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FUNDAMENTALS OF LEGAL RESEARCH (10th ed. 2015)

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Fundamentals of Legal Research

TENTH EDITION

by

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Preface

Fundamentals of Legal Research has a distinguished history¹ as both a teaching tool and a guide to legal research. Those two uses serve readers' different needs, at different stages of their development. Beginning legal researchers can read the chapters and look at the illustrations of sources to pick up the basics, such as how federal statutes are published. Later, they can use the book as a reference, looking up detailed answers to specific questions. Curious students and expert researchers can mine the footnotes for sources to take them deeper into the field of legal research—for example, examining the policy issues related to state publication of statutes online, the history of law review publishing, or the effects of statutory codification.

As in the past, the chapters in *Fundamentals of Legal Research* have been ordered to reflect a “jurisprudential” approach to teaching legal research—that is, with primary law first. Since most law students begin the study of law by reading and analyzing judicial opinions, the book begins with a discussion of the process of publishing court reports and the methods for locating them. Next follow chapters on other primary sources of law, then secondary sources. *Fundamentals of Legal Research* can also be used effectively to support a “process” approach to teaching legal research in which resources are presented in the order in lawyers tend to conduct research—that is, secondary authority before primary authority. Instructors who prefer that order can begin with introductory chapters 1–3, and then cover secondary sources in chapters 16–19 before covering primary sources.²

Several chapters address research areas that most law students do not reach in their first year but may find very important to them in their second and third years and in practice. These include public international law and human rights law, the law of the United Kingdom, and federal tax research. For the first time, this volume includes a chapter on Native American tribal law research, an area that is becoming more important as tribes exercise their sovereign authority in various ways. Many law schools have added to or expanded their curricular offerings to support more in-depth study of Native American law, and *Fundamentals of Legal Research* now supports that study

Assignments to Accompany Fundamentals of Legal Research, 10th and Legal Research Illustrated, 10th is available as a separate pamphlet. These assignments, produced by Professor Susan T. Phillips of the Texas A&M University School of Law, are designed to help students understand the resources described in this book.

¹ The history began with ERVIN POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* (1956). Although labeled the tenth edition, the present volume could be considered the fourteenth. The numbering of editions was reinitiated in 1977 with a change in authorship. For a history of this and other legal research textbooks, see Steven M. Barkan, *On Describing Legal Research*, 80 MICH. L. REV. 925 (1982) (reviewing J. MYRON JACOBSTEIN & ROY M. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* (2d ed. 1981)).

² For a dialogue on the two approaches, see Donald J. Dunn, *Why We Should Teach Primary Sources First*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 10 (1999); Penny A. Hazelton, *Why Don't We Teach Secondary Sources First?*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 8 (1999).

Legal research changes, as landforms do, by different processes and at different rates. Some changes are fairly minor, as when the wind creates shifting patterns on the surface of the sand—for instance, when the U.S. Government Printing Office began releasing the 2012 edition of the *United States Code*, there was little that someone familiar with the 2006 edition needed to learn in order to use it effectively. Other changes require some addition to our knowledge, as when a familiar source becomes available on an online platform; think of a river that carves a new channel while the original channel remains. But when familiar sources cease to exist or totally new platforms are introduced, it sometimes feels as though the legal research landscape has been affected by an earthquake that shifts the ground we stand on or a volcano that creates totally new features. We don't want to carry this metaphor too far—we believe that many of the changes we see in legal research are salutary, not cataclysmic—but the field is dynamic and the resources used to teach it must also change.

The changes in the legal research landscape have been and will continue to be dramatic. Here are a few changes since the prior edition of *Fundamentals*. Industry giants *Westlaw* and *LexisNexis* restructured their search interfaces, creating *WestlawNext* and *Lexis Advance*.³ *Bloomberg Law* made a strong entrance into the law school market. The Government Printing Office revamped and expanded its website, introducing *FDsys*. After twenty years of developing the very useful *THOMAS*, the Library of Congress replaced it with *Congress.gov*. And, although many researchers won't be as astonished as we were, the IRS stopped compiling the *Cumulative Bulletin*. Oh, and Scotland nearly left the United Kingdom, a move that would have changed the research in the law of those nations in multiple ways.

This book is the work of many hands, including the authors and contributors from all the past editions. In 2011, more than 18 contributors reviewed all the chapters of the ninth edition. (See the Acknowledgements for a list.) Many of them had been involved with one or more earlier editions. Beginning in 2013, we went over every chapter, reviewing and revising the content and style of each. Information in this volume is generally current as of late 2013 or early 2014.

