

Bullying from the Bench

Steven Lubet

SITTING IN GALVESTON, TEXAS, federal district Judge Samuel B. Kent has little use for inept attorneys – and he often lets them know it in uniquely colorful terms. Thanks to the Internet, lawyers all over the country are now aware of Judge Kent’s penchant for chastising incompetent counsel, since several of his unorthodox opinions have been widely circulated via email and various website postings.

For those who have not been let in on the fun, here are some choice excerpts from Judge Kent’s recent opinion in *Bradshaw v. Unity Marine Corporation*:¹

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an

effort which leads the Court to surmise but one plausible explanation. 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. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor’s edge sense of exhilaration, the Court begins.

After explaining why the defendant’s brief was particularly bad, Judge Kent then turned his attention to the efforts of plaintiff’s counsel.

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¹ 147 F. Supp. 2d 668 (S.D. Tex. 2001). The full text of the opinion, including the names of the lawyers, was also published in the *Legal Times* with the following introduction: “Though the opinion starts in a conventional enough manner, don’t be fooled. For anyone thinking that pretrial motions, summary judgments, or even professional responsibility issues need be boring, read on! For the record, we have it on good word that, despite Judge Kent’s claims to the contrary, the attorneys did not use crayons to draw up their briefs.” *LEGAL TIMES*, August 20, 2001, page 43.

The Court commends Plaintiff for his vastly improved choice of crayon – Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotted about Plaintiff’s briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

Many lawyers reacted with guffaws, or at least amused chuckles, enjoying Judge Kent’s caustic wit. For example, a colleague of mine suggested that we distribute the opinion to our students with a warning that “This is what can happen if you don’t study hard in law school.” I am told of judges who “got quite a hoot” from it, remarking “this judge is a riot” and “I only wish that I had written it.”

Schadenfreude runs deep. It is easy to take guilty pleasure in the misfortune of others, especially when they appear to be as bumbling as the lawyers who drew Judge Kent’s wrath. After all, they both apparently filed briefs that were devoid of meaningful authority, while failing to address the central issue before the court. We have all seen the havoc wreaked by poor lawyering, and it is tempting to snicker that the dummies deserved whatever they got.

Let’s resist that urge, at least for the time being, while we think a bit about the use and misuse of judicial opinions. In that regard, Judge Kent’s stylings turn out to be a symptom, or perhaps an exemplar, of a more general problem for both the judiciary and the legal profession.

Federal judges exercise enormous power over lawyers and their clients. Armed with life tenure and broad discretion, a judge can do great damage to an attorney’s reputation and

career, while the lawyer has almost no recourse. So when Judge Kent decided to torment the hapless counsel in the Bradshaw case – who are identified by name in the published opinion – he was taking aim at people who could not defend themselves. Under prevailing law, they cannot even get their case transferred to a new judge.² They just have to grin and bear it, in the hope that “His Honor” doesn’t decide to go after them again.

In litigation, the judge is the maximum boss. Everyone else is a supplicant, compelled to engage in stylized demonstrations of obeisance. We stand when the judge enters and leaves the room. Our “pleadings” are “respectfully submitted.” Before speaking, we make sure that it “pleases the court.” We obey the judge’s orders and we even say “thank you” for adverse rulings. These are the mandatory trappings of respect, but they do not ensure that a judge’s actions will always be respectable.

By belittling the lawyers who appear before him, Judge Kent used his authority to humiliate people who – in the courtroom environment – are comparatively powerless. There is a name for that sort of behavior, and it isn’t adjudication. It’s bullying. It smacks of nothing so much as the biggest boy on the playground picking on the smaller kids who are unable to fight back.³ Even the “crayon” taunt reveals the judge’s own schoolyard perspective, much more than it tells us anything about his unfortunate targets.

And this is no defense of the *Bradshaw* attorneys. I assume that their work was thoroughly dismal and that Judge Kent’s legal judgments

2 A judge’s expression of dissatisfaction with counsel is not a basis for mandatory recusal under 28 U.S.C. § 455, especially when there is no extrajudicial source for the court’s displeasure. See generally, Shaman, Lubet & Alfini, *JUDICIAL CONDUCT AND ETHICS* 3D, pp. 102-104 (explaining “extrajudicial source” rule as it applies to judge’s bias or prejudice against counsel). Moreover, it would be hard to argue that Judge Kent’s opinion raises a reasonable question as to his impartiality, per 28 U.S.C. § 455 (a), since he was equally nasty to both sides.

3 Or perhaps the more apt analogy is to the gunslinger who uses his six-shooter to make a tenderfoot “dance,” for the entertainment of everyone in the saloon.

were unfailingly correct. But a federal judge has many decent, reasonable ways of dealing with inadequate lawyers. He can chew them out in court, he can call them into chambers, he can require them to rewrite their briefs, he can sanction them under 28 U.S.C. § 1927. Any one of those steps could have been taken with a far greater remedial effect than can be achieved through public shaming. Elementary schools long ago abolished the dunce cap, recognizing that it was both cruel and counterproductive.

