

Deborah E. Bouchoux

CONCISE GUIDE TO LEGAL RESEARCH AND WRITING

FOURTH EDITION

Deborah E. Bouchoux

Featuring **Deborah E. Bouchoux's** highly regarded assignments, examples, and building-block approach, *Concise Guide to Legal Research and Writing, Fourth Edition* continues to provide timely coverage of the essential research and writing skills used by today's legal professionals. Designed to be accessible and practical, this is the ideal text for shorter legal research and writing courses.

**Classroom-tested and widely respected, *Concise Guide to Legal Research and Writing* features:**

- **Concise, well-organized text**, divided into six main sections:
  - Section I discusses primary authorities
  - Section II covers secondary sources
  - Section III focuses on computer-assisted legal research using Lexis Advance, Westlaw, and the Internet
  - Section IV covers citation form and how to ensure that these sources are still "good law"
  - Section V provides an overview of the legal research process
  - Section VI covers legal writing
- **Pedagogy designed to enhance the accessibility of the material**, including helpful charts and diagrams that synthesize complex topics, updated Practice Tips offering realistic and helpful suggestions for workplace success, and Ethics Alerts in every chapter.
- **Targeted and ample exercises** help students learn how to use a wide range of research sources.
- **Tips on how to effectively use electronic resources** are included throughout the text.

**Updates and highlights from the revised Fourth Edition:**

- **New "Sidebar" feature in all research chapters** provides quick tips showing how the material in that chapter applies to computer-assisted legal research systems, such as Lexis, Westlaw, and Bloomberg Law.
- **Discussion of GovInfo**, which provides free public access to official and authenticated publications from all three branches of the federal government.
- **Coverage of new tools used for cite-checking**, including EVA and Bestlaw.
- **Discussion of Westlaw Edge**, Westlaw's new research platform.
- **Extensive new coverage of the increasing use of artificial intelligence** in legal research and writing.
- **Discussion of new sources that provide free public access to the law**, including Harvard's Caselaw Access Project and CourtListener.
- **New sections on preparing email letters and email memoranda**, including assignments.
- **All new Research Questions and Internet Legal Research Assignments** have been included for each chapter.

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Wolters Kluwer

# Concise Guide to Legal Research and Writing



# **Concise Guide to Legal Research and Writing**

**Fourth Edition**

**Deborah E. Bouchoux, Esq.**

**Georgetown University**

**Washington, D.C.**



**Wolters Kluwer**

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To the Kenney Clan





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# Preface

## Introduction

**Legal research.** Legal research is likely the most “hands on” subject you will take in the course of your legal education. Although numerous books discuss research methods and techniques, there is no substitute for actually performing the task of legal research. Thus, you will learn the most about legal research only by *doing* legal research.

Today’s legal research projects are simultaneously easier and more difficult than they were years ago. They are easier because there are numerous sources for researchers to consult (including conventional print sources, the computerized legal research systems such as Lexis Advance and Westlaw, and the Internet), and they are more difficult for the same reasons. There are so many sources to consult that deciding where to begin and what resources to use calls for careful analysis of the quality of sources and the economics of a research project so you can obtain the best answer to a legal question in the most efficient manner and at the lowest cost to the client.

To that end, library assignments are placed at the conclusion of each chapter so you can see and use the books discussed in each chapter. Similarly, each chapter includes an Internet Assignment, requiring you to locate information pertinent to the chapter by accessing well-known Internet sites.

Performing legal research can be both frustrating and gratifying. It can be frustrating because there is often no one perfect answer and because there are no established guidelines on how much research to do and when to stop. On the other hand, legal research is gratifying because you will be engaged in a task that requires you to *do* something and one in which you will be rewarded by finding the right case, statute, or other authority.

View legal research as an exciting treasure hunt—a search for the best authorities to answer a question or legal issue. In this sense, the task of using and exploring the law library, Lexis Advance or Westlaw, or the Internet for answers to legal issues or questions should be a welcome relief from the assignments of other classes, which may be passive in nature and involve copious amounts of reading. Take the time to explore

the books by reviewing the foreword, table of contents, and index found in each volume. Familiarize yourself with all of the features of the books or electronic resources you use, and you will simplify your legal research.

Consider researching with other students if you are comfortable doing so. Often you will learn a great deal by comparing notes with others who may be able to share successful strategies for effectively using various resources or finding the answers to research problems. Naturally, sharing ideas and tips for research techniques should not be viewed as an excuse not to do the work yourself or a license to use answers discussed by others. In other words, you should research with other students (if you find it useful to do so), but you should never share or copy answers from others. Not only is this practice dishonest, but it will prevent you from effectively learning the skill of legal research. Ultimately, an employer is not interested in how many “points” you obtained on a class exercise or what grade you obtained in a class, but in whether you can be depended upon to research an issue competently.

**Legal writing.** The legal profession rests on communication and requires its professionals not only to know the law but also to write about it. Legal writing takes many forms. Some documents, such as internal office memoranda, are intended to explain the law to the reader. Other documents, such as court briefs, are intended to persuade the reader. No matter what the form of the document, however, it must be accurate, clearly presented, readable, and concise.

The good news is that good legal writing is simply good writing. It should not differ greatly from other forms of writing. On the other hand, there are some quirks to legal writing that deserve special attention. Legal writing is more formal than other forms of writing. For example, the use of contractions is rare, and the use of the personal pronouns *I*, *we*, and *our* is uncommon (because the focus of most legal documents is on the client’s position, not on the writer’s opinions).

