

Legal Research – what they don't tell you in law school

The process of legal research is the process of finding the rules, reasoning and policy that will support your legal conclusions.

Research sources can be categorized in four ways: primary or secondary authorities and persuasive or mandatory authorities.

A primary authority is one of the following:

An authority that is generated by a legislative body: a statute

An authority that is generated by an administrative agency: a regulation

An authority generated by a court case: a judge's statements of the rules and reasoning he or she used to reach a result in court.

And, of course, the federal constitution or any state constitution.

A secondary authority is one of the following:

An authority that explains a primary authority such as a law review, a legal encyclopedia, a legal dictionary, even a website you find on the internet.

Persuasive Authority

Persuasive authority is not binding on a court, but it can be a useful tool to persuade where no mandatory – also known as binding - authority exists. If you are in New York, and a California court has addressed the legal issue with which you are concerned, that California case is persuasive in New York.

Other persuasive authorities are treatises, law reviews and other secondary sources.

Mandatory authority

A mandatory authority is one that is binding in your jurisdiction. So, if you live in California then a California Supreme Court case is mandatory. The California constitution is mandatory. An administrative regulation issued by a state-wide California agency is mandatory. All pretty straightforward.

But California is also divided into six appellate court districts. If you live in the Fourth District Court of appeals, a decision reached in that court (fondly known as the "4DCA") will be binding in the 4DCA. Also pretty straightforward.

But what if you are involved in a dispute with a neighbor and you both live in the 2DCA, for example. Assume whatever legal question involved in your case has never been addressed in the 2DCA. But it HAS been addressed in the 4DCA, in a decision very favorable to your argument. But in no other DCA. What to do?

Happily for you, when the court in one district in California has ruled on a particular issue, and no other California district has ruled on that particular issue then that ruling is deemed to express the law of the state! This is true in other states as well.

The Significance of these Categories of Authorities?

Law school exams, and bar exams and countless legal writing textbooks and instructors all test your ability to discern what is primary or secondary authority, mandatory or persuasive authority. From this you might guess that these are crucially important, hard-and-fast distinctions. Not so!

First, let's look at an example of primary, mandatory authority – a case. Let's say it is a California Supreme Court case and we are in California. Let's take it a step farther. This case appears to address the exact problem we need to address. Have we struck research gold? Maybe, but maybe not.

Cases involve facts, often human actors, and often those human actors have different and distinctive characteristics. These characteristics can matter enormously. Suppose your 4DCA case involves a first amendment question, specifically whether the government is endorsing a religion by allowing prayer at the opening of a city council meeting. The court holds it is not – no first amendment violation. You hope to institute prayer at the beginning of the school day in a public school classroom of elementary students. Reading the case about prayer in the city council, you think you have a primary, mandatory case on your side. Wow!

But wait.

Children are not like adults. Children are more susceptible to the influences of their surroundings. They are more vulnerable to religious inculcation, and therefore a first amendment violation is infinitely more likely when one adds prayer to the equation. In fact, the city council case may make absolutely no mention of this distinction, since it is not relevant to its case. Thus, when your city council case addresses the first amendment, it is both a primary *and* mandatory authority - but it is not terribly important to your argument after all.

So let's put these four revered labels for legal authorities on a shelf, and look for a more efficient, user-friendly approach.

Instead of looking at the authorities as disconnected points of light, let's look at them once they have been synthesized – into law reviews, for example. A law review is a secondary, persuasive authority, which some dyed in the wool, “by-the-book” law student, professor or practitioner might consider a rather lowly starting point. Wrong.

Let's see why.

You are, probably, operating under strict time limits. The law review author, probably, not so much. The law review author, simply by virtue of the process of writing a law review, reviewed many scenarios and read many cases. The law review itself will contain footnotes, and when you find the right law review, it can act both as source of background to your subject and as a wellspring of useful

citations. If you had started with a law review that addressed first amendment concerns in a variety of government settings, you would probably never have gone for that city council prayer case at all. A law review, in fact is a better “filter” than many other secondary sources. Legal encyclopedias and treatises often must generalize to include as much information as possible. They will, necessarily, not be as current as a law review.

So, armed with this information, how do you find the “right” law review article for your purposes? First, law review authors almost always give their articles titles that are “searchable.” In other words, the title will include words or phrases that are important to the subject matter of the article. That means that if you put words that define your issue into Google, or an electronic research service such as Lexis or Westlaw (more about these services in a minute) then if the title of the law review also includes those words, they will pop up.

Next, take a critical look at law review titles you find. Do they suggest that the article addresses your subject head on, or is the article’s focus elsewhere?

