SURFIN' SAFARI—WHY COMPETENT LAWYERS SHOULD RESEARCH ON THE WEB

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ABSTRACT

The easy availability of information on the internet has drastically changed the way that lawyers conduct legal research and has also affected the standards for competency to which lawyers are held. This Article explores the ways in which judges' and lawyers' expectations have been shaped by technological changes in the last two decades. The Article reviews the various ways in which the adequacy of a lawyer's research can be measured and concludes that competence is measured both by what techniques are standard in practice and by what sources judges look to in supporting their decisions. Because many legal materials are increasingly available only online, and because judges are showing a greater willingness to rely on non-legal information available on the web, the Article concludes that a lawyer cannot competently represent a client without going beyond Westlaw and Lexis and conducting research on the internet.

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> *Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.*[1]

INTRODUCTION

No lawyer wants to be the subject of public ridicule in a judicial opinion, especially for something as basic as legal research. Yet in this age of increasingly available information, many lawyers do find themselves subject to public embarrassment or worse for failing to adequately perform the building blocks of law practice—legal research and analysis.[2] How do lawyers find themselves in this position? And how can they avoid it?

There is little question that locating relevant legal authority and evaluating it are fundamental skills every lawyer should possess.[3] The American Bar Association has reflected this in the Model Rules of

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[1] Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

[2] *See, e.g.*, Nagle v. Alspach, 8 F.3d 141 (3d Cir. 1993) (imposing sanctions under Federal Rules of Appellate Procedure Rule 38 for a frivolous appeal due to carelessness in research); Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 184 (D.D.C. 2002) ("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."); Schutts v. Bently Nevada Corp., 966 F. Supp. 1549 (D. Nev. 1997) (imposing Federal Rules of Civil Procedure Rule 11 sanctions for failing to conduct "minimally reasonable legal research"); TCW/Camil Holding L.L.C. v. Fox Horan & Camerini L.L.P. (*In re* TCW/Camil Holding L.L.C.), 330 B.R. 117 (D. Del. 2005) (finding that an attorney can be held liable for legal malpractice for failure to conduct adequate legal research); Blake *ex rel* Blake v. National Casualty Co., 607 F. Supp. 189 (C.D. Cal. 1984) (imposing sanctions under Federal Rules of Civil Procedure Rule 11 for failure to conduct reasonable research); Goebel v. Lauderdale, 214 Cal. App. 3d 1502, 1508 (Cal. Ct. App. 1989) (finding an attorney guilty of malpractice for "total failure to perform even the most perfunctory research"); Walder v. State, 85 S.W.3d 824 (Tex. 2002) (requiring a court-appointed counsel to file an amended brief for, among other things, inadequate citation to relevant authority).

[3] SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-40 (Robert MacCrate ed., 1992). The MacCrate Report identifies legal research and analysis as two of the ten "fundamental lawyering skills essential for competent representation." *Id.* at 138. Excerpts of the report are available at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html (last visited Dec. 6, 2007).

Professional Conduct.[4] Research is an essential part of any type of law practice. In law schools across the country, students are instructed in the fundamentals of legal research as a part of the required first-year curriculum.[5] Research texts abound, focusing on the various sources of primary and secondary legal authority and methodologies for accessing the vast amounts of material available to legal researchers.[6]

There is also general agreement that the availability of information through electronic media has changed the landscape of legal research.[7] The widespread use of Westlaw and Lexis has led to the expectation that they will be used, at the very least, for updating and locating the most recent authority.[8] A growing number of websites provide free and easy access to voluminous amounts of legal authority.[9] Courts and other governmental entities are posting information directly to the web.[10] Judges throughout the country are increasingly citing to information found on the web.[11] Indeed, some scholars have speculated that the increased availability of information on the internet is leading to a change in the

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[4] See *infra* Section II.A.

[5] *See* ASSOCIATION OF LEGAL WRITING DIRECTORS, LEGAL WRITING INSTITUTE, 2007 SURVEY RESULTS 7, 9 (2007), *available at* http://alwd.org/surveys/survey_results/2007_Survey_Results.pdf (last visited Dec. 6 2007) (showing that of 177 law schools teaching legal research and writing in the first year curriculum, 149 integrate legal research into the writing course).

[6] *See, e.g.*, ROBERT C. BERRING & ELIZABETH A. EDINGER, FINDING THE LAW (12th ed. 2005); CHRISTINA L. KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH (5th ed. 2000); ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH (8th ed. 2002); AMY E. SLOAN, BASIC LEGAL RESEARCH (2d ed. 2003).

[7] *See* Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. APP. PRAC. & PROCESS 275 (2000); Alvin M. Podboy, *The Shifting Sands of Legal Research: Power to the People*, 31 TEX. TECH. L. REV. 1167 (2000); Patrick W. Spangler, *The New World Versus the Old World of Legal Research*, 20-APR CBA Rec. 48 (2006).

[8] *See* Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 94 (2000) ("As judges become more and more familiar with using computers and electronic research it seems reasonable to believe that they will expect the same out of the attorneys that practice in their courtrooms.").

[9] *See e.g.*, FindLaw, http://www.findlaw.com (last visited Dec. 6, 2007); LawGuru, http://www.lawguru.com (last visited Dec. 6, 2007); Nolo, http://www.nolo.com (last visited Dec. 6, 2007); Refdesk.com, http://www.refdesk.com/factlaw.html (last visited Dec. 6, 2007);

[10] See *infra* Section III.B.

[11] Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002). For a more detailed discussion of the variety of sources courts are citing to the web, see *infra* Section III.B.

very nature of legal authority.[12] The rapid growth in citations to controversial sources such as the unpublished opinions of courts, Wikipedia, and legal blogs appears to support this contention.[13]

In spite of the widespread consensus on the importance of research,[14] and the voluminous attention to *how* to do it well, there has been relatively little analysis devoted to what courts mean when they chastise a lawyer for inadequate research. How much research is enough? How much support must a lawyer provide for a legal argument in order to be minimally competent? Must a lawyer use particular methods of research? Particular sources? As the nature of legal research and legal authority changes, does the standard for competent research change along with it?

This Article will attempt to answer some of these difficult questions. Part I will review the various legal rules that address inadequate research and the consequences for violating these rules.[15] Part II will explore the standard by which competent research should be measured, discuss how that standard should change with changes in technology, and suggest that because of widespread citation to the internet in judicial opinions and the way in which the nature of "legal" authority is changing, web-based research for non-traditional sources of authority should now be considered part of a lawyer's obligation of competent research. The Conclusion will address the implications of these findings for the future of legal research.

I. ASSESSING COMPETENT RESEARCH

Legal research is a process, but it is ultimately the result of that process that reveals the degree to which the researcher has located relevant

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[12] *See generally* Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000).

[13] *See infra* Section III.B.

[14] For ease of discussion, the term "legal research" in this Article will focus on not only locating relevant material, but evaluating and using it appropriately. When a lawyer is criticized for poor research, it can be difficult to determine whether the problem is failure to find a source, failure to understand it, or failure to use it properly. *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 6 (1997). For purposes of this Article, the term "legal research" refers to all three failures.

[15] This Article will focus on research as reflected in written documents submitted to courts. There are also cases in which the inadequate research of attorneys led to poor advice given to clients. *See, e.g.*, U.S. v. Kwan, 407 F.3d 1005 (9th Cir. 2005) (finding counsel ineffective for failing to advise his client that a criminal plea could result in deportation when simple research would have revealed this). It is often difficult to assess whether the failure to include a source in a document presented to a court is a failure to find the source, or failure to recognize its importance. This Article will consider both of these aspects part of the broader skill of competent legal research.

authority. Measuring the adequacy of legal research is thus a complex and challenging enterprise. There is no one source that provides a clear answer, though a variety of court rules and legal claims address aspects of competent research. A review of these various sources reveals two consistent themes in assessing the adequacy of legal research. Courts investigating the adequacy of a lawyer's research look both at the process and the results of the research. Thus, a competent legal researcher must employ research techniques that are standard in the field, and the result of that process must provide the decision-maker with adequate authority to make an informed decision.

There are numerous ways to approach a standard for competence in research. The most obvious indication of incompetent research is a negative decision by a court that is as a result of poor research, rather than the underlying merits of the issue. No lawyer wants to be in the position of plaintiff's counsel in *Brown v. Lincoln Towing Service*,[16] whose complaint was dismissed because it was based on an expired statute. In *Bergquist v. FyBX*,[17] the court found that the case was properly dismissed, even though Rule 11 sanctions were not warranted, where the complaint "was the product of ineptitude and misguided legal research, rather than a failure to attempt a reasonable inquiry into the law or an intent to harass."[18]

The appellate courts are particularly intolerant of briefs containing arguments that are not clearly based on sound research. Both federal and state courts simply refuse to consider issues that are not properly briefed.[19] When a legal argument is inadequately supported by authority, it forces the court into the role of an advocate creating legal arguments, rather than an objective decision-maker evaluating the arguments presented by counsel.[20] As the First Circuit has said, "the reviewing court cannot be

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[16] No. 88C0831, 1988 WL 93950 (N.D. Ill. 1988).

[17] 108 F. App'x 903 (5th Cir. 2004).

[18] *Id.* at 905.

[19] *See, e.g.*, Phillips v. Hillcrest Med. Ctr., 244 F.3d 790, 800 n.10 (10th Cir. 2001) (holding that an appellate court need not consider an argument where the party has failed to support it "with any authority, legal or otherwise"); Cooper v. Waters, 151 F. App'x 638, 639 n.2 (10th Cir. 2005) (refusing to review assertions raised by counsel "for which he has not provided argument or legal authority"); John v. Barron, 897 F.2d 1387, 1393 (7th Cir. 1990) (dismissing an appeal where the brief failed to cite any authority); Smith v. Town of Eaton, 910 F.2d 1469, 1471 (7th Cir. 1990) ("We recently have made it clear that we shall not hesitate to dismiss an appeal due to poorly prepared and researched briefs."); State v. Thomas, 981 P.2d 299 (Utah 1998) (declining to address an issue that was inadequately briefed).

[20] *See, e.g.*, Ernst Haas Studio v. Palm Press, 164 F.3d 110, 112 (2d Cir. 1999) ("Appellant's Brief is at best an invitation to the court to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant. We decline the invitation."); Mantiply v. Mantiply, 951 So.2d 638, 653 (Ala. 2006) ("It is

expected to 'do counsel's work, create the ossature for the argument, and put flesh on its bones.'"[21] Failure to research jurisdictional or procedural rules can also result in dismissal and subject an attorney to public embarrassment.[22]

Even without concrete standards or sanctions, the negative consequences of poor research alone should be enough to show a lawyer why competent research is essential. These examples tend to show the egregious cases, but do not clearly demonstrate a standard for sufficiency in research. While no sources clearly and directly articulate a standard for competence in research, a number of ethical and legal standards contribute to a general understanding of the level of research it takes to avoid ethical or legal sanctions and public embarrassment.

