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# Research Analysis and Planning: The Undervalued Skill in Legal Research Instruction

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# Research Analysis and Planning: The Undervalued Skill in Legal Research Instruction<sup>\*</sup>

Robert M. Linz<sup>1</sup>

## **ABSTRACT**

This paper describes a method of research analysis and planning for legal problems. It introduces the framework of research plan, log and product and provides a detailed research plan and log which students can use as a template for learning research. The article suggests how to teach the method in legal research classes, shares some of the author's experiences in teaching the method and addresses some possible criticisms of this approach.

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## Introduction

When I first taught Advanced Legal Research, I treated research analysis and planning almost as an afterthought. It was contained within a chapter on research methods in the book I was using, and so I thought I should cover the material. I also thought that one lecture would be the end of it. However, as the semester continued, and as assignments were completed, I realized that research analysis and planning were at the heart of students' inability to do effective and efficient research. Taking note of the deficiency, I kept improving how I taught "research methods" to my law students. The simple single lecture morphed into two lectures; then lectures and an assignment; and finally three class sessions including an in-class group exercise and three assignments.

I was determined to spend more time on teaching research process. During the first class session, I asked the students why they signed up for an advanced legal research class, which is not required at the University of Colorado Law School. Though the wording of the answers varied somewhat, almost all of the answers could be summarized as the law students lacked confidence in their research skills. It is an honest self-assessment. Given the myriad of resources and the opaqueness of the legal system and authority to these lawyers-in-training, it is right and proper that students should doubt their ability to perform adequate legal research. In addition to learning the sources of law and their publications, the cure for this doubt is learning a sound and

comprehensive strategy to navigate the corpus of legal materials. This is the work of research analysis and planning.

In this paper, I discuss a general method of legal problem analysis and planning. There are both general and particular research methods. The general method differs from research methods or techniques for individual resources. A particular research method may be how to create effective terms and connectors searches on Westlaw Next to locate cases on topic; how to use an index or table of laws in a treatise; or how to use the advanced searching features of Google to search within a specific domain. But the general method refers to the overall approach to solving a legal problem. It involves analysis and knowledge of the legal system as well as familiarity with available legal resources given the problem constraints.

While research analysis and planning has not escaped the attention of legal research textbook authors, there has been very little scholarship on determining and developing ideal planning and research documents as well as considerations on how to teach it. In Part I, I will explore the literature identifying the importance of planning to the research process. I will review the MacCrate Report, the AALL “Principles and Standards for Legal Research Competency” and the two Boulder Statements on Legal Research Pedagogy as well as review the little published literature on this topic. In Part II, I will review the development of a general approach to legal problem analysis and planning. In Part III, I will introduce a framework researchers can use to analyze a legal problem, develop a research plan and track research results. In Part IV, I will discuss various issues in

teaching this method. These issues include when to teach research methods in an advanced legal research course and difficulties in evaluating work product. Finally, in Part V, I will address some difficulties with research analysis and planning and muse about its validity in an online world.

## Part I: The Research Plan in Legal Research Education

### Recognizing the Need for Legal Research Analysis and Planning

In 1992, the American Bar Association released a report examining how well legal education prepares law students for the practice of law. This report is entitled the “Report of The Task Force on Law Schools and the Profession: Narrowing the Gap” but is more commonly known as the MacCrate Report named after the chairperson of the task force.<sup>3</sup> As part of its work, the task force issued a statement of skills and values of legal professionals. In this statement, the task force identified ten fundamental lawyering skills, among them legal research. In the introduction to Skill § 3 on legal research, the task force states that “a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design.”<sup>4</sup> Skill § 3.3

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<sup>3</sup> AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992)[hereinafter *MaCrate Report*], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report\).authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf).

<sup>4</sup> *Id.* at 157.

provides details on “[d]evising and [i]mplementing a [c]oherent and [e]ffective [r]esearch [d]esign” which includes among other things identifying issues, assessing time and financial constraints, and updating research.<sup>5</sup>

The American Association of Law Libraries (AALL) has addressed legal research skills in a document titled the “Principles and Standards for Legal Research Competency.”<sup>6</sup>

Approved by the AALL Executive Board in 2013, this document lists five principles for legal research competency. Principle II states that “a successful legal researcher gathers information through effective and efficient research strategies.” A competent researcher identifies legal issues to be researched; creates an appropriate research plan for each issue; evaluates available resources in which to locate authority; and validates the completeness and currency of resources.