Finally, don’t be star struck or snobby. Harvard may be a marvelous law school, but that does not mean an article in the Harvard Law Review will be marvelously helpful. In fact, an article in a lower tier school’s law review may– shhh! – have a more practical, nuts and bolts approach to your subject. It may not propose aery theoretical constructs, but, dollars to donuts, aery theoretical constructs are not what you need.

If you find one or two law reviews that focus on the legal problem you must address, you can read them to get an overview of your topic, often including background or side issues you didn’t anticipate. Then you can “mine” the articles for citations.

A former student of mine coined an expression to describe the way he used the cases he “mined.” If you are reading a law review article on line, he said, you can “click through” – that is, you can click on an individual citation and see which cases cited it, and why. You can click on those cases, and then on the cases you find from those cases. Your research unfolds beautifully, the way the cases, themselves, did, with one case using the last case, and, often expending on it or providing a new, useful analogy.

You can also cite the law reviews themselves. Secondary, persuasive authority is not as powerful a source as primary authority, whether persuasive or mandatory, but it is authority nonetheless. If the law review author makes a point that relates to one of your points, you can use it, and then cite the law review article.

Finally, a word about record keeping. Every legal research text I have ever seen admonishes the student to keep a list of cases uncovered during the research process. This is certainly a good idea, and the theory is that you won’t reread cases you’ve already found. I have never been good at record keeping, in part because I get

so interested in what the case says, and where the next case will take me when I “click through,” that I don’t want to take the time. Using the method I’ve described, this kind of record keeping is certainly good, but failure to keep this type of detailed records is not fatal.

Westlaw and Lexis

Westlaw and Lexis are computerized systems for conducting legal research. Both have excellent online tutorials and research attorneys on staff ready to answer research questions. Both services have gone to great lengths to become more user friendly. You can search using natural language instead of a baffling set of codes. Both services are continually updating their platforms and adding “bells and whistles.” You can create folders for cases and search by jurisdiction, subject matter, date of decision and so on, in a seemingly endless proliferation of detail. Both offer online tutorials and periodic trainings at law schools and larger law firms. That said, I never use either at the beginning of any research project to conduct research per se. At that point I use them only for their “get a document” function. Here’s why.

Both Lexis and Westlaw are comprehensive, but necessarily mechanical. Neither can capture the policy concerns, for example, that may animate a decision. Both may thus be ineffective if one needs to predict the appropriate outcome of a case on the cutting edge of law. In a sense, both reduce research to discrete points of light. If a decision’s nuances, word choices and dicta matter to you – as they should – you will not find them with Lexis and Westlaw. Discrete points of light do not add up to a picture of the sunrise.

Further, virtually any search using either search engine will yield hundreds of results. To me, the task of figuring out a sufficiently narrow search takes more time and effort than doing my own “click through” research. Lexis and Westlaw are, however, critically important tools in research.

Citations and the Legacy of Frank Shepard

I can assemble an excellent body of sources to use in analyzing any legal question without using Westlaw or Lexis as a search engine. But one further question remains and renders my research incomplete. How were my cases – or other authorities - handled by *subsequent* cases – or by other authorities? Centuries ago this was probably not a difficult question to answer. For example, there were fewer courts rendering decisions, and fewer cases, period. Indeed, I have witnessed the exponential growth of case law in my lifetime. Back in the day, as a newly minted clerk in the Rhode Island Supreme Court, I listened, awestruck, to Chief Justice Joseph R. Weisberger’s colloquies on state law. He could call to mind cases, seemingly in any area of law, and explain holdings and trends with effortless, impromptu enthusiasm. But the likes of Justice Weisberger are rare, and times, in any event, changed.

In the late nineteenth century, a certain Frank Shepard foresaw this change and created a tracking system, to show *why* one case cited another. His system relied, originally, on sticky labels affixed to printed cases, coded to indicate subsequent treatment. This gave attorneys an indispensable tool: was a case overruled? Had it been reversed, explained or distinguished by a subsequent case? By the late twentieth century Frank Shepard's system was so pervasive that he had become a verb – “to shepardize” – and his system was computerized. Lexis now owns the Shepard system, and Westlaw has a similar product, called “Keycite.”

Cases, statutes, and any other legal authority retrieved via Lexis and Westlaw all come with a link that lets you see what subsequent authorities have cited the authority you retrieved, and how these subsequent sources treated it. If you are shepardizing or key citing a case, therefore, and it has been reversed or overruled, the link will tell you that. If a subsequent case distinguished its facts from the facts in a key case you found, you will learn that, too.

The bottom line is: develop your own research strategies. Don't think you have to swallow the law school version hook, line and sinker. And certainly don't feel like you're lacking if you don't enjoy exploring the intricacies of electronic search engines!

