

## WAIVING A RED FLAG: TEACHING COUNTERINTUITIVENESS IN CITATOR USE

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Not so very long ago, teaching the use of citators meant a lesson in hieroglyphic interpretation—explaining the meaning of strange ciphers and little raised numerals, and providing assurance that helpful tables of abbreviations were available in each of the several volumes and pamphlets that would need to be consulted. Now the process has been so simplified that teaching it requires convincing students to go beyond what they see at first glance.

Let us dispense first, quickly, with printed *Shepard's® Citations*. Print resources still have a vital place in legal research. A treatise or an encyclopedia can clarify issues and provide a conceptual framework for a legal problem. Even a digest can lead to analogies that might never have occurred to someone who uses only keyword searching. *Shepard's Citations* does none of these. It has no commentary, and context is meaningless. It is simply a more cumbersome and less timely version of information available electronically.

The only advantage of printed *Shepard's Citations* is that it is available to library users without access to online databases.<sup>1</sup> But this is no excuse for leading with this antiquated format. Word-processing instructors don't have their students start on manual typewriters so that they know how to operate a carriage return.<sup>2</sup> The

<sup>1</sup> This article focuses on case law citators. Some statutory sources, such as session laws and obsolete code provisions, can still be Shepardized® only in print.

<sup>2</sup> At least typewriters, unlike printed citators, have nostalgic partisans. See, e.g., Robin Chotzinoff, *Type Casting*, Westword, Nov. 4, 1999, available at <<http://www.westword.com/issues/1999-11-04/chotz.html>> ("I can't help it. I love typewriters. Damn it, I miss them."); Colin McEnroe, *A Black Ribbon Round My Pinkie, Tears on My Paper*, Hartford Courant, July 7, 1995, at E1 ("Clatter clatter clatter. Ding! I miss that ding. It always made me feel as though I might have actually done something.").

electronic Shepard's and KeyCite® are more efficient, eliminating the abbreviations and the need to check several separate sources, and more powerful, allowing researchers to customize results and to go directly to citing cases.

Electronic citators are making the leap from the obscure to the intuitive, allowing students to incorporate their use as a more natural part of the research process. Law students today expect user-oriented computer applications, and anything that takes too long to understand will probably see little use by most students. The database suppliers recognize this. An online executive recently explained new research approaches to an *ABA Journal* reporter by saying, "There is no learning curve to use it. Everything is point and click."<sup>3</sup>

It makes sense for instructors to emphasize ways that citators are becoming more intuitive while still allowing for sophisticated retrieval. By incorporating the Focus feature of LEXIS®, Shepard's has added a user-oriented flexibility new to citators. No matter how powerful the KeyCite options for limiting retrieval, they require clicking on tabs and checking boxes. Shepard's has little boxes too, but it hides these on a "custom restrictions" screen. Anyone who has installed software knows that the safest course is to stick to "typical" and not to mess with anything "customized." "Custom" is just another word for "little used." Students should certainly be exposed to these features, but many of them will probably not return on their own.<sup>4</sup>

There is one area, however, in which both LEXIS and Westlaw® have taken intuitiveness to a potentially dangerous level. As part of their basic case display, both services have included graphic signals warning about a case's precedential status.

<sup>3</sup> Hope Viner Sanborn, *Up to the Plate: New Services Are Looking to Grab Small Firms and Solo Practitioners*, ABA J., July 2000, at 46, 48 (comments of Gregory Brown, QuickLaw vice president of marketing).

<sup>4</sup> Shepard's Focus advantage may be short-lived. For more than a year, West Group representatives have announced plans to incorporate the Westlaw Locate feature into KeyCite. Compare Daryl Teshima, *Users Win in the Battle between KeyCite and New Shepard's*, L.A. Law., Sept. 1999, at 84, 86 (Locate "will be incorporated shortly") with Tobe Liebert, *New Shepard's v. KeyCite: How Do We Compare?*, LLRX.com (June 1, 1999), at <<http://www.llrx.com/features/keycite.htm>> (Locate "will eventually be incorporated"). The latest word from West Group KeyCite Development is that the Locate feature for KeyCite "will be released in the first half of 2001." E-mail from James Roy, West Group E-Mail Support (Sept. 28, 2000).