Our goal was to make the content useful to contemporary readers who are familiar with online tools (and indeed prefer them) while also covering print resources sufficiently to ground students in the structure of legal authority and provide a useful reference for those needing information about print legal materials. Some of our changes were minor, likely to be noticed only by someone who carefully compares this edition with the last. Others are greater. Although we pondered whether it was necessary to have a separate chapter on electronic legal research when electronic sources are discussed throughout the book, we decided instead to revise it substantially. The chapter now has few specifics about *LexisNexis* and *Westlaw* and offers analysis and commentary to help even digital natives be more thoughtful about online research. The citators chapter now only briefly mentions *Shepard's Citations* in print, and focuses on online citators. In recognition that what we have long called "looseleaf services" are no longer printed on single sheets of paper (i.e., loose leaves) and are widely available, often only available, electronically, we

³ Between the time we sent the manuscript to the publisher and the first page proofs, the *Lexis Advance* interface was reshaped. What we say about the system—its content, the general method of searching—is still valid, even though the look of screens has changed. For the details of how to navigate any given system, we invite readers to use help screens and attend training. This book is offering a broader view.

have used the term “topical services” to describe this resource. This edition of *Fundamentals*, like a new map, reflects changes in the landscape.

A note about our citations: In general we follow *The Bluebook: A Uniform System of Citation* (19th ed. 2010), with three chief exceptions. First, we often provide publishers’ names when we are listing works in the text. Second, we do not provide the dates we visited the many websites we cite. Most were visited during the process of editing and revision during the fall of 2013 and early 2014. Finally, we cite the *Bluebook* itself so often that we shorten its citation. A full citation to the *Bluebook* in a footnote would be:

THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.4(e), at 50 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).⁴

This is cumbersome for a book that so often cites the *Bluebook*. We usually shorten *Bluebook* references to:

BLUEBOOK R. 1.4(e), at 50.

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⁴ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.8(c)(v), at 145 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

Acknowledgments

For over 50 years, *Fundamentals of Legal Research* has been a work-in-progress. This edition builds on the work of Professors Ervin H. Pollack, J. Myron Jacobstein, Roy M. Mersky, Donald J. Dunn, and numerous contributing authors. Along with the primary and contributing authors, the law library staffs at Ohio State, Stanford, Texas, Western New England, Washington, and Wisconsin have supported the research and development of this book.

The following people were primarily responsible for preparing specific chapters or sections of this edition. We are grateful for their contributions and for their commitment to this project.

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Fundamentals of Legal Research is a book for students learning to do legal research. Therefore, we thank and acknowledge law librarians and all teachers of legal research, both in and out of the classroom. Their efforts to teach law students and lawyers how to find the information upon which legal decisions are made contribute to the betterment of our legal system. Their suggestions and feedback for improving this book will always be appreciated.

Finally, we thank all of the law students who read and use the book and who continue to sustain our intellectual interests and curiosity. We are gratified when lawyers indicate that the book they used in their first-year legal research class or in an advanced course in legal research is still in their personal library, and that they continue referring to it. Ultimately, we are grateful for having the opportunity to make our contributions to the body of legal literature.

Summary of Contents

	Page
PREFACE	V
ACKNOWLEDGMENTS	IX
GLOSSARY OF TERMS USED IN LEGAL RESEARCH	XXXIII
CHAPTER 1. AN INTRODUCTION TO LEGAL RESEARCH	1
A. Sources of Law	1
B. The Materials of Legal Research	9
C. An Essential Skill	12
CHAPTER 2. THE LEGAL RESEARCH PROCESS	15
A. Introduction	15
B. Research Methodologies	16
C. When to Stop	24
D. A Few Final Words	24
CHAPTER 3. COMMUNICATING RESEARCH RESULTS THROUGH WRITING	27
A. Introduction	27
B. Types of Legal Writing	27
C. Forms of Legal Writing	28
D. Common Organizational Strategies for Legal Writing	33
E. The General Process of Writing	34
F. Selected Legal Writing Resources	37
CHAPTER 4. COURT REPORTS AND THE NATIONAL REPORTER SYSTEM	39
A. Judicial Opinions	39
B. The Segments of Court Opinions	44
C. Illustrations	48
D. The National Reporter System	53
E. Citations to Court Reports	56
CHAPTER 5. FEDERAL COURT REPORTS	59
A. United States Supreme Court Reports	59
B. Lower Federal Court Reports	66
C. Illustrations	72
CHAPTER 6. STATE COURT REPORTS	81
A. Official and Unofficial State Court Reports	81
B. Methods of Citing State Cases	86

