 (N.Y.A.D. 2 Dept. 2000)(listing all four items).

Smith v. Lewis

In an early legal malpractice case in 1973, the California courts considered the case of the wife of an officer in the California National Guard, who sued her attorney (Lewis) for failure to consider her husband’s retirement pensions as community property in a divorce action. The trial court found for the wife, awarded wife \$ 100,000 in damages, and the attorney appealed. The intermediate appellate court wrote:

Appellant [i.e., attorney Lewis] had the clear duty to research the law on the subject rather than advise his client that the benefits were not community property without such research. Had he done such work, he would have found, without much effort, that there was a clear probability that the benefits were community property. Unlike the situation in *Lucas*, appellant had alternatives open to him. If after such research he still had a wrong impression or came to a contrary conclusion regarding the status of the law, he had a duty to advise his client that

another attorney might reach a different conclusion in order that she might have a choice [citation omitted] and, if appellant remained as her attorney, a duty to protect her interest by pleading the benefits were community property and litigating the question. Instead, appellant voluntarily chose the risky path of not researching the problem, misadvising his client and ignoring the question in his pleading and settlement negotiations.

Smith v. Lewis, 107 Cal.Rptr. 95, 101 (Cal.App. 5 Dist. 1973).

The California Supreme Court affirmed both the trial court and the intermediate appellate court:

The State benefits, the large majority of the payments at issue, were unquestionably community property according to all available authority and should have been claimed as such. As for the Federal benefits, the record documents defendant's failure to conduct any reasonable research into their proper characterization under community property law. [FN7] Instead, he dogmatically asserted his theory, which he was unable to support with authority and later recanted, that all noncontributory military retirement benefits, whether state or federal, were immune from community treatment upon divorce. The jury could well have found defendant's refusal to educate himself to the applicable principles of law constituted negligence which prevented him from exercising informed discretion with regard to his client's rights.

FN7. At trial defendant testified that prior to the division of property in the divorce action, he had assumed the retirement benefits were not subject to community treatment, despite the fact General Smith had already begun to receive payments from the state; that he did not at that time undertake any research on the point nor did he discuss the matter with plaintiff; that subsequent to the divorce plaintiff asked defendant to research the question whereupon defendant discovered the *French* case which contained dictum in support of plaintiff's position; that the *French* decision caused him to change his opinion and conclude 'that the Supreme Court, when it was confronted with this (the language in *French*) may hold that it (vested military retirement pay) is community property.' On the basis of *French* defendant filed his unsuccessful motion to amend the final decree of divorce to allow plaintiff an interest in the retirement benefits. Defendant admitted at trial, 'I would have been very willing to assert it (a community interest) on her behalf had I known of the dictum in the *French* case at the time.'

As the jury was correctly instructed, an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He 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 which, although not commonly known, may readily be found by standard research techniques. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 364 P.2d 685; *Lally v. Kuster* (1918) 177 Cal. 783, 786, 171 P. 961; *Floro v. Lawton* (1960) 187 Cal.App.2d 657, 673, 10 Cal.Rptr. 98; *Sprague v. Morgan* (1960) supra, 185 Cal.App.2d 519, 523, 8 Cal.Rptr. 347; *Armstrong v. Adams* (1929) 102 Cal.App. 677, 684, 283 P. 871.) If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved. (See, e.g., *Sprague v. Morgan* (1960) supra.) But even with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem. In the instant case, ample evidence was introduced to support a jury finding that defendant failed to perform such adequate research into the question of the community character of retirement benefits and

thus was unable to exercise the informed judgment to which his client was entitled. (See fn. 7, Ante.)

We recognize, of course, that an attorney engaging in litigation may have occasion to choose among various alternative strategies available to his client, one of which may be to refrain from pressing a debatable point because potential benefit may not equal detriment in terms of expenditure at time and resources or because of calculated tactics to the advantage of his client. But, as the Ninth Circuit put it somewhat brutally in *Pineda v. Craven* (9th Cir. 1970) 424 F.2d 369, 372: 'There is nothing strategic or tactical about ignorance . . .'. In the case before us it is difficult to conceive of tactical advantage which could have been served by neglecting to advance a claim so clearly in plaintiff's best interest, nor does defendant suggest any. The decision to forego litigation on the issue of plaintiff's community property right to a share of General Smith's retirement benefits was apparently the product of a culpable misconception of the relevant principles of law, and the jury could have so found.