### The Boulder Conference

In recent years, there has been a renewed interest in legal research instruction. In 2009, a group of law librarians gathered at the University of Colorado Law School in Boulder to develop a legal research pedagogy. At the two day conference, law librarians read and critiqued research papers and developed a statement on legal research education.<sup>7</sup>

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<sup>5</sup> *Id.* at 160-63.

<sup>6</sup> AM. ASS’N OF LAW LIBRARIES, PRINCIPLES AND STANDARDS FOR LEGAL RESEARCH COMPETENCY (2013), available at <http://www.aallnet.org/Documents/Leadership-Governance/Policies/policy-legalrescompetency.pdf>.

<sup>7</sup> For information about the goals and work product of the conferences, see *Boulder Conferences on Legal Research Education*, <http://lawlibrary.colorado.edu/boulder-conferences-legal-research-education> (last visited January 12, 2015).

The goal of the statement titled “The Boulder Statement on Legal Research Education” is to express a “comprehensive approach to legal research education” that significantly “improve[s] the preparation of law students for their legal careers.”<sup>8</sup> Among its aspirations is the objective that students “will synthesize information about legal systems and resources to identify the best research plan for a given situation.”<sup>9</sup> In the second Boulder Conference held at the University of Colorado in 2010, the conference attendees issued the “Signature Pedagogy Statement to define in more concrete terms the elements of a signature pedagogy.” Legal research involves analytical skills. Effective legal research instruction helps students “[s]ynthesize knowledge of the legal resources and institutional structures to implement research design, and evaluate and communicate the results.”<sup>10</sup>

The overall objective of the Boulder Conference is to demonstrate that legal research is an analytical skill and that in order for it to be done well, the researcher needs to engage in a process of legal and research analysis. The research plan is the documented

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<sup>8</sup> THE BOULDER STATEMENT ON LEGAL RESEARCH EDUCATION (2009), *available at* [http://lawlibrary.colorado.edu/sites/default/files/images/docs/2009\\_boulder\\_statement\\_on\\_legal\\_research\\_education.pdf](http://lawlibrary.colorado.edu/sites/default/files/images/docs/2009_boulder_statement_on_legal_research_education.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> BOULDER STATEMENT ON LEGAL RESEARCH EDUCATION: SIGNATURE PEDAGOGY STATEMENT (2010), *available at* [http://lawlibrary.colorado.edu/sites/default/files/images/docs/2010\\_boulder\\_statement\\_signature\\_pedagogy.pdf](http://lawlibrary.colorado.edu/sites/default/files/images/docs/2010_boulder_statement_signature_pedagogy.pdf).



outcome of the researcher’s problem analysis and resource strategy to solve the legal problem presented.

While these documents establish the importance of teaching and employing a research strategy and research plan, they do not describe what a research plan contains or how to analyze a legal problem in order to research it. For this information, we turn to legal research textbooks and scholarship.

## Part II – Research Planning in Legal Research Literature

Despite the importance attributed to research analysis and planning from MacCrate, the AALL Principles, and the two Boulder Statements, there has not been a great deal of scholarship addressing this skill. Research analysis and planning and research methods are primarily addressed in legal research texts.

### Legal Research Textbooks

In *Principles of Legal Research*,<sup>11</sup> Olson includes a discussion of research methods in two sections in the first chapter. Most of the discussion in the section titled “Research Methods” deals with particular research techniques.<sup>12</sup> This includes techniques for efficient online research as well as tips for print research. In the section titled “Handling a Research Project” Olson introduces his readers to strategy considerations when given

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<sup>11</sup> Kent Olson, *Principles of Legal Research* (West 2009). This text is the successor to *How to Find the Law*, Morris L. Cohen et. al (West Publishing Co., 9<sup>th</sup> ed. 1989).

<sup>12</sup> *Id.* at 8-24.

a new legal problem to research. This section contains the usual advice about using secondary authority when unfamiliar with an area of law, updating and validating research and suggestions about when to stop researching.<sup>13</sup> The information provided is helpful but does not provide offer a structured analysis or approach to researching legal problems.

