"The time attorneys spend on case preparation is serious business."

Print Shepard's Is Obsolete: Coming to Terms with What You Already Know

BY TRAVIS MCDADE AND PHILL JOHNSON

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Introduction

The law firm of Badder & Worse is located three blocks away from a comprehensive law library that is open to the public. Because of its proximity to all of this free legal material the firm has decided not to maintain its own library nor subscribe to any online legal database like LexisNexis® or Westlaw®. The two named attorneys at the firm bill their time at $300 per hour.

The first attorney makes three separate trips to a law library three hours away, billing the client his full fee for the six-hour journeys. The other attorney drives down the street to the closer law library on three separate occasions where he uses print Shepard's® to update 25 cases relied on in a brief for his client. The total billing time for his trips to the law library amounts to eight hours.

The first attorney will eventually be sanctioned, have his license revoked for a month, and be told by his state's supreme court that his course of conduct suggests an "objective to lay hand on as much remuneration as the client was willing to provide without regard to the actual legal service furnished."[1] The second attorney, who will not be sanctioned, will never be questioned on his research behavior and never give it a second thought.

Is there a difference between the two? Probably, in terms of culpability. But in terms of outcome there is no difference: both attorneys charge their clients for time that needn't have been spent.

[1] Matter of Comstock, 664 N.E.2d 1165, 1169 (Ind. 1996).

Overbilling

The time attorneys spend on case preparation is serious business. A recent mini-scandal in the state of Illinois revolved around attorney Joyce Britton, who continually billed the state for up to 22 hours per day.[2] According to the director of the Department of Children and Family Services, the agency Britton most often charged, Britton was eventually investigated by both the Illinois State Police and the FBI.[3]

More mundane and low-profile overbilling cases take place all the time and, despite almost never reaching the ridiculousness of attorneys charging the equivalent of a full year of 12-hour days like Britton, result in sanctions nonetheless. The 1995 case of *Peterson v. Foote* offers a prime example of the problem of overbilling and a good synopsis of jurisprudence on the issue.[4]

The U.S. Court of Appeals for the Second Circuit wrote that, among other criteria, a court could excise those hours billed by an attorney that were not "reasonably expended" and which didn't show good "billing judgment."[5] In the opinion the court looked at hours reasonably spent and made some severe reductions including cutting by almost two-thirds the time claimed for a fairly pro forma procedure, cutting the time spent on preparation for oral argument in half (a loss of almost 40 hours), and cutting the time spent doing research and drafting a brief by a third.[6]

In *Peterson* the attorney was fairly lucky (if losing almost $10,000 is lucky). Often, shoddy research and overbilling result in more than just a trimming of billable hours—they result in sanctions. Failure to cite correct authority or pretending that countervailing precedent doesn't exist—both of which are often products of lack of updating—results in disciplinary action, usually of the Rule 11 sort.[7] Extreme examples of overbilling,

[2] *Worse Than It Looks,* Chicago Sun-Times, June 26, 2002, at 41.

[3] Jess McDonald, *DCFS Was Vindicated by Investigators,* Chicago Sun-Times, July 2, 2002, at 28.

[4] Peterson v. Foote, 1995 WL 118173 (N.D.N.Y Mar. 13, 1995).

[5] *Id.* at 2.

[6] *Id.* at 3–4.

[7] Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers,* 31 Suffolk U.L. Rev. 1, 5 (1997).

as seen with Britton, could potentially lead to criminal charges.

So while cases in which attorneys are disciplined for overbilling are rare, they are still serious.

Electronic Updating

It was predicted in *Law Library Journal* as early as 1986 that use of full-text electronic Shepard's might soon become part of an attorney's standard of care; or, if not that, at least part of every law firm's pretrial ritual.[8] The then-new electronic form of Shepard's was a faster version of the print publication, whose use by attorneys in updating cases was already an expectation.[9] It made perfect sense at the time that electronic Shepardizing™ would be a mandated part of every attorney's arsenal. Yet now, 15 years later, print Shepard's is still taught to first-year law students in schools all across the country. The maroon volumes and their yellow supplement still darken the shelves of many law libraries. It is plausible that this tendency by law libraries and legal research professors to cling to the Shepard's books has slowed the legal profession's transition to electronic updating.

There is a range of reasons why students are taught to use the print version of Shepard's. These run the gamut from the pedagogical value of legal research theory to simply intractable tradition. Some schools feel that a major purpose of the legal research class is to give students a concrete understanding of how research has been conducted in the past; that is, by giving students an understanding of the paradigm upon which LexisNexis and Westlaw are based, they become better researchers using those databases. Others keep teaching it for the reason that they think it is still practically applicable—that law firms still rely on their young attorneys being able to update cases using the books. Some are simply loathe to get rid of books in which they have invested so much money. And some schools keep teaching the use of print Shepard's simply because that is the way it has always been done. The reasons behind teaching law students to use print Shepard's are not as important as the fact that many students are still taught to use those books. And that, increasingly, is a disservice.