BASIC BLUEBOOK CITATION GUIDE

1. **A good tip: Use the Quick Reference guide to court documents and legal memorandum on the inside back cover of the Bluebook and the Bluepages (B), which are an introduction to the Bluebook proper!**

2. **When to cite to authority?**

Every point of law, or “proposition,” must be followed by a citation to legal authority supporting the proposition.

3. **Where to place citation?**

In textual sentences OR in citation clause or citation sentence.

1. Example of citation in textual sentence:

In reaffirming the maritime connection requirement, the *Gruhart* Court relied on *Sisson v. Ruby*, 497 U.S. 358 (1990). In *Sisson*, a fire started.....

For citation clauses or sentences, if authority supports entire sentence, citation appears in separate citation sentence, ending with period. If authority supports only part of sentence, citation is included in sentence, set off by commas.

2. Example of citation clause and citation sentence:

States have required defendants to provide both insanity, *e.g.*, *State v. Caryl*, 543 P.2d 389, 3397 (Mont. 1975); *State v. Hinson*, 172 S.E.2d 548, 554 (S.C. 1970), and self-defense, *see, e.g.*, *Quillen v. State*, 110 A.2d 445, 449 (Del. 1955); *State v. Skinner*, 104 P. 223, 224 (Nev. 1909). In several jurisdictions, the defendant must even establish that a homicide was accidental. *See, e.g.*, *Chandle v. State*, 198 S.E.2d 289, 291 (Ga. 1973); *State v. Enlow*, 536 S.W.2d 533, 535 (Mo. Ct. App. 1976).

4. **Basic citation form for cases. In general, see Rules 1 and 10 and Table T.1, United States Jurisdictions.**

Please note: the “hats” below are there only to show spacing; they are not part of the citation!

United States v. Calandra, 414[^]U.S.[^]338 (1974) OR *United States v. Calandra*.

Kubrick v. United States, 581[^]F.2d[^]1092[^](2d[^]Cir.[^]1978).

Note: watch for improper superscripts – Word will change 9th to 9th automatically.

100[^]F.[^]Supp.[^]2d.[^]500 (N.D.[^]Cal.[^]2000).

Herrick v. Lindley, 391[^]N.E.2d[^]729[^](Ohio 1979).

Amante v. State Bar, 50[^]Cal.[^]3d[^]247,[^]786[^]P.2d [^]375[^](1990).

5. Citations provided by LEXIS and WESTLAW

Do NOT rely on the citation format you see in the cases themselves, which may not be Bluebook format.

6. General rule for spacing in citations. See Bluebook Rule 6.1. In general, no space between adjacent single capitals (for ex., U.S. and S.D.N.Y.); but space between single capitals and longer abbreviations (for ex., D. Mass. and S. Ct.) and between two longer abbreviations (for ex., Cal. App. 3d, F. Supp. 2d). BUT F.2d and F.3d.

7. Omissions and abbreviations in case names – what you omit or abbreviate varies depending on whether case is used in a textual sentence or in a citation clause or sentence.

In general, if in textual sentence, follow Bluebook Rule 10.2.1. If used in a citation clause of sentence, follow Rule 10.2.2.

Highlights of omissions in textual sentences, under Rule 10.2.1:

1. If consolidated actions, cite only first listed. Ex: *Shelley v. Kraemer*, not *Shelley v. Kraemer, McGhee v. Sipes*.
2. Omit all parties other than first listed on each side, but don't omit any portion of partnership name. Ex: *Fry v. Mayor of Sierra Vista*, not *Fry v. Mayor & City Council of Sierra Vista*, BUT *Eisen v. Spradlin, Lincoln, & Amorosi*

3. Omit words such as “*et al.*”
4. Omit alternative names, listed as “d/b/a.”
5. Abbreviate only widely known acronyms (such as “NAACP”) AND eight words: “&,” “Ass’n,” “Bros.,” “Co.,” “Corp.,” “Inc.,” “Ltd.,” and “No.” BUT do NOT abbreviate these eight words if they begin a party’s name.
6. Omit “The” as first word of party’s name, unless action is in rem or where “The King” or “The Queen” is a party.
7. Omit “State of,” “Commonwealth of,” and “People of,” except when citing decisions of the courts of that state, in which case include only “State,” “Commonwealth,” or “People.” For example, *Commonwealth v. Ferine*, 448 A.2d 637 (Pa. Super. Ct. 1982), BUT *Boylston v. Pennsylvania*, 494 U.S. 299 (1990).
8. Omit “City of” and like expressions unless the expression begins a party name. For example: *Mayor of New York v. Clinton*; *Butts v. City of Boston*.
9. Omit all prepositional phrases of location not following “City” or like expressions, unless omission would leave only one word in name of party or location is part of name of business. Example: *Struck v. Board of Wardens*, NOT *Struck v. Board*.

