CHAPTER 1

ADVANCED LEGAL RESEARCH: GETTING STARTED

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1.1 WHAT THIS BOOK IS ABOUT

As a lawyer, an important part of your job is to advise your client on the law and on its implications for your client's affairs, both prospectively and within the context of litigation. Your responsibility encompasses being as sure as possible about what the law is *not*, as well as what the law is, on any particular subject. Establishing a negative proposition through research, an exigency which arises constantly in legal practice, requires a very sure hand. In order to answer questions from your client or from the court about the law authoritatively and confidently, you must know that you have looked for the law in all the right places. Hence, the title of this book.

As a student of advanced legal research, you are already familiar with the nuts and bolts of legal information. Cases and statutes are no longer alien or frightening creatures to you, but rather the eagerly-sought tools which you know you need for your daily work. But as you shoulder more and greater research responsibilities, as you graduate from canned research exercises to the real world, you will want to ensure that you know where you have to look to do your job competently and reliably. This book, we hope, will help you learn to do just that.

In the old days, finding the law was a jumpy sort of process, involving the use of multiple sources, some of which were interconnected, which had grown up as historical fruits of the evolution of American legal publishing. Legal research instruction focused on how to use each of these legal publications, most of which were either unique or had rival publications which were essentially the same in structure. Many of the great research treatises, such as Cohen, Berring and Olson's *How to Find the Law* and Price, Bitner and Bysiewicz's *Effective Legal Research*, concern themselves primarily with the description and illumination of these discrete publications.

[illegible] from the [illegible] packaged [illegible] today's legal [illegible] are looking for [illegible] arena, you can no longer [illegible] the field for you. The [illegible] publisher is influenced by [illegible] tion networks, and both economic and policy [illegible] that go beyond what the legal research market would [illegible] dictate. Researchers need to navigate through the [illegible] sands of the legal publishing world to locate all the information that they, as a matter of their own professional competency, deem necessary to the task at hand.

1.2 WHAT THIS BOOK IS NOT ABOUT

This book is about legal research, not about general research conducted by lawyers, which of course also happens all the time. Today's lawyer is called upon to argue from statistics, from marketing data out of the business world, from medical arcana, and from most other fields of human endeavor that furnish the background of discord. In order to construct their arguments and to master those anticipated from their opponents, lawyers may need to research facts or background in areas far afield from the law. Such research, since it is not specifically legal research, falls outside the scope of this book.

This book is also not about current awareness. All practicing lawyers have the responsibility of keeping up to date on legal developments in their areas of expertise, so as to be able to spot issues and recognize emerging problems or opportunities for their clients. Many of the sources discussed in this book arrive in the law practitioner's establishment fairly bristling with aids to maintaining such current awareness. Each volume of West's National Reporter System, for example, is chockablock with goodies intended for this purpose, e.g., tables of rules of procedure cited in that volume, words and phrases judicially construed in that volume, and so forth. These may, indeed, furnish the conscientious attorney with passingly interesting reading. However, they rarely figure in the process of active legal research, limited as they are to the tiny subset of materials (albeit recent materials) included in the selfsame volume. While we will occasionally mention some of these sources, we will focus instead on those elements that contribute usefully to research on a specific legal question rather than to speculative and abstract consideration of a legal authority's recent output.

1.3 WHY YOU MUST MAKE A RESEARCH PLAN

As advanced legal research students, it is you who are advanced. You are already somewhat versed in the law and know a bit about what you are looking for and about what problems you might encounter in finding it. Perhaps the most common problem expressed by students beginning a course in advanced legal research is the difficulty of knowing when to stop searching. We have already mentioned the frequent and demanding obligation to prove a negative through research. Yet the opposite, seemingly simpler and more inviting task of establishing a positive legal proposition is actually more fraught with peril because of this very problem of not knowing when to stop. When looking for legal authority for a proposition, the inexperienced legal researcher all too often falls prey to the "*EUREKA*!" syndrome, i.e., he finds something which supports his claim, and calls it quits right there. In trying to prove a negative, on the other hand, there is no treacherous "*EUREKA*! I have found it!" moment. There are only slowly mounting indications that you have, in fact, done enough: you start to see no new authorities cited, you have made a rational research plan and you have carried it out.

