

■ Legal Research and Writing

Some Starting Points

Fourth Edition



William P. Statsky



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■ Also by William P. Statsky

Case Analysis and Fundamentals of Legal Writing, 3d ed. St. Paul: West Publishing Company, 1989 (with J. Wernet)

Essentials of Paralegalism, 2d ed. St. Paul: West Publishing Company, 1992

Family Law, 3d ed. St. Paul: West Publishing Company, 1991

Inmate Involvement in Prison Legal Services: Roles and Training Options for the Inmate as Paralegal. American Bar Association, Commission on Correctional Facilities and Services, 1974

Introduction to Paralegalism: Perspectives, Problems, and Skills, 4th ed. St. Paul: West Publishing Company, 1992.

Legal Desk Reference. St. Paul: West Publishing Co., 1991 (with B. Hussey, M. Diamond & R. Nakamura)

The Legal Paraprofessional as Advocate and Assistant: Roles, Training Concepts and Materials. Center on Social Welfare Policy and Law, 1971 (with P. Lang)

Legal Thesaurus/Dictionary: A Resource for the Writer and Computer Researcher. St. Paul: West Publishing Company, 1985

Legislative Analysis and Drafting, 2d ed. St. Paul: West Publishing Company, 1984

Paralegal Employment: Facts and Strategies for the 1990s, 2d ed. St. Paul: West Publishing Company, 1993

Paralegal Ethics and Regulation, 2d ed. St. Paul: West Publishing Company, 1993

Torts: Personal Injury Litigation, 2d ed. St. Paul: West Publishing Company, 1990

Rights of the Imprisoned: Cases, Materials and Directions. Indianapolis: Bobbs-Merrill Company, 1974 (with R. Singer)

What Have Paralegals Done? A Dictionary of Functions. National Paralegal Institute, 1973

■ For Stanley Matthew Dzierzeski

Preface

The law library can be a fascinating arena for the paralegal. Not only is it the place to carry out research assignments, but also it can be a major source for exploring the rationale behind nonresearch assignments. Every day literally thousands of judges, legislators, administrators, and private citizens write materials that will both clutter and enliven the shelves of the law library. Knowing how to find this material and how to assess its current validity is an invaluable skill.

Changes in the Fourth Edition

- A *Student Workbook* has been created to accompany the fourth edition.
- More problems and assignments have been included in the text.
- The discussion of library materials has been updated to include new developments in the field such as the new citation rules of the Bluebook.
- There is more material on briefing and applying cases.
- The chapter on statutes has been expanded to include a legal analysis section on breaking statutes into their elements for purposes of application.
- Writings fundamentals have been added to the chapter on writing guidelines.
- CALR (computer-assisted legal research) has been enlarged into a chapter with expanded attention given to formulating queries.
- The coverage of legislative history now includes a section on the controversy over its misuse.

Teaching Aids and Supplements

The following teaching aids and supplements are available for use in conjunction with the fourth edition:

- *Instructor's Manual* covering each chapter of the book. The Instructor's Manual also contains a test bank, prepared by Dorothy Moore of Ft. Lauderdale College, and transparency masters of figures from the text that are easily used for overhead projection.
- *Student Workbook* (for student purchase) containing review questions and answers for all the chapters, research exercises, and other related material.
- *Instructor's Manual* to accompany the *Student Workbook*.
- *PC WESTrain II*, a WESTLAW tutorial software package for students.
- *West's Legal Clerk* software, which provides further training in computerized legal research.
- WESTLAW. Qualified adopters can receive six free hours of WESTLAW (during non-prohibited hours.) WESTLAW runs on most computers with a modem.

- *West's Legal Research Videotapes* covering many of the basics of legal research.
- *West's Law Finder* and *West's Sample Pages* covering the major research materials of West Publishing Company.
- *The Making of a Case* videotape narrated by Richard Dysart, star of *L.A. Law*. The tape introduces the student to the meaning and importance of case law, how cases are published, and in the process, provides an introduction to significant aspects of our legal system.

