CARLTON FIELDS

Legal Research: The Old Way Versus the New

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The Old School

I, Mark Neubauer, concede I am a dinosaur. I am like my grandfather before me, who lamented the end of the horse-and-carriage age by bemoaning, "Everything is moving too fast." Everything today keeps moving even faster. Faster cooking with Instant Pots and microwaves. Faster transportation with electric cars. Faster modes of communication with the internet and cell phones.

My garage is stacked to the ceiling with technology antiquities: my 8-track tape player, which trolled out those cool tunes; my Apple IIe computer, which was the cat's meow in its day; my transistor radio, on which I listened to ball games played in faraway places like New York and Kansas City; my BlackBerry with its terrific keyboard; my fax machine with the disappearing ink; and my Smith-Corona manual typewriter with its clickety-clack.

My law office is similarly stacked with antiquities of the practice. Treatises. Hornbooks. Even law review articles and back issues of *Litigation*.

In my firm's ever-shrinking law library, there used to be shelf after shelf of digests. The key system maintained by West opened a world of knowledge to you, if you stumbled on the right key. Just as a slow cooker makes certain dishes taste far better, slow legal research has its fine points as well.

No doubt the speed of computerized research has its attributes. Have a case involving a breach of contract over spoiled spinach? A computerized search can pinpoint a factually similar case, assuming one exists. Want to find out how your judge has ruled in similar contract breach cases? Find all of the cases your opponent has won or lost? Again, computerized research is far better than my old-fashioned way.

The real danger of computerized research is that it is done by legal novices who do not know the legal fundamentals. To effectively do computerized legal research, you have to know how to ask the right question. No computer gives you that question. It asks you for the question. If you do not provide it, then you will not get the answer you seek but only the half-truth you deserve. Years ago, I was taught the danger of GIGO-garbage in, garbage out. A lawyer trying to research the law needs to ask the right questions; otherwise, the output will be garbage.

Indeed, defective legal research has been pinpointed as the single largest basis of lawyer malpractice. Of all malpractice claims, 11.3 percent result from defective legal research, according to the latest Profile of Legal Malpractice Claims: 2016-2019 (ABA Standing Committee on Lawyers' Professional Liability 2020).

The reason for this is that computers can't think, notwithstanding all of the claims of artificial intelligence. Computers can't reason. They really can't analyze. All they do is algorithms. Mathematical computations. But the law is not so mathematically precise. It is driven by people. It is driven by thoughts. It is an art, not a science. It is verbal, not numeric.

In the old days, you would begin a legal research project by first learning the general law in the area you were going to research. You read hornbooks. You read treatises, those lengthy discussions of what the law is. The most valuable source was the West Digest System (sorry, Alexa). Scores of volumes of headnotes on every case under the magical West Key System.

When I would start a research project (now that I am old, I usually get to delegate it to younger lawyers), I would first read a hornbook or treatise. Then I would pore through the digest, trying to learn the basic precepts of the law by all of those headnotes. Similarly, I would read the annotated statutes. Each headnote and case note provided a building block for me to know the law.

Once I had determined that basis, I then could pull out cases and read them, not just the isolated word but the entire case. I learned the context of the words or phrase that supported my position. I learned cases against that position, even if they were not flagged as "distinguishing" the case I liked. I discovered opposing arguments that, even if they were not expressly against what I was advocating, could be used against my argument. Armed with that foresight, I could mold my argument to counter them even before my opponent made them.

Too often, young lawyers, hyped in law school on free computer legal research like some form of addictive cocaine, fail to make that investigation of the legal basics. Instead, they search for that needle-in-a-haystack case that has language that they can use, and they stop their research there.

Often when I get research from younger lawyers today, I worry if it is complete. Did the attorney ask the right questions? Did the attorney read the entire case or just the text the computer steered him

or her to? As a result, I often ask the attorney for copies of the cases he or she relied on. I am shocked when the cited case does indeed stand for the proposition that supports our cause but, just two pages below, there is language harmful to our case. Or, worse, the cited authority relies on other cases that, when read, are equally detrimental to our cause. Fortunately, my adversaries often make the same mistake-take the quote the computer spews out without peeling back the skin of the onion.

