

Research Sources and Strategies

When you master this chapter, you will understand:

1. how research, fact gathering, and analysis fit together;
2. what the major sources of research material are; and
3. some strategies for researching legal memos.

In previous chapters, you learned to analyze issues under controlled conditions. You were given a concise summary of the facts. You were also given the law. If your issue involved a common-law claim or defense, you were given related cases. If the issue was statutory, you were given the statute and some cases construing it. Until now, your task was to identify issues by applying given law to stated facts and then to analyze those issues.

In practice, however, lawyers must identify the necessary facts and relevant law. Clients rarely pose focused legal questions, such as whether a particular employment practice constitutes unlawful discrimination under Title VII of the Civil Rights Act, or whether a person has satisfied a specific element of the claim of negligent infliction of emotional distress. Usually clients just tell their stories and explain their concerns. Lawyers gather the facts by interviewing their clients and anybody else who might have relevant information, and by reviewing letters, agreements, documents, and other evidence. Clients depend on their lawyers to determine whether their concerns involve federal, state, or local law, and to understand the controlling law. Finally, clients depend on their lawyers to identify and analyze any issues that result from applying the relevant law to the facts.

This chapter is an overview of how lawyers find and evaluate the relevant law, and how they gradually refine their analysis as they do their research. It is not an exhaustive description of research sources and strategies. Rather, it offers practical advice on how to think about and approach a research project.

A. Research, Fact-Gathering, and Analysis: A Combined Endeavor

Legal research, fact gathering, and analysis are integrally related. To answer a legal question properly, you must understand how these tasks relate to each other. You might think that research precedes analysis: legal issues are identified when you apply the law to the facts, and you cannot apply law that you do not know. So you must research the law before you can apply it. However, research and analysis are intertwined, because while it is true that you cannot analyze an issue unless you know the applicable law, it is also true that you cannot know—or, at least appreciate the significance of—the applicable law until you know the issue.

Your understanding of the facts that relate to an issue develops as you research and analyze the issue. You cannot appreciate a fact's importance until you know the relevant law, but you cannot find the relevant law without knowing the facts. The solution, again, is to recognize that gathering the necessary facts, finding the applicable law, and deepening your legal analysis, are not three separate steps, but one multi-faceted task.

Suppose you represent Susan Johnson, the woman whose nephew was struck and killed by a reckless driver. As you may recall, the issue was whether the woman was *closely related* to the boy, a required element of the claim of negligent infliction of emotional distress. Unless you knew the applicable law well, you probably would not immediately realize that the closely-related element was a disputed issue. Instead, you might approach the problem this way:

- **Fact gathering:** you conduct an initial interview with your client.
- **Research:** you do some preliminary research to determine what the claim might be and to educate yourself generally on its elements.
- **Analysis:** you apply the law to your client's particular situation to determine whether all the elements of the claim are satisfied. After doing so, you might realize that you do not have enough information. Perhaps you did not adequately explore the nature of the relationship between your client and her nephew in your initial interview.
- **Fact gathering:** you speak to your client again to gather specific facts about their relationship, facts that your research suggested you need to uncover.
- **Research:** having obtained additional facts about the relationship, you research for factually similar cases that consider the closely-related element of the claim. After doing so, you might find that facts you thought were unimportant—such as the amount of time the aunt spent with her nephew—are important after all.
- **Fact gathering:** you speak to your client again, asking for specific information about living arrangements.
- **Research:** fully aware of the necessary facts and focused on the identified issue, you continue your research, looking for factually similar cases and reevaluating the relevance of cases you have already reviewed.
- **Update:** once you find the relevant cases, you must determine that they are still good law.
- **Analysis:** you are ready to formulate a rule (based on the cases you determine are relevant) and apply it to your client's particular situation.

The process of researching, fact gathering, and legal analysis will vary greatly from question to question since your knowledge of the facts and applicable law will vary with each question. So you must be flexible in your approach to this task.