Abbreviations and omissions in case names in citation sentences and clauses.

Bluebook Rule 10.2.2. Follow all rules in Rule 10.2.1, PLUS

1. Abbreviate any word listed in Bluebook Table T6.
2. Abbreviate states, countries, and other geographical units as indicated in Table T.10, unless the geographical unit is a named party.
3. Abbreviate other words of eight letters or more if substantial space is thereby saved and the result is unambiguous.
4. Abbreviate the United States, states, countries, and other geographical units per Table T.10 UNLESS it is the entire name of the party. Thus:

Center for Nat’l Sec. Studies v. U.S. Dep’t of Justice
BUT *Alvarez-Machain v. United States*.

- 8. Short forms for cases** – to be used when case has already been cited in full and not too far ahead of short cite. Rule 10.9 Bluebook.

Avoid using name of governmental or other common litigant in short form.

United States v. Calandra, 414 U.S. 338 (1974)
Short forms: *Calandra*, 414 U.S. at 343
414 U.S. at 343
Id. at 343 OR *Id.* at 343

Note: the Bluebook does NOT permit the use of “*supra*” for cases. Rule 4.2.

9. Subsequent procedural history of cases. Rule 10.7.

Kubrick v. United States, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

United States v. Baxter, 492 F.2d 150 (9th Cir.), *cert. denied*, 416 U.S. 940 (1974).

Allmean v. San Antonio, 200 F.Supp.2d 325 (E.D. La.), *rev'd on other grounds*, 300 F.2d 415 (5th Cir. 1997).

See Table T.8, Explanatory Phrases.

10. Pinpoint citations for cases. Bluebook B4.1.2, page 9.

When to use: when referring to a specific point made in a decision.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 570 (1985)

11. Where citing more than one authority for the same proposition:
Bluebook Rule 1.4.

1. Separate authorities by semicolon.
2. General order: federal before state.
3. Order for legislative materials: Constitutions, statutes, regulations
4. Order for cases:

Federal: Supreme Court, courts of appeals,, district courts.

State: Alphabetically by state, and then by rank within each state

For both federal and state, cite according to reverse chronological order within each particular rank (most recent first).

12. Parenthetical information. Bluebook Rule 1.5. Include information in parentheses where relevance of a cited authority might not be otherwise clear to the reader. Parenthetical information is particularly useful where you cite to a number of authorities, but note that it cannot take the place of CRAC analysis.

Examples:

But see Flanagan v. United States, 465 U.S. 259, 264 (1989) (explaining that the final judgment rule reduces the potential for parties to “clog the courts” with a succession of time-consuming appeals).

13. Signals: words that preface a case citation and indicate how the case relates to the proposition in question or how the case relates to other cited cases. Those signals and their meaning are listed in Bluebook Rule 1.2 – 1.4.

14. Rules for using and citing to quotations. Rule 5.1 Bluebook.

15. Basic citation form for Constitution, statutes, and regulations in citation clauses and sentences. Bluebook Rules 11 (Constitutions) and 12 (statutes):

Examples:

U.S. Const. amend. §2.
28 U.S.C. §1291 (1994).
Fed. R. Civ. P. 11.
7 C.F.R. §319.76 (1999).

16. Citation to Florida Constitution:

Fla. Const. art. IV, §2.

17. Citation to Florida statutes. Statutes are simply enacted laws. Laws enacted by the Florida Legislature are codified in the Florida Statutes.

Two possible variations in citing a Florida statute:

1. Fla. Stat. §x.x (1992).
2. Fla. Stat. Ann. §x.x (West 2002).

The abbreviations for the Florida Statutes are found in the Bluebook in Table T.1 under “Florida.”

18. Excerpt from Bluebook Rule 12.10 statute chart:

	Full citation in textual sentence	Full citation in citation sentence or	Short citation (for use after statute has
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		clause	already been cited once in full in document)
U.S. Code	42 U.S.C. § 1983	42 U.S.C. § 1983 (2000)	In either citation or textual sentence: 42 U.S.C. § 1983 or § 1983
California statutes	Section 33 of the California Penal Code	Cal. Penal Code § 33 (West 2005) Or Cal. Penal Code § 33 (Deering 2005)	In textual sentence: section 33 In citation sentence: § 33

19. Other questions that might come up:

When to abbreviate in general? See Bluebook Rule 6.1

How to refer to numbers? See Bluebook Rule 6.2

When to italicize? See Bluebook Rule 7.

When to capitalize? See Bluebook Rule 8.