The importance of making a rational and informed research plan cannot be overemphasized. By making such a plan (in writing, please, since this is tantamount to a contract with yourself!), you can avoid the pitfall of settling for the first (or fifth) plausible answer you encounter, when your conclusion is based on still incomplete research. This pitfall yawns all the larger in the electronic world. The speed and facility of flitting from one source to another in the multitasking environment makes it easy to fall into the trap of basically random research stabs at each new source; this leads to sketchy results, inviting error and defeat.

The research plan can save you from this all too common fate. Basically, the purpose of the research plan is twofold. First, it ensures that you have built checks into your research that will keep you from reaching unwarranted conclusions. Second, once carried out, it provides the structure for logical and orderly documentation of what you have done. This documentation is particularly important when you do not find anything that satisfies the requested conditions, since the worth of your negative findings lies wholly in your testimony of where you looked. This also applies when you *did* find something, your document trail serving to validate its appropriateness.

1.4 DOCUMENTING WHAT YOU FIND: CITATIONS

Documenting the fulfillment of your research plan should be done in such a way as to allow both today's and tomorrow's research-

ers to follow your trail easily. Such as the [illegible] the sometimes irritating but nonetheless [illegible] es of legal citation, such as [illegible]. But in your own personal research writeups, you are [illegible] yourself to leaving a trail universally legible to any and [illegible] wherever they may be. You can and should feel free to [illegible] your paper trail with additional comments and details that [illegible] your local environment. To be sure, you should always give full and correct cites to all references, so there is no possibility of error later, but you can also benefit by noting additional location information, such as page numbers that are not part of the cite, hints on getting to a particular URL, volume numbers, shelf locations, even color or other physical characteristics of volumes. The key here is to give such additional information in an easily strippable form, so that it can be removed at a stroke when adapting your research for a more generic reader.

At the other end of the spectrum from such private notes about exactly where the information you have found is enshrined, you need to be aware of the developing trend of universal citation systems. These systems derive from the star pagination schemes of yesteryear, which directed readers of a subsequent edition of a legal text, by means of graphical symbols interposed in that text, to the original location of the same text in an earlier edition. The "star pagination" concept was widely used during the last century to enable researchers to move back and forth between the West editions of published cases and their counterparts published by the government or by competing commercial publishers.

Today's universal citation systems, such as those adopted by the American Bar Association, the American Association of Law Libraries, and by some federal and many state courts since the early 1990's, seek to remove the "pagination" from the star pagination idea. Rather, the text itself gets divided up and labelled in manageable chunks (typically a paragraph), each of which is assigned an identifying number which is associated with the larger document and set of documents of which it is a part. One purpose of this graphically ungainly exercise is to remove the systemic preference which the traditional page-bound citation systems afforded to established print publishers of legal authorities. But by so doing, the new systems undercut one of the basic functions of citation: i.e., the referral of the researcher to an unchangeable physical reference standard, a tangible and yet distributed text of record. The world is grappling with this issue in a wide variety of contexts; suffice it for now to remember that, as of this writing, the *Bluebook* requires the legal writer to cite to physically inscribed texts when they exist.

1.5 DOCUMENTING WHAT YOU FIND: FORMATS

Such physically inscribed texts need not be consulted in paper format in order to furnish the desired unchangeable physical reference standard. The tangible reality of a book page is preserved for the researcher's purposes when it is reproduced in any analog-based format: thus, the longstanding acceptance of microformats (microfilm, microcard, microfiche) as reliably equivalent to the volumes they enshrined. To be sure, a manufacturing error can render an individual page illegible or misleading, and this has certainly created problems for individual researchers dependent on microformats for their information. But when it works, it works great. Even better for some purposes are electronically created image-based reproductions of print pages: digital graphic versions of the documents, such as .pdf files, that capture the reality of the page content for digital reproduction and distribution. Since the publisher can see instantly that an error in image capture has occurred, the image can be redone on the spot, preserving the integrity of the document.