Furthermore, no lawyer would suggest the property characterization of General Smith's retirement benefits to be so esoteric an issue that defendant could not reasonably have been expected to be aware of it or its probable resolution. (*Lucas v. Hamm* (1961) supra, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685.) In *Lucas* we held that the rule against perpetuities poses such complex and difficult problems for the draftsman that even careful and competent attorneys occasionally fall prey to its traps. The situation before us is not analogous. Certainly one of the central issues in any divorce proceeding is the extent and division of the community property. In this case the question reached monumental proportions, since General Smith's retirement benefits constituted the only significant asset available to the community. [FN8] In undertaking professional representation of plaintiff, defendant assumed the duty to familiarize himself with the law defining the character of retirement benefits; instead, he rendered erroneous advice contrary to the best interests of his client without the guidance through research of readily available authority.

FN8. It is undisputed that the only assets the parties had to show as community property after 24 years of marriage, aside from General Smith's retirement benefits, were an equity of \$1,800 in a house, some furniture, shares of stock worth \$2,800, and two automobiles on which money was owing.

Regardless of his failure to undertake adequate research, defendant through personal experience in the domestic relations field had been exposed to community property aspects of pensions. Representing the wife of a reserve officer in the National Guard in 1965, defendant alleged as one of the items of community property 'the retirement benefits from the Armed Forces and/or the California National Guard.' On behalf of the husband in a 1967 divorce action, defendant filed an answer admitting retirement benefits were community property, merely contesting the amount thereof. In 1965 a wife whom he was representing was so insistent on asserting a community interest in a pension, over defendant's contrary views, that she communicated with the state retirement system and brought to defendant correspondence from the state agency describing her interest in pension benefits. And representing an army colonel, defendant filed a cross-complaint for divorce specifically setting up as an item of community property 'retirement benefits in the name of the defendant with the United States Government.' It is difficult to understand why defendant deemed the community property claim to pensions of three of the foregoing clients to deserve presentation to the trial court, but not the similar claim of this plaintiff.

In any event, as indicated above, had defendant conducted minimal research into either hornbook or case law, he would have discovered with modest effort that General Smith's state retirement benefits were likely to be treated as community property and that his federal benefits at least arguably belonged to the community as well. Therefore, we hold that the trial court correctly denied the motions for non-suit and judgment notwithstanding the verdict and properly submitted the question of defendant's negligence to the jury under the instructions given. (See fn. 3, Ante.) For the same reasons, the trial court correctly refused to instruct the jury at defendant's request that 'he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers.' Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client. [footnote omitted]

Smith v. Lewis, 530 P.2d 589, 627-28 (Cal. 1975).

A rule of substantive law in *Smith v. Lewis* was overruled in *In re Marriage of Brown*, 544 P.2d 561, 569, n. 14 (Cal. 1976), but *Brown* has no effect on the validity of legal malpractice for failing to do legal research.

Goebel v. Lauderdale

A client sued his attorney (Lauderdale) in California, for malpractice. Another attorney, Cholakian, testified at trial as an expert witness. The trial court granted Lauderdale's motion for a nonsuit and the client appealed. The appellate court reversed, noting:

Where a malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against the attorney relates to his expertise, then only a person knowledgeable in the specialty can define the applicable duty of care and render an opinion on whether it was met. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810-811, 121 Cal.Rptr. 194.) However, "[w]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." (*Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647-648, 172 Cal.Rptr. 254; See also *Wright v. Williams*, *supra*, 47 Cal.App.3d at p. 811, 121 Cal.Rptr. 194.) In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.