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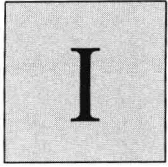
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Preliminary Considerations

■ Chapter Outline

Section A. A Strategy for Studying
Legal Research

Section B. The Importance of Legal
Research

Section C. Frustration and Legal
Research

Section D. Flexibility in Legal
Research

Section E. The Vocabulary of Legal
Research: A Checklist

Section F. Finding Law Libraries

■ Section A. A Strategy for Studying Legal Research

This book does not cover every aspect of legal research, nor does it treat every law book that could be found in a law library. Rather, our goal is to examine the major components of legal research in order to identify effective starting points.

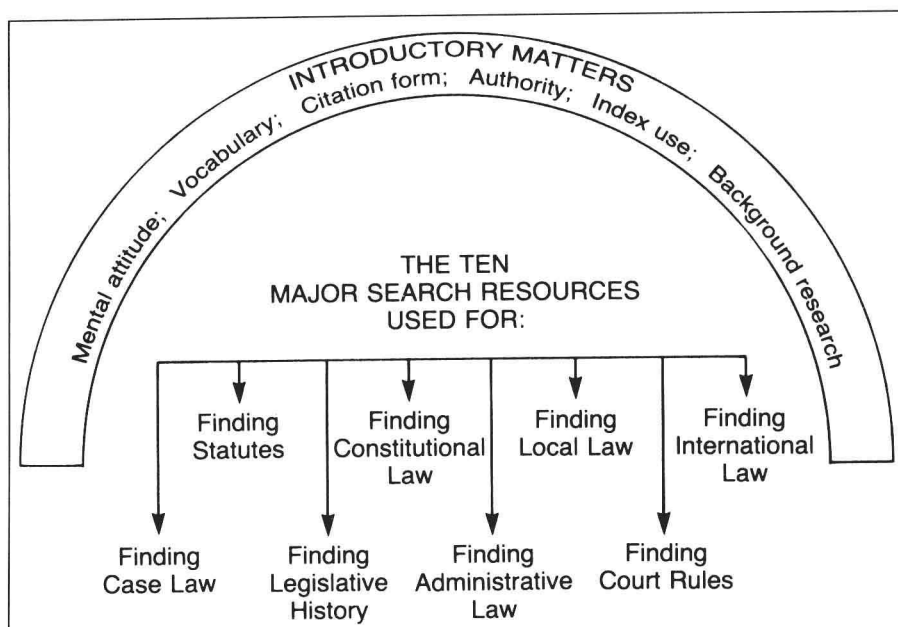
A great deal of information is provided in the pages that follow. You should first read the chapters through quickly to obtain an overview and to begin seeing where some concepts are covered in more than one place. The second time you read the chapters, you should begin collecting the terminology called for in Assignment 2.1. The best way to avoid becoming overwhelmed is to start feeling comfortable with terminology as soon as possible.

When you walk into a law library, your first impression is likely to be one of awe. You are confronted with row upon row of books, most of which seem unapproachable; they do not invite browsing. To be able to use the law library, your first responsibility as a legal researcher is to break down any psychological barrier that you may have with respect to the books in it. This is done not only by learning the techniques of research but also by understanding the limitations of the law library.

A major misunderstanding about the law library is that it contains the answer to every legal question. In many instances, legal problems have no definitive answers. The researcher often operates on the basis of “educated guesses” of what the answer is. To be sure, your guess is supported by what you uncover through legal research in the law library. The end product, however, is only the researcher’s opinion of what the law is, rather than the absolute answer. No one will know for sure what the “right” or final answer is until the matter is litigated in court. If the problem is never litigated, then the “right” answer will be whatever the parties accept among themselves through negotiation or settlement. The researcher will not know what answer carries the day for the client until the negotiation process is over.

FIGURE 1.1

A Strategy for
Studying Legal
Research



Many simple problems, however, can be answered by basic (easy) legal research. If someone wants to know, for example, the name of the government agency in charge of incorporating a business or the maximum number of weeks one can receive unemployment compensation, finding the answer is not difficult if the researcher knows what books to go to and how to use their indexes. Most legal research problems, however, are not this simple.

