

## From the Editor: Working with Facts

I have used this space previously to discuss the teaching of legal research and the published texts available to legal research teachers. Legal research training is a subject that deserves our ongoing professional attention for a number of reasons. Certainly, it is a matter that concerns law librarians in all types of libraries: academic law librarians are involved directly in teaching law students to develop legal research skills; law firm, corporate, and governmental law librarians have to cope with the results of law school training efforts. Everyone seems to agree that many law students do not begin their professional lives with competent research skills.

Part of the problem is our need to develop a better understanding of how legal research is done in practice. We continue to have too little data on how lawyers actually research problems, information which would seem essential for developing better ways to teach them how to do legal research. It is an appropriate professional concern of law librarianship to improve our knowledge base in this area.

Consequently, I am pleased to see evidence of greater concern with the legal research process from law librarians and others. This issue of the *Journal* includes an article by Steve Barkan dealing with the implications of critical legal studies for our understanding of the legal research process;<sup>1</sup> the next issue is scheduled to include a major piece by Christopher and Jill Wren on the teaching of legal research. The Wrens, of course, are the authors of *The Legal Research Manual*, a text that challenges the traditional bibliographically oriented approaches to teaching legal research. A major premise of the book is that the library stage of legal research is only part of a larger research process. This larger process is based on an understanding of the relationships between the published sources of the law and the bodies that create law,<sup>2</sup> and an appreciation of the importance of gathering and analyzing the facts of a research problem prior to engaging in library research.<sup>3</sup>

Working with facts creates some intriguing problems for the legal research teacher. Fact-gathering and analysis are essential to effective legal research but are difficult to teach. This may be why our legal research

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1. Barkan, *Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies*, 79 *LAW LIBR. J.* 617 (1987).

2. See generally C. WREN & J. WREN, *THE LEGAL RESEARCH MANUAL* 1-19 (2d ed. 1986).

3. *Id.* at 29.

courses tend to place more emphasis on bibliographic instruction than on other aspects of the research process, such as the need to formulate good research hypotheses before the books are opened.

Regardless of how one feels about the Wrens' lack of emphasis on bibliographic instruction, their approach makes clear that there is a tie-in between fact analysis and effective use of the sources of law used in the library phase of research. But what does the Wrens' book provide as help in teaching effective fact analysis? What do other legal research texts have to say? Where else can the legal research teacher go for help?

What the Wrens do is to note and compare the systems for analysis of legal research problems provided in the promotional materials of the two major legal publishers: West and Lawyers Co-operative/Bancroft Whitney.<sup>4</sup> Both publisher systems ask the researcher to categorize the facts of the problem into several elements. Lawyer's Co-op has its TAPP rule, which asks the researcher to analyze the facts of a problem in terms of the Things, Acts, Persons, and Places involved;<sup>5</sup> West has a more complex, five-part system: Parties; Places and Things; Basis of Action or Issue; Defense; and Relief Sought.<sup>6</sup> The Lawyers' Co-op system is limited to categorization of the actual facts of the problem; some of West's elements deal with legal theories and tactical and procedural issues that might arise. The Wrens' book provides a fact analysis exercise using elements from both systems,<sup>7</sup> which is worth examining because it discusses other important parts of the analysis process, such as generalization and analogization, as well as categorization.

Other legal research texts do not pay much attention to techniques for analyzing fact situations. *How to Find the Law* mentions the West system in its coverage of indexes to digests, and notes the importance of choosing specific terms rather than general terms as access points to the indexes. Using the example of a person tripping on a lettuce leaf in a supermarket, the authors suggest that terms such as "supermarket," "slip," "fall," and perhaps "lettuce" will be more useful than a more general term like "negligence."<sup>8</sup>

The recent Little Brown text, *The Process of Legal Research*, poses its own list of four categories (like West's, mixing facts of the case and legal aspects of it): Item, Location, or Subject Matter; Persons or Parties; Legal Theories; Relief Sought.<sup>9</sup> The book then offers the advice: "Until you are

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4. *Id.* at 32.

