



by Ryan Metheny

# Re-Searching

While search engines have made it easy to find facts, legal research still benefits from a methodical approach

THANKS TO GOOGLE, anyone with an Internet connection can access huge amounts of information at the click of a button, but this has not had entirely positive effects for legal research. Overreliance upon search engines can lead to the assumption that legal questions can be researched with little forethought, planning, or skill. Perhaps this is behind the perception that legal research skills have been eroding in recent years.<sup>1</sup> The default starting point for legal research projects should not be to type key words into Westlaw, Lexis, or another legal database,<sup>2</sup> even if West and Lexis implicitly encourage this practice through their new WestlawNext and Lexis Advance platforms, which mimic Google.<sup>3</sup>

This is not an efficient or reliable way to research. It may lead to an answer eventually,

but the researcher will likely spend a lot of time sitting with glazed eyes, overwhelmed by the sheer number of results. Moreover, the researcher will likely be less than confident in the end product of the research, since researching by this method is, by its nature, only as strong as the particular combination of key words used and the scope of one's Westlaw or Lexis subscription. These problems are entirely avoidable. Instead of relying solely upon key words, a search engine, and hope, attorneys should employ a legal research method.

Like many complex tasks, legal research is best approached with a strategy. Strategic research—as opposed to relying on serendipity as one does when typing key words into a search engine—“maximizes efficiency and accuracy through a systematic approach to

problem solving. It is the methodical approach to the query...that elevates the quality of the result.”<sup>4</sup> The basic framework, presented in outline form in the sidebar on page 28, is recommended for legal research. Different legal research tasks will require different methods, depending upon the topic and such practical issues as how much time and how many resources are available, but the basic plan outlined in the sidebar may be employed with flexibility and can evolve as the project progresses.

According to this method, before beginning to research, it is useful to write down an

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**Ryan Metheny is a librarian at LA Law Library in downtown Los Angeles and lecturer in law at USC Gould School of Law.**

outline of the sources to be consulted, and in what order. It is also advisable to keep notes of the results of one's search of each source and the search terms used. These practices keep the researcher focused and organized and avoids unnecessary replication of the work. Taking notes also helps the legal researcher remember what has already been found and where, which helps the writing process later.<sup>5</sup> Staying organized on paper also allows a freer range of thought and more room for in-depth analysis of the sources consulted. As one writer put it, "Legal research can be both organized and creative....[T]he flash of seemingly spontaneous insight [is] more likely to occur in the course of systematic research than in the random consultation of unrelated sources."<sup>6</sup>

After writing down the initial plan, the next step in a legal research project is to engage in preliminary analysis.<sup>7</sup> Before starting to search, the researcher formulates the question or questions to be answered and assesses his or her knowledge of the subject. In other words, one does some thinking before one starts typing into a search engine. Based upon how much knowledge the researcher has, the next step is usually to consult a secondary source in order to gain the background knowledge necessary to complete the research task effectively.

If one is already an expert in the field, or the particular task is simple, perhaps secondary sources can be skipped, but this is not often the case. If one's background knowledge in the area is minimal, one should first consult a less in-depth source such as *California Jurisprudence*, 3d before proceeding to more in-depth sources. If one's background knowledge goes deeper, one can go straight to a well-known multi-volume treatise such as *Collier on Bankruptcy*, *Milgrim on Licensing*, or *Miller & Starr California Real Estate*. If the issue is procedural, practice guides such as those published by the Rutter Group or CEB will likely prove helpful. Two reliable, all-in-one sources for procedure, legal background, and forms are the extensive Lexis publications, *California Forms of Pleading and Practice* (for litigation) and *California Legal Forms: Transaction Guide* (for transactional matters), which include in-depth but still accessible commentary spanning hundreds of topics.

It is necessary to develop knowledge through secondary sources for a few reasons. First, a researcher cannot properly frame the legal question involved unless he or she knows the doctrinal landscape of the subject area. For example, in a suit for defamation, one cannot begin to effectively research whether a particular publication is likely to be defamatory unless one first has an understanding of the elements of a defamation suit, the privileges and First Amendment protections that may apply to protect the statement, and so on.

One cannot simply start typing the facts of the case into a search engine with the words "defamatory" and "libel" or "slander" and expect to find an answer in a time-efficient and reliable way. By contrast, if one has reviewed a secondary source like Smolla's *Law of Defamation* and identified the potential applicability of, say, the common interest privilege, one can then query the relevant facts and "common interest," obtaining a much more focused and useful set of results.