It is axiomatic that online updating is better than print. It is more efficient. It is more accurate. It is more comprehensive. It is more timely. Any attorney who uses print Shepard's to update cases has to go through a several-step process for each case. First, go to the location in the library where the print version is housed. Second, find the right page in the right edition of Shepard's. Third, locate the citation on the page and look at the citing cases, taking note of particular symbols. Fourth, update the service by checking the supplements. Fifth, phone the company to see if anything has changed more recently than the update allows. For anyone who has ever navigated the semi-hieroglyphic fine script of print Shepard's, these steps are often easier said than done. Add to this the constant need to refer to the key page in order to decipher some of the symbols and the need to take care not to miss a citation, and accurately Shepardizing a case in print quickly (that is, in under 10 minutes) is a hard-learned skill.

But that is not really up for debate. Online updating is supposed to be better—that is what makes it de rigueur at law firms. But there is another reason that ought to make it extra appealing to good legal research advocates. In the print vs. electronic debate there is one word that often gets mentioned, but never on the side of the electronic source: serendipity. One of the prior drawbacks of electronic sources was the difficulty of browsing. Researchers scanning titles in print often discovered related sources through browsing. Recent enhancements to online Shepard's and West's citation research service, KeyCite®, now permit researchers to browse online.

Tracking down ancillary cases in print Shepard's is onerous. The books are, at best, utilitarian—they are a resource upon which practitioners do not linger. Once the updating is done the books are back on the shelves until the next time. But the online updating services are almost a pleasure. There is no disconnect. The researcher is made aware of how the case has been treated by other courts and where those courts are located and is instantly transported to the exact

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[8] Daniel Dabney, *The Curse of Thamus: An Analysis of Full-Text Document Retrieval*, 78 Law Libr. J. 5, 37–38 (1986).

[9] *Id.* Also, *see generally,* Smith v. United Transp. Union Local No. 81, 594 F. Supp. 96 (S.D. Cal. 1984); Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984).

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page in question. Time that might otherwise have been spent tracking down the location of possible referencing cases can now be spent reading them, and cases several steps removed from the original are brought closer. Both online services allow quick navigation in all directions (forward, backward, lateral) from the original case.

This speed and ease doesn’t come without a price, of course, and that price has been the main impediment for practitioners. But both LexisNexis and Westlaw are making electronic updating services increasingly affordable alternatives to print Shepard’s. Either through blanket coverage, specific area plans, or the case-by-case service available to the public (and priced at under $5 per case), both services are competing for a rapidly sophisticated market and both are willing to cut prices to get it. As the competition between the two gets stiffer, there are not going to be firms—regardless of how small—that don’t use electronic updating. With overbilling suddenly relevant, the use of print Shepard’s is a liability both in terms of existing alternatives and the fact that there is no record of use.

As for cost to academic law libraries, it has been the experience of the authors—both of whose law schools have recently been in the market for electronic updating—that maintaining subscriptions to print Shepard’s is no less expensive than a subscription to the electronic versions available. Our public monitors offer access to updating that is not only more comprehensive, timely, and easier for pro se patrons to use but also no more expensive than our former print subscriptions.

Conclusion

The print version of Shepard’s is obsolete. A clunky, slow, and inelegant tool, it is the research equivalent of legalese. Legal writing instructors who preach concision and clarity in the written word ought not then supplement this lesson on the research end with the multistep dinosaur that is print Shepard’s and expect their students to understand the difference.

In the not-too-distant future it may well become negligence per se to use print Shepard’s instead of the more efficient and reliable online version. The time it takes to use the service, coupled with the fact that anything in print can never be fully up-to-date, makes the process seem almost absurd in light of the extant alternatives. Law schools are certainly a place where change comes slowly but the instruction of legal research ought not get caught generations behind. Teaching students how to use an updating service that is neither useful, timely, nor much used in the real world anymore seems like a big waste of class time. And the fewer print sources we force students to learn that they’re never going to use, the more they’ll pay attention to the ones we teach them that are truly valuable.

At the colleges of law at Ohio State University and the University of Illinois, where the authors work, the law libraries have said goodbye to all but a skeleton crew of print Shepard’s. On our public monitors we have subscribed to the electronic versions of KeyCite and Shepard’s, respectively, and at prices well below the print equivalent. The legal research classes have been evolving to reflect this change. Law school culture nationwide should evolve as well.

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