This is such a case. Although Cholakian was not a bankruptcy expert, we believe that respondent's negligence was so clear that the testimony of a bankruptcy expert was not needed. Respondent's conduct demonstrates a total failure to perform even the most perfunctory research. Knowledge of what the Penal Code prohibits is easily discovered through standard research techniques. Knowing appellant was a general contractor, respondent only had to check the Penal Code to discover section 484b.

In addition, one does not need the testimony of a bankruptcy specialist to establish that it is below the standard of care to advise a client to violate the Penal Code. Respondent's failure did not arise because of carelessness in discovering bankruptcy law; it arose because he did not know what the Penal Code prohibited. Moreover, this is not a case where the law was unsettled or where strategic or tactical concerns prompted the attorney's advice. As stated in *Pineda v. Craven* (9th Cir. 1970) 424 F.2d 369, 372, "There is nothing strategic or tactical about ignorance, ..."

Quite simply, respondent advised his client to break the law. We see no problem in concluding that, as a matter of law, such conduct markedly departs from the skill and

diligence attorneys commonly possess. [citation omitted] Accordingly, we conclude that the trial court erred in granting the motion for nonsuit on the issue of respondent's negligence. *Goebel v. Lauderdale*, 263 Cal.Rptr. 275, 277-78 (Cal.App. 6 Dist. 1989).

Stanley v. Richmond

In a case decided in 1995, an appellate court in California wrote:

Viewed in the light most favorable to appellant and with all conflicts and inferences resolved in her favor, there is substantial evidence that, because of her plan to go into practice with Chamberlin before the expiration of appellant's right of first refusal, Richmond placed undue pressure on her client to settle the property division issues more quickly than necessary and on less favorable terms than appellant could have obtained without the time constraints. Certainly, a jury could reasonably infer that Richmond's failure to perform reasonable legal research about the advantages of the VA pension was the product either of her neglect or abandonment of appellant's cause, or of her eagerness to put appellant's case behind her so she and Chamberlin could open their new law offices as planned. This inference arises from the facts that on February 14, with only two days to go before Chamberlin's motion was to be heard, appellant discussed the matter with Richmond and asked for her advice; Richmond rendered a written opinion the very next day; and then — accepting appellant's version of the events as true — pressured appellant into a settlement waiving all rights in the VA pension the following day. There is, at most, a question of fact whether Dr. Stanley would have accepted a proposal that allowed appellant to retain a \$1 interest in his VA pension so as to preserve her right to a lifetime of very low-cost health benefits. However, on the evidence presented, a jury could reasonably find that such a minimal restructuring of the marital property division would not have been a "deal breaker."

Stanley v. Richmond, 41 Cal.Rptr.2d 768, 782-83 (Cal.App. 1 Dist. 1995).

Thomas Lazar, Esq.

Attorney Thomas Lazar filed a divorce action on behalf of his client, although the client had *not* met the jurisdictional requirement (i.e., being a resident of Michigan for at least 180 days) of the Michigan divorce statute. His client, Swanner, subsequently successfully sued Lazar for malpractice, then Lazar filed for bankruptcy.

At the trial on the malpractice action, Lazar testified that when he filed the divorce case, he knew that Swanner had not been a resident for 180 days, as required for jurisdiction in a divorce case. He did not conduct any research to determine the effect of filing a divorce case without jurisdiction. He intended, however, to remedy the defect in the future. He filed a divorce complaint without jurisdiction because he decided it was the best way to get a temporary custody order to protect against Swanner's husband kidnapping Jake out of state. He did no research to determine whether the jurisdictional defect could be corrected by filing an amended complaint. Nevertheless, he was sure of what he was doing. He felt that if the complaint was defective, he might file either a new complaint or an amended complaint. He did not tell Swanner that the court would have no jurisdiction over the complaint when he filed it. [multiple citations to trial transcript omitted]

In re Lazar, 196 B.R. 381, 383 (Bankr.E.D.Mich. 1996).