Thus .pdf files and microfiche can be said to function as proxies, full equivalents of their print originals for citation purposes. Yet no analog-based format can approach the flexibility, penetrability, and manipulability of text-based resources such as the full text databases of Lexis and Westlaw. When a choice exists, the researcher needs to identify the best format for each stage of research. In many cases, the electronic text-based resources will be the sources of choice for location of information, while the print-origin sources (whether distributed in paper, fiche, or electronically) will still be relied upon for text verification and authentication.

1.6 WHAT SOURCE TO USE?

Although *The Bluebook* is now beating around the bush a bit on this matter of physical format, no such shyness is in evidence in preferring one source to another within format. The general principle in play is that the preferred citation is to the source authorized by the legal authority in question, even when that is not really the source that most researchers use in everyday life. Thus, *The Bluebook* commands the writer to "cite the official code whenever possible" (Rule 12.3), compelling the researcher who has done all the leg work via, e.g., the USCA, to cross check the text found there against the official text, the US government-produced but comparatively unwieldy United States Code. All sources are clearly not created equal, and to avoid getting tripped up by a discrepancy, you need to keep strict track of which ones you actually perused with your own eyes. Looking at a reprint source may be the best you can do, or even the best thing that

anyone could [illegible]
reprint source rather than [illegible] that
comes up frequently in the [illegible] This
and Administrative News, the [illegible]
first (and therefore for a while [illegible] is the
source for United States federal statutes [illegible] print
to cite to USCCAN if that is all that is [illegible] required
Statutes at Large pagination indicated in USCCAN [illegible] use the
hypothetical Stat. cite. To maximize usefulness [illegible] construct a
researcher, you are to include the Stat. pagination [illegible] sequent
part of your USCCAN cite, but you are not to omit [illegible] hypothetical
USCCAN source (Rule 12.5(b)).

This principle is generalized in *Bluebook* Rule 1.6 to cover governing the use of material conveniently reprinted in a non-official source. The third example given, citation of a USCCAN reprint of a Congressional committee report, comes up frequently. Moreover, the notion of using a USCCAN reprint of a committee report without indicating knowledging your true source vividly demonstrates the dangers of not acUSCCAN as its source. The USCCAN versions of the reports are generally excerpts, and even though the precise text quoted may have survived the transplant intact, the context in which it appears may be different enough to affect how it is read and understood. The same dangers are posed by using materials culled from casebooks, treatises, or looseleaf services. You should always either go the extra mile of referring back to the original source for the reprint material, or acknowledge what you have done and either take the rap or accept the praise for having engaged in such a shortcut.

1.7 FOLLOWING TANGENTS: HOW MUCH IS TOO MUCH?

Don't let your research plan keep you from doing *more*. You must be prepared to recognize new opportunities for investigation as they present themselves in the course of your research. You cannot allow the plan (your own or any canned instructions or checklists for legal research) to turn you into an automaton. Grappling with the implications of the legal authorities you uncover is the heart of your professional function, and you cannot abdicate this responsibility. That said, you need to be able to decide when to stop.

You can and should stop a line of research when you get to a point where the facts you are encountering, the law you are finding, or both, are no longer relevant to your research question. This is a judgment call that will become easier to make as you become more familiar with the subject at hand. More straightforwardly, you should stop when you come full circle and are back at your familiar core of material again. Once you are in a closed system of this type, you need

to step back and consider whether it would be prudent to take a fresh approach.

On the other hand, you should not stop when you get to a point where you continue to find new cases but they are all similar. The temptation here is to get overwhelmed by the multiplicity of similar cases, and to stop reading. Instead, you can spot-check them for relevant variables such as similar facts or analogous law, and then narrow them down by applying combinations of criteria that make them ever closer to your situation. Another way to narrow down a potentially overwhelming array of seemingly similar cases is to run them through a citator to see which ones are of lasting importance. Which ones have been recently cited? Which ones have been voluminously cited, cited in law review articles, cited by higher courts, or in other jurisdictions? These are the cases that are likely to be the bases for the next stage of your research.

