

Introduction

The Legal Research Process

Legal research is a process. It has a logical sequence with definite goals. The sequence of steps is not exactly the same for each research project, but the process and the goals are the same. Some beginning researchers become frustrated or overwhelmed by research tasks when they see research, not as a process, but as a hit-and-miss or trial-and-error proposition. By viewing research as a process, you will develop the critical skills to conduct thorough legal research, and you will gain confidence in your ability to research and resolve legal issues.

The ultimate goal of legal research is to find primary authority that applies to the facts of the client's situation. *Primary authority* is the law that governs the case. The three types of primary authority are cases, statutes and constitutions, and administrative regulations. Primary authority is the product of the three branches of government. Cases are also called *judicial opinions*; they are written decisions of courts determining the outcome of litigation. Statutes and constitutions are sometimes referred to as *enacted law* because they result from actions of legislatures. Administrative regulations are promulgated by agencies in the executive branch of government, such as the Florida Department of Environmental Protection. Administrative law includes the decisions of agencies that interpret regulations and apply them in contested situations; these decisions are similar to judicial opinions.

One step in finding relevant primary authority is determining which type or types of primary authority control the issue—cases,

statutes and constitutions, or administrative regulations. Often, two or more of these types of primary authority work together to control an issue of law. Furthermore, you must determine whether federal law, state law, or both control the issue. Unless you are already very familiar with an area of law, answering these questions usually requires background research.

Secondary authority is a source that explains or interprets primary authority, but is not binding law. For example, a law review article about a specific case may provide an excellent interpretation of that case, but the article is only secondary authority, not binding law. Another example of a secondary source is a legal encyclopedia. Secondary sources are especially helpful to novice researchers because they can provide a broad overview of an unfamiliar area of law. This context often speeds research in primary authority.

Sources that are used to locate relevant authorities are often called “finding tools.” These include indexes for a single source (e.g., *Florida Statutes*) or for a certain type of authority (e.g., the Index to Legal Periodicals, which covers a large number of separate periodicals). “Finding tools” are not legal authorities, although they can occur within primary or secondary sources.

This chapter provides a very general summary of the research process that will be developed in the remainder of this book. There are four major steps in researching a legal issue: A) developing the client’s facts and legal questions into a research vocabulary; B) using the research vocabulary in secondary sources to better understand the legal issues; C) finding primary authority; and D) updating the primary authority.

A. Developing a Research Vocabulary

A research vocabulary is a list of terms, generated from the facts of a client’s problem and the legal questions raised, that help guide a research project. Much legal research is done through indexes, tables of contents, and topic guides. Having a research vocabulary gives a

researcher terms to look for in an index, table of contents, topic guide, or other tool for finding relevant material in legal resources.

Because facts give rise to the client's legal problem and control how legal rules are applied to resolve that problem, a research vocabulary is generated from a legal problem's facts. The first step in developing a research vocabulary is to gather the facts. In law school, the facts are often given to students by their professors. In practice, attorneys and paralegals must gather the facts through many means, such as interviewing clients and witnesses, visiting the scene of an accident or crime, taking depositions, and subpoenaing records.

After gathering the facts, you must analyze them to determine which facts may be legally relevant. During this process the research vocabulary is generated. There are many suggested methods for analyzing facts to develop a research vocabulary.

One method of generating research terms is to ask questions similar to the journalistic approach of who, what, when, where, and why. Because you are attempting to generate research terms, you should attempt to generalize the information rather than listing the specific facts, such as the parties' names. You also want to generate as many useful terms as possible. As you begin searching for the terms in indexes you will quickly learn which are the most helpful. At the beginning, though, you should take a brainstorming approach.

- 1) **Who** are the parties involved in the case? This question is not looking for the names of the parties, but for identifying characteristics, such as teacher, student, landowner, trespasser, doctor, or patient.
- 2) **What** is the legal basis of the action or the issue? This question could generate anything from the theory of law under which the lawsuit would be brought to the facts describing what occurred to bring about the legal question. Is a farmer concerned that someone is trespassing and stealing equipment? Is a patient suing for malpractice in medical treatment?