Too often, younger attorneys don't read the cases their key case cites. They don't look back in the law to determine what the law is. They just stop with their single citation.

Granted, computerized research gives you a long list of cases, much like the old Shepard's did. The difference between the new way and the old way is the old way requires lawyers to think. To make analogies. To use the precepts of one area of the law to apply them to another. Boolean research, for all of its advantages, is only as good as the search terms you give it. If you do not know the legal principles involved, you cannot provide the correct search terms. You either get too many hits or miss the key ones. That is why you need to study the area of law first before you ask your word search questions.

All your computers do is merely give you that needle-in-thehaystack case. You need to know the law to ask the right question. The computer does not know the law; you need to.

The New School

Although I, Kathryn Neubauer Rosen, am sure many lawyers have grand memories of learning the legal research "fundamentals" as a spry twentysomething fledgling associate while that midnight whale oil burned late in the law firm library, times have changed. Dramatically. Progress has transformed not only legal research tactics, but also the expectations of junior attorneys.

As we are constantly reminded when we begin our legal career, our value is limited-we don't have the experience, we lack the wisdom of trial and error, and we have yet to accumulate a depth of knowledge in any legal specialty. What we can bring to the table is a sense of certainty. My approach to research is that I can be sure that I am providing any supervisor with every case that is remotely on point for the legal proposition at hand. I know I am not sending someone to the courtroom with the fear that I have forgotten any dagger to our main point. Sure, there is a fear that someone will bring up a case that is not precedential, out of jurisdiction, and remotely analogous, but there is no way to eliminate that desperate lawyer tactic.

While I respect my elders immensely, the simplest way to say it is this: I am sorry, you are wrong. The notion that, as you put it, junior lawyers don't "think" while doing research is anything but the truth.

In fact, the research process using computer services such as LexisNexis or Westlaw only prompts more creative thinking. What grouping of words gets me to some sort of interesting case? What web of cases is this one related to? After reading those cases, how can I adjust my search? How can I work backward and forward from the case I am on? How can I use these new analytic tools to know which case to read first, last, next, which to skim, which to delve deeply into, which has interpreted this very particular statute? Research has gone from being unmanageable waters to becoming more of a puzzle, where each step I take brings me closer to some new answer or brings up new questions that could help lead me to a creative solution.

Beyond all, my modern approach to the research process gives certainty. Certainty that I have not given you a case that has been abrogated, overturned, limited in some fashion, or simply ignored by the judge or judges you are presenting to. I have the knowledge beyond the case law-the knowledge of what tricks the other side may bring to the fore.

I know, for certain, that if they bring up a case you don't know or one that hurts our case in some manner, it is not a case that can possibly be relevant and the judge will know that as well, because the judge knows his or her own research would have revealed the same.

This seems a lot to accomplish for such a young junior attorney-but, alas, I can do all of this in a fraction of the time it would take me to pore over books in a library until sunrise. I can spend more time perfecting the argument, finding the creative analogies, or drafting the flawless court filing than flipping through irrelevant case law or tracking down a dusty old book in the corner. I find more than the needle in the haystack; I find the whole haystack and can quickly and effectively triage that wealth of knowledge for your benefit.

Simply, I do all the research you did, better, faster, and with more certainty. The tools are only getting better.

A New vs. Old Example

Let's take a common problem. A breach of contract for the sale of marijuana. The contract was entered into in California, but payment was to be made to the grower's owner in Alabama. Where can the lawsuit be brought? By whom? What law governs?

The old way: The first thing I do is read up on cannibus contracts. Where are they being enforced? How do different state laws intersect?

I begin my research journey by going to treatises. Law review articles. They help me see the issues of the problem. Not the answers. But the questions I need to ask.

One thing sadly dying out are the "stacks," those shelves after shelves of musty old books (all pre-legal marijuana) and volume after volume of law review articles. I get the advantage of thousands of scholars thinking about my problem in esoteric ways.

Those books and articles give me certain cases. From reading the cases, I go to the digests, which have headnote after headnote, each summarizing the cases. From there, I learn an issue is whether Alabama will respect a contract made in California for the sale of a good that is illegal in Alabama. Following that digest number, I collect a legion of cases. I read them, one after the other. Some are extraneous. But others provide gems of words I can use in my brief. Some uncover analogous facts. Piece after piece, the jigsaw puzzle of my argument and analysis comes together.

