

法律研究与文书写作影印系列  
(Legal Research and Writing Series)

# 法律研究方法

克里斯蒂娜·L·孔兹 (Christina L. Kunz)  
[美] 德博拉·A·施梅德曼 (Deborah A. Schmedemann) / 著  
马修·P·唐斯 (Matthew P. Downs)  
安·L·贝特森 (Ann L. Bateson)

第五版

## The Process of Legal Research



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## 法律研究方法

FALÜ YANJIU FANGFA

著 者: [ 美 ] 克里斯蒂娜·L·孔兹 德博拉·A·施梅德曼 马修·P·唐斯 安·L·贝特森

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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%–10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路、透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

# **THE PROCESS OF LEGAL RESEARCH**



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*This book is dedicated to the thousands of students of  
William Mitchell College of Law who have worked with and  
helped us improve these material during the past fifteen years*

*and*

*to the faculty, administrators, and staff of William Mitchell  
College of Law, whose unwavering support for skills  
instruction has made this book possible.*

# PREFACE

The first edition of this book was published in 1986, nearly fifteen years ago. Since then, legal research has changed little and greatly.

What has changed little is legal authority. Now, as then, the purpose of legal research is to locate pertinent cases, statutes, and rules—the law—governing the client’s situation. Now, as then, commentators’ discussion of the law is used to lead one to the law and to help one fully understand the law. Now, as then, it is critical for new researchers to learn how the law is made, how different lawmaking bodies interact, how to discern which law is applicable when, how to read the law carefully, and how to integrate the insights of commentators. As with all earlier editions, this book emphasizes these matters. Today, as always, you must master these fundamentals to research competently.

What has changed greatly is the technology of legal research. Legal materials have long been published, of course, in books and microforms (such as microfilm and microfiche). With the development of computers and related technology, legal research has become a multimedia endeavor. The researcher now has a (sometimes bewilderingly) wide range of options for locating a governing statute, for example: books, online subscription services offered by private publishers, CD-ROMs, Internet web sites maintained by the government, and so forth. Indeed, some sources and tools are available only in computer-based media.

Technological change has brought other changes as well. The rate of product development has increased rapidly. Sources published in books tend to change infrequently; computer-based sources are reprogrammed far more easily and, hence, far more often. Furthermore, the corporate structure of legal publishing is in flux, with large, well established companies merging and small, new companies arising.

So, it is an interesting time to be teaching and learning legal research. For us, it has been a challenge to write about a moving target. And we suspect you will find it challenging to adjust your research techniques on a nearly continual basis as publishers change their products.

In writing this book, we chose to take the following approach: As noted above, we have set forth at some length what you need to know about legal authority. Then we have described what we deem the “best practices” currently employed by lawyers as they research a particular type of legal authority. Some practices have been in use for many years and likely will continue to be best practices. Others are newer and may well evolve as technology and research sources evolve. We have sought to cover the basics as to the various practices; we hope that you will learn and appreciate the analytical processes lawyers employ in legal research. We have not discussed

the mechanics and details of the best practices at length; these matters change, and you will be able to learn them easily enough once you master the basics.

A final observation: Excellent researchers are curious, persistent, flexible people. We hope you approach this book with curiosity, persistence, and flexibility. If you do, we believe you will learn a great deal about an important and interesting process.

*A Note to Professors:* If you have used previous editions of this book, you will notice a number of changes in this edition. Regarding the text, we would flag the following:

- expanded and somewhat reconceived discussions of the core analytical steps of legal research—generating research terms and issues, looking up concepts, and searching for words;
- substantial discussion of the Internet and CD-ROM research, along with discussion of subscription online services (primarily, but not exclusively, LEXIS and Westlaw);
- coverage of new products, such as KeyCite, Congressional Universe, and THOMAS;
- presentation of what we deem to be the handful of best research practices currently available for each type of authority, each separately presented so as to permit you to choose which to teach when;
- strengthened discussion of the authoritativeness of various legal authorities in our complex federal system;
- reconfiguration of the text into smaller chapters, grouped into units of related materials; and
- a cleaner layout, with simpler presentation of exhibits and illustrations alongside text.

Regarding the problem sets, we would flag the following:

- all new research situations for the problem sets;
- a problem set for rules of legal ethics;
- problem set design that reflects increasing levels of autonomy and source-neutrality as one moves from beginning chapters (commentary) to more advanced chapters (such as administrative materials);
- self-verifying answers to some questions (in which students attach copies or printouts); and
- more questions requiring students to link their research results to legal analysis of the facts of the situation.

We hope these changes work well for you and your students.

*Deborah Schmedemann  
Matthew Downs  
Ann Bateson  
Christina Kunz*

St. Paul, Minnesota  
May 2000

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More so than other publications by law school faculty, this book draws on the talents and hard work of the College's professional librarians: Anne Anderson, Mary Ann Archer, Anna Cherry, Pat Dolan, Elvira Embser, Paul Healey, Mary Rumsey, and Paddy Satzer. They tracked down the sources, answered our questions, and offered top-notch suggestions. Paddy Satzer prepared the Index as well.

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We are grateful for the expertise of Cal Bonde, Linda Thorstad, and Sara McDowell, who made sense of contorted and detailed revisions and constructed sophisticated exhibits from our mere sketches. Darlene Finch has provided valuable administrative support on this edition.

The College's faculty and administration have shown considerable interest and support for the project. In particular, we want to thank current Dean Harry Haynsworth for his generous support.

This book has been blessed with talented professionals on the publisher's end of the phone. Larry Wexler, our editor on this edition, presided over the complex process of assembling this complicated book with great patience and a sharp eye for detail. We want to recognize the work of Karen Quigley in the redesign of the book and Kathy Porzio in coordinating its manufacture and production. We are grateful for the efforts of the following people who nurtured this book and its predecessors for the past (nearly) twenty years: Nick Niemeyer and Richard Heuser (formerly at Little, Brown and Company), Carol McGeehan, Elizabeth Kenny, and Melody Davies.

On a larger scale, we would like to thank the community of legal writing and research teachers who have encouraged us and enriched us over the years with their ideas about the pedagogy of legal skills education. The same

measure of gratitude and recognition goes to our students, who remain our best source of insights about the process of learning legal research.

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We would also like to acknowledge those publishers who permitted us to reprint copyrighted material in this book:

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