The Court concludes that in several respects, Lazar's professional conduct in representing Swanner was wrongful and intentional, would necessarily produce harm, and was without just cause or excuse. He filed Swanner's divorce case knowing that the 180 day residency requirement for jurisdiction was not met, and did not properly explain to Swanner the potential consequences of that, or the potentially viable alternatives. He signed and filed, and caused his client to sign, a complaint with a false jurisdictional allegation, knowing it to be false. He did not advise Swanner or the court of the potential defect, and obtained an *ex parte* order on the basis of the false jurisdictional allegation in the complaint. He did no legal research to determine the potential consequences of this course of action. [FN3] This ill-conceived strategy was doomed to fail and was fraught with potentially dangerous consequences for both Lazar and Swanner, most of which eventually occurred. Lazar must have understood the substantial and unnecessary risks involved in his strategy. Given the trust that Swanner obviously placed in him and his professional judgment, as well as her interest in her child, his chosen course of conduct was unconscionable.

FN3. Indeed the only Michigan cases on point hold that an order in a case filed without jurisdiction is void. *Lewis v. Lewis*, 153 Mich.App. 164, 395 N.W.2d 44 (1986); *Pierson v. Pierson*, 132 Mich.App. 667, 347 N.W.2d 779 (1984).

In re Lazar, 196 B.R. at 384-385.

The bankruptcy court held that attorney Lazar's debt to his former client was *not* dischargeable in bankruptcy.

Shimer v. Foley, Hoag & Eliot

Shimer hired the law firm of Foley, Hoag & Eliot (FHE) in Boston to represent him in a contract dispute with his employer. FHE allegedly did inadequate legal research and encouraged Shimer not to accept a settlement from his employer. At trial in Federal court, Shimer lost his case with this employer. Shimer then sued FHE in state court for negligent advice. At trial on the malpractice issue, the judge excluded some evidence that was essential to Shimer's case, and Shimer appealed. The appellate court vacated the trial judge's exclusion of the evidence, and remarked:

The judge erred, as well, when she concluded that Shimer could not recover as damages in the malpractice action his legal fees and costs incurred in the underlying Federal litigation because he could not prove the existence and terms of a new contract offer from Synthes.

Shimer claims that FHE's failure to disclose the adverse findings of its legal research also resulted in his unnecessary defense of the declaratory judgment action. Had he been properly informed by FHE, he posits, he would have conceded the matter and brought the litigation to a close. He would have done so, he asserts, because the significant expense of legal representation would have outweighed the reduced likelihood of success in light of the adverse case law that FHE's research had revealed. Moreover, he would have taken that course of action, he states, regardless of the availability of a new contract offer from Synthes.

In such circumstances, it was appropriate for Shimer to claim as damages in the malpractice action his legal fees and costs associated with the continued defense in the Federal litigation. Thus, evidence demonstrating Shimer's payment of legal fees and costs would constitute competent proof of damages purportedly resulting from FHE's alleged negligence,

independent of any damages stemming from Shimer's rejection of Synthes's offer. [footnote omitted] Accordingly, his complaint should not have been dismissed on that basis. *Shimer v. Foley, Hoag & Eliot LLP*, 795 N.E.2d 599, 608 (Mass.App.Ct. 2003). My search of Westlaw on 3 March 2005 found no other judicial opinions in this case.

Cooks v. U.S.

It is no secret that indigent criminal defendants in the USA are provided legal counsel who is generally overworked and underpaid. Such counsel may not do adequate legal research, as shown in the case of *Cooks v. U.S.* This is not a malpractice case, however I have included it in the malpractice section, because Cooks' attorney clearly committed malpractice.

In a criminal case, the indigent Defendant's attorney apparently did no legal research on the sentence for the crime and advised the Defendant to plead guilty. The Defendant later filed a successful habeas corpus petition. The opinion of the U.S. Court of Appeals mentions the facts:

Defendant, a virtual illiterate with a minimal, sixth-grade education, was charged on a facially defective six-count indictment. Count I of the indictment accused the defendant of transporting a specified forged American Express Money Order across state lines, from Houston, Texas to Minden, Louisiana, in violation of 18 U.S.C.A. § 2314. Counts II through VI charged the defendant with aiding and abetting the transportation in interstate commerce of five other specified forged American Express Orders on the same date also in violation of 18 U.S.C.A. § 2314. Clearly the indictment was fatally infirm. A single trip across state lines can result in only one criminal charge of transporting forged securities in interstate commerce. [citation to two U.S. Supreme Court cases in the years 1955 and 1961 omitted].