CHAPTER 7. DIGESTS FOR COURT REPORTS	89
A. Digests in General.....	89
B. West’s Key Number Digests	90
C. Key Numbers and Digest Paragraphs in Westlaw.....	91
D. Research Using a State Key Number Digest.....	92
E. Key Number Digests for Federal Cases	95
F. Regional Key Number Digests.....	96
G. Decennial and General Digests	97
H. Keeping the Key Number System Current.....	99
I. Illustrations: Finding Topics and Key Numbers	99
J. Other Specialized West Digests.....	111
K. Chart Illustrating West Group’s Key Number Digests.....	112
L. Other Digests.....	113
M. Words and Phrases and Popular Name Tables	113
N. A Few Tips for Working with Key Numbers.....	114
CHAPTER 8. CONSTITUTIONAL LAW AND THE SUPREME COURT OF THE UNITED STATES	117
A. Researching the U.S. Constitution and Constitutional Law	117
B. Illustrations	122
C. Researching the Supreme Court of the United States and Its Justices	128
D. State Constitutions.....	133
E. Foreign Constitutions.....	135
CHAPTER 9. FEDERAL LEGISLATION	137
A. The Enactment of Federal Laws	137
B. Publication of Federal Laws	138
C. Codification of Federal Laws	141
D. Illustrations	148
E. Popular Names for Federal Laws.....	157
F. Tables for Federal Laws.....	157
G. Illustrations: Popular Names and Tables	158
H. Federal Legislation: Research Procedure	164
CHAPTER 10. FEDERAL LEGISLATIVE HISTORIES AND LEGISLATIVE MATERIALS	167
A. Legislative Histories in Legal Research	167
B. Documents Relevant to Federal Legislative Histories.....	168
C. Chart: Documents of Federal Legislative Histories	174
D. Compiled Federal Legislative Histories.....	175
E. Identifying the Documents of a Legislative History	179
F. Illustrations: Identifying Documents	183
G. Illustrations: Documents.....	189
H. Obtaining the Documents of a Legislative History	194
I. Illustrations: Sources	204
J. Charts: Finding Aids and Sources for Documents	204
K. Tracking Pending Legislation.....	212

CHAPTER 11. STATE AND MUNICIPAL LEGISLATION	215
A. Session Laws.....	215
B. Codification of State Laws	216
C. Illustrations for State Legislation	220
D. Comparative State Statutory Research	226
E. State Legislative Histories.....	227
F. Interstate Compacts	228
G. Municipal or Local Government Legislation	229
CHAPTER 12. COURT RULES AND PROCEDURES	231
A. Federal Court Rules: Sources, Interpretations, Analysis, and Forms	231
B. Federal Court Rules of Specific Applicability, Including Local Rules	237
C. Court Rules for State Courts	238
D. Citators.....	238
E. Illustrations	239
CHAPTER 13. ADMINISTRATIVE LAW	247
A. Introduction: Federal Administrative Regulations and Decisions.....	247
B. Historical Background: Publication of Federal Regulations	249
C. Sources of Federal Regulations	250
D. Finding Federal Regulations	253
E. Updating Regulations	255
F. Illustrations: Federal Register and Code of Federal Regulations.....	257
G. Other Sources of Information About Administrative Agencies.....	267
H. Presidential Documents.....	268
I. Illustrations: Presidential Documents.....	272
J. Federal Administrative Decisions	273
K. State Administrative Regulations and Decisions.....	274
CHAPTER 14. TOPICAL SERVICES	277
A. Benefits of Topical Services	277
B. Characteristics of Looseleaf Services	278
C. Illustrations	282
CHAPTER 15. CITATORS	293
A. Uses and Functions of Citators	294
B. Example: Uses and Functions of Citation Services.....	294
C. History and Formats of Citation Services	295
D. Electronic Citators: <i>Shepard's</i> and <i>Keycite</i>	296
E. Illustrations: <i>Shepard's</i> and <i>Keycite</i>	302
F. Other Online Law-Related Citation Services	320
G. Citators in Print: <i>Shepard's</i> Citations	321
H. Citation Services in Other Disciplines.....	321
I. Alternatives to Citators.....	322
CHAPTER 16. LEGAL ENCYCLOPEDIAS	325
A. Introduction	325
B. Current General Encyclopedias.....	326
C. Illustrations: Encyclopedias.....	329

D. State Encyclopedias.....	335
E. Specific Subject Encyclopedias	335
CHAPTER 17. AMERICAN LAW REPORTS (A.L.R.)	337
A. A.L.R., A.L.R. Fed., and A.L.R. International.....	337
B. Finding A.L.R. Annotations	340
C. How A.L.R. Is Kept Current	341
D. United States Supreme Court Reports, Lawyers' Edition.....	343
E. Illustrations: Locating and Updating A.L.R. Annotations	343
CHAPTER 18. LEGAL PERIODICALS AND INDEXES	353
A. Legal Periodicals	354
B. Comprehensive Periodical Indexes	362
C. Illustrations: Legal Periodicals and Indexes	366
D. Indexes to Foreign Periodical Literature.....	376
E. Indexes to Specific Subjects	378
F. Other Sources	380
CHAPTER 19. TREATISES, RESTATEMENTS, UNIFORM LAWS, AND MODEL ACTS.....	383
A. Treatises: In General.....	383
B. Treatises: Research Procedure	389
C. Illustrations: Treatises.....	389
D. Restatements of the Law	393
E. Illustrations: Restatement (Third) of Torts: Products Liability.....	396
F. Uniform Laws and Model Acts	402
G. Illustrations: Uniform Laws	404
CHAPTER 20. PRACTICE MATERIALS AND OTHER RESOURCES	411
A. General Legal Reference Sources.....	411
B. Forms	412
C. Jury Instructions; Verdict and Settlement Awards	415
D. Law Dictionaries.....	416
E. Legal Abbreviations	418
F. Law Directories.....	419
G. Legal Quotations	423
H. Briefs, Records, and Oral Arguments	424
I. Attorney General Opinions.....	427
J. Researching Legal Ethics.....	429
CHAPTER 21. PUBLIC INTERNATIONAL LAW	433
A. Introduction	433
B. International Agreements: United States Sources	437
C. International Agreements: Additional Sources.....	445
D. Customary International Law	451
E. General Principles of Law.....	454
F. Adjudications	455
G. Secondary Sources.....	463
H. Documents of International Organizations	466