Often I find issues I would have never imagined. Needless to say, I have never dealt with this novel area of the law before. So, as I learn this law, I see other issues. Nuances of argument. I am analyzing. Something the artificial intelligence of an algorithmic computer cannot do. It only does word searches. Matches of keywords. It cannot imagine or think creatively. A computer will never replace Brandeis creating a new right of privacy. Which is why the old way is a better way.

The new way: First, I start by spelling the subject correctlyc-a-n-n-a-b-i-s, not "cannibus" (although I do take some comfort in knowing that a certain person doesn't know how to spell this word). Junior lawyers are skilled with spell-check, something it looks like older lawyers are still learning (even though Microsoft Word now conveniently underlines misspelled words with a bright-red squiggly line to alert the writer).

Because I have never come across cannabis contracts before, I first do some research in secondary sources. I use my chosen legal research tool and may do a general search, using search string aids to limit the results, such as using "w/10" to find "cannabis" and "contract" within 10 words of each other. I may also look in practice guides for "cannabis or marijuana or weed" contracts or business because I know that I need to use alternative words to capture all items that discuss my topic. I may even expand this beyond cannabis-specific research and look for contracts involving other drugs.

Next, I would see if Alabama or California has any statutes involving such contracts. If they do, I will read the case notes on each of those statutes and click on a few to get a sense of the cases these web directories thought were worth noting.

Throughout this initial research, I will keep a running list of notes on my computer, with hyperlinks to the sources I may need to revisit so I don't have to waste time finding the source later when and if I need to take a second look.

I then turn to case law. I normally already have some cases in mind at this point because I found them linked to my earlier research, but now I have enough knowledge to create a search string to get to a

better answer. In the search results, I can then start whittling down by using filters. Are there any decisions by the federal courts, by the California or Alabama supreme courts? Are there any cases in the last two years that may be more relevant?

Every time I read a case, I can do three things: (1) make sure the case is still good law and assess how it has been treated by the courts that have cited it, (2) check the headnotes and find cases that have similar law, and (3) readjust my search string as these cases change and morph my questions and I get more familiar with the law. Sometimes I change my research step because I realize it was completely wrong.

I find that headnotes can be one of the most useful resources in using an online database. When I select a headnote, the research database can give me a myriad of sources based on that specific headnote. I can then conduct a narrower search within that headnote, including limiting my search to a time frame, court, keyword, and whether the service determines how integral that headnote is to the particular case based on its algorithm. After all of this, I can go back and readjust the puzzle I have put together as a string of words using the search string tactics. That way, I don't miss a case just because I used a different form of a word or don't get too many results because I didn't structure it narrowly enough.

I then have a document full of notes, and I can take a step back. I am easily able to go back and reference any case that I now want to revisit or double-check whether one is directly on point on any combination of facts or terms. I am now ready to write, knowing with full confidence what is out there and what I can point to if any questions arise-all at the tips of my fingers from my home, the office, or wherever I may be at that moment.

The Old Way and New Way Together

It is clear that we won't agree on who has a better research process, but it does not seem that our techniques are so different after all. We both use headnotes, we both review treatises and secondary sources, we both read case law-it's the use of the resources to get there that is different.

Using the old way, a researcher gets the full picture of the law, but picking the wrong key number can lead the researcher astray. Those books the older way uses are months and often years out of date. What about the opinion that was issued yesterday? Only the computer can provide that answer to you.

Using the new way, at the stroke of a few keys, a researcher has all the research but can be pigeonholed to a specific phrase used, or the results can be so expansive the researcher is swimming in a sea of case law and doesn't know where to start.

Overall, the biggest difference is speed and certainty. While an older lawyer is walking into the library trying to figure out which treatise or key note to read, the younger lawyer already has a full stack of research and is certain there is nothing missed that is on point. The use of books and older research strategies can make you inefficient. Yet, the younger lawyer may miss the understanding gained from reading the full law to find the answers.

Both have their place.

Authored By

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