Preliminary analysis through review of secondary sources also benefits the researcher by providing the vocabulary needed for a search of primary authority. For example, even if one is confident about the proper search terms to use, it is important to keep in mind that many commonly used terms have other, less commonly used permutations that can be discovered through review of the secondary materials. Examples of these interchangeable terms abound, such as "writ of mandamus," or its close relative, the "writ of prohibition," in place of the more common "writ of mandate."

Secondary sources also provide a useful shortcut to the major statutes, cases, and regulations governing a particular area. The fact that these authorities have been identified as important to a particular area of law by a recognized source can save time by narrowing the number of primary sources to be

reviewed. Being able to identify relevant cases early can also provide an entrée into the larger body of case law. Much useful case law can be discerned by reviewing a major case cited in a secondary source, and then Key-Citing or Shepardizing that case.

However, identifying and gaining access to needed secondary sources can be challenging. Fortunately, there are several tools available to help a researcher find the right source. First, many law school libraries publish online subject-specific research guides that list major sources on a topic. Google (which is useful) can help the researcher locate these guides. For example, terms such as "tax law research guide" can lead the researcher to the robust guide written by Kevin Gerson at UCLA School of Law. These research guides often list sources of primary law, as well, which can be very helpful. If one is dealing with a federal or common law issue, Georgetown Law Center maintains a handy treatise finder that is organized by topic.<sup>8</sup>

California's county law libraries are open to the public and free to use. Reference librarians at county law libraries have expertise in identifying appropriate sources and can be reached by phone, e-mail, or chat.<sup>9</sup> In many cases, they can also put the source material on hold at the reference desk or e-mail the pertinent pages to the researcher. One can also access law school libraries, especially if one is an

## An Outline for Legal Research

### A generally applicable method<sup>1</sup> for legal research consists of:

1. Preliminary analysis and review of secondary sources.
2. Locating primary law.
  - a. Statutes or other controlling law, through use of
    - i. Secondary sources,
    - ii. Code indexes, and
    - iii. Key word searching;
  - b. Cases, through use of
    - i. Secondary sources,
    - ii. Annotated codes,
    - iii. Digests, and
    - iv. Key word searching;
  - c. While, either along the way or at the end, Shepardizing or updating the primary law.
3. Refining the analysis through scholarly commentary and government data.—R.M.

<sup>1</sup> See MARJORIE DICK ROMBAUER, LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH, AND WRITING 145-48 (1991); MORRIS COHEN ET AL., HOW TO FIND THE LAW, 591 (1989); J. MYRON JACOBSTEIN ET AL., FUNDAMENTALS OF LEGAL RESEARCH, 15 (1990); AMY E. SLOAN, BASIC LEGAL RESEARCH TOOLS AND STRATEGIES, 9-12, 305-06 (2009); ROBERT C. BERRING ET AL., FINDING THE LAW, 14-21 (2005).

# MCLE Test No. 241

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. A good first step when researching a legal issue is to type relevant key words into Westlaw or Lexis.  
True.  
False.
2. A good first step in legal research is to consult a secondary source.  
True.  
False.
3. When starting to identify relevant cases, narrowing one's search to key numbers or headnotes is typically more efficient than a general key word search.  
True.  
False.
4. Secondary sources include materials that summarize or analyze the law, such as *California Jurisprudence 3d*.  
True.  
False.
5. When selecting a secondary source in an unfamiliar area, it is a good idea to start with a multivolume treatise.  
True.  
False.
6. KeyCite or Shepard's should be used at the end of a research project when checking the status of a case and earlier to help locate other relevant authority.  
True.  
False.
7. One can use a research guide to identify primary and secondary sources in the area of law one is researching.  
True.  
False.
8. A good way to locate a relevant research guide is to search Google for "[area of law] research guide."  
True.  
False.
9. Most practitioners in Los Angeles do not have easy access to a reference librarian.  
True.  
False.
10. It is often quite expensive to subscribe to or purchase a recognized secondary source.  
True.  
False.
11. County law libraries in California charge attorneys a fee for on-site access to databases like Westlaw and Lexis.  
True.  
False.
12. Reviewing the contents of a relevant section of the shelf at a law library is a good way to get a sense of the treatises, practice guides, and other sources available on a given subject.  
True.  
False.
13. Using an index to identify relevant sections of a treatise or code is functionally the same as doing an online key word search of a database containing that treatise or code.  
True.  
False.
14. Key Numbers are useful for identifying relevant cases without the uncertainty and laboriousness of key word searching.  
True.  
False.
15. Relevant Key Numbers can be identified from any of the following sources: West's Annotated Code, relevant cases on Westlaw, and some secondary sources published by West.  
True.  
False.
16. Lexis' Topics and Headnotes system allows one to search for potentially relevant cases assigned to a given headnote or topic.  
True.  
False.
17. By using established research tools like digests, annotated codes, and secondary sources, one can safely forgo key word searching on databases like Westlaw or Lexis entirely.  
True.  
False.
18. LegalTrac is a useful database for reading law review articles.  
True.  
False.
19. It is advisable to search for relevant cases first, before moving on to statutes.  
True.  
False.
20. When one knows only the popular name of a federal statute, the best way to find that statute in the U.S. Code is to search on the Internet for that name as a phrase.  
True.  
False.

