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February 01, 2020

Speaking of Cases

There is a [Monkey's Paw](#) quality in modern technology. For example, we get on some social network app and for a brief period feel like we've reinvigorated friendships, made happy new connections, did some gratifying stalking—then a year later, it feels like we're constantly confirming that everyone has better bodies, dinners, mates, vacations, jobs, children, and pets than we do, and come about mid-February in the lower-Alaska of Puget Sound you stare at the crusted ceiling of your bedroom for disturbingly long periods every dark morning until your (actually quite excellent) dog enters and nudges you out of canine concern that you won't be feeding her or going to work like a responsible adult (this is all hypothetical).

The Monkey's Paw applies to legal research as well. Westlaw and other tools seem to offer oasis after oasis in the legal desert, but they're frequently mirages. And then attorneys unwittingly pound sand upon sand into briefs.

I can't fix your relationship with social network apps, but after reading and writing briefs for 20+ years, all after the extinction of the [Shepardsaurus](#) and the dawn of online research, I do have some tips on how to do better with cases and Westlaw.

Tip #1? Watch for overkill. People frequently cite too many cases, especially for obvious stuff. Cases are easy to find on Westlaw and paste into briefs. Lots of them are never read by the paster. Too many citations? especially for the obvious stuff? creates visual clutter and diminishes important cases that you actually want the court to read. To the extent having a cite (or four) for every proposition is some vestigial paranoia from law review, it's not a real rule of legal practice, nor is it a useful guide for persuading people.

Tip #2? Quality, not quantity or variety. Having one good case, that you genuinely want the court to read, is far superior to a string cite of half-a-loaf cases. There is also no rule that you must offer a different cite for each mundane proposition you expound. You can use your one good case for every single run-of-the-mill proposition it covers. I'm doubtful variety is the spice of life, and I'm certain it doesn't spice up a brief if it means citing cases other than the ones you think the court should read, solely for the purpose of quantity or variety.

Tip #3? Watch what courts do, not what they say. Other than citation overkill, probably the second-worst trend is myopic focus upon snippets of judicial language (which find their way to awful explanatory parentheticals). Snippet hunting encourages lawyers?especially newer ones?to treat judicial language as if it were "the law." But as the [Holmesian bad man](#) reminds us, language is not the law.

The law is what a court will do (or has done). As with so many aspects of life, actions speak louder than words.

My friends in the Phoenix office told me of the "Jack Brown rule," which was that no judicial language or case could be cited unless the precise procedural result of the cited case was the same as what you are seeking. I'm not that strict, but I appreciate the sentiment. I frequently find attorneys far too enamored of judicial language in cases that, upon a complete reading, are not that good and do not have a court acting the way we want. A high-quality case does what you want the court to do. Once you find a court doing what you want, then reading the facts and legal discussion is much more informative about what was motivating the judges.

Tip #4? Judges are human beings. This one is easier to appreciate if you've clerked (no man is a hero to his valet), or if you are old enough to have friends and peers becoming judges. Easy access to judicial work product online can give the false impression that it was produced by all-knowing, vigilant, legal experts, perhaps resembling robots or computer systems. It's not.

Don't treat finding some judge somewhere saying something pertinent as talismanic. They're not gods, their words aren't statutes, they're not all created equal, and you can reason through these things yourself as well or better than many of them. You wouldn't run into court proclaiming that you found another lawyer in [pick a state] who agreed with you. As one of my law professors impressed upon me, cases do not appear with "asinine" emblazoned on the front; you must figure that out for yourself. The same is true of "persuasive" or "well reasoned."

Tip #5? Spend more time with treatises and focus on reasoning. Because judges are typically busy generalists limited by what the parties have presented, no one should expect them to provide sage, overarching statements on the law as a general matter. The place to find those is treatises, which are written by specialists who have the time and resources. Yes, they can be biased academics. But they are far more likely to give you the lay of the land and key cases worth reading than a Boolean search for particular judicial language or jumping from related case to related case. To obtain arguments from first principles and a decent shot at locating one good case, spend more time with treatises. And focus on arguments from first principles. Try to get the reasoning in place, then look for citations.

I love seeing the facility that my junior colleagues demonstrate with Westlaw and other online tools. But I am mildly amused at times when clients think that they save money by having associates research something instead of me. To be good at "searching," you must know what you are looking for, the best places to look, and when you have found it (and enough of it). Westlaw can't tell you any of those things, just like social networks can't tell you whom you should connect with and how. The real guidance must come from within—still human, all too human; knowing what you are looking for, finding those real-world examples of humans doing what you are looking for, and not getting overly enamored with what they say.

Maybe that does apply to social networks after all. How about that?

Authors