In *Fundamentals of Legal Research*, Barkan introduces a more formal, structured approach to the legal research process.<sup>14</sup> This method derives from the work of Ervin H. Pollack, who authored the first edition of the text.<sup>15</sup> *Fundamentals* provides researchers with a four step approach. The four steps are to (1) identify significant facts; (2) formulate the legal issues to be researched; (3) research the issues; and (4) update the research. It also contains advice on when to stop researching.<sup>16</sup> These steps form the essence of a research plan, though a template or structure is not presented. That type of structure is provided in the next chapter.

Barkan addresses research logs in Chapter 3 on legal writing.<sup>17</sup> The research log is viewed as a tool to assist in the writing process. *Fundamentals* provides a sample log. However, the sample appears to be more of a plan than a log.<sup>18</sup> The sample provides the information a researcher would gather to create a research plan. This information

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<sup>13</sup> *Id.* at 24-26.

<sup>14</sup> Steven M. Barkan et. al., *Fundamentals of Legal Research*, (Foundation Press 2009).

<sup>15</sup> Ervin H. Pollack, *Fundamentals of Legal Research*, (The Foundation Press, Inc. 1956).

<sup>16</sup> Barkan, at 15.

<sup>17</sup> This chapter was authored by Mary A. Hotchkiss.

<sup>18</sup> BARKAN ET AL., *supra* note 14, at 29.

includes the key facts, issues and knowledge assessment. Barkan points out in this chapter that researchers need to take into account time and money considerations as well as the required research product. The difficulty with the research methods materials presented in Barkan are that research planning and implementation are segregated from one another and not seen (or at least presented) as a complimentary continuity.

Both Olson and Barkan are law librarians. Legal writing faculty also author legal research textbooks and typically write more extensively on the topic of research analysis and planning in their textbooks. I suspect this difference can be explained by the starting point of the authors. Traditionally, law librarians have approached teaching legal research as teaching of legal bibliography. Researchers learn analysis in other parts of the law school curriculum. The researcher applies that knowledge to the legal research resources to determine which resources to use and when. Furthermore, law librarians are hesitant to engage in any activity that might be construed as giving legal advice. Perhaps this, too, plays into law librarians' reluctance to give guidance on how to analyze legal problems, even if it is to plan how to effectively research a problem.

Legal writing instructors, on the other hand, teach legal research as part of the writing process. Legal research is one step in the overall effort to convey legal advice in a written product. Both writing and research require analysis, a skill which legal writing instructors are required to exercise in the scope of their teaching duties.

In the seventh edition of *The Process of Legal Research*, Kunz provides a comprehensive method of research analysis in Chapter Two.<sup>19</sup> She divides the analysis and planning process into four phases and eight cognitive tasks. The phases are Curiosity, Content and Context, Consultation, and Closure.<sup>20</sup> These phases are a high level analysis of what researchers do when they engage in legal problem solving. Each of these four phases is characterized by one or more cognitive tasks.<sup>21</sup> In the Curiosity phase, which is depicted by the researcher's learning about the problem, the cognitive tasks are to (1) learn and react to the client's situation, and (2) develop research terms and research issues. In the Content and Context phase, the legal researcher assesses potential resources to answer the issues. Consequently, the cognitive tasks in this phase are to (1) list and rank potential authorities and (2) assess available sources. These tasks require researchers to consider available time and financial constraints as well as attributes of the tool itself. In the third phase, Consultation, the researcher uses information from the first two phases to research the problem. The cognitive steps in this phase are to (1) use the terms and issues to locate pertinent passages; (2) study pertinent passages; and (3) research backwards and forwards from major authorities. It is in this phase in which one would research the problem, using the ordered resource list as a guide through the legal research literature, and track the success of that research in a research log. Kunz notes that the research process is not linear, but that a researcher

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<sup>19</sup> CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* (7th. ed. 2008).

<sup>20</sup> *Id.* at 27.

<sup>21</sup> Kunz provides a detailed discussion of these phases and tasks in Chapter 2.

may return to a resource later in the research process or use a resource not initially considered if new terms or authority presents itself. The final phase is Closure and the cognitive skill is knowing when to stop researching.