## MCLE Answer Sheet #241



### RE-SEARCHING

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### INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

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4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.  True  False
2.  True  False
3.  True  False
4.  True  False
5.  True  False
6.  True  False
7.  True  False
8.  True  False
9.  True  False
10.  True  False
11.  True  False
12.  True  False
13.  True  False
14.  True  False
15.  True  False
16.  True  False
17.  True  False
18.  True  False
19.  True  False
20.  True  False

alumnus of the school. Additionally, many law libraries make their catalogs available online, which can prove a valuable tool in identifying sources. If one has the time to go to the law library, the call number system allows one to browse the shelf for a comprehensive overview of the publications classified within a given subject area. Since accessing materials at all county law libraries and many law school libraries is free, libraries can be remarkable cost-savers when one considers the steep prices of most recognized secondary sources.

index entries into headings with topics and subtopics (including the helpful “Generally, see...”), making index entries much more organized and accessible than a list of results generated by an algorithm. Related subtopics under a topic heading can also give the researcher ideas for further investigation.

If the researcher already has a statutory citation, the finding tools that accompany the code offer advantages over a key word search. Often, relevant law is referred to by the popular name or a section of the statute—for example, Title 7 of the Civil Rights Act.

return to secondary sources for further explanation, or if the researcher needs to find a form or template. (West’s version of the annotated code, however, refers primarily to West publications, as does Deering’s annotated code for Lexis.)

One last important feature of the annotated code should also be mentioned that leads into a third important and underutilized tool for finding primary law. When using West’s annotated code, one will find a Library References section with numbered key citations. These citations also follow each case

## When searching for statutes—which is, generally, a researcher’s first step, even if the presence of statutory authority in the area seems doubtful—the index to the controlling code, either in print or online, can prove more efficient than key word searching. This is because human creators of code indexes have already done an enormous amount of work.

### Primary Sources

Once a sufficient base of background knowledge is acquired, a researcher’s second step is to locate the relevant primary law. This usually means statutes and cases, but regulations, administrative decisions, court rules, constitutions, or international treaties and accords may also be considered. Usually, locating this primary authority will proceed in two steps: finding statutes or other controlling law, and then finding mandatory or persuasive precedents interpreting that law.<sup>10</sup> The secondary sources consulted in the first step will likely have uncovered some of the relevant primary law, but a researcher needs to search sources of primary law directly to be certain that all the relevant and controlling law has been found.

It is at this stage that a researcher may benefit from a general key word search on Westlaw or Lexis. However, other tools may prove faster and more reliable when beginning the search for primary law. When searching for statutes—which is, generally, a researcher’s first step, even if the presence of statutory authority in the area seems doubtful<sup>11</sup>—the index to the controlling code, either in print or online, can prove more efficient than key word searching. This is because human creators of code indexes have already done an enormous amount of work that researchers can use to their advantage. First, human indexers have often thought of some equivalent terms that researchers may use instead of the actual language of the statutes, providing an advantage over simple key word searching. The indexers have also broken up

However, neither of these refers to the code itself, necessitating use of the popular name table to find the corresponding code sections. If one only has a session law rather than a code reference, one may use conversion tables to find where a session law has been codified. Researchers may also find that using the print code makes it easier to flip between an index and different code sections and to see individual code sections in the context of surrounding sections. This may prove easier than looking at individual sections discretely, as one must on Westlaw or Lexis.