Perhaps the most healthy way to approach the law library is to view it not as a repository of answers but as a storehouse of ambiguities that are waiting to be identified, clarified, manipulated, and applied to the facts of a client's case. You may have heard the story of a client who walked into a law office and asked to see a one-armed attorney. When asked why he required an attorney meeting such specifications, he replied that he was tired of presenting problems to attorneys and having them constantly tell him that "on the one hand" he should do this, but "on the other hand" he should do that; he hungered for an attorney who would give him an answer. This concern is well taken. A client is entitled to an answer, to clear guidance. At the same time (or, on the other hand), part of the attorney's job is to identify alternatives or options and to weigh benefits and liabilities of any one particular course of action. Good attorneys are so inclined because they understand that our legal system is infested with unknowns and ambiguities. Good legal researchers also have this understanding. They are not frightened by ambiguities; they thrive on them.



Section B. The Importance of Legal Research

You will eventually forget most of the law that you learn in school. If you do not forget most of it, you should! No one can know all of the law at any given time, even in a specialty. Furthermore, the law is always changing. Nothing is more dangerous than someone with out-of-date "knowledge" of the law. Law cannot be practiced on the basis of the rules learned in school, since those

rules may no longer be valid by the time you try to use them in actual cases. Thousands of courts, legislatures, and administrative agencies spend considerable time writing new laws and changing or adapting old ones.

The law library and the techniques of legal research are the indispensable tickets of admission to current law. School teaches you to think. *You teach yourself the law through the skill of legal research.* Every time you walk into a law library, you are your own professor. You must accept nothing less than to become an expert on the topic of your research, no matter how narrow the topic. The purpose of the law library is to enable you to become an expert on the current law of your topic. Do not fall into the trap of thinking that you must be an expert in an area of the law to research it properly. The reverse is true. A major way for you to become an expert in an area is through what you discover in the law library on your own.

Never be reluctant to undertake legal research on a topic simply because you know very little about the topic. Knowing very little is often the most healthy starting point for the researcher! Preconceptions about the law can sometimes lead you away from avenues in the library that you should be traveling.

To become an expert through comprehensive legal research does not necessarily mean that you will know everything. Experts are able to provide answers, but equally important, they know how to *formulate the questions that remain unanswered even after comprehensive legal research.* An expert is someone who can say:

This is what the current law says, and these are the questions that the law has not yet resolved.

Of course, you cannot know what is unresolved until you know what is resolved. The law library will help tell you both.

Section C. Frustration and Legal Research

You are in the position of the king who sadly had to be told that there is no royal road to geometry. If he wanted to learn geometry, he had to struggle through it like everyone else. Legal research is a struggle and will remain so for the rest of your career. The struggle will eventually become manageable and even enjoyable and exciting—but there is no way out of the struggle no matter



how many short cuts you learn. The amount of material in a law library is simply too massive for it to be otherwise, and the material is growing every day with new laws, new formats for law books, and new law publishers offering different services that must be mastered.

Unfortunately, many cannot handle the pressure that the law library sometimes seems to donate in abundance. Too many attorneys, for example, stay away from the library, and consequently practice law “from the hip.” Such attorneys need to be sure that they have extensive malpractice insurance!

Legal research will be difficult for you at the beginning, but with experience in the law library, the difficulties will become manageable. The most important advice you can receive is *stick with it*. Spend a lot of time in the library. Be inquisitive. Ask a lot of questions of fellow students, teachers, librarians, lawyers, paralegals, legal secretaries, etc. Be constantly on the alert for tips and techniques. Take strange books from the shelf and try to figure out what they contain, what they try to do, how they are used, and how they duplicate or complement other law books that are not strange to you. Do not wait to be taught how to use sets of books that are new to you. Strike out on your own.

The coming of computer technology to legal research is of some help, but computers cannot eliminate your need to learn the basics. The struggle does not disappear if you are lucky enough to study or work where computers are available. Intelligent use of computers requires an understanding of the fundamental techniques of legal research. Furthermore, computers are generally an inefficient way to learn these techniques. Many computer systems assume you already know them.