The writing chapters in this text are designed to be a thorough guide that legal writers can use to answer not only the “big” writing questions (such as determining the elements of a court brief) but the many “small” questions that continually occur during the writing process (such as when a comma precedes the words *and* and *but* and when a writer should indent quotations).

Writing is a skill that you can master by repeated practice. If you are inexperienced at writing, keep practicing. Enjoy writing and understand that your writing not only says something about the topic you discuss but also something about you. Make sure your finished project is understood by the reader and reflects well on you.

## Structure of the Text

You will be expected “to hit the ground running” when you get a job, yet there is often a significant gap between what is learned in the classroom and the way to apply this knowledge in the real world of a law office environment. *Concise Guide to Legal Research and Writing* is meant to

bridge this gap by combining a thorough grounding in legal research with a pragmatic approach to the types of legal research and writing assignments you will find in the “real world.”

The text is divided into six main sections: The first section begins with a review of the American legal system and discusses the primary authorities used in legal research (namely, cases, constitutions, and statutes that are binding on courts); the second section covers the secondary sources used in legal research that are used to comment upon, explain, and help you locate the primary sources; the third section focuses on computer-assisted legal research using Lexis Advance, Westlaw, and the Internet; the fourth section covers citation form for the authorities previously introduced and how to ensure that these sources are still “good law”; the fifth section provides an overview of the legal research process, discussing how to begin and end research projects; and the sixth section covers legal writing so you can put your research to work.

Each chapter and section builds on the previous one. For example, once you read Chapter 2’s discussion of the federal and state court structure, you will be ready to understand Chapter 3’s discussion on reading cases that interpret statutes, paying special attention to cases from higher courts. Similarly, once you read Chapter 4 and understand the elements of cases and how they are published, you will be ready for the discussion in Chapter 5 about how to locate cases using digests. The chapters on writing begin with the mechanics of writing: grammar, punctuation, and spelling. Once a writer has mastered or reviewed these basics, the writer will be ready to address the characteristics of effective legal writing and how to prepare various legal documents.

## Features of the Text

The text includes a number of features to enhance learning. Each chapter includes the following features:

- **Chapter Overview.** Each chapter begins with a preview of the material that will be presented in the chapter.
- **Key Terms.** The key terms and concepts used in the chapter are presented in italics and are defined in the Glossary at the end of the text.
- **Practice Tips.** Most chapters include one or more pragmatic practice tips, linking the material in the chapter to “real-world” experience.
- **Ethics Alerts.** Most chapters include an ethics note or comment relating to the material discussed in the chapter.
- **Help Lines.** Nearly all chapters include at least one “go to” reference source, giving a telephone number or website to call or refer to for additional information on the material discussed in the chapter.
- **Internet Resources.** At the conclusion of each chapter, websites are given where you can locate additional information on

the topics covered in the chapter. Although every effort has been made to refer to useful websites, those sites can change both their content and addresses without notice. References to websites are not endorsements of those sites.

- **Research Assignments.** Each chapter includes questions requiring you to use the sets of books or other resources discussed in that chapter. You should never have to use a book or set of books that has not been discussed in the chapter you have read or a preceding chapter.
- **Internet Assignments.** Each chapter includes a series of practical questions that require readers to locate information pertinent to the chapter by accessing well-known legal or general-usage Internet sites.
- **Citation Form.** Each chapter demonstrates citation form for the resources discussed in that chapter, in *Bluebook* form. All citations in *Bluebook* form are displayed in the format used by practitioners, not in the LARGE AND SMALL CAP format used for law review articles and journals. Citations comply with *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). In 2000, the Association of Legal Writing Directors introduced a new citation manual, now in its sixth edition: ALWD & Coleen M. Barger, *ALWD Guide to Legal Citation* (6th ed. 2017). This manual, referred to as *ALWD* (pronounced “all wood”), provided a user-friendly alternative to *The Bluebook*. After the first edition of *ALWD* was published in 2000, each edition steadily crept closer to *Bluebook* citation format, and with the publication of the fifth edition in 2014, it was (and remains) identical to *The Bluebook* in all critical respects. Thus, the focus of this text is on *The Bluebook* because it is the citation manual used in nearly all law firms and the one you will be expected to have “on the job.”

Each chapter also includes charts, graphs, sample forms, and other instructional aids, as needed. For example, Chapter 4 includes a chart showing commonly used abbreviations for legal resources, Chapter 8 includes a chart comparing the terms and connectors used by Lexis Advance and Westlaw, and Chapter 12 provides a blueprint for conducting legal research and a research project planner.

This fourth edition of the text provides several new features, including the following:

- An entirely new feature included in all research chapters, called “Sidebar: Computer-Assisted Research,” which is a quick tip showing how the material in that chapter relates to Lexis, Westlaw, and Bloomberg Law, namely, the computer-assisted legal research systems.
- Discussion of GovInfo, which provides free public access to official and authenticated publications from all three branches of the federal government.