First, and most directly, the ABA Model Rules of Professional Conduct address competence in research.[23] A number of the Model Rules touch on aspects of legal research.[24] In addition, both trial and appellate court rules address the adequacy of research in documents submitted to court.[25] Finally, courts express their displeasure with inadequate research through publicly chastising lawyers,[26] and clients express their displeasure

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well settled that 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 legal research for an appellant.") (citation omitted).

[21] Redondo-Borges v. U.S. Dept. of Housing & Urban Dev., 421 F.3d 1, 6 (1st Cir. 2005) (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)).

[22] *See* Mortgage Elec. Registration Sys., Inc. v. Estrella, 390 F.3d 522, 524 (7th Cir. 2004) (dismissing an appeal where counsel "failed to do any research into the requirements of federal appellate jurisdiction before filing this appeal" and asserting that counsel for both appellant and appellee "deserve (and hereby receive) a public chastisement").

[23] MODEL RULES OF PROF'L CONDUCT (2007).

[24] *See* Carol M. Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing*, 29 NOVA L. REV. 49, 50 (2004). The majority of states have adopted the Model Rules directly, and other states have provisions roughly equivalent to the Model Rules. *Id.* For an alphabetical listing of all the states that have adopted the Model Rules of Professional Conduct, along with their respective dates of adoption, see http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Dec. 6, 2007).

[25] *See, e.g.*, FED. R. CIV. P. 11 (requiring that documents submitted to the court be supported by existing law or a good faith argument for the extension, modification or reversal of existing law); FED. R. APP. P. 28 (requiring that arguments in appellate briefs be supported by citations to relevant authority). Most state courts have equivalent rules. *See e.g.*, FLA. RULES OF PROF'L CONDUCT R. 4-3.3; MASS. RULES OF PROF'L CONDUCT R. 3.3; OR. RULES OF PROF'L CONDUCT R. 3.3; PA. RULES OF PROF'L CONDUCT R. 3.3.

[26] *See, e.g.*, *Mortgage Elec. Registration Sys., Inc.*, 390 F.3d at 524 (scolding attorneys for failing to research federal appellate jurisdiction before filing their claim); Bradshaw v.

through malpractice actions.[27] While it is rare for an attorney to be sanctioned for poor research alone, absent other serious problems, a review of these rules and principles sheds significant light on expectations for competent research.

A. MODEL RULES OF PROFESSIONAL CONDUCT[28]

The Model Rules include a number of provisions that touch on an attorney's obligation to perform competent research. Taken together, these rules create an ethical obligation to perform sufficient research to effectively advocate on behalf of a client. Each state has its own disciplinary system charged with enforcing these rules.[29] The Rules create a floor below which a lawyer may not fall without risking sanctions or malpractice liability.[30]

The very first substantive rule, Rule 1.1, provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[31] The comments to Rule 1.1 elaborate and clarify that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."[32] In addition, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice. . . ."[33] Model Rule 1.1 and its commentary are often cited

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Unity Marine Corp., 147 F. Supp.2d 668, 670 (S.D. Tex. 2001) (criticizing counsel for the poor quality of the briefs in a motion for summary judgment).

[27] *See, e.g.*, Smith v. Lewis, 530 P.2d 589 (Cal. 1975) (upholding malpractice verdict where attorney failed to perform adequate research); *In Re* TCW/Camil Holding L.L.C., 330 B.R. 117 (D. Del. 2005) (granting malpractice judgment for failure to conduct adequate research).

[28] The Model Rules of Professional Conduct were first adopted by the American Bar Association in 1983, replacing the Model Code of Professional Responsibility. They were amended in 2002. MODEL RULES OF PROF'L CONDUCT, Preface (2007) (describing the history of the ABA's role in developing standards for legal ethics and professional responsibility). The Model Rules and Preface are available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Dec. 6, 2007). To date, the Model Rules have been adopted by all but three states (California, Maine and New York). ABA, Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Dec. 6, 2007).

[29] Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1586 (2001).

[30] *Id.*

[31] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

[32] *Id.* at cmt. 5.

by scholars in support of the assertion that an attorney has an ethical duty to perform adequate legal research.[34] There is little clarity, however, regarding how competency is to be measured under this rule.[35]

While Model Rule 1.1 provides no general standard for what constitutes competent research, it is clear that at least some research is required when an attorney represents a client.[36] Courts are clearly aware of the duty of competent research and do not hesitate to refer attorneys for bar discipline when it appears they have violated their ethical duty.[37] The duty of competence is only invoked in egregious cases, such as in *Clement v. Public Service Electric and Gas Co.*, where the attorney filed a civil rights complaint based on a form book without reading the statute because she claimed the annotated statute was too lengthy.[38] The court found the attorney's failure to conduct independent legal research to show a "shocking lack of diligence and incompetence."[39] Finding the attorney's

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[33] *Id.* at 6.

[34] Bast & Harold, *supra* note 24, at 50; 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 GEO. J. LEGAL ETHICS 607, 614 (2000) ("[T]he requirement of competency in the [Model Rules] is directly applicable to a lawyer's legal research."); Whiteman, *supra* note 8, at 90 ("It has long been recognized that the ability to perform adequate legal research is a component of Rule 1.1.").

[35] Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 536-537 (noting that the comments to the Model Rules offer "limited guidance" regarding research competence); *see also* LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 214 (Aspen Publishers 2005).

[36] Baldayaque v. United States, 338 F.3d 145, 152 (2d Cir. 2003) (finding grounds for equitable tolling of a one year limitation where an attorney violated Rule 1.1 of the Connecticut Rules of Professional Conduct by failing to conduct any research).

[37] *See, e.g.*, John v. Barron, 897 F.2d 1387, 1394 (7th Cir. 1990) (referring an attorney to a disciplinary committee in his home state for, inter alia, an inadequate brief relying on a case that had been overruled and repeatedly rejected); SEC v. Suter, 832 F.2d 988, 991 (7th Cir. 1987) (referring an attorney's brief to the Illinois Registration and Disciplinary Commission where the court doubted whether an attorney was "minimally competent"); Clement v. Pub. Serv. Elec. & Gas Co., 198 F.R.D. 634, 635 (D.N.J. 2001) (referring the case to the Office of Attorney Ethics to determine whether the attorney had violated Rule 1.1 of the New Jersey Rules of Professional Conduct); *In re* S.C., 138 Cal. App. 4th 396, 428 (Cal. App. 2006) (referring the case to the State Bar of California where the appellant's brief contained incorrect citations, citations to irrelevant authority, and assertions supported by no authority at all).

[38] *Clement*, 198 F.R.D. at 636.

[39] *Id.* at 635-36.

excuse "simply mind-boggling,"[40] the court required, as part of a Rule 11 sanction,[41] that she complete basic legal education courses.[42]

When the duty of competence is invoked to identify inadequate research, the court rarely specifies a standard for adequate research. In one case, however, the court went so far as to spell out exactly what would be expected in a brief. In *Walder v. State*,[43] the court ordered a court-appointed defense counsel to file an amended brief or face referral to the state bar disciplinary committee because the lawyer's brief did not provide "adequate citations to pertinent legal authorities."[44] Sadly, the court noted that it received inadequate briefs with "disturbing frequency" and asserted that an attorney had the same ethical duty to a client whether the attorney was court-appointed or paid.[45] The court went into great detail explaining what level of citation would be adequate in a brief. The court specified both the types of cases the attorney should have cited in the brief (e.g., relevant authority from controlling courts) and the methods the attorney should have employed (e.g., research the subsequent history of any cited case).[46] The court's expectation appeared to have been based on a combination of what the court thought was sufficient support for the argument, and the methods the court considered standard to locate those sources.

The duty of competence provides the minimum threshold below which a lawyer must not fall. Extensive research revealed no cases in which a failure of competence based on research alone was found. However, a failure of competent research is often discussed by the courts in conjunction with other problems. Taken together with other ethical obligations, a standard for adequate research begins to emerge.

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[40] *Id.*

[41] FED. R. CIV. P. 11. For further discussion of Rule 11 and its relationship to legal research, see *infra* Subsection II.B.1.

[42] *Clement*, 198 F.R.D. at 637.

[43] 85 S.W.3d 824 (Tex. App. 2002).

[44] *Id.* at 826.

[45] *Id.*

[46] *Id.* at 827 ("When citing cases, counsel should identify and cite, at a minimum, pertinent decisions of the Supreme Court of the United States, the Court of Criminal Appeals, of this Court when available, and if no cases from this Court can be located on the issue presented, of other Texas intermediate courts of appeals. Counsel need not cite more than three cases on settled issues or principles. . . . Counsel should research the subsequent history of any case cited to be sure that it has not been reversed or modified. When counsel cites a decision of one of the fourteen intermediate courts of appeals, counsel should provide a subsequent history on any petition for discretionary review or indicate that no petition was filed." (internal footnotes and citations omitted)).

In addition to the basic duty of competence, the ethical duty of diligence also requires a certain level of legal research. Model Rule 1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[47] The comments explain that a lawyer must "act with commitment and dedication to the interests of the client."[48] Diligence is an implicit component of competent research because, even if a lawyer understands how to conduct effective research, if she does not do so, the result is no different (or worse) than if the research was done poorly.

This Rule has particular applicability in cases where a lawyer has done some research, but failed to perform a basic task, such as Shepardizing.[49] A number of courts have faulted attorneys for failing to Shepardize, either in print or, more recently, electronically.[50] Courts routinely emphasize the relative ease and quickness of Shepardizing, particularly with the use of Westlaw or Lexis, implying that failing to perform this simple task is a basic lack of diligence.

A lack of diligence can also be cited in cases in which a lawyer takes action without performing sufficient research. For example, in *Pravic v. U.S. Industries-Clearing*,[51] the defendant's attorney was sanctioned for relying on a memorandum written by another attorney without conducting any independent research. The court found that, at a minimum, the attorney should have "independently verif[ied] the reasoning of the cases cited in the memorandum and Shepardiz[ed] those

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[47] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007).

[48] *Id.* at cmt. 1.

[49] For most of the twentieth century, Shepard's citator service was the industry standard, and an essential part of the legal research process to verify that a found authority was still a valid source of law. *See* Robert C. Bering, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1698 (2000). In recent years, Westlaw's KeyCite service has proven to be a strong competitor. *Id.* at 1700. Judges and lawyers continue to refer to "Shepardizing" to describe the process of updating a legal source.

[50] *See, e.g.*, Horaitis v. Mazur, 2004 WL 524437 at *1 (N.D. Ill. 2004) ("[I]f they did not know better to begin with, they should have learned better by the simple act of Shepardizing *Geise* (as every laywer should do before citing any case) . . . ."); DeMyrick v. Guest Quarters Suite Hotels, 1997 WL 177838 at *1 (N.D. Ill. 1997) (noting that "no counsel ought to cite a case . . . without Shepardizing that case (or without conducting the equivalent electronic search via Westlaw or Lexis)"); Cimino v. Yale Univ., 638 F. Supp. 952, 959 n.7 (D. Conn. 1986) ("Counsel is admonished that diligent research, which includes Shepardizing cases, is a professional responsibility"); Gosnell v. Rentokil, 175 F.R.D. 508, 510 n.1 (N.D. Ill. 1997) ("It is really inexcusable for any lawyer to fail, as a matter of routine, to Shepardize all cited cases (a process that has been made much simpler today than it was in the past, given the facility for doing so under Westlaw or LEXIS.")); Meadowbrook LLC v. Flower, 959 P.2d 115, 120 (Utah 1998) ("Shepardizing a case is fundamental to legal research and can be completed in a matter of minutes.").