Kunz's analysis of the research process is quite comprehensive. Her textbook is complete with research templates for the various resources encountered in the legal research process and does include a "general research" template, though there is no corresponding "general research" log. Interestingly, the eighth edition of Kunz's book, which is no longer written by Kunz, discards this detailed structure in favor of an abbreviated research planning phase. Some of the original concepts are retained – for example, reacting to the client's situation – but the rest is removed. The new material also discards a formula by which researchers can create a research plan and log to guide their research.<sup>22</sup>

Sloan, in *Basic Legal Research: Tools and Strategies*, writes extensively about research planning.<sup>23</sup> She introduces the topic in Chapter 1 and then more fully explores it in Chapter 11. In Chapter 1, Sloan lists six steps in the research process. These six steps include (1) defining the scope of the project and issues; (2) generating a list of search terms; (3) planning a research path for each issue; (4) doing the research; (5) evaluating

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<sup>22</sup> CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH: AUTHORITIES AND OPTIONS* (8th ed. 2012). Although Kunz is listed as the leading author, the current authors point out in the books "Acknowledgements" on page xxiii that Kunz "does not in fact continue to work on it."

<sup>23</sup> AMY E. SLOAN, *BASIC LEGAL RESEARCH* (5th. ed. 2012).

research results and updating them; and (6) revising search terms and research plan as necessary to fully understand and apply the law. Sloan includes in this introduction an assessment of the work product desired and suggested approaches through the resources. Sloan devotes Chapter 2 to teaching researchers how to develop a list of keywords.

In Chapter 11, Sloan provides a more comprehensive discussion of the research plan. She provides researchers with three steps to create a plan: (1) obtaining preliminary information about the problem; (2) planning the steps for research; and (3) working effectively in the library and online. In Step 1, researchers are directed to assess the time and monetary constraints; determine the type of desired work product; identify the jurisdiction; consider available secondary authority; and consider consulting existing work product for the problem. In Step 2, researchers are directed to identify the issue statement(s); develop search terms; and outline a search strategy. In developing a search strategy, the researcher identifies the various research resources that will lead him to the legal authority. Finally, in Step 3, researchers are encouraged to work effectively. In this step, Sloan is suggesting that researchers keep a log of their research work, noting such items as the resource searched, the method used to locate the information; the value of the information; and the validity of the information. In this chapter, Sloan provides research flowcharts for different resources (e.g., state statutory research, common law research, procedural research). She also provides a comprehensive checklist for developing a research plan, using the three basic steps noted above as the broad areas of

the plan. While she does not provide an actual plan template, researchers can certainly create their own detailed plan based upon the information provided by Sloan.

### Recent Scholarship

There have been two recent papers that have discussed some aspect of research strategy. In 2009, Moye authored a paper discussing using a metaphor of washing clothes to teach a practical strategy for approaching a research problem.<sup>24</sup> While the paper is not focused on the method so much as how to best teach the method, Moye does provide details about the strategy he teaches – identifying facts, developing issue statements, selecting appropriate resources to research the issues, and updating.

Osborne published a paper in 2013 which promoted the research plan as the capstone learning experience in a legal research course.<sup>25</sup> The paper describes the importance and value of the research plan in the process of legal research. It is, however, short on providing details about the components of the plan and a template for the research plan. Also, there is no discussion about tracking research in a research log. Osborne

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<sup>24</sup> Allen Moye, *Tubs, Buckets, and a Variety of Lumber: Developing a Strategic Approach to Legal Research*, 28 LEGAL REFERENCE SERVICES Q. 181 (2009).

<sup>25</sup> Caroline L. Osborne, *A Methodical Approach to Legal Research: The Legal Research Plan, an Essential Tool for Today's Law Student and New Attorney*, 32 LEGAL REFERENCE SERVICES Q. 54 (2013).

does provide a good overview of the development of research methods in legal research textbooks.<sup>26</sup>

While not addressing a general approach to researching legal problems directly, other authors have addressed different aspects of research methods. Cordon tackles the topic of task mastery in his article on legal research instruction.<sup>27</sup> Callister examines the role of schemata in teaching complex problem solving skills.<sup>28</sup> Schemata provides researchers with cognitive frameworks by which they can understand the problem and begin to forge a solution.