- Discussion of new tools used for cite-checking, including EVA and Bestlaw.
- References to helpful YouTube videos for tips on updating (Shepardizing and KeyCiting), researching, and preparing memos and briefs.
- Enhanced discussion of computer-assisted legal research in Chapter 8, including discussion of the features of Westlaw Edge, Westlaw's newest research platform.
- Extensive discussion of new artificial intelligence features that boost legal research, including the following:
  - Visualization tools such as Lexis's Ravel View and Bloomberg Law's Citation Map
  - Lexis's Lex Machina (providing analytical data on judges, attorneys, and law firms)
  - Lexis Advance Context (identifying language a specific language a judge has relied on so writers can craft targeted arguments for that judge)
  - Lexis Advance's and Westlaw Edge's answer cards (providing clear and concise answers to commonly asked questions)
  - EVA (helping researchers find and summarize cases)
  - KeyCite Overruling Risk flag (indicating when a case has been implicitly overruled)
  - Typeahead technology (predicting suggestions as researchers begin typing)
  - Litigation analytics offered by Lexis Advance, Westlaw Edge, and Bloomberg Law
- A new section in Chapter 9 on three new websites that provide free public access to law:
  - Harvard's Caselaw Access Project (providing free online access to 6.5 million published cases)
  - CourtListener (allowing searchability of cases, as well as a citator service)
  - RECAP Project (providing free access to cases filed in the federal courts)
- A new section in Chapter 10 on using parentheticals in citation form.
- Practical writing tips using notetaking tools such as OneNote and Keep and using tech tools such as Grammarly (to locate spelling, grammar, and punctuation errors) and Hemingway Editor (to locate passive voice and improve difficult-to-read passages).
- A new section in Chapter 15 on preparing an email letter (and an assignment requiring you to prepare an email letter to a client).
- A new section in Chapter 16 on preparing informal or email memoranda (and an assignment requiring you to prepare such an email memo).
- All new Discussion Questions and Internet Legal Research Assignments.



Additionally, several new practice tips are included, such as a practice tip in Chapter 5 providing a checklist on using digests and a practice tip in Chapter 13 on new writing topics, such as using the tech tools Grammarly and Hemingway Editor to eliminate mistakes and improve your writing.

New charts are included, including those on presenting parallel citations and how to find and update C.F.R. regulations.

Additionally, references to helpful websites and blog sites have been updated, and numerous new sample documents are included. Chapter 12 (which provides an overview of the legal research process) includes a full range of open-ended research questions, requiring readers to use and apply all skills learned in previous chapters to obtain answers to these research questions.

## **Textbook Resources**

Instructor resources to accompany this text include a comprehensive Instructor's Manual, Test Bank, and PowerPoint slides. All of these resources are available for download at the Companion Website for this text.

## **Final Thoughts**

When you begin reading this book, most of you will be unfamiliar with cases, statutes, constitutions, or the numerous other legal authorities. As you advance in class and complete the assignments in the text, you will readily be able to measure your progress. When you complete this text and your legal research and writing class, you will have gained thorough mastery of both legal research and writing techniques to ensure you can locate the legal authorities you need and then use them to make your legal writings accurate, clear, readable, and concise.

*Deborah E. Bouchoux, Esq.*

Winter 2019

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# Concise Guide to Legal Research and Writing



Section

I

# Legal Research

*Primary Authorities*



# Finding the Law and Introduction to Legal Research

## Chapter Overview

This chapter discusses the role of legal professionals in legal research, the ethical duty to perform research competently, types of law libraries and their uses, and the sources of law in the United States. The chapter also examines the classification of law books as either primary or secondary sources. Finally, there is a brief introduction to the major law book publishers.

### **A. The Importance of Legal Research**

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Legal professionals are expected to perform the task of legal research competently and cost effectively. Performing legal research today is both easier and more difficult than it was just a generation ago. It is easier because many materials are available through electronic sources and the Internet, making it quick and easy to find statutes, cases, and other legal authorities. At the same time, it is more difficult because these new media make so many sources accessible that tracking down the right authority can seem like finding a needle in a haystack.

Today's legal researchers are expected to know how and when to use conventional print sources, computer-assisted research services such as Lexis Advance and Westlaw, and the Internet to find the best answer to a research question as quickly and effectively as possible.



## B. The Ethical Duty to Research Accurately

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Perhaps the most fundamental aspect of the attorney–client relationship is the client’s absolute trust and confidence in the attorney’s competence. In fact, Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct requires that attorneys provide competent representation, meaning the legal knowledge, skill, thoroughness, and preparation necessary for the representation.

Although it is important to *know* the law, particularly in a field in which you may intend to specialize, it is even more important to be able to *find* the law. In this sense, proficiency in legal research is the foundation for a successful legal career. Your employer will not be as interested in your final grade in any specific class as much as your ability to find accurate answers to questions relating to topics, even though you may not have been exposed to those topics in school.

In fact, the duty to perform accurate legal research has been addressed in a number of cases. For example, *People v. Ledesma*, 729 P.2d 839, 871 (Cal. 1987), held that an attorney’s first duty is to investigate the facts of a client’s case and to research the law applicable to those facts. Moreover, the failure to research adequately may lead to liability for legal malpractice. In *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975), *overruled on other grounds*, 544 P.2d 561 (Cal. 1976), the California Supreme Court affirmed a lower court decision requiring an attorney to pay \$100,000 to a former client because the attorney’s research was inadequate. In sum, you will be expected to perform competent legal research not only because your employer will insist on it but also because ethical standards demand it.

## C. Law Libraries

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### 1. Types of Law Libraries

As noted in the preface to this text, legal research is a “hands-on” skill, requiring you to know how to use a law library. Your first task, therefore, is to locate a law library that you may use. There are thousands of law libraries in the United States. Following is a list of the most common types of law libraries:

- **Law School Libraries.** All ABA-accredited law schools have their own law libraries, most of which will have tens of thousands of volumes in print and nonprint forms. Many law school libraries are open only to their students. In a newer trend, many law libraries offer research tutorials and guides on their websites.