[51] 109 F.R.D. 620 (E.D. Mich. 1986).

cases."[52] Other courts have gone so far as to identify the ease with which an uncited authority could have been found when other related cases had already been cited.[53] These examples, in which an attorney already had the research that could have led to other sources, shows a basic lack of diligence in conducting thorough legal research.

The duties of competence and diligence are both duties the lawyer has to the client. The lawyer also has a duty to the court that is relevant to legal research—the duty of candor.[54] Model Rule 3.3 provides in part that a lawyer may 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."[55] This rule is designed to ensure that when lawyers are representing clients in court, they preserve the integrity of the judicial system by not allowing the court to be misled by a false understanding of the law or facts.[56] The duty to disclose adverse authority is narrowly drawn, focusing only on authority in the controlling jurisdiction that is intentionally withheld,[57] however, it is frequently invoked when courts are displeased because the lawyers haven't cited and argued the impact of important cases.[58]

While the duty to disclose adverse authority is aimed at ensuring that an attorney does not intentionally mislead the court, it is frequently invoked in cases where sloppy research, rather than intentional omission, is the reason for a failure to cite a controlling case. It can be difficult to determine whether a case has been omitted because of poor research or intentional obfuscation.[59] From the court's perspective, the relevant

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[52] *Id.* at 623.

[53] For example, in *Salahuddin v. Coughlin*, 999 F. Supp. 526 (S.D.N.Y. 1998), an attorney failed to cite a key case, although other closely related cases had been cited. The court pointed out that the key case could have been found by "Shepardization of *LaReau*, a keynote search based on keynotes gleaned from the Second Circuit's *Salahuddin* opinion, or any word search the Court can conceive that results in finding *LaReau* and *Smith*." *Id.* at 540.

[54] MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

[55] *Id.*

[56] *Id.* cmt. 2.

[57] Daisy Hurst Floyd, *Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor Towards the Tribunal*, 29 GA. L. REV. 1035, 1039 (1995).

[58] *See, e.g.*, Cimino v. Yale Univ., 638 F. Supp. 952 (D. Conn. 1986); Glassalum Eng'g Corp. v. Ontario LTD, 487 So.2d 87 (Fla. Dist. Ct. App. 1986).

[59] *See, e.g.*, *Cimino*, 638 F. Supp. at 959 n.7 ("The court is unable to discern whether sloppy research or warped advocacy tactics are responsible for these errors of omission. . . .").

authority has not been provided, and the court must at least consider whether the omission has been intentional.

Ultimately, courts are more tolerant of unintentional failure to disclose adverse authority, though they do not hesitate to express displeasure at the poor quality of the research that led to the omission.[60] For example, in *Glassalum Engineering Corp. v. Ontario, LTD*, the court roundly criticized both counsel for failing to cite the controlling case.[61] The court pointed out that the case relied on by appellee's counsel had been superseded, which Shepardizing would have quickly revealed, leading to the currently controlling case.[62] Chastising the lawyers for "at the least," performing inadequately, the court suggested that "[i]f either counsel discovered but intentionally failed to disclose [the controlling case], the implications would be far more severe: appellant's counsel would be guilty of gross incompetence for failing to call our attention to an obviously controlling case . . . ."[63]

Perhaps because of the difficulty in determining when failure to cite adverse authority is due to intentional deception, it is extremely rare for Rule 3.3 to be the basis of a disciplinary action.[64] Courts are reluctant to identify an ethical violation based on an assumption of wrongdoing.[65] Nonetheless, cases show that the courts have an expectation that thorough legal research should reveal any controlling case, whether or not ethical sanctions will be imposed.[66] For example, in *Massey v. Prince George's County*,[67] the court considered a violation of Model Rule 3.3 where the defendants failed to cite an adverse case from the controlling appellate court. The court saw the problem as a failure of research, and noted that counsel should have been aware of the case.[68] The court even went so far as to specify the search terms in Westlaw which would have led to the

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[60] *See, e.g.*, *Glassalum*, 487 So.2d at 88 (scolding counsel for failing to cite a controlling case).

[61] *Id.*

[62] *Id.*

[63] *Id.* at 88 n.2.

[64] Floyd, *supra* note 57, at 1044.

[65] *See, e.g.*, Geter v. Texas, 1996 WL 459767 at *3 n.2 (Tex. App. 1996) (stating that "we have no reason to assume that counsel *knowingly* made a false statement of law and failed to disclose controlling authority not disclosed by the State" but cautioning counsel "to choose authorities more carefully in the future").

[66] Floyd, *supra* note 57, at 1036-37.

[67] 918 F. Supp. 905 (D. Md. 1996).

[68] *Id.* at 907.

case.[69] However, the court ultimately did not impose sanctions, ruling that the public airing of the problem in a published opinion should be sufficient to emphasize the seriousness of the problem.[70] Thus, even if fear of actual sanctions does not motivate attorneys to conduct thorough research, having their ethics called into question and being publicly scolded should.

Finally, Model Rule 3.1 has implications for performing legal research. Rule 3.1 mandates that a lawyer should not bring a proceeding, raise or controvert an issue "unless there is a basis in law or fact for doing so . . . , which includes a good faith argument for an extension, modification or reversal of existing law."[71] This rule bears a great similarity to Rule 11 of the Federal Rules of Civil Procedure and was designed to address similar problems.[72] The comments clarify that "[w]hat is required of lawyers . . . is that they inform themselves about . . . the applicable law and determine that they can make good faith arguments in support of their clients' positions."[73]

Failure to perform adequate research prior to filing a claim can result in bar discipline for a violation of Rule 3.1, often in conjunction with violations of Rule 1.1.[74] Like the other ethical rules, violations of Rule 3.1 are rarely based on poor research alone, and the courts do not specifically identify a standard for adequacy in research beyond an expectation that some research be done. In addition, cases imposing sanctions under Rule 3.1 are relatively rare and focus primarily on cases brought with an intention to harass.[75]

Taken together, the ethical rules paint a picture of the level of research an attorney is expected to perform. What all of the cases have in common is a sense by the judge that the attorney has not provided the court with what it needs to make an informed decision. However, because these rules are enforced by state bar disciplinary organizations,

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[69] *Id.* at 908 n.4.
[70] *Id.* at 909.

[71] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007).

[72] *See* Brown, *supra* note 29, at 158-88. For an interesting discussion of why Rule 3.1 and Rule 11 are not used more synonymously, see Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819 (2004). For further discussion of Rule 11 and the standards therein, see *infra* Subsection II.B.1.

[73] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2.

[74] *See, e.g.*, *In re* Young, 639 S.E.2d 674 (S.C. 2007) (imposing a public reprimand and costs on attorney for filing RICO claim without conducting any research in violation of Rules 3.1 and 1.1); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) (finding violations of Rules 1.1 and 3.1, inter alia, where an attorney handled a custody dispute without researching Maryland laws on custody).

[75] Brown, *supra* note 29, at 1593.

the cases are not as widely publicized or as easily accessible as they would be if they were reported opinions of a court. In addition, poor research tends to be addressed only in the most egregious cases, and often in combination with other ethical violations of a serious nature. The degree to which the failure of research is a violation is sometimes difficult to discern. As a result, the ethical rules do not alone provide lawyers with a clear understanding of the expectation of competent research.[76] Competence must mean more than not failing to make the most basic mistakes. A clearer standard for competence in research can be found in federal and state court rules addressing documents filed in court.

B. COURT RULES

The judicial system, in an effort to ensure the efficient administration of justice, has promulgated several rules that address the level of research expected by the courts. Primary among these are Federal Rule of Civil Procedure 11 and Federal Rules of Appellate Procedure 28 and 38.[77] The courts use these rules to sanction lawyers whose poor legal research has resulted in sub-par pleadings and briefs submitted in court. These rules, and the opinions implementing them, shed further light on the standard for competence in research.

1. Rule 11

At the trial level, Rule 11 specifically addresses the adequacy of legal research in pleadings or other filings to the court. It does so by requiring the lawyer submitting the documents to certify that "the claims, defenses, and other legal contentions [in the filing] 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."[78] If the court finds that a lawyer has violated this rule, it may impose sanctions.[79] The judiciary has not hesitated to use its sanctioning power under Rule 11,[80] and these cases reveal a great deal about the level of research judges expect from the lawyers practicing before them.

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[76] For a general discussion of the current limitations of ethics rules as a way of enforcing attorney conduct, see Johnson, *supra* note 72. Johnson suggests that the ethical standards should be incorporated into Rule 11 of the Federal Rules of Civil Procedure in order to create more uniform and effective enforcement of professional standards. *Id.* at 914-916.

[77] All states also have rule-based or statutory equivalents to these federal rules, with very similar standards. Marguerite L. Butler, *Rule 11—Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681 (2001). For ease of discussion, this Article will focus on the Federal Rules.

[78] FED. R. CIV. P. 11(b)(2).

[79] FED. R. CIV. P. 11(c).

By its own terms, Rule 11 requires an objective assessment to determine whether an argument is based on adequate research.[81] The Advisory Committee explicitly calls for an examination of "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys."[82] In assessing whether there has been an objectively reasonable inquiry into the law, courts consider whether a reasonable attorney under the same circumstances would have drawn the same conclusions about the merits of a claim.[83] To make this determination, courts first look at the kind and quality of research that the lawyer engaged in before filing the lawsuit.[84]

While many cases impose sanctions under Rule 11 for filings based on inadequate research, few provide any concrete guidance for measuring the reasonableness of the research. Many commentators have pointed out that, in spite of the purported "objective" analysis, courts have been unable to come up with a principled line for determining whether a complaint is based on a frivolous claim.[85] This is largely as a result of the courts' efforts to balance the goals of Rule 11 against the fear of chilling legitimate claims.[86] This same indeterminacy exists in the courts' assessment of the research underlying a claim. Thus, while the cases are instructive in illustrating the kinds of research problems that lead to sanctions, they do not provide a general standard for reasonableness.

The Federal Circuits have generally been vague in articulating a standard for unreasonable research under Rule 11. The Third Circuit has repeatedly held that, to comply with the Rule 11 standard, an attorney must conduct "a normally competent level of research to support the presentation."[87] The Ninth Circuit has similarly held that an attorney must

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[80] *See* Butler, *supra* note 77, at 683 (noting the trend toward increasing use of judicial sanctions against lawyers and their clients).

[81] FED. R. CIV. P. 11(b)-(c).

[82] FEDERAL RULES OF CIVIL PROCEDURE ADVISORY COMMITTEE NOTES (1993).

[83] Butler, *supra* note 77, at 689-90.

[84] *Id.* at 701; *see also* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1486 (1996) (discussing how courts have shifted from assessing the merits of an argument to analyzing the research process in an attempt to objectively determine when a claim is frivolous).