Notwithstanding the obvious inefficacy of the indictment, [footnote omitted] Defendant was advised by court-appointed counsel that should he go to trial on the indictment, he would face a maximum sentence of up to sixty years – ten years on each count. Instead of risking such an extended incarceration, defense counsel advised Defendant to accept a "plea bargain" which had been negotiated with the Government's Attorney – if Defendant would plead guilty to Count I of the indictment, and face a maximum penalty of ten years in prison, the Government would move to dismiss the other five (unenforceable) counts. The Defendant quite understandably accepted the deal.

Cooks v. U.S., 461 F.2d 530, 531-32 (5th Cir. 1972).

The U.S. Court of Appeals then explained why the guilty plea must be withdrawn, because the plea was neither knowing nor voluntary.

While the good faith errors of appointed counsel are normally insufficient to justify granting a motion to vacate sentence, [citations to four cases omitted] significant misleading statements of counsel can rise to a level of denial of due process of law and result in a vitiation of the judicial proceeding because of ineffective assistance of counsel. See *Arrastia v. United States*, 5 Cir., 1972, 455 F.2d 736 and cases cited at 740. Where counsel has induced defendant to plead guilty on the *patently erroneous* advice that if he does not do so he may be subject to a sentence six times more severe than that which the law would really allow, the proceeding surely fits the mold we describe as a "farce and a mockery of justice." [citations to three cases omitted].

Of course, counsel's inability to foresee *future* pronouncements which will dispossess the court of power to impose a particular sentence which is presently thought viable does not render counsel's representation ineffective, nor does a plea later become invalid because it is predicated upon advice correct at the time, but later proved to have been erroneous by reason of *subsequent* decisions. [citations to three U.S. Supreme Court cases omitted]. Clairvoyance is not a required attribute of effective representation.

But although counsel need not be a fortune teller, he must be a reasonably competent legal historian. Though he need not see into the future, he must reasonably recall (or at least research) the past—and today the past surely encompasses the present. But for this case the past is enough since the controlling Supreme Court precedents which demonstrate unequivocally that defendant could not possibly receive a total sentence of 60 years on the indictment were decided more than a decade before this defendant pleaded guilty. Effective counsel should have been aware of and advised the defendant of, at a minimum, the maximum — that is, the maximum penalty as the law was then understood.

[footnote omitted]

Cooks, 461 F.2d at 532.

My search of the Westlaw state and federal databases on 3 March 2005 shows no further judicial opinions on this case.

8. Why do some attorneys do poor research?

While I do not intend to make excuses for attorneys who either (1) file a Complaint without doing legal research, or (2) submit a Brief with *inadequate* citations to authority, I believe it is important to understand *why* it might happen.

Legal research is a *scholarly* activity, unlike most of the practice of law. Someone who is good at courtroom presentations (e.g., cross examinations, objections that preserve the right to appeal, making a convincing presentation to the jury, etc.) and good at depositions, is not necessarily also good at legal research. Similarly, someone who has good interpersonal skills (e.g., acquiring clients, ability to interview, counsel, or negotiate) is not necessarily also good at legal research, which can require many hours working alone. I have worked with attorneys for more than twenty years, and I know only a few attorneys who genuinely enjoy legal research. Most attorneys seem to regard legal research as a chore to be dumped on a law clerk (i.e., a law student who is working part-time in a law firm) or on an *inexperienced* lawyer (e.g., an associate at the law firm). The problem is that the dumpee, while *unable* to escape from the task of legal research, probably does not have the knowledge and experience to do a good, thorough job of legal research in a case involving complex or novel legal issues.¹⁶

¹⁶ Everyone seems to recognize that a litigator who has tried more than thirty cases in a courtroom is “better” in a courtroom than a 26-year-old kid, fresh out of law school. But experienced litigators don’t seem to recognize that a specialist in legal research, with more than ten years of experience searching for cases, statutes, and regulations – and with at least several scholarly publications about law – is “better” at legal research than a 26-year-old kid, fresh out of law school.