I. International Protection of Human Rights.....	475
J. Illustrations	488
CHAPTER 22. RESEARCHING THE LAW OF THE UNITED KINGDOM.....	491
A. English Law	492
B. English Primary Legislation.....	492
C. English Secondary Legislation	499
D. English Case Law	501
E. Digests and Encyclopedias.....	505
F. Citators/Noting Up	506
G. Reference Tools	507
H. Scotland.....	509
I. Scottish Primary Legislation	509
J. Scottish Secondary Legislation.....	510
K. Scottish Case Law	511
L. Northern Ireland	514
M. Northern Ireland Primary Legislation.....	515
N. Northern Ireland Secondary Legislation	516
O. Northern Ireland Case Law	517
P. Illustrations	518
CHAPTER 23. ELECTRONIC LEGAL RESEARCH.....	525
A. Introduction: The Interface of Technology and Legal Information	525
B. The Westlaw and LexisNexis Services.....	527
C. Illustrations: Westlaw and LexisNexis.....	530
D. Other Online Legal Information Sources.....	532
E. Legal Research on the Internet	537
CHAPTER 24. LEGAL CITATION FORM.....	551
A. The Bluebook: A Uniform System of Citation	551
B. ALWD Citation Manual: A Professional System of Citation.....	557
C. Citation to Electronic Resources	560
D. Neutral Citation	561
CHAPTER 25. NATIVE AMERICAN TRIBAL LAW.....	565
A. Identifying Tribes and Tribal Officials	565
B. Primary Sources of Tribal Law.....	569
C. Secondary Sources of Tribal Law	576
D. Illustrations	579
CHAPTER 26. FEDERAL TAX RESEARCH.....	587
A. Introduction	587
B. Research Methodology	588
C. Constitution	588
D. Statutes	589
E. Legislative Histories	593
F. Treaties	597
G. Treasury Regulations.....	599
H. Internal Revenue Service Pronouncements.....	602

I. Judicial Reports	610
J. Citators.....	614
K. Topical Services	617
L. Legal Periodicals	621
M. Form Books	623
N. Newsletters	624
O. Collections of Primary Source Materials	625
P. Microforms	633
Q. CD-ROMs and DVDs.....	633
R. Online Legal Research	634
APPENDIX A. TABLE OF LEGAL ABBREVIATIONS	643
APPENDIX B. STATE GUIDES TO LEGAL RESEARCH.....	737
APPENDIX C. LEGAL RESEARCH IN TERRITORIES OF THE UNITED STATES.....	745
APPENDIX D. STATE REPORTS	757
APPENDIX E. COVERAGE OF THE NATIONAL REPORTER SYSTEM	759
INDEX.....	761

Chapter 1

AN INTRODUCTION TO LEGAL RESEARCH

Legal research is the process of identifying and retrieving the law-related information necessary to support legal decision-making. In its broadest sense, legal research includes each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation.

Many types of information are needed to support legal decision-making. Although this book focuses on information sources that are concerned explicitly with law, legal decisions cannot be made out of their economic, social, historical, and political contexts. Today, legal decisions often involve business, scientific, medical, psychological, and technological information. Consequently, the process of legal research often involves investigation into other relevant disciplines.

This chapter, an introduction to legal research, explains why researchers seek certain types of information. This chapter explains the basic jurisprudential model upon which legal resources are designed, created, and collected, and introduces materials that are covered more comprehensively in subsequent chapters.

A. SOURCES OF LAW

American law, like the law of other countries, comes from a variety of sources. In the context of legal research, the term “sources of law” can refer to three different concepts. In one sense, the term sources of law refers to the origins of legal concepts and ideas. Custom, tradition, principles of morality, and economic, political, philosophical, and religious thought may manifest themselves in law. Legal research frequently must extend to these areas, especially when historical or policy issues are involved.

The term sources of law can also refer to the governmental institutions that formulate legal rules. The United States incorporates one national (federal) government, fifty autonomous state governments, and the local government of the District of Columbia. Also within the United States are more than 560 federally recognized Indian tribes.¹ Although there are some variations in their structures, each of these governments has legislative, executive, and judicial components that interact with one another. Because all three branches of government “make law” and create legal information that is the subject of legal research, researchers must understand the types of information created by each branch and the processes through which that information is created.