- **Federal Depository Libraries.** More than 1,150 libraries throughout the nation have been designated as *Federal Depository Libraries*, meaning that certain U.S. government publications, such as statutes and cases, will be sent to the library for access by the public. In many instances, local public libraries, law school libraries, or university libraries are designated as federal depositories. The location of the depository library nearest you can be found at [www.fdlp.gov](http://www.fdlp.gov).

- **Local Law Libraries.** Often, a county or city will maintain a law library (typically near a courthouse), and these are usually open to the public. The American Association of Law Libraries provides a list of state, county, and court law libraries at [www.aallnet.org/gllsis/resources-publications/member-libraries](http://www.aallnet.org/gllsis/resources-publications/member-libraries).

- **Courthouse Law Libraries.** Many courts, both federal and state, maintain their own law libraries. Some law libraries are open to the public while others restrict access to courthouse personnel, attorneys, and their paralegals.

- **Law Firm Libraries.** Almost every law firm will maintain a law library. Large law firms maintain extensive collections. These law libraries are available for use only by employees of the firm.

To find a law library, consult a directory or use a general Internet search engine such as Google and call law schools, courthouses, and county offices in your area to determine library policy on use.

Additionally, law libraries exist in computer databases such as those offered by Lexis Advance or Westlaw. In fact, these computer-assisted legal research services offer far more resources than most legal professionals could afford to maintain on their own. Finally, law libraries now exist in cyberspace with vast collections of legal materials available for free “24/7.” These virtual law libraries afford quick and easy access to a significant number of legal resources, as discussed in detail in Chapter 9. See “Internet Resources” at the end of this chapter for a list of some websites that provide research guides and tutorials.

## 2. Arrangement of Law Libraries

There is no one standard arrangement for law libraries. Each law library is arranged according to the needs of its patrons. Spend an hour browsing the shelves and familiarizing yourself with the law library’s arrangement, organization, and collections. The law library’s website may also offer a “virtual” tour.

To locate the books you need in the law library, you will use the library’s online catalog or OPAC (online public access catalog). Simply type in or “enter” the title, author, or subject matter you desire in the search box displayed on the screen, and you will then be given the “call number.” The shelves or *stacks* in the law library are clearly marked, and locating a book is merely a matter of matching up the call number provided by the card or online catalog with the appropriate stack label.

***Ethics Alert: Library Courtesy***

Assume that everyone who uses the law library is as busy as you are. Observe standard library etiquette by reshelving properly every book you use (unless the law library has a preshelving area for books that are to be reshelved). Do not deface books by turning pages down or marking in them. Do not resort to unfair conduct by hiding or intentionally misplacing books. There is no excuse for such overzealous tactics that not only impede learning but also reflect poorly on one who is joining the legal profession.

***Practice Tip: Legal Abbreviations***

In the beginning of your legal career, you may become confused by the numerous abbreviations used for legal books, case reports, and journals. To determine the meaning of abbreviations such as “Ala.” for *Alabama Reports* or “C.J.S.” for *Corpus Juris Secundum*, check Appendix A in *Black’s Law Dictionary* (10th ed. 2014), which provides an extensive list of abbreviations commonly used in law. Additionally, be patient. Within just a few weeks you will probably know about 90 percent of all of the abbreviations you are likely to encounter. See Chapter 4 for a list of some common legal abbreviations.

Law libraries are non-circulating libraries, meaning that few materials may be checked out by patrons. Your law library may offer other services, such as allowing you to reserve a room for group projects or to hold materials in a carrel.

## **D. Sources of Law in the United States**

---

### ***1. Cases and Our Common Law Tradition***

The American legal system is part of what is referred to as the “common law” tradition. *Common law* is defined in part by *Black’s Law Dictionary* (10th ed. 2014) as that body of law that derived from judicial decisions rather than from statutes or constitutions.

In early English cases, people training to be lawyers began “taking notes” on what occurred during trials. When judges were called upon to decide cases, they then began referring to these written reports of earlier cases and following the prior cases in similar situations. The English

referred to this system as the “common law” because it was applied equally throughout England and replaced a less uniform system of law.

This concept of following previous cases, or precedents, is called *stare decisis*, which is a Latin phrase meaning “to stand by things decided.” Broadly, the doctrine of *stare decisis* means that once courts have announced a principle of law, they will follow it in future cases that are substantially similar. It is this doctrine of *stare decisis* that serves to protect litigants from inexperienced or biased judges. Moreover, *stare decisis* encourages stability in our judicial system because it promotes uniform and predictable rulings.

Under this system of precedent following, “the law” was thus found in the written decisions of the judges, and these decisions served as precedents that were followed in later cases involving substantially similar issues. Thus, the first source of law in the United States is judge-made case law.

## 2. *Constitutions*

A second source of law in the United States is constitutions. A *constitution* sets forth the fundamental law for a nation or a state. It is the document that provides the principles by which a country, state, or organization is governed. We have a U.S. Constitution, our supreme law of the land (and which establishes the framework for our government by creating the legislative branch, the presidency, and the judiciary), and each state has its own individual constitution.