## Part III – A Method of Problem Analysis and Research

### Planning

The presentations of research analysis and planning in the textbooks are either too shallow or too dense. While generally providing sound advice, the materials provided in the law librarians' texts lack sufficient detail to give a detailed guide to students new to research methods. The instruction provided by Kunz and Sloan is thorough and

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<sup>26</sup> *Id.* at 58-64.

<sup>27</sup> Matthew C. Cordon, *Task Mastery in Legal Research Instruction*, 103 L. LIBR. J. 395 (2011).

<sup>28</sup> Paul D. Callister, *Thinking Like a Research Expert: Schemata for Teaching Complex Problem-Solving Skills*, 28 LEGAL REFERENCE SERVICES Q. 31 (2009).



comprehensive. Researchers will understand both the process and components of legal research but may not glean the structure of the research process for the detail provided.

As I have taught these materials and have asked students to generate research plans and logs, however, I have found students are simply not certain what to do. They really do not know what a research plan or log should contain and how to use it.

Understandably, the textbook authors advise that students need to develop their own style of research plan and log in terms of how the information is captured and with what method the research is recorded. Ultimately, this is true but at the early stage of learning the process, the students need more guidance.

Students are skeptical of the value of the plan or log. As has been noted, today's newer generation of legal researchers tend to devalue planning and resort to immediate keyword searching in an online database or Google.<sup>29</sup> The pause to plan, much less to write down the plan and record their research, strikes the law students as a tremendous waste of time and a tedious academic exercise. The challenge is to provide students with a more fluid and flexible planning and recording system while still retaining the completeness necessary for proper problem analysis.

In an effort to present a simplified structure which researchers can use as a template for research, I present the research process as the effort of creating three documents: (1) Research Plan; (2) Research Log; and (3) Research Product. Teaching the same basic

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<sup>29</sup> Osborne, *supra* note 25, at 62-63.

process as presented in the legal research textbooks, I present the elements of the planning process in a different conceptual organization. Finally, I also use the Interrogative Pronoun method<sup>30</sup> for keyword development as I have found this easiest to understand and flexible for most problems, though certainly not perfect.

## Research Plan

The first step in researching a legal problem is understanding the legal problem to be researched. This task is undertaken in the planning phase of legal research, and the end result of this phase is the creation of a Research Plan. With a properly prepared Research Plan, the researcher will have confidence that she is checking the appropriate resources to find the legal authority to answer the right issue.

### *Step 1 – Problem Analysis*

There are two steps in developing a Research Plan. In the first step, the researcher thoroughly analyzes the problem to discover the issues, jurisdiction, authority, and key facts presented in the problem.

- **Issue.** The legal issue or issues to be researched. While identifying the legal issue takes experience, it is important to do so that the researcher can determine which law addresses the client's problem.

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<sup>30</sup> This method directs researchers to use the pronouns Who, What, When, Where and Why to parse the legal problem. This method is also referred to as the Journalism or Journalist Method.

- **Jurisdiction.** This is the jurisdiction in which the problem arises and is controlling. Jurisdiction may be federal, state or local. This is important so that the researcher can know which law is binding and which law is persuasive.
- **Area of Law.** This part of the plan is often less clear to researchers. In identifying the “area of law” a researcher is determining under which legal subject area the problem arises. For example, is this a torts problem or a contracts problem or an agency problem? This is important because different types of law are predominant for different subject areas. Some subject areas are likely to be controlled by statute while other common law areas by judicial decisions. Identifying the subject area prepares the researcher to be certain to check for that type of authority when doing research.
- **Key Facts.** Not all facts presented in a problem are legally significant in that, they do not give rise to a legal claim. The researcher’s task is to determine which facts are important for resolving the problem and may serve as useful research terms.

In this first step, the researcher also develops a list of search terms to use in legal resources. There are various shorthand methods researchers have created to develop this list of search terms. One method is called the Interrogative Pronoun Method. In

this method, the researcher queries the facts of the problem and asks the “What – Who – When – Where –Why” of the problem.<sup>31</sup>

- **What.** What has happened? What is involved? What are the things or objects in the problem?
- **Who.** Who are the individuals or entities involved in this problem? What are the relationships between these entities? Are there any legally significant relationships?
- **When.** When did the events take place, or are they to take place at an unknown future date? The answer to this question determines whether researchers need to find current law or historical law.
- **Where.** Where did the events take place? Is that location in itself legally significant?
- **Why.** Why is this matter being brought to the researcher? What are the parties seeking? Why is it important? Why is it being litigated or likely to be litigated?