¹ <http://bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/>.

Chapter 2

THE LEGAL RESEARCH PROCESS

A. INTRODUCTION*

Legal research is as much art as science; at times, it benefits from serendipity almost as much as from strategy. There are many ways to approach a legal research problem, and most often there is no single or best way to conduct legal research. Methods vary according to the nature of the problem and depend on the researcher's subject expertise and research skills. Whatever the method chosen to address a given problem, however, the wise researcher is open to using creativity in approaches and exploring new theories and areas of law in addition to using proven strategies throughout the research process.

This chapter presents several approaches to legal research that can be modified and applied to most problems and can be merged with various approaches to legal writing. The examples are resource neutral, in that they can be applied to research in books, electronic resources, or a combination of media. In the end, researchers must develop research and writing methods that are most effective for their needs, but the frameworks presented here for constructing a research plan can guide any legal research from the outset. These frameworks include three basic and indispensable components: reliance on as complete and accurate a statement of legal issues and facts as possible, the identification of appropriate legal resources, and grounding the research in the correct jurisdiction.

Strategies for solving legal research problems are shaped by the availability of research materials. Because researchers do not always have access to a comprehensive array of resources, it helps to know a range of resources useful for addressing a specific type of problem and the methods for accessing those resources. Further, resources do not always produce the expected or desired results, and researchers need to be prepared to pursue alternative research strategies to overcome the limitations of a particular resource or research method. Finally, regardless of one's level of expertise in a particular field of law, a lawyer encounters problems involving unfamiliar subjects.

The processes of legal research, legal analysis, and legal writing are closely related.¹ The legal research process includes continual analysis and evaluation of the information found. Legal research informs legal writing; legal writing is meaningless—or worse—without accurate content gained from the research process. Some researchers prefer to conduct most of their research before beginning to write. Others prefer to write as they conduct their research. Regardless, the ability to solve legal

* This chapter was revised by Susan Nevelow Mart, Associate Professor and Director of the Law Library, University of Colorado Law School.

¹ In this context, “legal writing” means any method of communicating research results, including briefs, memoranda, letters, etc. See Chapter 3 for an introduction to the forms and processes of legal writing.

Chapter 3

COMMUNICATING RESEARCH RESULTS THROUGH WRITING¹

This chapter briefly describes the types and forms of legal writing, describes common organizational strategies, discusses the general process of legal writing, and lists selected sources.

A. INTRODUCTION

As observed in the previous chapter, the processes of legal research and legal writing are closely related. A written product is very often the goal of performing research, and the quality of research fundamentally affects the quality of writing. And of course, legal analysis is intertwined as well, for a researcher who does not understand what question to answer does not identify relevant sources, and a writer who does not think clearly cannot write clearly.

Because writing is so intimately connected with research, this chapter presents a broad overview of the types of and general process of legal writing. Complete coverage of the craft of legal writing is beyond the scope of this research book. For that, the reader is referred to the many excellent resources on the nuts and bolts of legal writing, as well as its theory and rhetoric. The end of the chapter includes a selective list.

Legal writing begins with research and analysis. A piece of legal writing must convince the reader that the writer understands the problem discussed; has identified the issues and sub-issues, the key facts, and the unknowns; has researched and analyzed the relevant law; and has considered the appropriate arguments and counterarguments. Above all, the writing must persuade the reader that the writer's conclusions are valid.

B. TYPES OF LEGAL WRITING

Lawyers (and other legal writers, from law students to judges) produce many different types of written work, for different audiences and different purposes. A fundamental distinction among the types is that between *objective* writing and *persuasive* writing. In objective or predictive writing, the author provides a neutral analysis of the law governing a certain situation and predicts the likely outcome. For example, a summer associate in a law firm might write an office memorandum to a supervising attorney addressing one issue facing a client, exploring possible legal claims and defenses, and predicting how a court would resolve them, whether favorably or unfavorably for the client. Persuasive writing, on the other hand, is analysis with an

¹ This chapter was revised by Mary A. Hotchkiss, Associate Dean for Students, University of Washington School of Law.

Chapter 14

TOPICAL SERVICES

Topical services provide timely and up-to-date access to information in specific areas of law. These services typically bring together in one source various types of primary and secondary authority, as well as finding tools. Traditionally they have been called “looseleaf” services because they are published in binders rather than as bound books, so that superseded pages can easily be removed and new pages inserted.¹

In recent years, the content of many looseleaf services has been made available electronically in full text on the Internet, directly from publishers and through *Bloomberg Law*, *LexisNexis*, *Westlaw*, and *Loislaw*. The electronic format allows levels of currency, access, and precise searching that are not available with print resources. Some services are now available only online and so are no longer “looseleaf” at all. Nonetheless, this chapter will frequently use the traditional designation of “looseleaf service,”² primarily in discussing print publications.