B. Research Sources and Formats

Research materials are categorized as either primary or secondary authority. **Primary authorities** reproduce the *actual text of the law*. Primary authority includes federal and state constitutions, statutes, cases, and administrative regulations. **Secondary authorities** help you understand and/or find primary authority. Secondary authority includes (a) *digests*, which are organized by subject and summarize or “digest” the holdings of cases; (b) *narrative secondary authorities*, which discuss or explain primary authority; and (c) *citation services*, which help you find cases and statutes and update the law.

A particular source may function both as primary and secondary authority. For example, annotated codes contain not only the statutes themselves but also commentaries on the law and summaries of cases construing the statutes.

Research materials are available in print and online formats. Since books have been around much longer than computers, many sources (especially older ones) are available only in print. As time goes on, many sources surely will be available only online. For this reason, you cannot rely on only one tool when conducting your research.

Online search tools often provide an alternative to print sources when locating primary and secondary authority. Although many databases on the Internet contain some of these authorities, the most comprehensive search engines and databases are on Westlaw and Lexis-Nexis. It is important to learn how to conduct online searches productively and efficiently because, outside of law school, time spent conducting online searches costs money. Therefore, before going online, you should familiarize yourself with researching techniques on Westlaw and Lexis-Nexis and get hands-on instruction.

1. Primary authority

a. Statutes

Statutes are published in two basic forms: by chronology (in the order they were enacted) and by subject. Statutes passed during a particular legislative session are called **session laws**. Session laws are arranged and published chronologically. The official chronological record of federal laws is *Statutes At Large*.

States also publish their statutes in chronological (or session law) form. When a law is enacted by the legislature, it is first published in a chronological source. So if you were trying to locate recently-enacted legislation, you might start with a chronological source. Chronological sources are also good for finding laws that have been repealed if you know when they were enacted.

Federal and state laws are also arranged and published by subject. These subject compilations are called **codes**. Codes are very useful for statutory research because it is easier to find and review law arranged by subject. Codes are published in official (i.e., by the government) and unofficial form. Many lawyers prefer unofficial codes to the official ones because unofficial codes are more frequently updated than the official codes and because they are annotated.

b. Cases

Reporters (sometimes called *reports*) are sets of books that publish court and administrative decisions. There are separate reporters for federal and state court decisions. Often a particular reporter publishes only the decisions of a single court. *United States Reports* is a single-court reporter, containing the decisions of the United States Supreme Court. So is *California Reports*, the official reporter for California Supreme Court cases. Other reporters publish decisions of a group of courts. For example, the *Federal Supplement* reporter publishes select decisions of all the federal district courts, while *New York Miscellaneous Reports* contains, among other things, select decisions of the New York trial courts.

Not all reporters are organized by court or court system. Instead, some reporters are dedicated to cases in a particular area of law. The *Bankruptcy Reporter* publishes cases that interpret and apply federal bankruptcy law. Because the cases in this reporter are determined by subject, not by court, a typical volume of *Bankruptcy Reporter* includes decisions of United States Bankruptcy Courts as well as decisions of federal district courts, courts of appeals, and the United States Supreme Court. Similarly, in *Federal Rules Decisions*, you will find decisions of various federal courts, all construing federal rules of civil and criminal procedure.

A court's decisions may be published in more than one reporter. For instance, United States Supreme Court decisions are published as collections in three different reporters:

- *United States Reports* (published by the United States government);
- *Supreme Court Reporter* (published by West Publishing Co.); and
- *United States Supreme Court Reports, Lawyers' Edition* (published by Lexis Publishing Co.).

Reporters can be official or unofficial. An official reporter is published or approved by the court or court system. An unofficial reporter is privately published. *United States Reports* is the official reporter of U.S. Supreme Court cases. The other two principal reporters are unofficial. Because the unofficial reporters are annotated and cross-referenced, researchers may find them more useful than the official reporters.

The principal publisher of unofficial reporters is West Publishing Co. West publishes decisions of federal and state courts in all 50 states. West refers to its various federal and state court reporters as the National Reporter System.