At this stage of your career, most of the frustration will center on the question of how to *begin* your legal research of a topic. Once you overcome this frustration, the concern will then become how to *end* your legal research. After having located a great deal of material, you will worry about when to stop. In this book, our major focus will be the techniques of beginning. Techniques of stopping are more troublesome for the conscientious researcher. It is not always easy to determine whether you have found everything that you should find. Although guidelines do exist and will be examined, a great deal of experience with legal research is required before you can make the judgment that you have found everything available on a given topic. Don't be too hard on yourself. The techniques will come with time and practice. You will not learn everything now; you can only begin the learning that must continue throughout your career.

Keep the following “laws” of legal research in mind:

1. *The only books that will be missing from a shelf are those that you need to use immediately.*
2. *A vast amount of information on law books and research techniques exists, most of which you will forget soon after learning.*
3. *Each time you forget something, relearning it will take half the time it previously took.*
4. *When you have relearned something for the fourth time, you own it.*

At times you will walk away from a set of law books that you have used and wonder what you have just done—even if you obtained an answer from the books. At times you will go back to a set of books that you have used before and draw a blank on what the books are and how to use them again. These occurrences are natural. You will forget and you will forget again. Stay with it. Be willing to relearn. You cannot master a set of books after using them only a

few times. Learning legal research is a little like learning to play a musical instrument: a seat is waiting for you in the orchestra, but you must practice. A royal road does not exist.

Section D. Flexibility in Legal Research

Researchers have reached an enviable plateau when they understand the following paradox: You sometimes do not know what you are looking for until you find it. As researchers pursue avenues and leads, they invariably come upon new avenues and thoughts that never occurred to them initially. An entirely new approach to the problem may be uncovered that radically changes their initial perceptions. They reached this stage not because they consciously sought it out, but because they were flexible and open-minded enough to be receptive to new approaches and perceptions. This phenomenon is by no means peculiar to legal research. Take the situation of the woman in need of transportation. She sets herself to the task of determining the most economical way to *buy* a good car. In her search, she stumbles upon the practice of leasing cars. After studying this option, she concludes that leasing is the most sensible resolution of her transportation problem. She did not know what she was looking for—a car *leasing* deal—until she found it. Compare this situation with that of a client who comes into a law office for advice on how to write a will so that a certain amount of money will pass to designated individuals upon death. The attorney asks you to do some legal research in the area of wills. While in the law library studying the law of wills, you see reference to life insurance policies as a substitute for wills in passing cash to beneficiaries at death. You bring this to the attention of the attorney, who decides that this option is indeed worth pursuing. You did not know what you were looking for—a will substitute—until you found it.

Section E. The Vocabulary of Legal Research: A Checklist

In Figure 1.2, there is a list of 175 words and phrases, most of which are examined in the remaining chapters of Part I of this text. The page number in parentheses indicates one of the pages where the item is covered in the text. The list is the vocabulary of legal research. Before you are finished with this text, one of your goals should be to know the meaning or function of everything on the list. You must learn to speak the language of legal research, as well as to do legal research.

■ ASSIGNMENT 1.1

For each of the words and phrases in Figure 1.2, prepare a three-by-five-inch index card on which you include the following information:

- The word or phrase
- The pages in this text where the word or phrase is discussed (begin with the page number given in parentheses, then add other page numbers as the word or phrase is discussed elsewhere in the text)
- The definition of the word or phrase, or the function of the word or phrase
- Other information about the word or phrase that you obtain as you use the law library