A. BENEFITS OF TOPICAL SERVICES

To research a problem in the law of taxation, for example, a researcher might need to locate not only relevant statutes and judicial opinions but also administrative regulations of the Internal Revenue Service and the Treasury Department, rulings of the Commissioner of Internal Revenue, news releases, technical information publications, and other agency documents. Topical services can provide access to many of these different types of sources. Most topical services aim to consolidate into one source the statutes, regulations, judicial opinions, agency decisions, and commentary on a particular legal topic and then facilitate access to this material, whether through printed detailed indexes and other finding aids or online full-text searching.

In some areas of law, such as taxation and other areas of administrative law, there is a need for frequent updating. Topical services can be updated much more quickly, both in print and online, with additional or replacement pages and new releases, than can other publications updated by pocket parts, supplemental pamphlets, or replacement volumes.

Most topical services include current awareness information, which can include news of proposed legislation, pending agency regulations, court and agency decisions, and even informed rumor. They also frequently contain forms, summaries of

¹ Many treatises by named authors are also published in binders. They are not looseleaf services because they do not have the range of constantly updated material contained in topical services. Treatises are discussed in Chapter 19.

² For a wide-ranging history of looseleaf services—including background on the legal profession, legal publishing, office technology, and the Industrial Revolution—see Howard T. Senzel, *Looseleafing the Flow: An Anecdotal History of One Technology for Updating*, 44 AM. J. LEGAL HIST. 115 (2000). A much briefer history is presented in Peyton Neal, *Loose-Leaf Reporting Services*, 62 LAW LIBR. J. 153 (1969).

professional meetings, calendars of forthcoming events, and other news relevant to researchers or practicing attorneys in the field.

Services published in a looseleaf format generally: (1) have new pages *interfiled* with existing materials; (2) come in *newsletter* format, with each issue added chronologically to a binder; or (3) use a combination of (1) and (2). Traditionally, looseleaf publications have had standardized publication schedules, typically weekly, biweekly, or monthly.

The electronic versions are available on the Internet directly from the publishers and also, in some cases, via electronic research services such as *LexisNexis* and *Westlaw*. Rather than requiring subscribers to file pages mailed by the publisher, electronic services are updated immediately when new materials are added, deleted, or changed. An electronic full-text version of a topical service is an efficient source for research in updated materials and offers precise searching capabilities.³

This chapter highlights only those features common to most topical services. Particular attention is given to representative publications of Commerce Clearing House (CCH) and the Bureau of National Affairs (Bloomberg BNA or BNA) because of the large number of topical services produced by these two companies.

The convenience, currency, frequency, and indexing of topical services often make them the best place to begin researching many types of legal problems. In some rapidly developing areas of the law, such as privacy, the environment, and consumer protection, a topical service may be the only extensive research tool available.⁴

The original topical services were looseleafs, and the print format for many topical services remains widely used. The contents and, to a great extent, the organization of electronic services reflect their print origin. The discussion below describes the major features of the print versions and the publications of the two major topical services publishers, with brief information about the publishers' electronic publications.

B. CHARACTERISTICS OF LOOSELEAF SERVICES

1. Interfiled Looseleafs in General

Most topical looseleaf services, in which new pages replace older pages, share these characteristics:

- a. Full text of the statutes on the topic, often with significant legislative history;
- b. Either full text or abstracts of relevant judicial opinions and administrative agency decisions;
- c. Editorial commentary and explanatory notes;

³ The best method for determining whether a particular publication is available in electronic format is to consult the publisher's website or print catalog. The content guides for *Westlaw*, *LexisNexis*, *Loislaw*, and *Bloomberg Law* indicate the looseleaf services available via that research service. Also helpful is the "Electronic Format Index" in *Legal Looseleafs in Print* (Arlene L. Eis comp. & ed.). This is an annual publication that lists approximately 3,600 titles by over 240 publishers. It includes information on the number of volumes in a looseleaf set, price, frequency, cost of supplementation, and Library of Congress classification number. It is arranged alphabetically by title and includes publisher, subject, and electronic format indexes.

⁴ For assistance in identifying relevant topical services, see *Legal Looseleafs in Print*, *supra*, [note 2](#).

Chapter 23

ELECTRONIC LEGAL RESEARCH¹

Legal information is published in a variety of formats: print, electronic, and microform. A generation ago, print was the most common format, with electronic tools supplementing print research. Now many researchers do almost all of their research online. *Westlaw* and *LexisNexis*—the two dominant, national commercial legal information services—provide access to a wide variety of primary and secondary legal databases, along with news, business, public records, and other non-legal databases. Other electronic research products and services provide access to different collections of materials—either broad-based, covering many jurisdictions and topics, or focused on specialized topics. A wide range of legal materials are available free on websites sponsored by government agencies, nonprofit organizations, and others. Although particular resources are discussed throughout this book, this chapter discusses issues that arise in using and evaluating electronic resources more generally.