Publication of an opinion, however, is an extraordinary measure. As Professor David McGowan recently pointed out, there are very good reasons for courts to avoid the unnecessary proliferation of published opinions.⁴ The Judicial Conference of the United States has endorsed a resolution on the limitation of publication, suggesting that it be restricted to “decisions of precedential import.”⁵ The Fifth Circuit rule, adopted January 1, 2001, notes that “the publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.”⁶

By any standard, Judge Kent’s opinion in

Bradshaw has scant precedential value. The actual issue in the case is a garden variety application of the *Erie* doctrine to a statute of limitations question, which the court answered in a single paragraph while remarking that it could be “readily ascertained.”⁷ Thus, the only possible purpose for publication was to add to the embarrassment of the attorneys. I have no quarrel with embarrassing lawyers when it is necessary to the outcome of a case – as obviously happens in Rule 11 decisions and in *Habeas Corpus* petitions based on inadequate representation, for example. But in *Bradshaw* the comments were entirely gratuitous, not even rising to the level of dicta.

Furthermore, there are severe costs when courts use published opinions for the purpose of humiliation, even when couched in humorous terms.⁸ First, we ought to worry about the impact on the parties. *Bradshaw* is a Jones Act case, involving serious personal injuries to a seaman. Judge Kent’s decision dismissed an important defendant from the case, causing a definite setback to the plaintiff. Imagine how the injured Mr. Bradshaw would feel upon reading this passage from the opinion:

4 David McGowan, “Judicial Writing and the Ethics of the Judicial Office,” 14 *Geo. J. Legal Ethics* 509, 568, 574 (2001). As Professor McGowan explains, “The choice to make a public example of private conduct must be made with care.” *Id.* at 568.

5 Judicial Conference of the United States, *LONG RANGE PLAN FOR THE FEDERAL COURTS* 69 (1995), cited in McGowan, *supra* at 575. The recommendation referred to appellate opinions, but the same logic certainly applies to trial court opinions.

6 Rule 47.5, *RULES AND INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*. The Fifth Circuit rule goes on to specify six situations in which opinions should be published, none of which appear remotely applicable to *Bradshaw*. See also McGowan, *supra* at 575 note 322 (detailing the publication rules in other circuits).

7 *Bradshaw*, *supra* at 671. This too was occasion for a barb from the bench: “Take heed and be suitably awed, oh boys and girls – the court was able to state the issue and its resolution in one paragraph ... despite dozens of pages of gibberish from the parties to the contrary!” *Id.* at note 3.

8 Upon rereading, the *Bradshaw* opinion isn’t really that funny, as it is mostly just a series of cheap shots. The crayon metaphor fights with the pig-in-a-dress, and we are left to wonder why either one would cause a “devil-may-care laugh in the face of death, life on the razor’s edge sense of exhilaration.” On the other hand, readers will probably enjoy Judge Kent’s opinions in *Republic of Bolivia v. Philip Morris Companies, Inc.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999) and *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782 (S.D. Tex. 1996). Both opinions are considerably funnier than *Bradshaw* and, not coincidentally, they both refrain from *ad hominem* invective.

After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for summary Judgment is GRANTED.⁹

Put aside the fact that Mr. Bradshaw was injured when climbing from a tugboat to the pier, which Judge Kent chose to use as part of a joke. Until seeing this excerpt, Mr. Bradshaw might once have believed that federal judges decided cases out of an obligation to justice, not out of affection for counsel, and certainly not out of morbid curiosity (another bad joke). He would surely be confused, or more likely appalled, by the court's trivializing reference to the odor of a wet dog. And remember, the plaintiff lost. Although you would not know it from reading the opinion, the case was about Mr. Bradshaw, not about the judge's relationship to the lawyers. Will Bradshaw be able to read Kent's opinion and feel that he received a fair hearing?

Then there is the problem of civility. Many observers, including a good number of federal judges, have bemoaned the decline of civility in the courts. Rambo lawyers, it is said, are too combative, too overbearing, too ready to substitute personal attacks for advocacy. But why

should lawyers be polite when the court itself insults and demeans them? If the judge calls my adversary "blithering counsel," adding that his work is "asinine tripe,"¹⁰ why should I treat him any differently? If the court engages in that sort of name-calling, why shouldn't I incorporate similar bombast into my own arguments and briefs? What hope is there for civility, when the judge himself coarsens the discourse?

By modeling intemperate behavior, Judge Kent merely invites more of the same from the lawyers in his court and beyond (given the Internet-driven notoriety of Kent opinions). As an old Yiddish saying puts it, a fish rots from the head.

We might also be concerned about the quality of justice being dispensed in Judge Kent's courtroom. As stated earlier, I have assumed thus far that all of Judge Kent's decisions have been legally correct. In fact, however, there are reasons to doubt his rulings. When the court becomes so contemptuous of lawyers, and so eager to insult them in public, we must wonder whether its judgments are truly free of bias. A judge who becomes so incensed just might possibly be inclined to take it out on the offending counsel (and by extension, on counsel's client).¹¹ Of course, there is no way to know for sure. Judges make thousands of discretionary decisions in the course of resolving motions or trying cases. Most of those decisions are not subject to review; many are not even recorded. Does the judge listen closely to the arguments of

⁹ Bradshaw, *supra* at 672.