Another factor to consider in deciding when your research is finished is what kind of assignment you received. Different types of research are called for at different times. "Get me a case" means something very different from "what is the law on x". The former is clearly calling for a more abbreviated research foray than the latter. But beware! "A case" doesn't mean any old case relevant to the matter, but one *good* case. A "good case" ideally means one with a desirable interpretation of the law from the client's point of view, especially when it explicitly criticizes undesirable interpretations. As compared with the client's situation, the ideal "good case" will involve similar facts, a relevant jurisdiction (maybe even the same judge!), and still be valid, i.e., still "good law." Obviously this latter point, if explored in detail, takes you over into the other sort of research, the more exhaustive "find me the law on x". It is all a matter of degree.

1.8 HOW TO MAKE A RESEARCH PLAN

As you start to make a research plan you will need to determine first who it is that has authority to speak on your issue. Often more than one legal authority has legitimate claim to speak to an issue, so you should plan to address them in descending order of authority. As a simple example, if one legislative body, e.g., the United States Congress, has preemptive authority over a particular subject matter, you should research its output before considering the output of other lesser, probably more local, authorities. As a less simple example, if there is reason to anticipate that a normally higher authority would afford deference to the opinion of a nominally subordinate one, you should start with the output of the latter. Thus, for matters of local court rule interpretation, you would start with the opinions of the local court involved, rather than go straight to the Supreme Court to see what it has to say. Similarly for substantive issues of state law.

Once you have decided upon the authorities re[illegible] are interested, you next need to consider what are the [illegible] places where you could look for its output. As you will see in [illegible] chapters, the output of most legal authorities is now available [illegible] many different places and formats. You will need to consider the [illegible] ences between the options and whether there is anything to be [illegible] ed by looking in multiple places.

Finally, you should consider whether somebody has done this work before. Other attorneys in your workplace may have considered this same issue last week, and you will want to find out how that work may be accessible to you. The armies of law students, law professors, and practitioners toiling away to produce law journals may have done a lot of the leg work on your subject already. And of course, librarians and other legal writers sustain a whole industry of publications aimed at distilling and distributing legal research to the profession. Make sure you are not reinventing the wheel, at least where an appropriate wheel already exists!

When you have considered all the factors above, you are ready to set down a logically ordered and thorough plan. Your plan should account for all the elements in our diagram on page 13 below. It should specify where and how you are going to look for each of the following: the primary source which determines the legal issue, its history, its commentary, and its progeny or applications. Although each of these should be accounted for, elements that may not be necessary should not be sketched out in detail unless they prove to be so, e.g., mention "legislative history to be investigated if necessary," but only plan legislative history out if you, the courts, or commentators find some ambiguity, error, or omission in the governing statute.

Writing out a research plan will probably prove discomfiting to many at first, since it calls for an assertion of researcher control over the process that may seem unfamiliar. The untutored legal researcher of today first dives instinctively into exploratory full text searching of legal databases. This may or may not be a good idea, depending on the problem at hand. Whether it is a good idea or not can become apparent to the researcher in the course of writing out the research plan. You will need to consider the best uses of full text searching, and what is its optimal place or places in your plan. You do not usually want to be in the situation of having full text searching as the only arrow in your quiver.

1.9 BEST USES OF FULL TEXT SEARCHING

That said, the full text searching of large legal databases is understandably a mainstay of legal researchers today, and the unique functionalities which such searching entails should be exploited in

almost every research plan. When doing case law research, full text searches can be used by the clueless to mount fishing expeditions to figure out what the blazes is going on. Plugging terms from your situation's fact pattern into a query put to a large case law database without any constraining knowledge of the law will usually retrieve other cases from similar situations; these can illuminate for you broadly what the legal issue in the case might actually be. The simplest form of this kind of search would include distinctive keywords from the facts, especially in combination with each other. Terms of art, either factual or legal, are particularly powerful used in this way. Another approach would be to combine such keywords with the names of attorneys involved in the current matter, since they may have been called in to deal with familiar, i.e., similar, legal issues. More complex exploratory full text searches could include terms associated with particular procedural postures in combination with a judge's name, to see how a judge handles particular kinds of requests.