5. THE LIVING LAW 1987/1988, at 9 (1987).

6. WEST'S LAW FINDER 22 (1987).

7. C. WREN & J. WREN, *supra* note 2, at 33-36.

8. M. COHEN & R. BERRING, HOW TO FIND THE LAW 120-22 (8th ed. 1983).

9. C. KUNZ, D. SCHEDEMANN, C. ERLINDER & M. DOWNS, THE PROCESS OF LEGAL RESEARCH 4-5 (1986).

experienced in analyzing facts, you should use these categories to identify facts that may be relevant. (Otherwise, your research may be frustrating and time consuming.)”<sup>10</sup> However, when this advice is applied to the example of an auto accident case involving a dispute between two people who disagree on who is responsible for the injuries, the authors suggest that the best starting point might be with “words describing general legal theories, such as tort, negligence, and recklessness.”<sup>11</sup>

*Fundamentals of Legal Research* also has its own system of categories for analysis, called the TARP rule: T for Thing; A for Cause of Action; R for Relief; and P for Persons or Parties.<sup>12</sup> The TARP system itself is a carryover from earlier editions of the book written by Ervin Pollack.<sup>13</sup> What the current authors have added to the book is a general summary of research procedure in the final chapter,<sup>14</sup> which emphasizes the importance of working with and analyzing the facts of the case and how to tie that analysis into library research. The presentation identifies each stage as part of a process in ways similar to what the Wrens suggest.

But, in general, these books say pretty much the same thing: factual analysis is a matter of fitting the facts of the case into one or another recommended scheme of categories. The act of categorization will identify which facts are relevant and allow the researcher to frame issues and organize the further steps of the research process. Yet, is the process quite that easy? Are relevance, ranking, and order really going to become apparent simply by classifying the raw facts of a case under one of several headings or by anticipating a legal theory or tactic that may be part of the case?

Since the legal research books were of limited help, I turned to several of the current texts on legal writing to see whether those books dealt with the question more comprehensively. I found little, which indicates that teaching law students how to work with facts is a neglected area for writing teachers, as well as for teachers of research. Some examples: Rombauer’s *Legal Problem Solving*, which I thought might be helpful, has a few paragraphs on the importance of identifying significant facts when reading a court opinion, and about “abstracting” from particular facts to more general categories;<sup>15</sup> Dernbach and Singleton’s *A Practical Guide to Legal Writing and Legal Method*, an overlooked, but excellent, little introductory

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10. *Id.* at 5.

11. *Id.*

12. R. MERSKY & J. JACOBSTEIN, *FUNDAMENTALS OF LEGAL RESEARCH* 9-10 (1987 ed.).

13. *See, e.g.*, E. POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* 14-15 (3d ed. 1967).

14. R. MERSKY & J. JACOBSTEIN, *supra* note 12, at 536-44.

15. M. ROMBAUER, *LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH AND WRITING* 35-37 (4th ed. 1983).

book on legal problem-solving for law students, was also disappointing on fact analysis, but good on organizing legal issues for research.<sup>16</sup>

What I found to be most helpful was somewhat of a surprise; it was a text from West by William P. Statsky and R. John Wernet, Jr., *Case Analysis and Fundamentals of Legal Writing*,<sup>17</sup> which I had examined before, but had never taken too seriously. William Statsky is a prolific text writer, with current works on legal research and writing, statutory analysis, and paralegalism. I tend to be a little skeptical of his books—in an earlier review I questioned the value of providing photographs of law book spines in a legal research manual.<sup>18</sup> I also wondered a bit about the utility of a work, such as the first edition of the *Case Analysis* text, which appeared to devote 180 pages to telling a student how to brief a case.<sup>19</sup>

Yet, as is the case with Statsky's legal research text, this book contains some very good material. For factual analysis, it provides methods, examples, and exercises to help students identify significant facts, work with facts, and organize them for research. The 1977 first edition of the book may be a bit better for this than the second edition, published in 1984. In the revision the book was reorganized, and some of the material helpful for fact analysis appears to have been removed. Both editions are written to help students analyze opinions, but much of what these authors say about fact analysis in that context can be used in fact analysis and organization for legal research problems as well. The materials should be helpful to students learning how to put the TARP, TAPP, and other classification systems into operation. Statsky and Wernet provide guidance in categorizing terms through exercises that help students learn how far to generalize or broaden the specifics of a research problem before they start framing issues and begin library research.