### Annotated Code and Digests

Once a researcher is satisfied that the search for statutes is complete, often the best starting point in the search for case law is the annotated code. Annotated codes have Notes of Decisions that list the major decisions interpreting a particular section. These case citations are organized by topic and include short summaries of the basic facts and holding. The annotations to the code include additional, often overlooked, content that is of value to researchers. First, immediately following the end of the text of the statute, one finds a list of all of the session laws that enacted or modified that section, along with, usually, a narrative history of the changes made to the statute over time. This is a gold mine should a researcher have to investigate legislative history. After this and prior to the Notes of Decisions, one can find a variety of references to treatises, practice guides, and law review articles that address the section. These can be helpful should a researcher need to

citation under the Notes of Decisions. Most lawyers will recognize these as citations to West’s Key Number system, but many may not realize or remember how useful this system is. (Lexis has a similar system of searching by topic or headnote.)

West’s Key Number system (frequently called the Digests) originated in the late nineteenth century as a solution to the problem of finding relevant case law by topic within and across the country’s many jurisdictions and case reporters. It was the first such system to do so, and it started the rise of West Publishing Company. Essentially, the Key Number digest system organizes all published case law within the United States into a hierarchical tree of 400 major topics and 80,000 subtopics. Once a relevant key number is identified, results can be limited to particular jurisdictions, either by going to the digest for that state in print or setting limits manually on Westlaw. The same number is assigned to the same topic in every jurisdiction, allowing easy identification of cases across jurisdictions.<sup>12</sup>

This system can provide a major advantage to researchers looking to avoid the uncertainty and laboriousness of key word searching. Identifying a relevant key number provides access to a set of cases on a narrow topic that have already been interpreted and given short summaries by research attorneys at West. In other words, much of the work has already been done. This set of results can then be searched by key word or simply scanned if not too long.

Because the key number system is inte-

grated throughout West publications online and in print, there are many ways to identify relevant topic numbers. West's annotated codes are one way, but if a researcher is using a secondary source published by West, these will also sometimes refer to key numbers. In the West version of a published case, each headnote will be assigned to a specific key number, which on Westlaw will enable the researcher to click through to that key number immediately for a list of other potentially relevant cases.

A researcher can also go straight to the digests without intermediary, either in print or online. One can view the top-level major topics, and from there focus on specific topics through the key number hierarchy. This approach has the advantage of bringing closely related issues to the researcher's attention. Alternatively, if using the digests in print, a researcher can use the words and phrases finding tool (essentially an index) to locate relevant key numbers by topic. If using the key number system online, one can accomplish the same thing by searching key numbers for relevant terms.

The topic and headnote system of Lexis operates similarly to West's key number system, although it does not have a print counterpart. One can use the Lexis system by selecting the Topics tab from the homepage under Browse, access a full hierarchical tree of U.S. legal topics, and from there narrow the search to specific topics on which one needs case law. Alternatively, a researcher may search for relevant forms among the topics and headnotes themselves. Once a relevant topic is found, one can display the cases on that topic by jurisdiction. For example, if a bankruptcy practitioner in California needs case law on lack of good faith as a basis for dismissal, he or she can select the topic Bankruptcy Law from the By Topic or Headnote page, select the subtopic Conversion & Dismissal, the sub-subtopic Lack of Good Faith, the jurisdiction Ninth Circuit, and press Get Documents to display—and search only within—the cases from the Ninth Circuit addressing this subject.

The Topic and Headnote system can also be accessed indirectly when reading a case in Lexis online. This can be done by clicking on the View in Topic Index icon next to the relevant headnote topic to display other cases that address the same or similar points of law.

By using the simple but underutilized research tools of secondary sources, indexes, annotated codes, and digests, a researcher can usually locate the majority of relevant primary law quickly, systematically, and reliably. This is not to say, however, that a key word search on Westlaw or Lexis should be avoided entirely. To the contrary, this research technique certainly has its advantages. It can

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be useful at the end of one's search for primary law as a way to be certain that nothing important has been missed. Because the researcher is aware of the basics of the topic, performing a key word search toward the end of the process makes sifting through results much less time-intensive than it would likely prove at the beginning.

Lastly, the search for relevant primary law would conclude with Shepardizing or otherwise updating all the statutes, cases, and any other authority upon which the researcher plans to rely. Although print resources are underutilized, electronic research clearly has the edge when it comes to checking for recent updates. In years past, updating could be a complex task that involved consulting print Shepard's reports, advance sheets for statutes and cases, and legislative service publications. Now the validity of a case or statute can be determined quickly through use of KeyCite on Westlaw or Shepard's on Lexis. For the most part, statutes are kept up-to-date on these databases, including notes indicating pending legislation that may affect the statute. However, it is still advisable to search recently passed session laws (or pending regulations in the notice register for the jurisdiction if dealing with regulations).