Some legal researchers use other approaches to problem analysis. Other models include the TARP method (Things-Actions-Relief-Parties) and TAPP method (Things-Actions-Persons-Place). The American Association of Law Libraries promotes JUST-ASK (Jurisdiction-Useful Tips-Scope-Terms of Art-Acronyms-Sources-Key Cost Constraints).

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<sup>31</sup> Although the Interrogative Pronoun method starts with Who, not What, I have found that the initial question to be asked of the problem is what happened and then determine who is involved. Hence, I switch the first two pronouns.

Essentially, all of these approaches direct the researcher to get at the same basic information about the problem in order to research it. I have found the Interrogative Pronoun method is easiest to understand and use.<sup>32</sup>

### *Questions and Assumptions*

As the researcher considers the problem, she will have questions about the problem and need to make certain assumptions about the problem. The researcher should list those questions and assumptions in the Research Plan. If possible, the researcher should confer with the attorney or client to have those questions answered and assumptions confirmed. If not, as the researcher conveys her research results, she should note on what assumptions the work is based.

At the conclusion of this analysis, the researcher will have an understanding of the problem and a list of search terms to use. The search terms can be combined to formulate search phrases which can then be tailored to search for particular facts or legal concepts in the legal research literature. Online databases may allow the researcher to pose the search queries in plain language. This is typically how researchers enter search terms into Google. But online databases also allow users to create more sophisticated and precise searches using Boolean operators. The

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<sup>32</sup> Callister, *supra* note 28, at 35. Callister presents a form of this approach as a “working the problem” schema. Notably, it includes the adverb, “how” by which researchers considers issues of time, cost and research product.

researcher should check the database's online help pages to determine which method would work best and how to formulate those searches.

### *Step 2 – Resource Strategy*

In the second step of the Research Plan, the researcher develops a Resource Strategy to find the legal authority that addresses the issue(s) raised in the Problem Analysis step. A Resource Strategy is simply a listing of those resources – statutory codes, treatises, law reviews, practice guides, case law databases, regulatory codes, etc. – that will lead the researcher to find all of the relevant applicable authority for the legal problem. Ideally, the resource should be listed as specifically as possible. For example, if a step in the resource strategy is to check the state statutes, it would be better to list that as to check the Colorado Revised Statutes, if the problem involves Colorado statutes. Sometimes, it may only be possible to identify a type of resource to use. For example, a step in the resource strategy may be to check for a jurisdictional practice treatise instead of a specific title that the researcher may not know about. There is one additional item to include in the Resource Strategy – the search terms. For each resource, the researcher should list the search terms or phrases that will likely succeed in that resource. For a print publication, that might mean identifying terms to use in the index or table of contents. For an online publication, that might mean search phrases written using Boolean operators for use in the search field.

This list of resources should be put into the order that is most logical for the researcher to understand the law and to find the law. That is to say, the researcher is likely to start

research by consulting secondary authority resources and then work towards primary authority resources. However, the Resource Strategy will vary from researcher to researcher. It will be based upon her experience in the subject area as well as the search terms derived from the research problem. Whatever strategy is used, however, it must include consulting those resources that contain the primary authority most likely to address the legal issue.

#### *Resource Constraints*

There are a few additional factors that will impact the Resource Strategy. The first is the amount of money available to spend on the research project. A more limited budget might dictate that expensive subscription-based resources, such as Westlaw Next and Lexis Advance, are unusable for the project. Rather, the researcher may be forced to use free publications of law.

The second is the amount of time available for the project. An answer that is expected to be produced in a few hours or days may force the researcher to consult certain key resources instead of performing an exhaustive survey of all available resources. These two considerations may require that the Resource Strategy use a certain set of resources instead of another.

#### *The Research Plan Document*

When joining the two steps in the Research Plan, the researcher can produce a written document to guide the research process. Appendix 1 contains a sample template. Again, the template provides a suggested resource strategy. The actual resource strategy will vary from researcher to researcher and problem to problem. It may not always be necessary to produce a written research plan, especially for simpler problems. However, for more complicated research problems, or problems that will be researched over a long period of time, committing a research plan to paper can be quite helpful. Regardless of whether or not the plan is written, the researcher should always pause before beginning research and compose a thoughtful plan of action.