At the other end of the process, full text searching should always be employed as a check on the completeness and validity of index-based research. Once you are approaching the end of research through other means, you should do a full text search to see whether completely different indexing terms come up on cases retrieved via the full text search, and, if so, figure out why. This use of full text searching allows you to reap the benefits of indexing without subjecting you to its limitations.

Beyond fishing expeditions, and beyond checking up on your other research, full text searching can be especially effective in areas with which you are already quite familiar. In such cases you are really using it as an updating and current awareness tool to supplement your own knowledge of the area, and it is a powerful tool indeed. However, as a beginning lawyer, such areas will take a while to accumulate.

Finally, full text searching can be the best way to go in areas of the law that are poorly or unsuitably indexed. This is an example of how the elimination of the middleman (the indexer) can pay off in certain circumstances. Indexing has necessarily focused on areas of greater industry demand, usually as a result of the economic or political environment. But cases of all types come to trial and get published, even some that do not have a powerful economic or political constituency behind them. For finding these kinds of cases, the full text database search can be the best way to go.

1.10 BEST USES OF FIELD-LIMITED SEARCHING

While full text searching offers some indispensable capabilities, the more focused results offered by field limited searching are usually

what the researcher wants and needs. While many fields of search in the large legal databases are specific to certain types of documents and will be handled in the appropriate later chapters, some general observations are in order at the outset. The concept of fields, that is, particular categories of information about or from documents that can be searched in isolation from other categories, is not limited to the electronic environment. Highly developed print indexes of field-limited information have long been available in American law. Some of the most important field limited searching in law is done in indexing documents which are also available in print in the West digest system. However, the electronic environment does uniquely offer both newly created fields and the ability to combine field limited searching with full text searching.

Newly created fields, i.e., fields that are only accessible in the electronic databases, allow searching by judge's name, by date of decision, and by submerged party names (i.e., parties not included in the short title of the case). The essence of focused and effective searching consists of combining fields effectively in a number of ways. One field-combining technique that speeds case location is to combine a distinctive word in the title field with a range of dates in the date field.

Many field-combining techniques boost the effectiveness of subject-oriented research. One such technique is to require multiple subject headings that must all be present. Another is to focus the search by limiting it to the headnote/summary field. The language in the headnotes is extracted for the most part directly from the language in the case; since the headnotes refer only to the significant legal points made by the court in the opinion, a search limited to the headnotes field will only pick up cases where the search terms relate to the main thrust of the case, not to passing asides.

1.11 BEST USES OF SEARCHING INDEXED/EDITED DATA

American common law is a huge edifice and its key is the indexing that has developed over the last hundred and fifty years. A principal branch of that indexing, the West key number system, dates back to 1907, and continues to evolve (conservatively) to this day. The enormous utility of the West key number indexing has prompted competing publishers to develop analogous indexing systems, such as the "Topic" terms added to case law documents in the Lexis database. Whichever indexing scheme is used, there are several common circumstances in which resort to searching the indexing fields is strongly indicated.

First, the use of indexes is invaluable to the researcher who is learning about the structure and development of the law in a particu-

lar area. While the area may have been preliminarily identified via a full text fishing expedition, mapping it out in a coherent fashion will be expedited by the use of indexed information. The indexing schemes are built on hierarchical subject arrangements, so incorporation of that structure into your search will present you with the case law arranged in a meaningful order.

This meaningful order means that you don't need to hit the bullseye every time. Because of the structure of the index, if you don't come up with just the right legal authority on your first try, the material preceding or following your targeted material might well be better for you than what you came looking for. This serendipity factor, made possible by the ability to rummage around in the subject-structure of the indexed resource, can help you get your bearings in a new subject.