- 3) **When** did the situation that created the legal issue occur? While it may be important to a defense that the crime occurred at precisely 5:17 p.m., for research purposes, think more generally. Did the situation arise at night, dusk, or noon? Did the important events take place before the patient reached the emergency room or after she had been in intensive care for several days?
- 4) **Where** did the legal situation arise? Again, look for identifying characteristics of the place where the situation arose, not necessarily the street address. Examples might include a school gym, a rural piece of property, or a hospital.
- 5) **Why** is the claimant bringing the legal issue, or why does the defendant think there is no liability? A student may claim a teacher was negligent for not stopping a fight in which the student was injured. In another situation, a doctor who provided free medical care to a man suffering chest pains outside a movie theater may claim immunity under a “Good Samaritan” statute. In your early work you will likely be told the claim or defense by your supervisor. As you gain legal experience you will begin identifying these for yourself.

Two other methods of analyzing facts and generating research terms use mnemonics to help the researcher in brainstorming. In the TAPP method, you should generate a list of relevant Things, Acts, People, and Places regarding your facts.¹ Still another method of generating research vocabulary is to categorize facts using the “TARP” mnemonic: (1) Things; (2) Acts; (3) Relief; and (4) People or Places.² It makes little difference which method you use to generate research vocabulary. The point is to analyze the facts and generate terms that will help with research in indexes, tables of contents, topic guides, and other “finding tools.”

1. Larry L. Teply, *Legal Research and Citation* 44 (4th ed., West 1992) (citing Lawyers Cooperative Publishing Co., *A Student Guide to Am. Jur. 2d, ALR and USCS* 11 (1990)).

2. J. Myron Jacobstein et al., *Fundamentals of Legal Research* 16 (7th ed., Found. Press 1998).

After generating an initial research vocabulary, list synonyms and antonyms for each term. This extra step helps to expand the research possibilities and increases the likelihood that you will find results that are on point. Novice researchers, or even experienced researchers who are researching a new field, risk missing helpful sources if they skip this step. A legal dictionary, such as *Black's Law Dictionary* (Bryan A. Garner ed., 7th ed., West 1999), or a legal thesaurus, will help you to develop a broad list of research terms that are likely to appear in other legal sources. A legal dictionary is also essential when you are first starting to read and analyze cases. Some words and phrases non-lawyers use, such as “reckless,” have a particular meaning in a legal context; conversely, legal sources still use phrases in indexing, such as “Master and Servant,” that non-lawyers would probably not use.

B. Using Research Vocabulary in Secondary Sources

After developing a research vocabulary, you are ready to begin using secondary sources, such as law review articles and legal encyclopedias. Secondary sources are often used in the early stages of research to help you gain background knowledge of the legal issue. Which secondary sources you use depends on how much you already know about the topic and how broad or narrow the problem is. How many secondary sources you use will depend on how successful your early searches are.³

Use the index, table of contents, or other search methods in each secondary authority, looking for references to the research vocabulary you generated earlier. Do not stop looking in the index just because you find one research term. Thoroughly search the index for all research terms before turning to the text of the secondary authority. This will save you the time of going back and

3. For more information on secondary sources, see Chapter 6.

forth between the index and the text of the source, and it will also ensure that you do not either inadvertently omit research terms or duplicate research.

C. Moving from Secondary Sources into Primary Authority

Secondary sources often cite directly to primary authority either in text or in footnotes. These citations will help you make the transition from doing background research to locating primary authority. You cannot assume that a secondary source has given you an exhaustive list of relevant primary authorities, however. In addition to reading primary sources referred to in secondary sources, remember to search for all three types of primary authority—cases, statutes and constitutional provisions, and administrative regulations. Every publication that prints primary authority contains an index, table of contents, or other finding tool, and you must search these resources thoroughly.