Westlaw uses red and yellow flags, while LEXIS uses a red stop sign and a yellow diamond. These signals are wonderful tools for reminding researchers that citator analysis is needed, but they are such powerful visual cues that they can drown out the more complex analysis that is often required. The intuitive conclusion drawn from a red flag or a stop sign runs counter to the need to think while using a citator, to read the cases cited, and to determine their effect on the precedent of the cited case. As Michael Lynch has observed, legal research “is not merely a search for information; it is primarily a struggle for understanding. The need to think deeply about the information discovered is what makes legal research the task of a professional lawyer.”<sup>5</sup>

The two distinct types of signals—red and yellow—present different problems. Red signals are less broadly used than yellow, and they are almost always correct in indicating that a case does indeed have precedential problems. But they should signify the beginning, not the end, of the investigation. Shepard’s tells us only that a red stop sign means “strong negative history or treatment of your case (for example, overruled by or reversed),”<sup>6</sup> but the Westlaw explanation is more carefully worded: “A red flag warns that a case is no longer good law for at least one of the points it contains.”<sup>7</sup> It follows, obviously, that a red-flagged case may still be good law for some other point it contains. But how many students simply see red and look no further? Even an experienced librarian can be drawn into oversimplifications and explain that a red signal “indicates that the case is not safe to use as a precedent.”<sup>8</sup>

To encourage my students to look beyond these graphic signals, I give them a fact scenario in which one party relies on a case that has been

overruled in part but that is still good law for the purpose for which it is cited:

You are clerking for the Wisconsin Court of Appeals. Appellants have challenged a jury verdict, but appellees cite *Fehring v. Republic Insurance Co.*, 347 N.W.2d 595 (Wis.1984), for the rule that the verdict must be sustained if there is any credible evidence to support it. You have been asked to check the status of *Fehring* to determine whether appellants can rely on it as precedent. Explain briefly how you reached your conclusion, and cite a recent case (decided within the past five years) to support your answer.<sup>9</sup>

The Wisconsin Supreme Court overruled one minor aspect of *Fehring* in *DeChant v. Monarch Life Insurance Co.*,<sup>10</sup> but there is a long line of Wisconsin cases showing that *Fehring* remains good law on the standard of review issue. Most students find these cases, but a few are stopped short by the red signals.

The erroneous students can take heart that they are not alone, because the *Fehring* case was the subject of what must be the first published instance of a judge chastising a lawyer for overreliance on citator signals. In *Lewis v. Paul Revere Life Insurance Co.*,<sup>11</sup> U.S. District Judge Lynn S. Adelman added a footnote to discuss this aspect of the defendant’s brief:

I must address Paul Revere’s briefing. Lewis cites *Fehring*, 118 Wis. 2d at 313, 347 N.W.2d 595, for the type of investigation that an insurer must provide to avoid bad faith liability. Paul Revere contends that *Fehring* was overruled by *DeChant*, 200 Wis.2d 559, 547 N.W.2d 592, and therefore “*Fehring* is of no value and must be disregarded by this Court.” (R. 125 at 4.) A cursory glance at *DeChant* reveals that it does not discuss the only issue for which Lewis cited *Fehring*, namely, how bad faith may be established. And reading *DeChant* shows that it overrules *Fehring* only to the

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<sup>5</sup> Michael J. Lynch, *An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Schools*, 89 Law Libr. J. 415, 415 (1997). See also *id.* at 425–27 (discussing “the primacy of thinking”); Julius J. Marke, *Teaching the Process*, N.Y.L.J., Mar. 16, 1993, at 4 (“At each step of the research process, mechanical as it may be, decisions must be made as to the relevancy of information retrieved. Thus, to Shepardize a case without understanding what is at issue, could lead the researcher astray.”)

<sup>6</sup> Understanding lexis.com: An Introductory Guide to Web-Based Legal Research 46 (2000).

<sup>7</sup> Quick Reference to Using KeyCite in westlaw.com® 1 (2000).

<sup>8</sup> Elizabeth M. McKenzie, *Comparing KeyCite with Shepard’s Online*, Legal Reference Services Q. No. 3, 1999, at 85.

<sup>9</sup> A similar problem can be created in another jurisdiction by doing an online case search for the phrase “overruled on other grounds,” and then examining (1) one of the cases found to see on what point it continues to rely on a “red” case, and (2) the overruling case cited to determine the scope of its announced overruling.

<sup>10</sup> 547 N.W.2d 592 (Wis. 1996).

<sup>11</sup> 80 F. Supp. 2d 978 (E.D. Wis. 2000).

“Sometimes a thousand words are worth a lot more than a picture.”

extent that *Fehring* held that attorney’s fees may be recovered in a bad faith action. See *DeChant*, 200 Wis.2d at 577, 547 N.W.2d 592. On the issue of the elements of bad faith, *Fehring* thus remains good law.