FIGURE 1.2**The Vocabulary of
Legal Research:
A Checklist***

- | | |
|---|--|
| 1. Act (14) | 56. Constitution (15) |
| 2. Administrative code (14) | 57. Corpus Juris Secundum (C.J.S.) (26) |
| 3. Administrative decision (15) | 58. Cumulative (27) |
| 4. Administrative regulation (15) | 59. Current Law Index (130) |
| 5. Advance Sheet (for reporters) (16) | 60. Decennial Digest (29) |
| 6. Advance Sheet (for Shepard's) (16) | 61. Descriptive Word Index (DWI) (106) |
| 7. A.L.R. Blue Book of Supplemental
Decisions (20) | 62. DIALOG (197) |
| 8. A.L.R. Digest to 3d, 4th, Federal (110) | 63. Dicta, dictum (55) |
| 9. A.L.R. First, A.L.R.2d, A.L.R.3d,
A.L.R.4th, A.L.R.5th, A.L.R. Fed (16) | 64. Digests (for A.L.R. annotations) (110) |
| 10. A.L.R. First Series Quick Index (110) | 65. Digests (for West reporters) (27) |
| 11. A.L.R.2d Digest (110) | 66. Docket Number (144) |
| 12. A.L.R.2d Later Case Service (111) | 67. Et. Seq. (125) |
| 13. American Digest System (28) | 68. Executive Order (15) |
| 14. American Law Institute (39) | 69. Federal Digest (29) |
| 15. Am. Jur. 2d (19) | 70. Federal Practice Digest 2d (30) |
| 16. Amicus curiae brief (20) | 71. Federal Practice Digest 3d (30) |
| 17. Annotated reporter (19) | 72. Federal Practice Digest 4th (30) |
| 18. Annotation (19) | 73. Federal Supplement (F. Supp.) (22) |
| 19. Annotation History Table (A.L.R.) (112) | 74. Federal Register (Fed. Reg.) (31) |
| 20. Appellant (144) | 75. Federal Reporter 2d (F.2d) (22) |
| 21. Appellate brief (20) | 76. Federal Rules Decisions (F.R.D.) (22) |
| 22. Appellate court (144) | 77. General Digest (29) |
| 23. Appellee (144) | 78. Headnote (34) |
| 24. Atlantic Digest (30) | 79. Hornbook (34) |
| 25. Atlantic 2d (A.2d) (24) | 80. Index Medicus (133) |
| 26. Authority, mandatory (51) | 81. Index to Legal Periodicals (130) |
| 27. Authority, persuasive (51) | 82. Index to Annotations (A.L.R.) (110) |
| 28. Authority, primary (51) | 83. Insta-Cite (199, 201) |
| 29. Authority, secondary (51) | 84. Key number system (27) |
| 30. Auto-Cite (197) | 85. Law review (35) |
| 31. Bill (20) | 86. Lawyers' Edition (L. Ed.) (21) |
| 32. Bluebook (citations) (20) | 87. Legal dictionary (35) |
| 33. Blue and White Book (20) | 88. Legal encyclopedia (35) |
| 34. Brief of a case (143) | 89. Legal newspaper (35) |
| 35. California Reporter (Cal. Rptr.) (21) | 90. Legal periodical (35) |
| 36. CALR (195) | 91. Legal Resource Index (130) |
| 37. Case (21) | 92. Legal thesaurus (36) |
| 38. Casebook (25) | 93. LegalTrac (132) |
| 39. Case on point (53) | 94. Legislative history (170) |
| 40. CCH U.S. Supreme Court Bulletin (22) | 95. LEXIS (195) |
| 41. CD ROM (25) | 96. Loose-leaf service (36) |
| 42. Century Digest (28) | 97. Majority opinion (146) |
| 43. Certiorari (Cert.) (281) | 98. Maroon Book (79) |
| 44. Charter (15) | 99. Martindale-Hubbell (37) |
| 45. CARTWHEEL (91) | 100. Memorandum opinion (145) |
| 46. Citation (25) | 101. Military Justice Reporter (22) |
| 47. Citator (26) | 102. Modern Federal Practice Digest (30) |
| 48. Cite checking (79) | 103. National Reporter System (22) |
| 49. Cited material (Shepard's) (116) | 104. National Reporter Blue Book (20) |
| 50. Citing material (Shepard's) (116) | 105. New York Supplement (N.Y.S.) (37) |
| 51. Code, codify (26) | 106. NEXIS (197) |
| 52. Code of Federal Regulations
(C.F.R.) (26) | 107. Nominative reporter (70) |
| 53. Common law (152) | 108. North Eastern 2d (N.E.2d) (24) |
| 54. Concurring opinion (146) | 109. North Western Digest (30) |
| 55. Congressional Record (26) | 110. North Western 2d (N.W.2d) (24) |
| | 111. Notes of decisions (103) |
| | 112. Official reporter (21) |
| | 113. Opinion (court) (21) |

*The numbers in parentheses refer to pages in this book.

Continued