A. INTRODUCTION: THE INTERFACE OF TECHNOLOGY AND LEGAL INFORMATION

The technology of legal research has changed dramatically in the last thirty-seven years. The first edition of this textbook to discuss electronic tools was in 1977, when a chapter called “Computers and Microforms in Legal Research” introduced the concepts of full-text databases and Boolean searching.² At that time, coverage was much more limited than what today’s researchers take for granted. For example, *LexisNexis* (then called *LEXIS*) provided coverage of Supreme Court cases from 1938 forward. It did not provide information for all states. The only topical libraries were for Delaware corporation law, federal tax law, and securities law. There was no mention of law reviews, treatises, or international materials.³ *Westlaw* at that time was even more limited: it did not contain the full text of opinions, but provided only headnotes, key numbers, and topic headings. Its contents were available for an even shorter time period than in *LexisNexis*: federal courts from 1961 and state courts from 1967.⁴

Over the years, the content available online has grown dramatically. *LexisNexis* and *Westlaw*, the providers who were fairly new in 1977, now have hundreds of databases with millions of documents. And they offer multiple platforms and ways of searching, including *Westlaw Classic*, *WestlawNext*, *Lexis.com* and *Lexis Advance*. Further, within each platform there are multiple ways to navigate and search: e.g.,

¹ This chapter was revised by George H. Pike, Director, Pritzker Legal Research Center, and Senior Lecturer Northwestern University School of Law.

² J. MYRON JACOBSTEIN & ROY M. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* 456–62 (1977).

³ *Id.* at 463–64.

⁴ *Id.* at 465.

browsing tables of contents, Boolean searching, and natural language searching.⁵ While *LexisNexis* and *Westlaw* still enjoy a large share of the legal research market, they have been joined by many other commercial providers. Moreover, researchers may now find legal materials on hundreds of free websites, hosted by government agencies, universities, nonprofit organizations, law firms, and businesses.

Meanwhile, researchers have changed too. Legal researchers who read prior editions of this textbook in the 1970s, 1980s, and even 1990s generally had little or no experience with online searching before they were introduced to *LexisNexis* and *Westlaw*. But many of the people learning how to do legal research now are digital natives. It may surprise someone starting law school in 2014 or 2015 to realize that *Wikipedia* has been around only since 2001⁶ and *Google's* search engine was still being tested until late 1999,⁷ because, as recent as *Wikipedia* and *Google* are, they were already available for those students to use when researching reports in middle school and high school. And new law students today also have had experience using many commercial databases—as well as free websites—in college.

In 1977, the authors' tasks included introducing the concept of “searching machine-readable data bases online”⁸ and summarizing what was available in *LexisNexis* and *Westlaw*. Now researchers assume that content will be digitized and searchable and, in fact, the major research systems have so much material online—and coverage changes so quickly—that attempting to list what is on which system would be a waste of time. Search features and interfaces change frequently, as well. Therefore, this chapter will offer an overview of electronic legal research, along with some observations and tips for becoming effective users of the rich legal information sources now available online.

One important lesson for legal researchers—both beginners and those with years of experience—is to learn and stay current with whatever research systems are used. In law schools, it is typical for librarians or representatives of *LexisNexis*, *Westlaw*, and perhaps other companies to offer training sessions. Law firms, courts, and government agencies also regularly have training opportunities. The systems are easy enough to use that it might be tempting to skip the training and conduct research by trial and error. After all, typing in a few words and hitting Enter *does* generally lead to results—and maybe even relevant results. But training will help researchers become efficient searchers, able to find exactly what they need with less floundering and more precision. When time is a valuable commodity (either because it is being billed or because there just isn't enough of it to get everything done), hours saved from fruitless, inefficient searching make the training pay off.

Effective researchers also take time to use their systems' help screens, search templates, advanced search features, toll-free assistance services, and online chat. A researcher's guess about how to construct a search might be good—or it might be far off

⁵ Each system also offers an app for use on iPhone or iPad and a mobile site for researchers using other devices. Each system also has a product it markets to colleges and universities: *LexisNexis Academic* and *WestlawNext Campus Research*.

⁶ Wikimedia Foundation, *Our Projects*, https://wikimediafoundation.org/wiki/Our_projects (visited Dec. 2, 2013).

⁷ Peter H. Lewis, *State of the Art: Searching for Less, Not More*, N.Y. TIMES, Sept. 30, 1999, at G1 (describing *GurUNET* and *Google*).

⁸ Jacobstein & Mersky, *supra* note 2, at 458.

track. Advice from the system experts can save time, money, and frustration. Using these resources will pay off with better results in less time.