[85] Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 521 (2004) (noting the irony that the "objective reasonableness" test has made the current Rule 11 less predictable than the "subjective bad faith" standard it replaced).

[86] FED. R. CIV. P. 11(b)-(c); FEDERAL RULES OF CIVIL PROCEDURE ADVISORY COMMITTEE NOTES (1993).

"perform adequate legal research" prior to filing a claim in order to avoid sanctions.[88] These courts do not provide any definition of "normally competent" or "adequate," leaving it to the individual cases to demonstrate the expectations of adequate research.

The Seventh Circuit has been more detailed, articulating some particular factors for consideration.[89] These include "the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law."[90] While somewhat more specific, these factors do not provide great clarity in terms of predicting when research will be adequate. The Seventh Circuit has even gone so far as to suggest that an objectively frivolous legal argument can give rise to an inference that the signer did not conduct reasonable research.[91] Thus the court is willing to presume inadequate research based on the merits of the argument, rather than by looking specifically at the research undertaken.

A number of cases identify specific research problems that can lead to sanctions. One concrete reason given in the Rule 11 cases finding inadequate research is the failure to Shepardize or otherwise update.[92] Failing to conduct any research or cite any authority in a filing is also a

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[87] Simmerman v. Corino, 27 F.3d 58, 62 (3d Cir. 1994) (quoting Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988)); *see also* Brubaker Kitchens, Inc. v. Brown, No. 05-6756, 2006 WL 3165010 (E.D. Pa. 2006); Harris v. Se. Pa. Transp. Auth., 2005 WL 1899501 (E.D. Pa. 2005); *In re* Jazz Photo Corp., 312 B.R. 524, 536 (D.N.J. 2004).

[88] Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002) (citing Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986)).

[89] Brown v. Fed'n of State Med. Bds., 830 F.2d 1429, 1435 (7th Cir. 1987), *overruled on other grounds*, Mars Steel Corp. v. Cont'l Bank, N.A., 880 F.2d 928 (7th Cir. 1988); Lopacich v. Falk, No. 92C 2339, 1994 WL 127257 (N.D. Ill. 1994).

[90] *Id.*; *see also* Thomas v. Capital Sec. Services, Inc., 812 F. 2d 984 (5th Cir. 1987).

[91] *Mars Steel*, 880 F.2d at 932.

[92] *See, e.g.*, Salahuddin v. Coughlin, 999 F. Supp. 526, 529 (S.D.N.Y. 1998) (noting that Shepardizing would have led the defense counsel to a key case); Gosnell v. Rentokil, 175 F.R.D. 508, 510 n.1 (N.D. Ill. 1997) ("It is . . . inexcusable for any lawyer to fail . . . to Shepardize all cited cases."); Brown v. Lincoln Towing Serv., No. 88C0831, 1988 WL 93950 (N.D. Ill. 1988) (imposing sanctions where the attorney filed a claim based on an expired federal statute); Pravic v. U.S. Indus.-Clearing, 109 F.R.D. 620, 623 (E.D. Mich. 1986) (holding that the act of relying on another attorney's memorandum without Shepardizing the cases cited warranted sanctions); Blake v. Nat'l Cas. Co., 607 F. Supp. 189, 191 (C.D. Ca. 1984) (noting that Shepardizing cases already cited would have led to controlling authority). It is interesting to note that most of the failure to Shepardize cases are older, suggesting that the ease of Shepardizing electronically on Lexis (or KeyCiting on WestLaw) has made it less likely that attorneys will fail to do so.

sanctionable offense.[93] In addition, courts impose sanctions where, in the face of a clear line of authority, the attorney neither cites any adverse authority nor makes an argument for the extension or modification of existing law.[94] Finally, citing cases that are inapposite can result in sanctions.[95] In most of these cases, judges identify the failure of research and impose sanctions without articulating a generally applicable standard.

For the most part, judges impose sanctions for inadequate research based on the perception that the authority should have been known, or could have been easily found through basic research techniques known to all lawyers.[96] Many courts judge the reasonableness of the research by the sufficiency of the argument, rather than looking at the research itself. If the legal argument lacks merit, the court will presume that the attorney did

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[93] Butler, *supra* note 77, at 705; *see also In re* Young, 639 S.E.2d 674 (S.C. 2007) (imposing sanctions under the state equivalent of Rule 11 for an attorney's failure to conduct any research prior to filing RICO claim); Smith & Green Corp. v. Trustees of Const. Indus. & Laborers Health & Welfare Trust, 244 F. Supp. 2d 1098, 1108 (D. Nev. 2003) (imposing Rule 11 sanctions where an attorney filed a complaint "without performing adequate research"); Clement v. Pub. Serv. Elec. & Gas Co., 198 F.R.D. 634 (D.N.J. 2001) (imposing Rule 11 sanctions for a complaint based on a form book without any additional research); Schutts v. Bentley Nev. Corps., 966 F. Supp. 1549, 1560 (D. Nev. 1997) (imposing Rule 11 sanctions where "Plaintiff's counsel simply could not be bothered either to dig up any 'existing law' in support of Plaintiff's claim, or to make a good faith argument for the law's reversal or modification").

[94] Butler, *supra* note 77; *see also* Truesdell v. S. Cal. Permanente Med. Group, 209 F.R.D. 169, 177 (C.D. Cal. 2002) (imposing Rule 11 sanctions for failing to cite any authority undermining a "clear line of cases" contrary to the position taken); Vazquez Morales v. Estado Libre Asociado de Puerto Rico, 967 F. Supp. 672 (D.P.R. 1997) (finding a violation of Rule 11 where the attorney failed to make non-frivolous arguments for disregarding existing precedent finding defendant immune from suit under the Eleventh Amendment to the U.S. Constitution); McGregor v. Bd. of County Comm'rs, 130 F.R.D. 464, 466 (S.D. Fla. 1990) (imposing sanctions where the attorney disregarded controlling authority cited by the court in a previous order); Alison v. Dugan, 737 F. Supp. 1043, 1051 (N.D. Ind. 1990) (imposing sanctions because "pretending that potentially dispositive authority against one's position does not exist is as unprofessional as it is pointless").

[95] Butler, *supra* note 77; *see also* Zuk v. E. Pa. Psychiatric Inst. of the Med. College of Pa., 103 F.3d 294, 300 (3d Cir. 1996) (affirming Rule 11 sanctions for an attorney's weak grasp of copyright law and "a strained analysis of what appears to be an inapposite case").

[96] Salahuddin, 999 F. Supp. 526 (imposing sanctions where the attorney failed to cite key cases that could have been found through other cases already cited); D'Orange v. Feeley, 877 F. Supp. 152, 161 (S.D.N.Y. 1995) (finding sanctions warranted where counsel did not conduct "remotely reasonable" research, which would have revealed claim to be meritless); Cont'l Air Lines Inc. v. Group Sys. Int'l Far East, 109 F.R.D. 594, 596 (C.D. Cal. 1986) (finding a lack of reasonable inquiry into the law where the attorney did not know of Supreme Court case decided four months earlier that had been widely reported in the press and could have been easily found even without Lexis or Westlaw).

not conduct reasonable research.[97] Ultimately, in deciding when research has been sufficient to survive a request for sanctions under Rule 11, the courts tend to approach the question in the same way the U.S. Supreme Court defines obscenity—they know it when they see it.[98]

2. Appellate Rules

In addition to the rules at the trial level, the Federal Rules of Appellate Procedure and state equivalents provide courts with a vehicle to penalize attorneys for inadequate research. Court rules, such as Rule 28 of the Federal Rules of Appellate Procedure, specifically require citation to authority in the argument sections of appellate briefs.[99] In addition, appellate courts are explicitly authorized to impose sanctions for frivolous appeals, including those that lack merit or are unsupported by legal authority.[100] While appellate judges are not shy about expressing their displeasure with poorly researched briefs, few cases articulate a clear standard for competent research. Like the Rule 11 cases, judges seem to base their decisions on their own expectations of the authority that should have been provided. These cases do provide individual examples of the level of research expected by the bench.

The basic requirement that the argument section of a brief be supported by citation to relevant authority[101] seems so obvious it could go without saying. In the federal courts, however, dismissals for failure to comply with Rule 28 are not uncommon.[102] When an attorney fails to cite any cases in a brief, it is difficult to know whether this is actually a failure of research or can be attributed to other causes. Courts do not generally take the extreme step of dismissing a meritorious argument unless it appears that there was actual misconduct on the part of the attorney, rather

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[97] *See, e.g.*, Matter of Ulmer, 19 F.3d 234, 235 (5th Cir. 1994) (affirming Rule 11 sanctions for failure to perform a reasonable inquiry into the law where attorney filed a frivolous bankruptcy petition).

[98] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting that, while he could not define obscenity, "I know it when I see it").

[99] *See, e.g.*, FED. R. APP. P. 28(a)(9)(A); CAL. R. APP. P. 8.204; GA. CT. APP. R. 25; ME. R. APP. P. 9; PA. R. APP. P. 2111.

[100] FED. R. APP. P. 38.

[101] FED. R. APP. P. 28(a).

[102] *See, e.g.*, Singh v. Gonzalez, 211 F. App'x 33 (2d Cir. 2007) (dismissing a case where the brief did not contain a single authority); Armstrong v. City of North Las Vegas, 138 F. App'x 41 (9th Cir. 2005) (dismissing an appeal where the citations to authority were "few and far between"); Heft v. Moore, 351 F.3d 278 (7th Cir. 2003) (waiving issues on appeal where there was a failure to cite cases in support of the argument); John v. Barron, 897 F.2d 1387 (7th Cir. 1990) (dismissing a case where the only citation was an incorrect statutory reference).

than mere incompetence.[103] Nonetheless, it is clear that failure to support legal arguments with citation to relevant authority can have serious consequences.

Likewise, state courts also encounter briefs that do not comply with the basic requirements "with disturbing frequency."[104] In *Walder v. State*, the court was clearly disturbed by the lack of relevant authority in the briefs.[105] The court also made clear that, even where there is no immediately controlling authority, counsel should cite cases from other jurisdictions.[106] While the court did not spell out specific research techniques, it clearly expected counsel to conduct research in a way that would yield authority for the arguments made.

In addition to risking dismissal, attorneys risk being assessed with costs and damages under Rule 38 and state equivalents for poor research resulting in frivolous appeals.[107] Appellate judges tend to avoid sanctions, except in the most egregious cases.[108] In addition, the federal circuits do not take a uniform approach to imposing sanctions under Rule 38, particularly in terms of whether the appeal needs to be non-meritorious in order to warrant sanctions.[109] Nonetheless, courts have made clear that they expect attorneys to conduct diligent research before filing appeals.[110] Often, attorneys are personally liable and cannot charge the client for sanctions imposed under Rule 38.[111]

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[103] Pena-Torres v. Gonzales, 128 F. App'x 628, 630 (9th Cir. 2005).

[104] Cowan v. Wilson, 85 S.W.2d 824, 826 (Tex. Civ. App. 2002); *see also* State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (declining to address an issue where the brief was so inadequate that it "shift[ed] the burden of research . . . to the reviewing court").