Decisions in West reporters are usually preceded by headnotes. Each headnote summarizes a rule of law announced in a decision. Here is a sample headnote from the *Santalucia* opinion published in full in Chapter 3:

4. Parent and Child 13(1)

Bicycle ridden by five-year-old child was not a “dangerous instrument” for purposes of imposing duty on parents to supervise a child who struck pedestrian; undisputed evidence established that child had been riding bicycle two years prior to the accident, and that he possessed basic skills to ride it and had never had a prior accident.

This one-sentence summary is not the court’s holding on this issue. Rather, it is merely a *summary* of a rule of law in this opinion. *Headnotes are written by West Publishing Co. and are not part of the court’s opinion.* Although headnotes are not primary authority, they can help you determine if a particular case is on point. Moreover, they are an especially useful tool for finding other cases.

West creates a headnote for each rule of law. A two-page opinion might generate two or three headnotes; a thirty-page opinion 40 or 50. The title that precedes the headnote—“4. Parent and Child”—tells you two things. The “4” means that this headnote is the fourth headnote for *this* opinion. The remaining information in the title is the **topic** and **key number** for that headnote. In the example, the topic is “Parent and Child” and the key number is “13(1).” West divides the law into about 400 topics. Topics are further subdivided into more narrow numbered categories called key numbers. West assigns topic and key number references to headnotes to facilitate research through its Key Number Digests (discussed below) and through Westlaw.

2. Secondary authority

Secondary authorities are books, articles, and annotations that summarize, explain, and help you update the law. Secondary authorities play an important

role in research. They provide background information if you are unfamiliar with an area of law and can help you gain enough familiarity with the issue or area of law to begin more detailed research in primary sources or digests. In addition, these secondary authorities may provide you with a valuable citation to a case or a statute, allowing you to move directly to reporters or annotated codes.

a. Digests

A **digest** is a set of books that summarizes (or digests) the holdings of cases in a particular jurisdiction. Digests are comprehensive secondary authorities: they summarize *every* case in a particular jurisdiction or subject. The most widely used case digests—known as West’s Key Number Digests—are published by West Publishing Co.

West’s Key Number Digests help you find court holdings about specific rules of law. A West Digest gathers the headnotes for the decisions of a particular jurisdiction—the same headnotes that precede these decisions in West reporters—and arranges them by subject. Although West has different digests for different reporters and reporter groups, key numbers are universal—the same key number outline is used in every digest and remains the same across jurisdictions. For example, if you were looking for California cases on duress in the making of a contract, you would find headnotes on this point in West’s California Digest under “Contracts 95.” “Contracts” is one of more than 400 broad topics into which West has divided the law, “95” is the key number or sub-category within that topic. The title of that sub-category is “Duress.” If you were researching this issue under Florida law, you would find Florida cases on duress under the same topic and key number in West’s Florida Digest. If you were looking for persuasive authority outside your state, you could consult West’s Decennial Digest. The Decennial Digest contains headnotes from all jurisdictions, federal as well as state.

Often West includes a headnote in more than one key number because the rule of law relates to more than one area of law. The headnote is included in multiple topics and/or key numbers to make it easier for you to find the headnote when you are researching an issue.

Digests are useful research aids. Once you get to the key number in the digest that relates to your legal issue, you can review the case summaries in that key number to find cases that appear to be relevant. Of course, since annotations and headnotes are not primary authority, you must read the full text of the decision to determine whether a case that seems relevant really is.

b. Narrative secondary authorities

Narrative secondary authorities are more narrowly focused than digests. Narrative secondary authorities generally give you an overview of the law, citing only important or representative cases, and are not updated as frequently as digests, if at all. As a result, they are best used for background information and issue identification.

Legal encyclopedias, like *Corpus Juris Secundum* and *American Jurisprudence*, are narrative secondary authorities that offer background information about particular areas of law. To find an entry in a legal encyclopedia, use its index. If you know the appropriate entry, you can use the index at the end of the entry to find the relevant section. In addition, you can access *American Jurisprudence* online.