## 3. *Statutes*

A *statute*, or law, is defined by *Black’s Law Dictionary* (10th ed. 2014) as “a law passed by a legislative body.” In the United States, legislatures did not become particularly active in enacting statutes until the early to mid-1800s, when our economy began changing from a very rural one to a more urban one. This major change in American society was coupled with a tremendous population growth, and it became clear that rather than having a system in which disputes were decided on a case-by-case basis, which was slow and cumbersome at best, enacting broader laws that would provide rules to govern public behavior would best serve the needs of a growing society.

## 4. *Administrative Regulations*

A fourth source of law in the United States is found in the vast number of *administrative rules* or *regulations* promulgated by federal and state agencies such as the Food and Drug Administration or the Iowa Division of Labor.

The agencies play a unique role in our legal system because they function quasi-legislatively and quasi-judicially. You may recall from basic history classes that our government is divided into three branches: the legislative branch, which makes laws; the judicial branch, which interprets laws; and the executive branch, which enforces laws. Each exercises its own powers, and, by a system usually called “checks and balances,” each functions separately from the others and may limit the powers of the others.

The agencies, on the other hand, perform two functions: They act like a legislature by promulgating rules and regulations that bind us; and they act like a judiciary by hearing disputes and rendering decisions.

## 5. *Executive Branch*

Although the primary function of the federal executive branch is to enforce the law, it serves as a source of law itself in three ways. First, treaties are entered into by the executive branch with the advice and consent of the U.S. Senate. Second, the President, our chief executive, can issue executive orders to regulate and direct federal agencies and officials. State governors may also issue executive orders. Third, the executive branch exerts influence on the law through policies on enforcing laws. For example, if federal laws relating to possession of small amounts of drugs are rarely enforced, the effect is as if the law does not exist, despite the fact that a statute clearly prohibits such acts. Nevertheless, although such an approach by the executive branch influences the law as well as societal behavior, such influence on the law is indirect and remote. In the event the government prosecutes an individual for violation of a previously unenforced law, the individual usually may not raise the previous laxity as a defense.

## E. Legal Systems of Other Countries

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Although every country has its own system of law, most systems are classified as either being part of the common law tradition, described previously, or part of the civil law tradition. *Civil law* systems developed from Roman law, which followed a comprehensive set of codes. In general, civil law countries place much heavier reliance on their collections of statutes than on their much smaller collections of cases. China, France, Germany, Italy, Japan, Mexico, the Russian Federation, South Korea, Spain, and many of the countries of Latin and South America and Africa are civil law countries. Some countries follow mixed systems. Typically, English-speaking countries or those that are prior British Commonwealth colonies are part of the common law system (and are greatly dependent on cases used as precedents), whereas non-English-speaking countries are usually part of the civil law system (which is greatly dependent on codes

or statutes). In practice, however, even in many countries with systems based on civil law, case law still plays a significant role, and there is typically judicial review of legislative acts. Table T.2 of *The Bluebook* identifies more than 40 foreign countries as either common law or civil law countries.

## F. Legal System of the United States

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Although the United States adheres to a uniform common law tradition, there is no one single legal system in this country. Federal laws are enacted by the U.S. Congress, and cases are decided by the federal courts. Moreover, unless an area of the law has been preempted by the U.S. Constitution or the federal government, each state is free to enact laws as well as to decide cases dealing with state or local concerns.

Thus, there is a tremendous body of legal literature on the shelves of law libraries: federal cases and statutes; state cases and statutes; federal and state administrative regulations; and numerous other texts and journals that explain the law.

All of the great mass of legal authorities can be classified as primary or secondary authority. *Primary authorities* are official pronouncements of the law by the executive branch (treaties and executive orders), legislative branch (constitutions, statutes, and administrative regulations and decisions), and judicial branch (cases).

If a legal authority does not fall within one of the previously mentioned categories, it is a secondary authority. In general, the *secondary authorities* provide comment, discussion, and explanation of the primary authorities, and, equally important, they help researchers locate the primary authorities. Secondary authorities include legal encyclopedias, law review articles written about various legal topics, and books or other treatises dealing with legal issues.

It is critical to understand thoroughly the differences between primary and secondary authorities because only primary authorities are binding on a court, agency, or tribunal. Thus, if an argument relies on or cites a case, constitution, statute, or administrative regulation that is relevant to the legal issue, it *must* be followed. The secondary authorities, on the other hand, are persuasive only and need not be followed. In sum, a primary authority *is* the law; a secondary authority *discusses* the law. See Figure 1-1 for a chart showing primary and secondary authorities and other legal research tools.

In addition to the various authorities previously discussed, there are other books in the law library that are in the nature of practical guides or finding tools. These include books such as digests, which help locate cases (see Chapter 5); form books, which provide forms for various legal documents such as wills and contracts (see Chapter 6); and electronic tools that help you update the authorities you rely upon in any legal writing (see Chapter 11).

**Figure 1-1**  
**Primary and Secondary Authorities**

<i>Primary Authorities (binding)</i>	
<i>Authorities</i>	<i>Source</i>
Cases (state and federal)	Judiciary
Statutes and Constitutions (state and federal)	Legislature
Administrative regulations (state and federal)	Administrative agencies
Executive orders (federal and state) and treaties (federal only)	Executive branch
<i>Secondary Authorities (persuasive)</i>	
A.L.R. Annotations	
Encyclopedias	
Legal periodicals	
Texts and treatises	
Restatements	
Dictionaries	
<i>Finding Tools</i>	
Digests	
<i>Updating Tools</i>	
<i>Shepard's Citations</i> (on Lexis Advance)	
KeyCite (on Westlaw)	

## **G. Law Book Publishing**

There is a tremendous amount of publication of legal authorities, both primary and secondary, that occurs each year. You cannot be expected to know all of the law contained in the published authorities; however, you can be reasonably expected to be able to locate and use these legal authorities. That is the goal of legal research.