[105] 85 S.W.3d 824, 828 (Tex. App. 2002).

[106] *Id.* at 828 n.4.

[107] FED. R. APP. P. 38 (authorizing the court to assess damages and single or double costs against an appellee in frivolous appeal).

[108] Mark R. Kravitz, *Unpleasant Duties: Imposing Sanctions for Frivolous Appeals*, 4 J. APP. PRAC. & PROC. 335, 335-36 (2002).

[109] Scott A. Martin, Note, *Keeping Courts Afloat in a Rising Sea of Litigation: An Objective Approach to Imposing Rule 38 Sanctions for Frivolous Appeals*, 100 MICH. L. REV. 1156, 1159 (2002).

[110] *See, e.g.*, Mortgage Elec. Registration Sys., Inc. v. Estrella, 390 F.3d 522, 524 (7th Cir. 2004) (chastising the attorney for failing to research appellate jurisdiction before filing an appeal); *In re* Maurice, 73 F.3d 124, 128 (7th Cir. 1996) ("Counsel must do the research and restrict their arguments to those with some support."); Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) (discussing attorneys' affirmative obligation to research the law); Transnational Corp. v. Rodio & Ursillo, Ltd., 920 F.2d 1066, 1072 (1st Cir. 1990) (imposing sanctions for appeal brought without even minimal research).

[111] Kravitz, *supra* note 108, at 340.

Like the Rule 11 cases, the Rule 38 cases do not articulate a specific standard for research. Some courts, using an objective standard, find that sanctions are warranted where, "following . . . careful research of the law, a reasonable attorney would conclude that the appeal is frivolous."[112] As with the ethical rules and trial court rules, the standard "careful" is not specifically defined. Instead, courts condemn specific practices such as misquoting precedent,[113] failing to cite clearly controlling authority,[114] and citing irrelevant authority.[115] The appellate courts are particularly concerned with being provided with the authority they need in order to make a decision. Rule 38 costs and attorneys' fees are most readily assessed when the court has been put in the position of conducting its own research to determine the merits of the appeal.[116]

None of the cases identify specific research techniques, though if the court is using a "reasonable attorney" standard, it presumes that counsel should have used those techniques and research methods that are standard practice. Since the court measures reasonableness by considering what other attorneys in a similar position would do, it follows that the research techniques employed by the majority of lawyers are those that are standard in practice, and thus set the bar for reasonableness. The collective message from the cases is that judges expect to be provided with the authority they need to render a decision, and that they expect the "reasonable attorney" to find that authority using standard research techniques.

C. MALPRACTICE AND INEFFECTIVE ASSISTANCE

In addition to bar discipline and court sanctions, courts are called on to assess the effectiveness of lawyers' research at the request of clients in malpractice claims and requests for post-conviction relief due to ineffective assistance of counsel. While the bar and bench may be reluctant to discipline lawyers for incompetent research, clients show no

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[112] Quiroga v. Hasbro, Inc., 943 F.2d 346, 347 (3d Cir. 1991); *see also Nagle*, 8 F.3d at 145. There is some disagreement among the circuits as to whether the standard under Rule 38 should be objective or require subjective bad faith on the part of counsel. *See* Martin, *supra* note 109, at 1159. Obviously, those circuits requiring bad faith would not impose sanctions for poor research alone.

[113] McCandless v. Great Atlantic & Pac. Tea Co., 697 F.2d 198 (7th Cir. 1983).

[114] *See* Pierotti v. Torian, 96 Cal. Rptr. 2d 553, 563 (Ct. App. 2000) (imposing sanctions for a frivolous claim for "counsel's utter failure to discuss the most pertinent legal authority").

[115] SEC v. Suter, 832 F.2d 988, 991 (7th Cir. 1987).

[116] *See, e.g.*, Ernst Haas Studio v. Palm Press, 164 F.3d 110, 112 (2d Cir. 1999); John v. Barron, 897 F.2d 1387, 1393 (7th Cir. 1990) (asserting that the "court is not obligated to research and construct legal arguments open to parties").

such compunction.[117] Lawyers' poor research skills are often called on the carpet in these cases, which provide good insight into the expectations of competency in legal research.

Legal malpractice is generally analyzed as a negligence claim, requiring a duty, breach, causation and damages.[118] As a result of the fiduciary relationship between lawyer and client, the lawyer owes a duty of competent representation to the client.[119] The duty of competent representation includes an obligation to know and to research the law.[120] Inadequate research can be the basis of a breach of that duty.[121]

In fulfilling the duty of competent research, the lawyer is expected to exercise ordinary care under the circumstances.[122] A lawyer breaches this duty "if he or she fails to possess and exercise that degree of knowledge, skill and care which would normally be exercised by members of the profession under the same or similar circumstances."[123] As in other professional malpractice cases, courts will usually require expert testimony to establish what members of the profession would ordinarily do.[124]

Similarly, in cases for post-conviction relief based on ineffective assistance of counsel, courts assess the competence of lawyers in representing their clients.[125] Under *Strickland v. Washington*,[126] the first

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[117] *See* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2601 (1996) (arguing that legal malpractice is the predominant way in which lawyers are regulated).

[118] 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14:2 (2007 ed.).

[119] *Id.* § 14:1.

[120] *Id.* § 18:6.

[121] *See, e.g.*, Smith v. Lewis, 520 P.2d 589, 595 (Cal. App. 1975), *overruled on other grounds*, *In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976); *see also In re* TCW/Camil Holding L.L.C., 330 B.R. 117 (D. Del. 2005) (holding an attorney liable for failing to conduct adequate research); Shopsin v. Siben & Siben, 268 A.D.2d 578, 578 (N.Y. App. Div. 2000) ("'An attorney may be liable for . . . his failure to conduct adequate legal research.'" (quoting McCoy v. Tepper, 261 A.D.2d 592, 593 (N.Y. App. Div. 1999))); Collas v. Garnick, 624 A.2d 117, 120 (Pa. Super. Ct. 1993) ("Although a lawyer is not expected to be infallible, he or she is expected to conduct that measure of research sufficient to allow the client to make an informed decision.").

[122] 2 MALLEN & SMITH, *supra* note 118, § 18:6.

[123] Fiorentino v. Rapoport, 693 A.2d 208, 210 (Pa. Super. Ct. 1997); *see also* 2 MALLEN & SMITH, *supra* note 118, § 19.3 (explaining the parameters of competence across jurisdictions).

[124] 4 MALLEN & SMITH, *supra* note 118, § 32.162.

[125] Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 12-13.

prong of an ineffective assistance claim is whether the lawyer's performance was "deficient."[127] Deficiency is assessed based on what is reasonable "under prevailing professional norms."[128] Courts treat this standard interchangeably with the standard of ordinary care in malpractice cases.[129]

In the context of both malpractice and ineffective assistance cases, the courts have had many opportunities to consider the adequacy of the lawyers' research. The most oft-repeated standard for reasonable care in terms of legal research was articulated by the California Supreme Court in *Smith v. Lewis*.[130] In *Smith*, the plaintiff sued her divorce attorney for malpractice for failing to include her husband's retirement benefits as community property.[131] The defendant claimed that since the community property status of retirement benefits was unsettled, he should not be liable for malpractice even though he relied on his general knowledge of the field and did not specifically research the issue.[132] The court disagreed.

The court found that, while an attorney is not liable for every mistake, he "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."[133] In a move that is unusual in the inadequate research cases, the court actually presented some detail about the "standard research techniques" that could have been used by the defendant. The court referred to "the major authoritative reference works that attorneys routinely consult for a brief and reliable exposition of the law,"[134] including legal encyclopedias and hornbooks, and discussed these sources' impact on the question of whether the relevant legal questions were unsettled.[135]

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[126] 466 U.S. 668 (1984).

[127] *Id.* at 687.

[128] *Id.* at 688.

[129] *See* MacLachlan, *supra* note 34, at 619 n.74.

[130] 530 P.2d 589 (Cal. 1975), *overruled on other grounds*, *In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976).

[131] *Id.*

[132] *Id.* at 592.

[133] *Id.* at 595.

[134] *Id.* at 593.

[135] *Id.* The specific sources listed by the court were the American Law Reports (A.L.R.), American Jurisprudence (Am. Jur.), California Jurisprudence (Cal. Jur.), California

In addition, though *Smith* did not ultimately find the law to be unsettled in the case at bar, the court stated that even when the law is unsettled, "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."[136] Many jurisdictions have followed suit in requiring attorneys to prove that they engaged in reasonable research to avoid liability in cases where the law was unsettled and they turned out to be wrong.[137] The decision about when research has been reasonable is a question of the fact, generally established by an attorney expert assessing the adequacy of the attorney-defendant's research.[138]

The most important factor in these cases is that the attorney has conducted sufficient research to make an informed decision, even if that decision is ultimately proven wrong and the attorney does not achieve a successful result for the client. Thus, while an attorney who makes an incorrect judgment following reasonable research will not be liable for malpractice, an attorney who is correct in spite of having conducted no research on an issue can be.[139] While these cases make clear that at least some research must be done, the gap between no research and reasonable research is not clearly defined.

In assessing the adequacy of the research in malpractice and ineffective assistance cases, courts have considered a variety of research issues. Lawyers are expected to engage in research to stay current in the areas of law in which they practice.[140] They must also research and

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Family Lawyer, Witkin Summary of California Law, and Corpus Juris Secundum (C.J.S.).

[136] *Id.* at 593.

[137] 2 MALLEN & SMITH, *supra* note 118, § 18:6 (identifying sixteen states that have adopted the rule); *see also* Williams v. Amerisure Ins. Co., 607 N.W.2d 78, 84 (Mich. 2000) (holding that attorneys have an obligation to engage in reasonable research when the law is unsettled); Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker, 981 P.2d 236, 239 n.1 (Idaho 1999) (noting that at least thirteen jurisdictions had adopted the "judgmental immunity rule" that where law is unsettled, an attorney is not liable for an incorrect judgment if he engaged in reasonable research); Baird v. Pace, 752 P.2d 507, 510-511 (Ariz. Ct. App. 1988) (holding that 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).

[138] Farrar v. Mortimer, No. A104173, 2005 WL 2033339 at *11 (Cal. App. 2005) (finding an attorney not liable in malpractice case where an expert testified that the defendant's research notes revealed "extensive research" and consideration of the issues).

[139] Clary v. Lite Machines Corp., 850 N.E.2d 423 (Ind. App. 2006) (affirming a malpractice verdict where research validating the attorneys' tactical decisions was not conducted until after the trial).

[140] Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 781 (Ct. App. 1995) (stating that an attorney can avoid liability by conducting "thorough, contemporaneous research" and demonstrating "detailed knowledge of legal developments and debate in the field"); *see*

understand the rules of the courts before which they practice.[141] The number of sources a lawyer considers may also be a measure of the reasonableness of the research.[142] Courts will also find lawyers negligent for failing to find readily available existing authority.[143] Ultimately, the standard for reasonable research is similar to that used in the ethics and court-rules situations: research has been sufficient when it yields existing sources that support the result being advocated.