Hornbooks and treatises are narrative secondary authorities that cover a broad area of law, such as torts, contracts, employment discrimination, or constitutional law. These books are especially useful if you know the area of law that relates to your client's problem but have not focused on the specific claim or issues. You can review the book's index or table of contents and skim relevant chapters. For instance, if your client's problem related to slander, and you knew slander was a tort, you could review the chapter on slander in a torts treatise to familiarize yourself generally with the claim and its defenses.

Other narrative secondary authorities are more focused and should be consulted after you understand your issue. *Law review articles* often focus on discrete, narrow issues and provide a good survey of the case law related to the issue. Similarly, *American Law Reports* ("A.L.R.") focuses on extremely narrow issues and discusses and summarizes relevant cases on the issue. A.L.R. articles are regularly updated to include the most recent cases. Many recent law review articles, as well as *American Law Reports* articles, are available online too.

c. Citation services

Legal research often involves a search for relevant statutes or cases. But when you find a relevant case or statute, you must first determine that it is still good law (that is, still in force and not repealed or overruled) before you can rely on it. Citation services help you determine that your case is still good law. They recite the case or statute's treatment history: whether your case has been affirmed or reversed on appeal, or limited, modified, or overruled in a subsequent litigation. The two main citation services are Shepards (available in print, CD-ROM, and online on Lexis) and KeyCite (available on Westlaw).

Moreover, citation services are also excellent case-finding tools. They help you find additional statutes or relevant cases since they contain citations to all jurisdictions. You can also find other cases that have cited your case. Then you

can review these other cases to see if they consider the same legal issue and are relevant to your search.

Citation services list not only statutes and cases, but certain secondary authorities, including *American Law Reports* and selected law reviews. So a lawyer researching an issue also might use Shepards or KeyCite to find a law review article or an A.L.R. article dealing with the issue he is researching.

C. Strategies for Researching Legal Memos

Finding the law requires a flexible research strategy. As you research, you must constantly review the facts and refine your analysis. You must continue to question whether you understand the issues, and you must choose research sources that are most suitable for your level of understanding at the moment. Research in stages, thinking carefully and creatively at each step. Here are some guidelines for researching a legal memo:

1. Determine the relevant law by doing preliminary background research

Many students plunge into their research by going online, or by reviewing immense collections of case summaries in annotated codes or digests, before they have identified their issue. As a result, they squander their time reading cases that will ultimately prove irrelevant. The reason these students waste so much time is that they have not done preliminary background research in secondary authorities.

Your threshold inquiries are whether your question is controlled by federal or state law, and whether the controlling law is constitutional, statutory, or common law. Determine the relevant law by consulting secondary authorities that offer background information about particular areas of law. Find a hornbook or treatise or an encyclopedia article that discusses the area of the law relevant to your question. Use them not only to identify the relevant law but also to understand the general structure and purpose of the law. All issues arise in a context. If you have a particular issue relating to libel, it is unwise to zero in on your issue without first knowing the elements of a claim for libel and the defenses to it. You can find this information in secondary authorities.

2. Identify and refine the issue

When you have done your preliminary research, determine which principles of law relate to the question. Apply these principles to the facts of your case. For instance, once you determine that the crime of aggravated robbery has elements, determine whether these elements are satisfied. You do this by matching each ele-

ment to the necessary facts in your question. When you cannot match an element or it is unclear whether the element is matched, you have identified an issue that must be analyzed. Remember, closing in on the issue is a gradual process. At each stage of your research, actively apply the law to the facts to identify and refine your issue.

3. Keep the question in mind

As your understanding of the law develops, so should your understanding of the issue. Reread the instructions in the assignment, and understand the question you must answer. Identify the necessary facts. You may find that facts you disregarded initially are now important. Keep going back to the question and the facts.

4. Design a research strategy

When you have completed your background research and identified the issue, you must devise a comprehensive note-taking strategy that works for you. Taking good notes is essential to doing thorough research. Develop a consistent method for taking notes. Remember to use quotation marks and note specific page numbers to avoid inadvertent plagiarism. If you think you have found a relevant case, brief it, and then update it to insure that it is still good law. Note the case's relevant headnote numbers (if you are using a case in a West reporter or Westlaw) and its subsequent history. To avoid duplicating your efforts later, keep a central list of all of the sources you consulted, including those you did not find useful. Jot down your ideas about the issues, possible arguments, and additional areas to investigate as you research. Keep all of your notes in one place and take them with you whenever you do research.