Indexing can also enable the researcher to narrow down a large body of case law to a specific point, especially when few or no distinctive key words are anticipated in the judicial language. Again, the hierarchical structure of the indexing system enables you to progress from general areas of law to highly specialized points of legal doctrine, based on the refinements of the subject headings assigned to each case by specialized indexers. The difficulty of doing similarly refined searching in an unindexed data base is compounded when the researcher is not sufficiently familiar with the language used in a particular area to distinguish between apparently minute or inconsistent variations in terminology.

When, on the other hand, the range of vocabulary that can be used in a given legal situation is unusually varied, indexing again comes to the rescue. Even though the judge in one case wrote "lawyer" and "dereliction" and the judge in another similar case wrote "counselor" and "misfeasance", both cases can be found through the good offices of the indexer who put them both (as well as many others) under the rubric of "attorney" and "misconduct". This collocation function of indexing is particularly important in our country, with its fifty-one principal jurisdictions, each of which can develop its own strain of terminology for the same legal reality.

Finally, indexing collocates cases not only across jurisdictions, but also over time. The language of indexers needs to be responsive to new developments in the law, but it also needs to enable us to reach across the generations to understand the foundations of today's law in the cases of yesterday. Indexes change slowly, in order to facilitate the comparison of cases from different stages of the law's development. While context and, especially, language change in response to the life of the world outside the courtroom, the indexing terms provide enough continuity to enable the researcher to recognize the legal identity of issues considered.

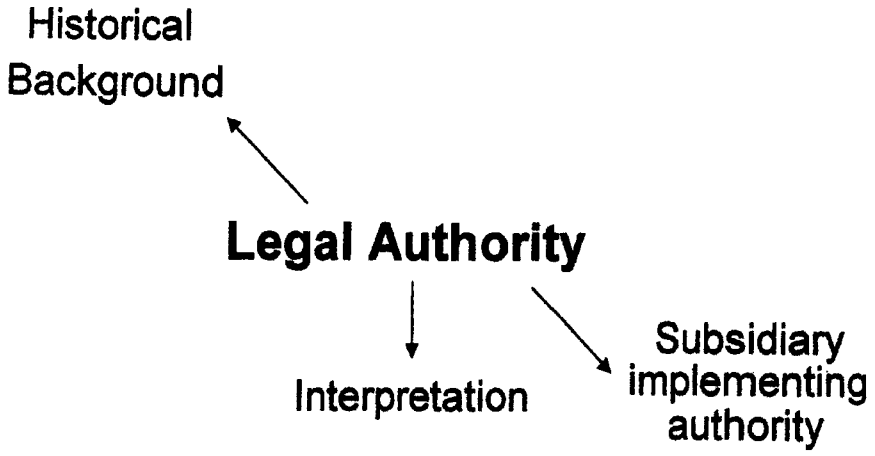
1.12 WHAT YOU ARE GOING TO LOOK FOR

Please be forewarned that this [illegible] or how charts. Such cookbook instructions may [illegible] they will not teach you how to think about [illegible] you must yourself be able to generate the checklist, the [illegible] to research plan since this process contributes to your professional [illegible] product.

The unique opportunities in case law research presented by full text database searching have led us to address case law in many of these opening observations. However, the point about being able to understand the law's development across a span of time can usefully be extended to all sources of legal authority. You will always want to be armed with an understanding not only of the applicable legal authorities, but of the antecedents, the commentary on, and the applications of those authorities. In order to emphasize this injunction, we are willing, despite our aforementioned aversion to formulae for the researcher, to present one simple diagram **(see Table 1.A)**.

This diagram, which represents graphically the elements you need to account for in your research plan, can be adapted to the different types of legal authority which you will be using. The elements represented in it are conceptual and general enough that they will not relieve any researcher from the burden of thought about what they are doing. Rather, it is hoped that the diagram will stimulate thought about how the law you are researching has developed over time, and where it is likely to develop in the future.

TABLE 1.A


Historical Background
Legal Authority
Interpretation
Subsidiary implementing authority