II. A UNIFIED STANDARD

It is no great surprise that none of the avenues of assessing research provides a clear standard for competent legal research. Legal research is complex, and context-dependent. There are as many approaches to research as different types of legal issues. It is virtually impossible to articulate a clear, concrete standard to apply in all contexts. Nonetheless, when viewed as a whole, the cases discussing ethical standards, court rules, malpractice and ineffective assistance reveal a great deal about the expectations of competent research.

A clear standard emerges from the various approaches to determining competent research. When a lawyer has failed to provide the court with relevant authority to support the result being advocated, the court looks into the adequacy of the research process. Judges evaluate the adequacy of the research in terms of whether they have been provided with what they need to make an informed decision in the case before them, and they evaluate the process based on their own, or expert witnesses' perception of what is standard in the field. These two threads create a standard that, while flexible, allows an analysis of whether today's legal researcher must use the internet in order to avoid the negative consequences of inadequate research.[144]

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also McGurk v. Stenberg, 58 F. Supp. 2d 1051 (D. Neb. 1997) (finding deficient performance in a malpractice claim where counsel failed to find a case decided seven months prior to trial).

[141] *See, e.g.*, Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151, 173 (3d Cir. 2001) (finding that under New Jersey law, a lawyer has a duty to research the statute of limitations).

[142] Aloy v. Mash, 696 P.2d 656, 657 (Cal. 1985) (finding a triable issue of negligence in a malpractice claim where a lawyer relied on an incomplete reading of a single case rather than "all the pertinent authorities, state and federal").

[143] *See, e.g.*, Haas v. Warren, 459 S.E.2d 255, 255 (N.C. 1995) (finding a triable issue of negligence where lawyers reviewed statutory index but missed the relevant reference).

[144] While no court has yet explicitly held that failure to use the internet for research is grounds for sanctions or malpractice liability, scholars have periodically raised the issue. *See, e.g.*, MacLachlan, *supra* note 34; Whiteman, *supra* note 8.

A. STANDARD RESEARCH TECHNIQUES

The question of what research techniques are standard is a difficult one, since the answer varies depending on the vicissitudes of the publishing industry, the development of technology, and individual practice areas of the law. Scholars have noted that much greater attention has been given to what lawyers find than how they find it.[145] Nonetheless, there are ways to assess whether certain sources or techniques are standard, and they all point towards electronic research.[146]

There is little doubt that the internet has become a major tool in a legal researcher's arsenal in the last two decades.[147] In spite of resistance in certain quarters,[148] and legitimate concern about some of the pitfalls of electronic research,[149] it can safely be said that research via the internet[150] is a standard technique used by a majority of lawyers in a majority of jurisdictions throughout the country.

In 2000, Michael Whiteman assessed whether electronic research has become a standard research tool by considering whether lawyers can charge clients for use of electronic tools and whether there is evidence that judges and lawyers actually engage in electronic research.[151] As to the fee

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[145] *See, e.g.*, Richard Danner, *Contemporary and Future Directions in American Legal Research: Responding to the Threat of the Available*, 31 INT'L J. LEGAL INFO. 179, 184-185 (2003) (noting that "we know very little about how lawyers go about their research").

[146] *See, e.g.*, Whiteman, *supra* note 8, at 92-103 (assessing the question whether the use of Computer Assisted Legal Research and the Internet have become standard research techniques).

[147] The widespread use of the internet for legal research has been well documented. *See, e.g.*, Robert J. Howe, *The Impact of the Internet on the Practice of Law: Death Spiral or Never-Ending Work?*, 8 VA. J. L. & TECH. 5, 16 (2003) (noting that for all practical purposes, legal research has "migrated to the internet"); Christine Hurt, *The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship*, 82 IND. L.J. 49, 68 (2007) (noting that electronic sources represent the single biggest change in legal research in the twenty-first century).

[148] *See, e.g.*, Ezra Dodd Church, *Technological Conservatism: How Information Technology Prevents the Law from Changing*, 83 TEX. L. REV. 561 (2004); Ronald K. L. Collins & David M. Skover, *Communications Revolutions and Legal Culture*, 27 LAW & SOC. INQUIRY 637 (2002); Nazareth A. M. Pantaloni III, *1994 Call for Papers: Legal Databases, Legal Epistemology, and the Legal Order*, 86 LAW LIBR. J. 679 (1994).

[149] *See, e.g.*, Kris Gilliland, *What Lawyers Need to Know About the Internet for Legal Research,* 705 PLI/PAT. 225 (2002); Molly Warner Lien, *Technocentrism and the Soul of the Common Lawyer*, 48 AM. U. L. REV. 85 (1998); Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What is the Modern Legal Researcher To Do?*, 97 LAW LIBR. J. 661 (2005).

[150] In discussing the "internet," I refer not only to web-based legal research databases such as Lexis and Westlaw, but also to the vast array of resources that can be accessed for little or no cost via the World Wide Web.

issue, Whiteman reasoned that if courts allowed attorneys to bill for electronic research, it must be a standard technique. Using this rationale, Lexis and Westlaw both meet the criterion for a standard research tool.[152] Recent surveys of the practicing bar provide ample evidence that, not only Lexis and Westlaw, but also the internet as a whole, are now widely used by lawyers in their legal research efforts.[153]

In 2006, the American Bar Association Legal Technology Resource Center conducted a large-scale survey on the use of technology in the legal profession.[154] The survey, with over 2500 respondents covering a broad cross-section of lawyers from different firm sizes, practice areas, and years of experience, reveals the extent to which online research has become the norm.[155] The great majority of respondents (93%) conduct legal research online, and print was not selected as the dominant format for accessing any of a number of common research sources (for example, legal citators, federal case law, legislative and administrative materials, state case and legislative materials, law reviews, legal treatises, general news, etc.).[156]

The survey results also show that lawyers are using the internet as a whole, and not just Lexis and Westlaw. Forty-two percent of the survey respondents reported starting their research with a fee-based service,[157] while twenty-five percent reported using a legal-specific search engine[158] and twenty-four percent start with a general search engine.[159] In addition,

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[151] Whiteman, *supra* note 8, at 92-95.

[152] *Id.*

[153] *See* 4 2006 LEGAL TECHNOLOGY RESOURCE CENTER SURVEY REPORT: ONLINE RESEARCH (American Bar Association 2006) [hereinafter ABA SURVEY]; SANFORD N. GREENBERG, ATTORNEY SURVEY 2007, BACK TO THE FUTURE OF LEGAL RESEARCH, *available at* http://www.kentlaw.edu/academics/lrw/future/handouts/greenberg%20-%20powerpoint.pdf; 2007 LIBRARIAN SURVEY, BACK TO THE FUTURE OF LEGAL RESEARCH, *available at* http://www.kentlaw.edu/academics/lrw/future/handouts/gaylord%20-%20powerpoint.pdf; 2007 LEGAL RESEARCH E-SURVEY, BACK TO THE FUTURE OF LEGAL RESEARCH, *available at* http://www.kentlaw.edu/academics/lrw/future/handouts/mayer%20powerpoint.pdf.

[154] ABA SURVEY, *supra* note 153, at iv.

[155] *Id.* at vi.

[156] *Id.* at xiv-xvi.

[157] *Id.* at xiv. Fee based services include Lexis and Westlaw.

[158] Legal-specific search engines which can be accessed for free include sites such as Findlaw.com and Lawguru.com.

[159] ABA SURVEY, *supra* note 153 at xiv. The most widely known search engine is Google, http://www.google.com.

eighty-seven percent of respondents reported using free online resources at some time during the research.[160]

Other recent surveys reinforce the findings of the ABA study. A 2007 study of Chicago-area lawyers also showed that the majority of legal research is conducted on-line, particularly through the use of Westlaw and Lexis.[161] In a similar national study, over ninety percent of respondents thought that attorneys must have access to and know how to use Westlaw and Lexis.[162] A clear majority of respondents also indicated that tasks such as case research and updating through Shepard's or KeyCite were best done online.[163] These studies provide clear evidence that research on the internet is not only standard, but the predominant method by which lawyers in practice conduct legal research.[164]

A final method of assessing whether a research technique is standard is looking at whether it is being taught in law school and what emphasis it is given to it. The great majority, if not all, law schools include training in Lexis and Westlaw as part of their legal research and writing curriculum.[165] Despite concerns about the effect of online legal research on students' analytical abilities,[166] the trend has been to incorporate more instruction in online research earlier in the semester.[167]

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[160] The most widely used free services included Findlaw.com (39%), state bar association websites (26%), other web sites (14%), and Cornell's Legal Information Institute (12%). *Id.* at xv.

[161] GREENBERG, *supra* note 153.

[162] Patrick Meyer, 2007 Legal Research E-Survey, http://www.kentlaw.edu/academics/lrw/future/handouts/meyer%20powerpoint.pdf (last visited Dec. 6, 2007).

[163] *Id.* The same respondents did note, however, that tasks such as statutory and secondary source research were better done in print.

[164] The fact that many attorneys perceive that conducting case research online is more efficient does not necessarily make it so. Many legal research experts have noted that case research is very inefficient when conducted online because searches are limited to key words and do not allow the researcher to find cases that are related in substance but do not use the same terminology. *See, e.g.*, Peoples, *supra* note 149, at 663-64 (reviewing the literature analyzing the limitations of electronic research).

[165] *See* Ass'n Legal Writing Dirs., Legal Writing Inst., 2007 Survey Results 10-11 (2007), *available at* http://alwd.org/surveys/survey_results/2007_Survey_Results.pdf (showing that 112 schools give limited Westlaw/Lexis training in the first semester and ninety-eight schools give unlimited training in the first semester).

[166] *See, e.g.*, Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151 (2006); Lien, *supra* note 149.

[167] For example, this year for the first time, many legal research and writing professors at the Beasley School of Law at Temple University will be allowing full access to Westlaw and Lexis from the start of the year as well as teaching students about various free online legal research sources. For an account of one school's switch to integrating online

As more members of the "Google Generation"[168] graduate from law school and enter the practice of law, and as print collections in law libraries shrink while online databases grow,[169] use of the internet as the primary tool of legal research will continue to increase.

While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means. It is unlikely that a court considering a Rule 11 sanction or an expert testifying in a malpractice case will even consider the research method unless the lawyer has failed to provide sufficient support for the result being advocated. That is where the real measure of adequate research takes place.

B. PROVIDING ADEQUATE SUPPORT FOR THE RESULT BEING ADVOCATED

As the review of the Model Rules, court rules, and malpractice and ineffective assistance cases revealed, research is most often judged inadequate when judges are not given what they need and what they know can be found, in order to render a decision in a particular case.[170] This is not to say that a lawyer must provide everything in a brief that a court could use in the opinion. Lawyers will always make strategic choices about what to include, and courts may well find other authorities to be relevant.[171] Nonetheless, to avoid charges of incompetence, the lawyer must provide enough support to justify the requested result, and the competent lawyer should strive for more than the minimum. It would be

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research into the curriculum, see Carrie W. Teitcher, Rebooting Our Approach to Teaching Research: One Writing Program's Leap into the Computer Age (Brooklyn Law Sch. Legal Studies, Paper No. 62, 2006), *available at* http://ssrn.com/abstract=934688. *See also* Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 LAW LIBR. J. 117 (2005) (advocating teaching electronic legal research before print research in order to reflect the reality of the predominance of electronic research in practice).