After compiling a list of primary authorities from secondary sources and various finding tools, you must read and analyze each case, statute, or regulation to determine its impact on your client's situation. In this process, do not disregard primary authority that is negative for the client. A properly prepared attorney must be able to respond to negative primary authority and explain why it does not control the case. Furthermore, an attorney has a professional and ethical duty to inform the court of negative, binding authority that is directly on point.

D. Updating Primary Authority

Because the law is constantly changing, attorneys must constantly update their research to adequately represent their clients' interests. The most common term for updating is "shepardizing" because the first major tools for updating were Shepard's citators. By referring to a source like Shepard's, the researcher learns whether subsequent

authorities still follow a particular case or whether it has been reversed, overruled, or criticized by later courts.

Updating can be tedious and time consuming, but it is also critical. In one situation, a clerk at a large law firm was asked to respond to a motion to dismiss a complaint. In researching the issues, the clerk quickly discovered that the attorney who wrote the complaint had relied heavily on a case that had been overruled nearly fifteen years earlier. Needless to say, the case was dismissed. Furthermore, the plaintiff's attorneys were ordered to pay the defendant's attorney's fees because the case was frivolous. This example demonstrates that failure to update research can cause a lawyer to lose credibility before judges and colleagues, and can also cost a lawyer money in opposing counsel's fees and legal malpractice claims.

E. When to Stop Researching

At some point, you must decide to stop researching. Often this decision is dictated by deadlines or by the client's resources. In addition, a good researcher knows not to search forever for the one case, statute, or regulation that exactly answers the question. This is because legal issues requiring research seldom have clear answers. Often, novice researchers either under- or over-research legal issues. As you gain more experience, you will know when to "call it quits." Until then, here are some helpful hints.

You should not stop researching until you have at least considered all types of primary authority that may be relevant. You *must* update *every* primary authority on which your analysis relies. As a general rule, you can stop researching when all of the sources are leading back to the same primary authority or rules of law. When you see the same authorities and rules over and over, stop researching and begin writing.

In general, you should focus your research on the jurisdiction where your issue arose. You may find dozens of articles on a particular legal issue, but only a few of them are likely to address developments in your state or circuit. In contrast, if you find you are dealing with an issue of

first impression in your jurisdiction, do not stop researching until you know whether other jurisdictions have already resolved the issue.

If you follow the research process and find nothing on point, consider (1) expanding your research vocabulary, (2) reviewing more secondary sources, and (3) returning to your supervisor for additional guidance.

One of the most time-wasting mistakes made by novice researchers is trying to do all of the research before they begin writing. More than just wasting time, this mistake can prevent you from fully developing your analysis. Often attorneys do not find the gaps in their research and, more importantly, their analysis, until they start writing. Do not be afraid to start writing. When gaps come up, go back and use the research techniques summarized above and explained in other chapters to fill in those gaps.

F. Varying the Research Process

Sometimes you will begin the research process with a good background understanding of the legal issues involved, or even with a citation to primary authority. In that situation, you might not need to develop a research vocabulary or review secondary sources to begin your research.

Even when you begin your research with a citation to primary authority, it is still a good idea to go through all the research steps to ensure thorough research. For example, if you simply rely on one case and subsequent cases stemming from that one case, you may never find a line of cases or a statute that conflicts with the line of cases you researched. Even if you know you want to go directly to primary authority, such as when you are looking for a Florida statutory provision, taking a moment to think about research terms will ensure that you do not stop your research too soon.

Additional Reading

- Robert C. Berring & Elizabeth A. Edinger, *Finding the Law* 1–17 (11th ed., West 1999).
- Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell* 1–18 (7th ed., West 2000).
- J. Myron Jacobstein et al., *Fundamentals of Legal Research* 1–21 (7th ed., Found. Press 1998).
- Christina L. Kunz et al., *The Process of Legal Research* 3–47 (5th ed., Aspen L. & Bus. 2000).
- Helene S. Shapo et al., *Writing and Analysis in the Law* 209–26 (4th ed., Found. Press 1999).
- Amy E. Sloan, *Basic Legal Research: Tools and Strategies* 1–19 (Aspen L. & Bus. 2000).