The actual publication of these authorities is conducted by only a handful of publishing companies, including the following, which are among the best known legal publishers:

- **Thomson Reuters Corporation (“West”).** Although West, with its U.S. headquarters in Minnesota, is actually owned by Thomson Reuters Corporation, a global information company, in the United States it is still routinely referred to as Thomson Reuters/West or simply “West.” In fact, because so many practitioners still refer to this publisher as “West” and



many of the publisher's books themselves still use the brand "West," this text will generally refer to this publisher as "West" or "Thomson Reuters/West" rather than "Thomson Reuters." Founded in 1872, West publishes cases, statutes, secondary authorities, and provides Westlaw, the computer-assisted legal research system (previously called "WestlawNext" for several years but rebranded as simply "Westlaw" in 2016). West also owns FindLaw ([www.findlaw.com](http://www.findlaw.com)), a leader in free online legal information. For simplicity, this text will generally use "West" when referring to print products and "Westlaw" to refer to the computer-assisted legal research system.

- **LexisNexis Legal & Professional ("Lexis").** Lexis is a division of RELX Group (formerly Reed Elsevier) of London. It competes head-on with West in the publication of many legal sources, including statutes. Lexis also provides its self-named computer-assisted legal research system. Its newer research platform, Lexis Advance, has replaced the original platform, Lexis. Through a series of acquisitions, Lexis has combined other publishers, including Matthew Bender. You will likely notice some differences in the presentation of Lexis's name on its various publications. For simplicity, this text will generally use "Lexis" to refer to the company's print publications and "Lexis Advance" to refer to its electronic research service.

- **Wolters Kluwer.** Headquartered in the Netherlands, Wolters Kluwer includes a number of other "brands," including Aspen Publishers and CCH. Wolters Kluwer publishes a variety of primary and secondary authorities.

- **Bloomberg L.P.** Bloomberg is a global information and news provider. Its affiliate Bloomberg BNA publishes looseleaf services (sets of books dealing with various topics and contained in ringed binders) and offers Bloomberg Law, an online research service that competes with Lexis Advance and Westlaw.

One of the common features shared by the primary sources (cases, constitutions, statutes, and regulations) as they are initially published is that they are arranged in chronological order. Thus, a set of case reports may include a case related to a will, followed by one related to burglary, followed by one relating to a contract dispute. Similarly, during any given session, a legislature will enact laws relating to motor vehicles, regulation of utilities, and licensing of real estate salespeople. The initial publication of these statutes is in the order in which they were enacted rather than according to subject matter.

This type of organization makes research difficult. If you were asked to locate cases dealing with contracts, you would find that they have not been brought together in one specific set of books but rather may be scattered over several hundred volumes of cases. It is clear then that a method of obtaining access to these primary authorities is needed, and in general, the secondary authorities and digests will assist in locating the primary authorities. For example, a secondary source such as a legal encyclopedia will describe and explain contract law and will then direct you, typically by footnote references, to cases that are primary or binding



authorities relating to this area of the law. These cases, when cited in a legal argument, under the doctrine of stare decisis, must be followed by a court, whereas the encyclopedia discussion is persuasive only and need not be followed by a court.

## **H. Nonprint Research Media**

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For centuries, all legal research was performed using conventional print volumes in law libraries. With the advent of computer-assisted legal research (see Chapter 8) and Internet legal research (see Chapter 9), legal professionals use a variety of media to get the right answers to their research questions and are no longer tied to the law library.

Good researchers must be adept at both methods of performing legal research: using conventional print sources and using newer technology sources such as law-related “apps,” Lexis Advance and Westlaw (the computer-assisted research systems), and the Internet. In fact, in 2012 the American Bar Association modified its Model Rules of Professional Conduct to impose an affirmative duty on attorneys to understand the benefits and risks of technology. More than one-half of the states have adopted this duty of technology competence. These newer technologies allow legal professionals to perform research at their desks and on the road.

Some methods are more efficient and cost-effective than others. For example, if you need general background information about an area of the law, consider browsing an encyclopedia or treatise in print form. If you need information about a new or evolving area of law, computer-assisted legal research will likely provide the most current information. Today’s researchers need to be flexible in using all methods of legal research in case materials are unavailable: Books can disappear from library shelves and networks can crash.

Successful legal researchers thus combine research media to obtain information for clients. Knowing which media to use requires an analysis of many factors, including the complexity of your task, the costs involved, and time constraints. Many research instructors urge students first to become familiar with the conventional print tools before becoming too wedded to computer-assisted or Internet legal research. Strong skills in conventional legal research provide a good foundation for using Lexis Advance, Westlaw, and the Internet more effectively. Thus, this text will fully examine the conventional print research tools before discussing technologies such as computer-assisted and Internet legal research.

## **I. Change in Our Legal System**

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Although stare decisis promotes stability, fairness, and uniformity in our legal system, blind adherence to established precedents in the face of

changing societal views and mores may result in injustice. For example, in 1896, the U.S. Supreme Court held that “separate but equal” public facilities for blacks and whites were lawful. *Plessy v. Ferguson*, 163 U.S. 537 (1896). This precedent served to justify segregation for more than 50 years. In 1954, however, in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), the Supreme Court overruled its earlier decision and held that segregation solely according to race in public schools violated the U.S. Constitution. A strict adherence to *stare decisis* would have precluded a second look at this issue and would have resulted in continued racial segregation.