[168] The term "Google Generation" refers to the generation of students who have grown up with computers and consider them integral to the academic setting. The average law student falls into this category. Gallacher, *supra* note 166, at 163-64.

[169] For a discussion of the reduction in print sources and expansion of online sources in the law library, see Teitcher, *supra* note 167, at 15.

[170] See *supra* Part I.

[171] *See* William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002) (documenting the differences between authorities cited in briefs and those that appear in the related opinions).

extremely difficult, if not impossible, to provide today's judges with what they need, or think they need, without using the internet as part of the research process. A lawyer who fails to research on the web will not find all of the relevant sources and will likely fall below the standard of competence by any measure.

1. Legal Materials

First, and most obviously, judges expect to be provided with current, controlling authority. While much legal authority can easily be found through print research tools, judges recognize that using the internet is the best way to make sure that information is up-to-date. Because information can be uploaded to the internet and made available almost instantaneously, changes in the law are much more accessible online than in print sources and can be easily located.[172] A lawyer can no longer use lack of time as an excuse for not being current on the law.[173] Case law has long reflected judges' awareness of the increased availability of information in modern times.

For example, in *McNamara v. United States*, an ineffective assistance case, the court considered "whether, in this environment, it is outside the wide range of reasonable conduct for a lawyer to fail to utilize some method of keeping up with changes in the law."[174] Although the district court decision was ultimately reversed and remanded, the lower court stated that "[o]ne consequence of this modern environment and of dramatic advancements in technology is the advent of extensive resources for staying abreast of developments in the law. Numerous legal newspapers, periodicals such as United States Law Week, and on-line services serve this important purpose."[175] Noting the advancements in technology in the past twenty years, the court found that "[a]s technology and resources develop, the minimum knowledge and preparation required of lawyers develops as well."[176]

In this environment, a lawyer must use some form of web-based research to make sure that all primary sources of law cited are up-to-date. Because of the ease of posting digital information online, changes in the law are now readily available instantaneously.[177] Court decisions are

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[172] Podboy, *supra* note 7, at 1182.

[173] *Id.* at 1191.

[174] 867 F. Supp. 369, 374 (E.D. Va. 1994), *rev'd*, 74 F.3d 514 (4th Cir. 1996).

[175] *Id.*

[176] *Id.* at 375 n.3.

[177] Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 LAW LIB. J. 233, 248-49 (2005).

posted online well in advance of appearing in print.[178] Shepard's on Lexis or KeyCite on Westlaw are the fastest and most reliable ways for a lawyer to ensure that a case has not been reversed or overruled.[179] The cases indicate that judges are aware of these online services and expect lawyers to use them.[180] There is no doubt that the internet has raised the standard for competence in research when it comes to ensuring that a cited case is current and has not been overruled or invalidated.

Likewise, statutory amendments and regulatory changes are posted on Lexis and Westlaw, as well as on many government websites, well in advance of print sources, and today's lawyers would be well-advised to look for this information. The court in *Whirlpool Financial Corp. v. GN Holdings, Inc.* recognized this over ten years ago, stating that "[i]n today's society, with the advent of the 'information superhighway,' federal and state legislation and regulations, as well as information regarding industry trends, are easily accessed."[181] The ease with which government information can be accessed for free on the internet has raised judges' expectations that they will be provided with the most recent controlling sources. A lawyer who fails to use the internet to ascertain the most current version of the law would certainly be considered deficient.

In addition, an increasing amount of primary legal material is available only online. This is particularly true of state and federal legislative and administrative material.[182] Because of the low cost of digital publication, legislatures and administrative bodies are publishing directly on their own websites, rather than using commercial publishers to print and disseminate their work.[183] Several jurisdictions have begun to

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[178] Whiteman, *supra* note 8, at 100.

[179] Wu, *supra* note 177, at 248. While neither KeyCite nor Shepard's is infallible, there is currently no better option for making sure that a case to be cited has not received negative treatment by a subsequent court.

[180] *See, e.g.*, U.S. v. Mack, 229 F.3d 226, 244 n.9 (3d Cir. 2000) (Becker, C.J., concurring) (reflecting a judge's use of KeyCite); Rivera v. Jeziosky, No. 03-CV-830(M), 2007 WL 913990, at *4 n.3 (W.D.N.Y. Mar. 23, 2007) (noting the discrepancy between Shepardizing on Lexis and KeyCiting on Westlaw for the same case); Cooper Tire & Rubber Co. v. Farese, No. 3:02CV210-P-A, 2007 WL 108281, at *6 n.2 (N.D. Miss. Jan. 9, 2007) (indicating the use of KeyCite in preparing opinion); Andreshak v. Service Heat Treating Inc., 439 F. Supp. 2d 898, 901 n.2 (E.D. Wis. 2006) (indicating the use of KeyCite in preparing the opinion); Gosnell v. Rentokil, 175 F.R.D. 508, 510 n.1 (N.D. Ill 1997) (noting the ease of updating via Lexis or Westlaw); Meadowbrook, L.L.C. v. Flower, 959 P.2d 115, 120 n.11 (Utah 1998) (noting the speed with which Shepardizing can be accomplished online).

[181] 67 F.3d 605, 610 (7th Cir. 1995).

[182] Wu, *supra* note 177, at 252.

[183] Whiteman, *supra* note 8, at 98 (quoting Peter W. Martin, *The Internet: "Full and Unfettered Access" to Law—Some Implications*, 26 N. KY. L. REV. 181, 193 (1999)). For

replace print sources with online databases. For example, ten states and the District of Columbia currently "deem[] as *official* one or more of their online primary legal resources" and five of these states "have declared the online versions of legal resources a substitute for a print *official* source."[184] These official resources are primarily administrative. New Mexico has even created an online administrative code where a print version never existed.[185]

This trend of discontinuing print official resources and replacing them with online versions will only continue.[186] While law librarians and others have raised concerns about the authenticity of official legal materials found only on the internet,[187] today's reality is that the only way to access these materials is by conducting research on the internet, either through Westlaw, Lexis, or individual government websites. A lawyer who fails to use the internet, particularly when researching administrative issues, is likely to miss key sources that a judge would expect to see cited. Particularly in the context of administrative practice, failure to research on the internet could easily fall below the standard for competent research.

The final category of primary authority that judges are citing (and presumably feel they need in order to render decisions) is unpublished appellate opinions. "Unpublished opinions" is the misnomer for those judicial opinions that have not been designated for publication in the courts' official case reporters.[188] These opinions, while technically unpublished, are widely available in a variety of online databases. Some federal "unpublished" decisions have even been in print since 2001 in the Federal Appendix. Citation to unpublished opinions has been quite controversial.[189] Nonetheless, in 2007, Federal Rule of Appellate

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a history of the federal government's transition to digital publication of the Federal Register and Congressional Record, see MacLachlan, *supra*, note 34, at 637-43.

[184] RICHARD J. MATTHEWS & MARY ALICE BAISH, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 33 (2007), *available at* http://www.aallnet.org/aallwash/authen_rprt/authenfinalreport.pdf (last visited Dec. 6, 2007).

[185] *Id.*

[186] Mary Alice Baish, Assoc. Washington Affairs Rep., American Ass'n Law Libraries, The Future of Primary Legal Resources on the Web, Presentation at the Back to the Future of Legal Writing Conference 15 (May 18, 2007), *available at* http://www.kentlaw.edu/academics/lrw/future/handouts/baish%20powerpoint.pdf.

[187] *See, e.g.*, MATTHEWS & BAISH, *supra* note 184; Barger, *supra* note 11, at 438-42; Robert C. Berring, *Losing the Law: A Call to Arms*, 10 GREEN BAG 2D 279 (2007).

[188] Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. PRAC. & PROCESS 199, 205-06 (2001).

[189] *See, e.g.*, Patrick J. Schiltz, *Much Ado About Little: Explaining the* Sturm und Drang *over the Citation of Unpublished Opinions*, 62 WASH & LEE L. REV. 1429 (2005). This

Procedure 32.1 went into effect, requiring the federal courts to allow parties to cite unpublished decisions issued after January 1, 2007. Likewise, the trend in the states has been to allow the citation of unpublished opinions as precedent.[190]

The trend towards citing unpublished opinions is driven in large part by their ready availability and accessibility online. For the same reasons, there is an increase in citations to unpublished opinions in judicial opinions.[191] As judges continue to see unpublished opinions cited as precedent in briefs, the number of citations in opinions will rise, and competent lawyers will be expected to provide relevant "unpublished" authority. Scholars and lawyers have already begun to note the possibility of malpractice liability for failure to research unpublished opinions.[192] Because the majority of unpublished opinions are available only online, lawyers will have to research online in order to avoid charges of incompetence.

A final reason lawyers will have to turn to the internet for research of primary authority is the economics of law publishing. At the same time as access to electronic databases is getting cheaper, acquiring print resources is getting more expensive.[193] Many academic and law firm libraries are cutting back on their subscriptions to print materials.[194] This, in conjunction with the growth of flat fee agreements with Lexis and Westlaw and the plethora of free legal databases, will make it increasingly

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Article does not begin to address the complex controversy over whether unpublished opinions should be used as precedent or not but instead recognizes the reality that these opinions are being used and considers the implications for competent research.

[190] Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRACTICE & PROCESS 349 (2004) (noting the growing number of states that allow citation of unpublished opinions as authority of some kind).

[191] *See* Robert Timothy Regan, *A Snapshot of Briefs, Opinions, and Citations in Federal Appeals*, 8 J. APP. PRAC. & PROCESS 321, 330-35 (2006); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 137-38 n.239 (2006) (noting an increase in use of unpublished opinions in appellate decisions).

[192] *See, e.g.*, Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. CENT. L.J. 139, 142 n.11 (2003) (noting that attorneys may feel compelled to research unpublished opinions with precedential value in order to avoid malpractice claims in light of a North Carolina rule allowing citation of unpublished opinions); Donn Kessler, *Citation and Access are a Dangerous Precedent*, ARIZ. ATT'Y, June 2006, at 15 (noting that the failure to research unpublished opinions may be malpractice in light of increase in rules allowing their citation).

[193] Catherine Sanders Reach, David Whelan, & Molly Flood, *Feasibility and Viability of the Digital Library in a Private Law Firm*, 95 LAW LIBR. J. 369, 380 (2003).

[194] Kent Milunovich, *Issues in Law Library Acquisitions: An Analysis*, 92 LAW LIBR. J. 203, 204-06 (2000).

difficult for the legal researcher to locate in print all of the materials necessary to conduct thorough legal research. For all of these reasons, the competent legal researcher must turn to the internet in order to locate and provide courts with the legal material necessary to support the results being advocated.

