WHY DON'T WE TEACH SECONDARY MATERIALS FIRST?

BY PENNY A. HAZELTON*


Just one of the "big four" legal research textbooks (How to Find the Law: Fundamentals of Legal Research), Legal Research in a Nutshell, The Power of Legal Research) includes chapters on secondary sources before chapters on primary legal materials. Why do Christina Kuntz and her co-authors use this organizational structure when none of the other textbooks do? Because teaching about secondary sources first is the right way to teach legal research!

OK, OK! Give me a few minutes of your time to persuade you to at least think about my recommendation. I know that legal research has always been taught by starting with court reports, digests, and case verification systems. And, as we all know, "always" has the weight of tradition, even prejudice behind it! I know that primary materials are "the law" and important. I agree that the ultimate goal in legal research is to find "the law" relevant to the problem. But teaching students first about court reports难道也让他们

about the role of judicial decisions in the role of law and confines them as they later learn how to solve a legal research problem.

For many years I have been using a modified version of Professor Marjorie Rombauer's research strategy from her book, Legal Problem Solving. She suggests five steps in the research process: preliminary analysis; search for statutes; search for mandatory case authority; search for persuasive case authority; and refine, double-check, and update your work.

As part of my explication of the first stage of research—preliminary analysis—the classroom discussion focuses on what a good researcher needs to know before beginning the process of research itself. The relevant facts must be isolated from the mass or sea of information known about the problem. From these relevant facts, the researcher should try to formulate the issue(s) that must be researched. The jurisdictions whose law will control need to be identified. From this basic information, the researcher then

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* I am indebted to Donald Dussin, who recently started arguing with me about this topic. I became exercises and decided to try to pin my mouth on my head.

** mozlim, Cohen et al., How to Find the Law (7th ed. 1985).


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must identify words and phrases that will help find relevant legal material.

We can probably all agree that these are essential elements in the preliminary analysis of a research problem. Now, however, we separate the wheat from the chaff! As an additional stage in the preliminary analysis step, researchers all analyze what they know about this subject matter. If the researcher knows little or nothing, some time spent using secondary sources is usually advised. And how often do we really know much about what we are researching? We’re usually doing research because we don’t know the answer to the client’s problem!

The breadth and depth of a search using secondary sources will vary with the problem, the researcher, and how much the researcher needs to educate himself or herself about the problem. For example, if the issue is hard to formulate or express, the researcher may find a legal encyclopedia useful to help conceptualize the problem. If the issue is very narrow and specific, ALR® might be a good choice for a quick search. If jurisdiction is in doubt, a recent law review article can help formulate a research plan that includes resources from the correct jurisdiction(s). If the researcher can identify the broad area of law—contracts, banking, torts—finding relevant passages in publications from the Nutshell Series® or Hornbook Series® or in treatises will include specific terminology and definitions, jurisdictional analyses, context, history, and the like.

In any of these situations, the legal researcher’s foray into legal information is by way of the secondary literature. If you know little about the subject matter, how else can you determine what kind of law (court decisions, statutes, regulations, constitutional provisions) is most likely to answer your question? Knowing this before you begin searching is bewildering and stressful; statutes or millions of court decisions can help make your research efficient and productive.

Secondary sources can help you determine the relationships between different types of primary authority. If the common law rule has been changed by statute, your research strategy will be very different than if you find that there are both federal and state statutes relevant to your research problem.

Another reason to use secondary authority early in your research stems from the difficulty of formulating legal analogies, especially in this day of electronic legal information. Searching online for cases using facts may actually hide the potential legal analogies. Secondary sources tend to focus more on legal issues so that relevant analogies are easier to identify.

Not only do secondary sources analyze and synthesize legal doctrine, rules, and precedents, but secondary materials also refer to cases, statutes, regulations, and other primary and secondary legal information. Reading that key law review article or treatise may give you a direct lead to the important statutes, cases, or regulations that will help answer your question, thereby satisfying the first rule of any research: find someone who has already done the work for you.

Once the legal researcher has completed preliminary analysis of the research problem by identifying the issue(s) to be answered, the jurisdiction(s) involved, and the appropriate words and phrases, then a search of relevant statutes is the next step. Why? Because statute rules. I hope that I have convinced you that most legal researchers cannot begin to understand and make use of primary materials—statutes, cases, or regulations—without some early help from secondary materials. If this is so, why don’t we teach students about secondary sources first?

I assume that the legal research course has historically taught court reports first because most law students only deal with court decisions in their first-year courses. But, in my opinion, a legal research course that teaches court reports, digests, and citation-checking systems first reinforces the notion that law is only made by judges. Most of us realize that students are very likely to misconstrue the relative roles played by the various sources of law—statutes, cases, regulations, constitutions/charters, and the common law (if you wish to think of common law as a source of law). Teaching a legal research course by beginning with secondary sources can help dispel the notion that case law is all that matters in the law.

In fact, since I’ve read so many cases in their other classes, they might actually be more ready to learn secondary sources first. When law review
"Another reason to use secondary authority early stems from the difficulty of formulating legal analogies, especially in this day of electronic legal information."

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**Why We Should Teach Primary Materials First**

BY DONALD J. DUNN

Donald J. Dunn is Dean and Professor of Law at Western New England College School of Law, Springfield, Massachusetts. Prior to becoming Dean in 1996, he was a practicing attorney at his school for 25 years. He is a member of the Perspectives Editorial Board and co-author (with Jacques & Merki) of Fundamentals of Legal Research (4th ed., Foundation Press, 1998).

When teaching legal research, some difference of opinion exist as to which sources the instructor should expose the students to first—primary or secondary authority. Frankly, I had never given the issue a great deal of thought until I found myself debating the issue with Penny Hardrom in the midst of a Perspectives Editorial Board meeting. Thereafter, I was asked to write this article presenting my side of the argument. The answer is self-evident. Primary means "main" or first. Everything else is secondary. In other words, "secondary" comes after primary.

Imagine this scenario: You are before a judge and you put forth a brilliant legal argument, throwing in some policy and concluding with a black letter principle of law. At this point the judge asks, "Counselor, can you cite some authority for that proposition?" You respond, "Yes, your honor, I have a C.J.S. section, an A.R.B. annotation, a law review article, and a learned treatise." I don't even want to think about what happens next, but I assure you it's not a pretty sight. If you want to make yourself look even worse, try rattling off a few dozen paragraphs to the judge.

During the first days of law school, law students are likely to find themselves in a course on constitutional law, another focusing on the Federal Rules of Civil Procedure, and still others involving the Model Penal Code and the Uniform Commercial Code. The first deals with the ultimate primary authority, the U.S. Constitution—it trumps everything else. Interpretation of the Constitution and its amendments are found in the cases. The federal rules are a massive statutory compilation, with subsequent cases providing clarification. Criminal law, another part of the first-year course package,