Thus, it is clear that as society changes, the law must also change. A balance must be struck between society’s need for stability in its legal system and the need for flexibility and change when precedents have outlived their usefulness or result in injustice. Change in established legal precedent comes about by rulings of higher courts, which then bind lower courts in that judicial system or hierarchy. Thus, because *Brown v. Board of Education* was decided by the U.S. Supreme Court, it can only be overruled by the U.S. Supreme Court. Nevertheless, a lower court might try to evade a binding precedent by striving to show that precedent is not applicable or that the facts in the case before it are distinguishable from the facts in the previously decided case. This flexibility in reasoning produces a rich, complex, and sometimes contradictory body of American case law.

Thus, *stare decisis* means more than following settled cases: It means following settled cases that are factually similar and legally relevant to the case or problem you are researching. Such a factually similar and legally relevant case from a court equivalent to or higher than the court that will hear your particular case is said to be *on point* or “on all fours” with your case. The goal of legal research is to locate cases on point with your particular problem. Such cases are binding upon and must be followed by the court hearing your case.

In the event you cannot locate cases on point in your judicial hierarchy (possibly because your case presents a novel issue not yet considered in your jurisdiction), expand your search for cases on point to other jurisdictions. For example, if Ohio has no precedents on a particular issue, expand your search to another state. The Ohio court, however, is not bound to follow cases from other jurisdictions, although it may be persuaded to do so. See Figure 1-2.

Change in our legal system can occur not only as a result of judges expanding or overruling precedents found in cases, but also through enactment, repeal, or amendment of a statute by a legislature or even through judicial interpretation of a statute. Although a court cannot change the plain meaning of a statute, it is free to interpret the statute or to declare it unconstitutional. Thus, even when you locate a statute that appears directly to address your research problem, you cannot stop researching. You must read the cases that have interpreted the statute, because it is the judicial interpretation of a statute rather than the statute’s naked language that is binding under the doctrine of *stare decisis*.

**Figure 1-2**  
**Stare Decisis and Our Judicial Hierarchy**

- Primary law consists of cases, constitutions, statutes, treaties, executive orders, and administrative regulations. All other legal authorities are secondary.
  - Primary law from your state or jurisdiction is binding within your state or jurisdiction.
  - Primary law from another state or jurisdiction is persuasive only in your state or jurisdiction.
  - If your state or jurisdiction adopts the law or position of another state or jurisdiction, then that position is now binding within your judicial hierarchy.
  - Secondary sources (no matter where they originate) are persuasive only.
  - Higher courts in any given judicial hierarchy bind lower courts in that hierarchy.
  - Higher courts can depart from a previously announced rule of law if there are compelling and important reasons for doing so.
  - Trial court decisions typically bind only the parties to the case itself.
  - Cases from the U.S. Supreme Court are binding on all courts in the United States.
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## **J. Identifying the Holding in a Case**

Although analysis of cases will be discussed in great detail in Chapter 4, you should be aware that under the concept of stare decisis, only the actual rule of law announced in a case is binding; that is, only the holding of the case is authoritative. The holding is referred to as *ratio decidendi* or “the reason for deciding.” Other remarks or judicial comments in the case are often referred to as *dicta*, meaning remarks “in passing.” Dictum in a case is persuasive only.

In many instances, distinguishing the holding from the dictum is easily done. Often, a court announces its holding by using extremely specific introductory language, such as the following: “Therefore, we hold that . . .” On other occasions, finding the holding requires more persistence and probing.

You will shortly discover that some cases are difficult to read and use archaic and outmoded language. Do not become discouraged by this. Reading cases takes a great deal of experience and patience. You will find that the more cases you read, the more skillful you will become at locating the holding, distinguishing dicta from the holding, and understanding the relevance of the case for the future.

## **K. How the Legal Research Process Works: A Research Scenario**

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Just as it is nearly impossible to put together a puzzle without first seeing a picture of the finished product, it is difficult to understand the process of legal research before actually performing a legal research project. To understand what you will be able to do when you have completed your research class, consider the following scenario, which is typical of the type of task a researcher often encounters.

Ann was recently hired by a law firm and asked by her supervising attorney to do some legal research. The attorney met with a client, Grace, whose husband, Phil, died two years ago. Grace is the mother of a ten-year-old boy. The son spends occasional time with Phil's parents. Grace is remarrying, and although Phil's parents, the grandparents, are kind and loving, Grace has decided that it would be better to limit any visits by her son with Phil's parents so that she can begin her new marriage and start her new family. Phil's parents have told Grace that they will go to court to seek visitation. The attorney wants Ann to find out how the courts in the state handle grandparent visitation.