In a similar fashion, in its response to Abrams’s motion for summary judgment, Paul Revere claims that a second case was overruled and of no value to this court. Paul Revere there asserts that *Jones v. Reliance Insurance Co.*, 607 F.2d 1 (D.C. Cir. 1979)—cited by Abrams for the construction of the words “disease” and “disorder” in insurance contracts—was “overruled” by *Harbor Insurance Co. v. Schnabel Foundation Co.*, 946 F.2d 930, 936–37 (D.C. Cir. 1991), and that *Jones* therefore “is of no value to the Court.” (R. 88 at 10.) But the issue on which *Harbor Insurance* overturned *Jones* had nothing to do with how to construe “disease” or “disorder,” but rather the standard of review for certain denials of directed verdict motions. Such unwarranted claims about the precedential value of cases cited by opposing parties are discouraged.<sup>12</sup>

While it is not known why Paul Revere’s lawyer concluded that two perfectly valid cases were “of no value to the Court,” the most likely cause is that they appeared on the screen with bright red flags or stop signs.<sup>13</sup>

Yellow signals, which are much more common than red, indicate simply that a case may have “negative history.” This is a concept that the services interpret very broadly. When *Fehring* is run through KeyCite or Shepard’s, for example, *Lewis v. Paul Revere Life Insurance Co.* is listed as a negative history case, despite its express repudiation of reports of *Fehring*’s demise.

To demonstrate the overbreadth of yellow signals, I offer a cautionary tale. On the first day of the Supreme Court’s new term, October 2, 2000, I checked the status of its decisions from the October 1999 term. All were still good law, of

<sup>12</sup> *Id.* at 990 n. 10.

<sup>13</sup> To its credit, Shepard’s is trying to teach students not to rely on an “overruled” indication without investigating further. It has produced an entertaining new video noir, *The Shepard’s Case* (2000), which shows how Jake Laxlawyer’s lack of diligence loses a case and leaves his career in shambles. The videotape, however, doesn’t mention the red stop signs LEXIS uses.

course, but you wouldn’t readily reach that conclusion from their KeyCite or Shepard’s treatment. Of 78 cases, more than half had yellow symbols and negative history references in both services. Within just a few months each system had given these cases at least 115 negative history references, more than 98 percent of which were cases in which lower court judges distinguished or declined to extend the Supreme Court’s holding.<sup>14</sup>

For example, on May 15, 2000, the Supreme Court in *United States v. Morrison*<sup>15</sup> struck down a provision of the Violence Against Women Act as exceeding congressional power under the Commerce Clause. Within a month, lawyers had unsuccessfully argued that courts must also strike down regulations governing the taking of red wolves on private land<sup>16</sup> and the content of volatile organic compounds (VOCs) in consumer and commercial products.<sup>17</sup> By the first Monday in October, the KeyCite and Shepard’s displays for *Morrison* each listed 10 distinguishing cases. These lower court decisions consider the scope of *Morrison*’s holding, but they don’t affect its status as precedent.

Unless students learn that red and yellow visual cues mean “think” and “analyze” rather than “stop” or “go very fast,” we are likely to see more Paul Reveres making unwarranted claims about the precedential value of cases. Sometimes a thousand words are worth a lot more than a picture.

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<sup>14</sup> Thirty-four cases had no negative references. Of the remaining 44 cases, five had negative treatment only in Shepard’s, seven had negative treatment only in KeyCite, and 32 had negative treatment in both citators. (It should be noted that Shepard’s also gave yellow symbols indicating “possible negative treatment” to nine of the 34 cases that did not in fact have any negative citing cases.) On Shepard’s, 114 of 115 negative references were “distinguishing” cases. An unreported district court decision, *Tracy v. Board of Regents*, 2000 U.S. Dist. LEXIS 11320 (S.D. Ga. June 16, 2000), criticized *Texas v. Lesage*, 528 U.S. 18 (1999), as unclear. In KeyCite, 115 of 117 negative references were either distinguishing or declining to extend a holding. The others were *State v. Fire*, 998 P.2d 362 (Wash. Ct. App. 2000) (not following *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000) on state law grounds); and *United States v. Hoskie*, 2000 WL 1052022 (D. Conn. July 26, 2000) (recognizing a disagreement between *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) and other Supreme Court cases).

<sup>15</sup> 120 S. Ct. 1740 (2000).

<sup>16</sup> *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

<sup>17</sup> *Allied Local & Reg’l Mfrs. Caucus v. E.P.A.*, 215 F.3d 61 (D.C. Cir. 2000).