The third step is to refine the analysis. After a researcher has located and reviewed the relevant primary law, it will often prove fruitful to engage in a final, big-picture analysis of the issue. At this point, a researcher should know what the law is, but often it will be useful to find support for one's position on how the law should be interpreted or applied, as a matter of public policy.<sup>13</sup> This support can come from different places. Law review articles are a major source of scholarly commentary, and they can be found via annotated codes and through Shepard's or Key Cite. Perhaps the best resource, however, is a database called LegalTrac, which is available at many law libraries. The most complete indexing service for law reviews, LegalTrac allows the researcher to search by key word and subject heading. Subject headings can enable a researcher to see (but not read) all the articles on a specific subject or limit a search to a specific subject.

LegalTrac may be used with HeinOnline, another commonly available database at law libraries. HeinOnline contains virtually all law reviews and bar journals, making it a good source for obtaining relevant articles. If one has access to a Lexis or Westlaw subscription that includes law reviews, one can use that instead, although the price can be high and the scope of publications and the date range may not be as broad as HeinOnline and LegalTrac. Major national treatises will also frequently contain scholarly commentary beyond mere summaries of the law. As noted, major treatises can be

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identified by consulting an online research guide or the Georgetown Treatise Finder.

### Government Data

Finally, public policy arguments can often be bolstered through statistical and other government data. The easy-to-use census.gov site contains a huge amount of publicly available data on a great number of topics concerning business, employment, health, income, poverty, and international trade, among many others. The handy *Statistical Abstract of the United States* is available at any law library and collects many of these statistics. It should also be noted that some larger law and general libraries employ a specialized government documents librarian who can be consulted to find specific government information.

A time-tested legal research method can still save attorneys time and frustration, and print tools such as code indexes, digests, and treatises still have tremendous value. Online databases may have made locating and accessing many types of legal information easier and faster than before, but it is important to remember that they have not at all changed which sources one should generally consult, and in what order, if one hopes to carry out effective and efficient research. ■

<sup>1</sup> See, e.g., Caroline L. Osborne, *A Methodical Approach to Legal Research: The Legal Research Plan, an Essential Tool for Today's Law Student and New Attorney*, LEGAL REFERENCE SERVICES QUARTERLY, 2013, at 54, 55-58 [hereinafter Osborne]; Ian Gallacher, "Who Are These Guys?": *The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 44 CAL. W. L. REV. 151, 154 (2007); see also Nicholas Carr, *Is Google Making Us Stupid? What the Internet is Doing to Our Brains*, THE ATLANTIC, July 1, 2008, <http://www.theatlantic.com/magazine/archive/2008/07/is-google-making-us-stupid/306868/>.

<sup>2</sup> Osborne, *supra*, note 1, at 55.

<sup>3</sup> See Shawn G. Nevers, *WestlawNext: Westlaw's next generation research system*, STUDENT LAWYER, Dec. 2010, at 12.

<sup>4</sup> Osborne, *supra*, note 1, at 55.

<sup>5</sup> See MARJORIE DICK ROMBAUER, LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH, AND WRITING 145-48 (1991) [hereinafter ROMBAUER]; MORRIS COHEN ET AL., HOW TO FIND THE LAW, 591 (1989) [hereinafter COHEN]; J. MYRON JACOBSTEIN ET AL., FUNDAMENTALS OF LEGAL RESEARCH, 15 (1990); AMY E. SLOAN, BASIC LEGAL RESEARCH TOOLS AND STRATEGIES, 9-12, 305-06 (2009); ROBERT C. BERRING ET AL., FINDING THE LAW, 14-21 (2005) [hereinafter BERRING].

<sup>6</sup> COHEN, *supra* note 5, at 385-86.

<sup>7</sup> See, e.g., ROMBAUER, *supra* note 5, at 144-46; Osborne, *supra*, note 1, at 55.

<sup>8</sup> See <http://www.law.georgetown.edu/library/research/treatise-finders>.

<sup>9</sup> See, e.g., *Reference Assistance*, LALAWLIBRARY.ORG, <http://www.lalawlibrary.org/index.php/legal-research/reference-assistance.html> (last modified Nov. 12, 2013).

<sup>10</sup> See, e.g., ROMBAUER, *supra* note 5, at 144-46.

<sup>11</sup> *Id.* at 147.

<sup>12</sup> See BERRING, *supra* note 5, at 101-110; *West's Key Number System*, Westlaw, <http://lawschool.westlaw.com/knumbers/> (last visited Jun. 12, 2014).

<sup>13</sup> ROMBAUER, *supra* note 5, at 146.

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