After getting the assignment, Ann returned to her office to begin the research process. First, she thought about the places she might need to look to find an answer to this question. Because Ann was unfamiliar with family law, she realized that she would need to learn a bit more about grandparent visitation in general so that she would have the background to understand the materials she would be reading as she worked on this research assignment. Ann thus reviewed some introductory information in a legal encyclopedia (Chapter 6) to "get her feet wet." Next, she looked to see if her state had any statutes (Chapter 3) that addressed this issue. After reading the statutes, Ann realized that she needed a better understanding of the meaning of some of the language in the statute, so she looked up some court cases (Chapter 4) that interpreted the statute. One case in particular was relevant to this question, so she used a digest (Chapter 5) to find other cases that dealt with the same issue. She then reviewed a set of books on family law in general and read the chapters relating to grandparent visitation (Chapter 6). Ann also decided to use Lexis Advance or Westlaw to locate the most current information and other specialized articles or texts on grandparent visitation (Chapter 8). Next, she made sure that the statutes and cases were still in effect and had not been modified or overturned (Chapter 11). Finally, Ann wrote her attorney a memorandum describing what she had found out from her research (Chapter 16), being careful to use correct citation form (Chapter 10).

Ann's approach to her research problem is only one way that the problem could be solved; another researcher might well approach the problem differently, but both would reach the same conclusion.

It is thus important for researchers to understand thoroughly all of the legal research resources that are available, so that when a project is received, it can be completed efficiently and correctly. Moreover,

researchers need to understand the American legal system and court structures (Chapters 2 and 4) so that cases can be put into context and researchers can understand which authorities are binding. You may wish to read Chapter 12, “Overview of the Research Process,” for additional information and practical guidelines on beginning and ending your research projects.

Legal research is not so much about following a predictable formula as it is about understanding how the numerous resources fit together so that researchers can make intelligent decisions about performing legal research. Thus, the next chapters will afford you an in-depth understanding of the available resources so that you will know how and where to look for answers, allowing you to fulfill your ethical duties to perform research accurately and efficiently to help clients with their legal problems.



### **Sidebar: Computer-Assisted Research**

Researchers must be adept in both print and electronic research methods. Begin now to learn some techniques to make your searching on Lexis, Westlaw, or Bloomberg Law more precise. Researchers may search on these platforms using either natural language (much like any Google-type search, in which you will simply type in your research issue, using plain English, into a search box on the first screen you are given) or Boolean searching (in which you combine keywords with certain “operators” such as *AND* or *OR* or use certain symbols. For example, a search for *digit!* will produce documents that include the term *digit*, *digital*, *digitize*, and so forth. Learn the “terms and connectors” used by Lexis, Westlaw, and Bloomberg Law so that you will have the necessary foundation for using these valuable electronic legal research systems.

Most experts agree that Boolean searching produces more precise results. Washington University Law Library offers a guide to the terms and connectors used by Lexis, Westlaw, and Bloomberg Law at <http://libguides.law.wustl.edu/LRMSearchingIntro/Boolean>. Print the guide and begin practicing constructing searches so you will be ready to use these electronic research systems efficiently and effectively.

## **L. Case Citation Form**

Although case citation will be discussed in much more depth in Chapter 10, the sooner you begin examining the books in which our cases are published and reading those cases, the more confident you will become about your ability to research effectively.

All cases follow the same basic citation form: You will be given the case name, the volume number of the set in which the case is published, the name of the set in which the case appears, the page on which it begins, and the year it was decided (and the deciding court, if not apparent from the name of the set). For example, in reading the citation to the U.S. Supreme Court case *Brown v. Board of Education*, 347 U.S. 483 (1954), you can readily see the following:

- The case name is *Brown v. Board of Education*;
- It is located in volume 347;
- It is found in a set of books entitled *United States Reports*;
- It begins on page 483 of volume 347; and
- It was decided in 1954.

Although this text shows case names, book titles, and other materials in italics, underlining or underscoring is also acceptable according to *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) ("*The Bluebook*"). For many years, another citation manual competed with *The Bluebook*. That citation manual, ALWD & Coleen M. Barger, *ALWD Guide to Legal Citation* (6th ed. 2017), was user-friendly and popular with students. In its present sixth edition, however, its rules are identical in nearly every respect to those in *The Bluebook*, and thus the emphasis in this text is on *The Bluebook*, which is the commonly accepted manual for citation form throughout the nation.

There are additional citation systems as well and variation among practitioners, so check with your firm or office to determine if there is a preference. Finally, this text will show citations in the "ordinary" typeface used by practitioners, rather than in the LARGE AND SMALL CAPITAL format used for academic writing and law review articles. (See Chapter 10.)

## Internet Resources

<a href="http://www.lexisnexis.com/en-us/home.page">www.lexisnexis.com/en-us/home.page</a>	Information about Lexis products and services.
<a href="http://legalsolutions.thomsonreuters.com/law-products">http://legalsolutions.thomsonreuters.com/law-products</a>	Information about Thomson Reuters/West products and services.
<a href="http://www.hg.org/publishers.html">www.hg.org/publishers.html</a>	HG.org's website, offering links to legal publishers.
<a href="http://www.law.cornell.edu">www.law.cornell.edu</a>	Cornell Law School's Legal Information Institute provides access to our Constitution, cases, statutes, and much more.
<a href="http://www.loc.gov/law/help/guide.php">www.loc.gov/law/help/guide.php</a>	Guide to Law Online, prepared by the U.S. Law Library of Congress, Public Services Division, providing an annotated guide to sources of information and law available online and links to useful and reliable sites for legal information.

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(continued)

**Internet Resources** *(Continued)* 

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[www.law.georgetown.edu/library](http://www.law.georgetown.edu/library)

Georgetown University Law Library's legal research tutorials and guides. Select "Research Guides."

<http://libguides.law.ucla.edu>

UCLA School of Law provides excellent research guides.

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