One Statsky and Wernet problem is based on the statement, "At the time of the accident, defendant was driving a blue 1967 Ford Falcon."<sup>20</sup> Following the categories of any of the classification systems, a *thing* for this problem is obviously the "blue 1967 Ford Falcon." But exactly how should the Falcon best be characterized to analyze the problem and do the research? The systems themselves provide little help for the process of categorization. Certainly, a researcher moderately skilled in using proximity connectors could sit down at a LEXIS or WESTLAW terminal

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16. J. DERNBACH & R. SINGLETON, *A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD* 32-40 (1981).

17. W. STATSKY & R. WERNET, *CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING* (2d ed. 1984).

18. See *From the Editor: Reading Legal Research*, 79 *LAW LIBR. J.* 1, 4 (1987).

19. W. STATSKY & R. WERNET, *CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING* 101-280 (1977).

20. *Id.* at 158-59.

and pull up cases dealing with blue 1967 Falcons. Such an approach would not work in the West digest system, but this fact is probably at too high a level of specificity to be legally significant anyway. Among the things that the beginning researcher needs to learn early on is that facts of legal research problems may need to be generalized to some degree in order to be useful for issue framing and access to published law. The student needs guidance on how far to generalize and on the implications of choices made in the generalization process. Statsky and Wernet do a pretty good job of this. For the above example, they show that the blue 1967 Ford Falcon is a part of a series of broader categories, such as:

- all 1967 Ford Falcons
- all 1967 Ford automobiles
- all Ford automobiles
- all automobiles
- all motor vehicles
- all vehicles.

They note also that choice of category is significant to the result. If there is no applicable law for automobiles, there may be one for motor vehicles; if the facts specified a truck, perhaps a law on automobiles would not apply.<sup>21</sup>

Working with facts is something that we need to think a lot more about in the course of designing legal research instruction, not only in teaching manual research procedures, but as we consider how to teach computer-assisted legal research more effectively. Where is competent fact analysis, formulation of good research hypotheses, and correct choice of entry more important than in an unindexed system? At the present time, we do not have teaching materials for CALR that seriously consider the problems of fact analysis for computer-assisted legal research. The current (1986) *Learning LEXIS* pamphlet says nothing about it. The section "Developing a Search" in the *Quick Reference* booklet says to "[l]ist the most important words that express your topic" and asks, "Do you need to search for different forms of a word?"<sup>22</sup> But that is a reminder to use universal characters. The new LEXIS training script for law students is a little better, suggesting the need to isolate elements of the research problem and to think about relevant words for research.<sup>23</sup> But that turns out to be really a reminder to look for synonyms; it doesn't focus on whether

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21. Statutory interpretation teachers are fond of the Supreme Court case of *McBoyle v. U.S.*, 283 U.S. 25 (1931), which turned on whether an airplane was considered a "self-propelled vehicle not designed for running on rails" under a federal statute prohibiting taking stolen autos across state lines.

22. MEAD DATA CENTRAL, *QUICK REFERENCE 2* (1986).

23. INTRODUCTION TO THE LEXIS SERVICE: A TRAINING SCRIPT FOR LAW STUDENTS TO USE DURING HANDS-ON TRAINING 6-7 (July 1987).

broader or narrower terms should be used, which may be as important for effective computer-assisted research as it is for book research.

*WESTLAW for Law Students* is much the same. Query formulation is acknowledged to be "the heart of WESTLAW research,"<sup>24</sup> and the student is urged to search for unique terms. Yet, the only specific advice given is to consider using synonyms for terms pulled out of the given fact statement and to use the devices for automatic generation of alternative and expanded versions of terms used.<sup>25</sup> As with LEXIS, the advice given here is largely technical, emphasizing one limitation of the system (its literalness) and a capability (the power of the root expander and universal character). Neither system's materials focus on the problems of analogy or on whether broader or narrower search terms should be selected, aspects of fact analysis that are as important for effective computer-assisted research as they are for research in books.

The problems of analyzing facts are an area of concern for those of us who are involved in training others to do legal research, whether it be computer-assisted or manual. Statsky and Wernet's book provides a place to turn for some help in teaching students about working with facts. The Wrens' book is another. The overall lack of materials for teaching factual analysis is evidence that we need to know more about the actual process of legal research in order to teach beginning researchers. That is why the work of Chris and Jill Wren and others in the field is important; it forces us to think a little harder about the legal research process than we do ordinarily, and it makes us consider what it is we are actually talking about when we teach legal research.

Richard A. Danner

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24. *WESTLAW FOR LAW STUDENTS* 11 (2d ed. 1985).

25. *Id.* at 12-14.