2. Non-legal Materials

The "dramatically accelerating increase in the availability of non-legal sources accessible through on-line information methods,"[195] combined with courts' increasing willingness to cite these materials, suggests that the standard for competence in legal research will soon encompass these materials. Lawyers will need to go beyond primary and secondary legal authority in order to provide judges with the tools they need to render decisions. While it is unlikely that a judge today would find that a lawyer fell below the minimum standard for competent research by failing to research and cite non-legal materials, that day may be fast approaching. Even more than with legal materials, many of the relevant non-legal materials can be found more easily, and sometimes exclusively, on the internet.

There has been a noticeable increase in judicial citation to non-legal sources since the early 1990s.[196] This increase has been documented in a number of studies.[197] While these studies do not consider the extent to which the non-legal sources are being specifically relied on as authority,[198] there can be little doubt that their presence in opinions serves to reinforce the courts' reasoning, and contribute to the precedential value of the cases. A wide variety of non-legal sources are being cited, including dictionaries,[199] news articles,[200] and academic journals in a variety of disciplines.[201]

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[195] Schauer & Wise, *supra* note 12, at 512-13.

[196] *Id.* at 497 (noting the dramatic increase in the Supreme Court's citation of non-legal sources since 1990, while the overall number of citations has remained constant and the overall pages of opinions has decreased).

[197] *See* John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427 (2002) (reporting the results of a study of citations to non-legal sources in Supreme Court opinions from 1989-1998); Manz, *supra* note 171, at 286-89 (noting the regular appearance of citations to non-legal treatises and periodicals in Supreme Court opinions for the October 1996 Term); Schauer & Wise, *supra* note 12 (documenting citations to various non-legal sources in multiple courts from the 1950s through the mid-1990s).

[198] See Schauer & Wise, *supra* note 12, at 513 (noting that their study did not consider whether the non-legal material cited "in fact influenced the judges doing the citing," though the authors do not discount the possibility that these sources might have an effect on the outcomes of cases).

[199] Hasko, *supra* note 197, at 432 (noting an increase in citations to the dictionary in the 1990s).

It is likely that the ease of access to information on the internet is driving the increased citation to non-legal sources.[202] For example, newspaper articles are easily accessed either directly on the internet, or through legal search engines such as Lexis and Westlaw.[203] A legal researcher is likely to come across these articles in the course of online research and, seeing their relevance, cite them. This is reinforced by the fact that, while citations to non-legal materials are on the rise overall, citations to traditional print secondary sources, such as law reviews, legal encyclopedias, and treatises are decreasing.[204] Of particular note is the increase in citations to two sources—blogs and Wikipedia—that are available only on the internet.

Among the growing legal resources available on the internet are law blogs.[205] Blogs are an online resource covering a broad array of legal subjects, from tips on maintaining a solo law practice to theoretical legal scholarship. The American Bar Association Journal maintains a list of over 1000 blogs written by lawyers.[206] Blogs are also increasingly popular among law professors, as a place to engage in scholarly discussion about the law.[207] The blogs cover every legal topic imaginable, and judges are clearly reading them and citing them in judicial opinions.[208]

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[200] *Id.* at 437; *see also* Melissa Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1107 (2004) (noting the increase in courts' use of news in judicial opinions); Schauer & Wise, *supra* note 12, at 505 (noting that citation to newspapers accounted for a significant portion of the increase in citation to non-legal materials since the early 1990s).

[201] Hasko, *supra* note 197, at 441-53 (noting citations to political science materials, medical publications, business-related materials, technology information, history, psychiatry, religious studies, and others); Schauer & Wise, *supra* note 12, at 503.

[202] Schauer and Wise, *supra* note 12, at 510.

[203] *Id.* at 511.

[204] *Id.* at 506-07.

[205] Blogs (web logs) about the law, or "blawgs," are websites maintained by lawyers, law professors, law students, and other legal commentators. *See* Blawg, http://www.blawg.com/About.aspx (last visited Dec. 6, 2007). Some of the more well-known blawgs include The Volokh Conspiracy, http://volokh.com; Balkinization, http://balkin.blogspot.com; How Appealing, http://howappealing.law.com; Professor Bainbridge.com, http://www.professorbainbridge.com; and Sentencing Law and Policy, http://sentencing.typepad.com.

[206] Blawg Directory, http://www.abajournal.com/blawgs (last visited Dec. 6, 2007)

[207] Welcome to Law Professor Blog, http://www.lawprofessorblogs.com (last visited Dec. 6, 2007).

[208] There are currently two online studies of legal citations to blogs. *See* Ian Best, Cases Citing Blogs—Updated List, http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html (last visited

The number of citations to blogs, while relatively small, is remarkable given the relative newness of blogs. The earliest citations to blogs date back a mere three years to 2004.[209] The citations appear primarily in federal court decisions, including those of the U.S. Supreme Court,[210] though, in the last year the number of state courts citing blogs has increased.[211] While the cases appear to cite blogs for a variety of reasons, judges do not appear to be heavily relying on blogs as authority for the decision being rendered. Thus, it is unlikely that failure to research in blogs would currently fall below the standard for competent research. Nonetheless, a lawyer seeking to rise above the minimum level of competence should consider this type of research.

A similar, and possibly more disturbing, trend is the growing number of citations to Wikipedia, the "online free-content encyclopedia that anyone can edit."[212] Since 2004, when two cases cited Wikipedia, the number has steadily increased, with eight cases in 2005, forty-four cases in 2006, and seventy-three cases between January and November of 2007.[213] Judges appear to be turning to Wikipedia for definitions, as well as background information for a wide variety of topics.[214] The majority of

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Dec. 6, 2007) (documenting twenty-seven cases citing blogs thirty-two times through August 6, 2006); Dave Hoffman, Court Citation of Blogs: Updated 2007 Study, http://www.concurringopinions.com/archives/2007/07/court_citation.html (last visited Dec. 6, 2007) (noting sixteen additional citations to blogs from August, 2006 through July, 2007).

[209] Best, *supra* note 208 (noting nine citations to blogs in 2004).

[210] *See, e.g.*, United States v. Booker, 543 U.S. 220, 278 (2005) (Stevens, J., dissenting).

[211] *See* Hoffman, *supra* note 208 (listing Trenwick Am. Litig. Trust v. Ernst & Young, 906 A.2d 168, 195 n.75 (Del. Ch. 2006); *In re* Tyson Foods, 919 A.2d 563, 593 n.77 (Del. Ch. 2007); State v. Foster, 845 N.E.2d 470, 478 n.3 (Ohio 2006)).

[212] Wikipedia: Overview FAQ, http://en.wikipedia.org/wiki/Wikipedia:Overview_FAQ (last visited Dec. 6, 2007).

[213] These numbers were determined by searching Westlaw's Allfeds/Allstates database for "Wikipedia" with the relevant date restrictions and then filtering out cases in which Wikipedia was mentioned, but not relied upon to support any proposition.

[214] Some recent cases citing Wikipedia demonstrate the range of information cited. *See, e.g.*, Boim v. Fulton County School Dist., 494 F.3d 978, 983 (11th Cir. 2007) (citing Wikipedia for the number of school shootings in the years preceding the incident underlying the appeal); Lands Council v. McNair, 494 F.3d 771, 785 (9th Cir. 2007) (Smith, C.J. specially concurring) (citing Wikipedia for background information on an author relied on by majority); Sedrakyan v. Gonzalez, 237 F. App'x 76, 77 (6th Cir. 2007) (citing Wikipedia for geographical information); Courtney v. Halleran, 485 F.3d 942, 943-44 (7th Cir. 2007) (citing Wikipedia for historical information); Exxon Mobil Corp. v. Comm'r, 484 F.3d 731, 732 n.1 (5th Cir. 2007) (citing Wikipedia for the definition of "accrual"); Matthews v. Ishee, 486 F.3d 883, 894 (6th Cir. 2007) (citing Wikipedia for an explanation of "sarcasm").

cases citing Wikipedia are from the federal courts, but state courts are well-represented as well.[215]

The citations to blogs, Wikipedia, and other non-legal (and legal) information on the internet have raised valid concerns.[216] The impermanence of the internet, as content is modified and/or migrates to other locations, means that a citation to a URL today may not lead to the exact same information tomorrow.[217] For example, if a judge cites a Wikipedia entry in an opinion by using the URL, and the entry is subsequently modified, the reader of the opinion who tries to access the entry will not get the same information the judge relied on. In addition, reliability, authoritativeness, and accuracy are all important concerns, since there is often no way to know anything about the author of internet content, or be assured that the information has not been tampered with.[218]

In spite of these concerns, the evidence is clear that courts are increasingly relying on, and citing non-legal sources on the internet. The practicing lawyer must recognize this reality and respond accordingly. This means moving beyond the confines of traditional legal research sources and searching for relevant non-legal information.

CONCLUSION

The complex, ever changing nature of the law and legal research make it difficult to articulate a concrete standard for competence in legal research. Nonetheless, the review of ethical rules, court rules, and malpractice and ineffective assistance claims reveals some guiding principles. The competent lawyer must, first and foremost, provide courts with current, accurate authority to support the result being advocated. If a lawyer does not provide the court with this authority, the court is likely to investigate the lawyer's research process. The investigation will focus on whether the lawyer employed standard research techniques in an attempt to locate relevant, controlling authority. If the lawyer did not engage in standard research techniques, negative consequences ranging from public embarrassment to sanctions will follow.

The challenge for the modern attorney is that both research techniques and judges' expectations are continually evolving. The rapid pace of developing technology has meant that both methods for locating authority and the nature of that authority have changed. The low cost of

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[215] Of the forty-four cases from 2006, see text accompanying note 214, *supra*, twenty-six were from federal courts and eighteen were from state courts.

[216] *See generally* Barger, *supra* note 11; David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, PROF. LAW., Spring 2005, at 2.

[217] Barger, *supra* note 11, at 439.

[218] Tennant and Seal, *supra* note 216, at 16.

digital publishing, combined with the ease of distribution over the internet, has created "vast repositories of free legal information,"[219] easily accessible with a few keystrokes. Its very accessibility is leading lawyers and judges to use the internet, and the sources found there, with increasing frequency. While this creates great possibilities, it has also raised the bar with regard to the expectations for legal research.[220]

Thus, while online databases have made it easier to locate current material, today's lawyer is faced with higher expectations and a broad array of sources to choose from. As the boundaries of legal and non-legal information become murkier, a competent lawyer must research in both arenas to provide clients and courts with all of the information needed to make a decision. At the same time, the researcher must be aware of the pitfalls of internet research, including reliability and impermanence. Despite these concerns, the expectations of competent research should include a review of relevant online material. Those judges and attorneys who resist citation to online material will not be able to do so much longer.

As technology continues to change, so too will the standard for competence in legal research. While the minimum threshold for competence may be a moving target, all lawyers should strive for more than bare competence. As the expectations for relevant, up-to-the-minute legal and non-legal sources rise, any lawyer hoping to avoid public embarrassment in a judicial opinion, sanctions, or worse, should understand that legal research involves a review of relevant online resources. Research on the internet is no longer a luxury; it is a necessity.

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[219] Barger, *supra* note 11, at 424.

[220] *See generally* MacLachlan, *supra* note 34.