5. Stop researching when you keep finding the same cases

When you understand your issue and your research is not uncovering any new cases, stop researching and concentrate on writing your memo. Give yourself sufficient time to write and rewrite your memo.

6. Continue to update the law

When you decide what cases are relevant, you must update them (using Shepard's or KeyCite) to be certain they are still good law. You must continue to update the law periodically to insure that it has not changed (or that you have not missed anything new) since you did your original research. Also, when you

update a case, make sure to note all subsequent history (such as an affirmation or a recent denial of certiorari) because certain subsequent history notes must be included in the citations in your memos.

D. Sample Research Strategies

You must also have a research strategy in mind when you begin your research in comprehensive sources. While there are many ways to get to the same law, if you start with one of the following research paths, you will find what you are looking for. Here are two examples of research strategies, one for common-law issues and the other for statutory issues.

1. Research strategy for common-law issues

Step 1A. If your background research yielded a relevant case, then

- a. read the full text of the case in a West reporter or online;
- b. note the key numbers of the relevant headnotes; and
- c. do one of the following:
 - (1) review entries under those key numbers in the appropriate West Digest;
 - (2) do a Key Number Search in Westlaw, searching for those key numbers in the appropriate federal or state database; or
 - (3) use a citation service to find other relevant cases and secondary authorities.

Step 1B. If your background research did not yield a relevant case, then

- a. find cases in the appropriate West Digest, starting with the Descriptive Word Index; or
- b. search for relevant words or phrases in Westlaw or Lexis.

Step 2. Read the full text of the cases in a reporter or online. If a case is not relevant, note it to insure that you do not consider it again. If a case is relevant, brief it, and note the key numbers of the relevant headnotes.

Step 3. Find additional cases two ways:

- a. If you noted any relevant key numbers in step 2 above, then
 - (1) review entries under those key numbers in the appropriate West Digest; or
 - (2) do a Key Number Search in Westlaw, searching for those key numbers in the appropriate federal or state database.
- b. Update the most promising cases using Shepards or KeyCite. Using a citation service may lead to other, relevant cases, law review articles, A.L.R. articles, and other secondary sources. If the case has multiple headnotes, update only the relevant headnotes.

2. Research strategy for statutory issues

Step 1. Find the relevant statutory sections by using the statutory code's Index or Popular Name Table, or search for relevant words or phrases in an online version of the code.

Step 2. Review the relevant statutory provisions and all pertinent definitional provisions in an annotated code.

Step 3. Read the case annotations, looking for relevant cases. Make a list of cases to read.

Step 4. Read the full text of the cases. If a case is not relevant, note it to insure that you do not consider it again. If a case is relevant, brief it, and note the key numbers of the relevant headnotes.

Step 5. Find additional cases three ways:

- a. If you noted any relevant key numbers in step 4 above, then
 - (1) review entries under those key numbers in the appropriate West Digest; or
 - (2) do a Key Number Search in Westlaw, searching for those key numbers in the appropriate federal or state database.
- b. Update the most promising cases using Shepards or KeyCite. Using a citation service may lead to other, relevant cases, law review articles, A.L.R. articles, and other secondary sources. If the case has multiple headnotes, update only the relevant headnotes.

- c. Annotated codes have cross-references to secondary authorities. Review the cross references to find relevant law review articles and A.L.R. articles.

Do not hesitate to abandon dead ends.

Step-by-step research strategies oversimplify the research process. Have a research strategy, but keep it flexible. Move to more comprehensive sources as your appreciation of the issue develops. Return to secondary authorities if you become confused or lose the "big picture." Be realistic. Recognize when a particular research path is not working and switch to another. There are many research paths to the same law.

Mastering the techniques of research requires lots of practice. New and easier to use research tools are being developed with increasing frequency. This chapter is an overview of basic research sources and strategies. It is not a substitute for a course in legal research.