¹⁰ *Labor Force, Inc. v. Jacintoport Corporation and James McPherson*, 144 F. Supp. 2d 740 (S.D. Texas 2001). Judge Kent took the extraordinarily unusual step of publishing his order denying a change of venue in this matter, in which he named the erring lawyer while referring to his motion as "patently insipid" and "obnoxiously ancient." Judge Kent later withdrew the opinion from publication (perhaps having thought better of it), but not before it was spread about the country on the Internet. 144 F. Supp. 2d 740. Withdrawn for N.R.S. bound volume, 2001 WL 640675 (S.D. Tex.).

¹¹ See, e.g., *United States v. Microsoft Corporation*, 253 F.3d 34, 113 (D.C. Cir. 2001)(reversing in part because trial judge's intemperate characterizations of one party violated Canon 2A of the Code of Judicial Conduct, which requires federal judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

“blithering” lawyers? Will you get a fair hearing in your next case, if the judge said your last smelled like a wet dog? Is the judge open-minded, or is he just playing gotcha? Judge Kent, no doubt, believes that he is scrupulously even handed, but we are entitled to question his level of self-awareness, given how little self-consciousness he has shown in several of his opinions.

Finally, we have to consider the morale of the lawyers. I don't mean we should worry about whether their feelings have been hurt. Lawyers are all grown-ups, and most of them are pretty well-paid. But we do have to worry about the vigor of the advocacy in Judge Kent's courtroom. Will lawyers pull their punches for fear of incurring Judge Kent's ire? In the *Labor Force* case, Judge Kent blistered a lawyer for seeking a change of venue, per 28 U.S.C. § 1406(a), rather than moving for transfer to a new division, per 28 U.S.C. § 1404(a). Admittedly, the mistake was elementary, and counsel compounded it by bringing his motion under Rule 12(b)(3), but Judge Kent's reaction was furiously disproportionate. In addition to insulting the lawyer in scathing terms, the court determined that the attorney was “disqualified for cause from this action for submitting this asinine tripe.”¹²

Imagine that you are a young (or not-so-young) lawyer with a case before Judge Kent. Now imagine that you want to advance a novel claim or make an innovative motion. You know that your chances are slim, but you believe that your position is supported

by a “good faith argument for an extension, modification or reversal of existing law.”¹³ Judge Kent, however, has a reputation for seeing things in stark black and white. And when he thinks something is “asinine,” well, the roof caves in.¹⁴ How much would you be willing to risk in order to bring your inventive motion? Would you be willing to see yourself maligned in a published opinion? Vilified by name in Internet postings across the country? Removed from the case, with the consequent responsibility of explaining it to your client?

No matter what the merits of their positions, lawyers will obviously have to tread softly in Judge Kent's courtroom. In a system that is premised on zealous advocacy, that's just a shame.

Samuel B. Kent is not the only martinet on the federal bench, alas. But he has succeeded in becoming the best known by virtue of his intentionally outlandish, publicity-seeking opinions. One of the great strengths of our Constitutional system is that federal judges are appointed for life – a measure intended to assure the independence of the judiciary. Occasionally, however, a judge, for reasons of large ego or poor judgment, mistakes independence for license and becomes abusive. Unfortunately, there is no good response to that sort of misconduct, which often tends to get worse over time. Lawyers may talk behind the judge's back, but in the courtroom it pretty much has to be “Yes, Your Honor,” and “Thank you, Your Honor,” lest the client suffer.

12 *Labor Force* (see pdf of original opinion at www.greenbag.org).

13 Rule 3.1, AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT.

14 This appears to happen with abnormal frequency. A quick LEXIS search located 13 opinions in which Judge Kent referred to something as asinine (often “asinine on its face”), and many others in which he used equally pejorative adjectives, including ludicrous (23 times), ridiculous (15 times), absurd (19 times), preposterous (13 times), and idiotic (19 times). And see *Massey v. State Farm Lloyds Ins. Inc.*, 993 F. Supp. 568, 569 (S.D. Tex. 1998)(denying plaintiffs' motion for remand to state court because it was “frighteningly disingenuous, and frankly, moronic”).

In contrast, a search for all of the United States Courts of Appeals (combined) found only 16 uses of asinine since 1944; a similar search of all United States District Courts (combined) located only 38 such cases. Searches conducted August 16-17, 2001.

But silence in the face of invective only encourages more of the same. And laughter at the ill fate of others – even when they are bunglers – just enables further victimization. Judge Kent, and others like him, need to know that ridicule isn't funny. It's just mean. It isn't judging, it's just showing off. I agree that slipshod lawyering can be a problem. But in the end, an incompetent lawyer is far less dangerous than a judicial bully. ~~CB~~