Why did legal research get its reputation amongst practicing attorneys as a chore to be dumped on some lower-level person? Traditional legal research involves searching through books (e.g., West's Digests, Sheppard's Citations, etc.) in a law library that is very tedious work. It is easy to understand why practicing attorneys want to avoid such tedious work. The disdain by practicing attorneys for manual legal research reminds me of a remark attributed to John Pell, an English mathematician in the 1600s, that solving polynomial equations was "work unfit for a Christian".

Modern legal research involves use of online databases (e.g., Westlaw, Lexis, etc.) and developing search strategies for those databases. Many practicing attorneys are technophobes¹⁷ who are *uncomfortable* sitting at a computer terminal for hours, searching for cases and statutes. Additionally, paying for online databases per search or per hour can be exorbitantly expensive, often incurring *more* than US\$ 1000 in expenses for searches in one case.

For these reasons, there exists a culture amongst attorneys that legal research is a chore to be delegated to low-paid people (e.g., law clerks and associates), *not* a proper activity for highly paid superstar litigators. Television shows about attorneys or law firms reflect this culture, by showing actors playing attorneys almost everywhere, except in a library or sitting at a computer terminal. When legal research is routinely delegated to people with low status, it is a clear signal that senior attorneys regard legal research as relatively *unimportant*. *If* senior attorneys appreciated what good legal research could produce, perhaps they would be willing to use the services of a specialist in legal research who is also an attorney. But, because most senior attorneys hate legal research, they are unwilling to allocate significant resources to legal research. As a consequence, clients suffer from less effective briefs, attorneys for plaintiffs may not plead *all* viable causes of action, opportunities to make new law may be squandered, and — occasionally — attorneys are sanctioned for misleading the court about the law.

Very few clients appreciate the need to spend several thousand dollars on legal research, which may encourage experienced litigators to do minimal legal research to avoid complaints from whiny clients. On the other hand, it would *inappropriate* for a client to demand that the attorney do legal research in a specific way, because the attorney is an independent contractor. Further, according to the rules of professional responsibility, an attorney is unable to escape liability for

¹⁷ As evidence of how technophobic attorneys are, even in the year 2003, most attorneys still have no e-mail address in their advertisements. Of the few attorneys who have a website, most of these websites were either prepared by a consultant, or prepared by using a one-size-fits-all template at lawyers.com that has little expression of individuality and severe limits on the amount of significant information at the website. This technophobia probably has its origins in the education of attorneys: most attorneys took the minimum amount of science and mathematics in high school and undergraduate college, and their ignorance causes them to reject new technology, instead of learning to use technology effectively.

negligence,¹⁸ so the attorney alone must be able to determine what is appropriate legal research. Not only is the attorney liable in malpractice for *inadequate* legal research, but also judges who sanction attorneys for *inadequate* legal research routinely order the attorney personally (*not* the attorney's client) to pay the sanction or opposing counsel's fees.

Finally, many successful attorneys say they are "too busy" with depositions, court appearances, and meetings to do legal research. But, at the same time, these successful attorneys are often reluctant to hire a consultant to do legal research, because hiring an outside consultant would decrease the law firm's income, compared with doing all work inside the law firm.

This document is at **www.rbs2.com/legres.pdf**

My most recent search for court cases on this topic was in October 2003.

created 18-28 Oct 2003, revised 17 Mar 2005

return to my homepage at <http://www.rbs2.com/>

¹⁸ American Bar Association Model Code DR6-102 (1969), with some exceptions in the more recent American Bar Association Model Rules of Professional Responsibility 1.8(h). *Committee on Legal Ethics of The West Virginia State Bar v. Cometti*, 430 S.E.2d 320, 328 (W.Va. 1993); *Maher v. Miller*, 18 Pa. D. & C.3d 767, 771 (Pa.Com.Pl. 1980)(Court will not enforce contract that violates a rule of professional responsibility.)