B. THE WESTLAW AND LEXISNEXIS SERVICES

The two most widely used electronic legal research services are *Westlaw*, owned by Thomson Reuters, and *LexisNexis*, a product of Reed Elsevier.⁹ Today both services serve as comprehensive and sophisticated sources of legal information, providing primary source materials (including cases, statutes, and regulations) and secondary sources (such as legal periodicals and treatises). Both services also have been expanding their holdings of non-legal resources, now providing current and archived news, public records, and corporate and business information among many other offerings. Materials provided by *Westlaw* and *LexisNexis* are constantly undergoing expansion and refinement.¹⁰

The content of *Westlaw* and *LexisNexis* databases is determined by licensing agreements. Both systems have wide and deep coverage of primary legal materials produced by governments (which generally do not assert a copyright and typically cooperate with the online providers). They both have licensed the content of most student-edited law reviews and the journals published by the American Bar Association. The most apparent difference in their coverage is in commercially published treatises and practice materials. Notably, *Westlaw* includes treatises and other material published by Thomson Reuters (formerly West Publishing) and *LexisNexis* includes treatises and other material published by LexisNexis (including Matthew Bender titles); both also offer access to services from other information vendors. A vendor may eliminate or restrict information in *Westlaw* or *LexisNexis* when licensing costs reduce the profitability of placing material in an online environment, when a vendor enters into an exclusive arrangement with a different service provider, or when a vendor develops its own online product.¹¹ The educational contract between a law school and *Westlaw*, *LexisNexis*, or other database vendor may have additional restrictions on individual databases, due to cost, privacy, or other concerns.

Although a particular research resource or title may appear in *Westlaw* or *LexisNexis*, it is critical to the research process to determine the scope of the materials that actually are available online. For example, when legal information vendors introduce a new resource, they typically do not provide a complete retrospective file of the collection. Sometimes only selected content from the resource may be provided. A researcher should evaluate very carefully the scope and content of any database before relying on that database's contents for legal research. Database directories or menu screens provide instructions for determining the content of a file.

⁹ An ABA survey asked lawyers in private practice which fee-based online service they used most often for legal research. The leading products were *WestlawNext* (28.1%), *Westlaw* (25.7%), *Lexis* (24.1%), and *Lexis Advance* (5.2%). Those four responses total 83.1%. 2013 AMERICAN BAR ASSOCIATION LEGAL TECHNOLOGY SURVEY REPORT V-45 (Joshua Poje ed., 2013) [hereinafter ABA TECH SURVEY].

¹⁰ The size of these services is vast. For example, as of June 2014, *LexisNexis* contained over 45,000 legal, news, and business sources with billions of searchable documents. *Westlaw* offers similarly extensive content, also reporting billions of pages of content.

¹¹ For example, in 2013 Bloomberg BNA stopped licensing BNA newsletters and other BNA content to *LexisNexis* and *Westlaw*. They are now available only on the *Bloomberg BNA* web product and in *Bloomberg Law*.

Chapter 25

NATIVE AMERICAN TRIBAL LAW¹

This chapter discusses research on the law of American Indian tribes. Tribal law defines the governance of tribes themselves and is distinct from the subject known as American Indian law,² which deals with the legal relationship between tribes and the United States federal system.³

Native American tribes are sovereign entities that self-govern and have the power to legislate, regulate, police, and adjudicate. Because each tribe is an autonomous governmental unit, tribal law is unique to each Indian nation. As with other governments, tribal governments generally enjoy sovereign immunity.

The primary law of tribes may include treaties or agreements with the United States government, constitutions, codes, statutes and ordinances, compacts, administrative rules and regulations, and court decisions. Tribes also may adhere to orally transmitted, non-written, customary law.

A. IDENTIFYING TRIBES AND TRIBAL OFFICIALS

Native American political groups claim an inherent right of self-government that predates the formation of the United States government. Under federal law this sovereignty is acknowledged, with evolving legal limitations, through the establishment of a government-to-government relationship between the United States and the Native American political entity.

Federal recognition of this relationship is today extended to more than 566 historically distinct Indian tribes, bands, Pueblos, or Alaska native villages that exercise governmental authority.

Tribes may exist outside the umbrella of federal recognition, but the first tribal law research question is whether a tribe has been acknowledged as standing in a government-to-government relationship with the United States. Researchers must be aware that during various phases of federal Indian policy, the government-to-government relationship between some tribes and the federal government was unilaterally terminated by congressional mandate. When policy again changed, recognition for most of these tribes was “restored” or “reaffirmed.” These terms may be

¹ This chapter was written by Nancy Carol Carter, Professor of Law (retired), University of San Diego.

² The terms “American Indian” and “Native American” are used interchangeably in this chapter.

³ For guidance on researching Indian law, see DAVID SELDEN & MONICA MARTENS, BASIC INDIAN LAW RESEARCH TIPS—PART I: FEDERAL INDIAN LAW, <http://www.narf.org/nill/bulletins/lawreviews/articles/coloradoLawyerArticle-fed.pdf> (2008); GALLAGHER LAW LIBRARY, UNIV. OF WASH. SCH. OF LAW, INDIAN & TRIBAL LAW RESEARCH, <https://lib.law.washington.edu/content/guides/indian> (last updated Jan. 14, 2014); M. Christian Clark, *Analytical Research Guide to Federal Indian Tax Law*, 105 LAW LIBR. J. 505 (2013).