### Research Log

Once the Research Plan is complete, the researcher can begin working the plan. This is where the Resource Strategy is put into action. The researcher can turn to the Resource Strategy and start with the first step listed. And then proceed to the second step and so on. However, as research is conducted, the researcher may uncover new information – cases, search terms, citations - that should be pursued. This, too, is part of the research process. It is a continuation of the analysis of the problem. Those new leads should also be followed. As the original and new plan evolve, it will become difficult to keep track of what resources have been researched, when they were researched and what was learned from them. To solve this problem, researchers use a Research Log.



The Research Log is simply a record of the research process. It should contain some basic elements including the resource searched; the terms used to search the resource; the date the resource was searched; the relevant findings from the resource; citations and leads derived from the resource; and the currency or validity of the resource or authority.

- **Resource.** The resource that was searched. This should be the particular title of the publication or the database. Examples can include the “Colorado Practice Series, Volume 9” or “Colorado Cases on Westlaw Next.”
- **Search Terms.** These are the actual search terms used in the resource. This entry should also include the number of results retrieved. This indicates how successful the search was and what other search terms to try.
- **Date.** This is the date when the resource was searched. This will be helpful for updating your research.
- **Findings.** These are the researcher’s notes about what was found in that resource that was or was not helpful to understanding and solving the legal problem.
- **Citations and Leads.** This records citations that should be pursued, or steps that should be taken. Some researchers may put such next steps in a different font color to draw their attention to the need to complete the step before finalizing the research.

- **Validity and Currency.** All legal authority needs to be checked to ensure that it is still valid. In this step, the researcher notes whether the cases, statutes and regulations are still the current statements of the law. For secondary authority, this information would include the last date the publication was updated.

While researchers should develop their own mechanism to capture this information, one approach is to record it in a spreadsheet. Appendix 2 contains a sample Research Log. This log was created in Microsoft Word using the table feature. It is quite detailed, and this level of detail may not be necessary for all research problems. Once the process and type of information to be noted is learned, the researcher should develop her own method of tracking her research that is both complete and comfortable to use. Other options might include Microsoft OneNote or Evernote or mind mapping software in addition to simply making notes on a legal pad.

Initially, the Research Log will be an annotated Resource Strategy. But as is noted from the above comments about the process, the researcher may add steps to the initial plan or abandon steps from the initial plan. Either outcome is part of the research process. The key is to record the actual research so that researchers can ensure all appropriate resources were checked. A good rule for a well-written research log is that it should contain sufficient detail so that another researcher could continue researching the problem using that log without having to re-research something because he could not determine if it had been done or done correctly.

## Research Product

The final document in the planning process trilogy is the Research Product. It is both the starting point and ending point in the research process. At the start of the process, the researcher needed to take into consideration the type of work product to be produced. Was it a client letter? Was it a comprehensive review of the issue? Was it advice given to a client in a consultation by a senior attorney? The audience and comprehensiveness of the product was taken into account at the start of the research process. This information played a role in determining the selection of resources. Now, at the end of the process, the researcher needs to summarize the research findings into the product. Indeed, being able to complete the product is one indication that the research phase of the process is complete. If the researcher cannot coherently write the memo or brief or client letter or give advice, then this likely indicates that the research is incomplete. It may also indicate that the researcher does not understand what was uncovered, but at some level this too is a research problem. If the researcher is unable to analyze the material, this indicates that the researcher has not sufficiently studied the area of law and should return to secondary authority to obtain this understanding. Poor writing is sometimes an indication that the writer does not understand the material being written about. At any rate, generating the Research Product is the final stage in the research process.

## Part IV: Teaching Research Analysis and Planning

Though research analysis and planning is not particularly difficult, it is a new skill for law students to acquire. Like case briefing, the skill is new to law students and once explained and practiced, it is learned and becomes second nature. Legal research is not like any type of research process they would have engaged in previously. It requires the mastery of the legal system; an understanding of the hierarchy of authority; and an awareness of the publication of law into a multitude of resources of varying formats. To create an effective plan, the student needs to learn all of these components. To implement it, the student also needs to know how to use various research methods.

The instructor's job is threefold. First, the instructor needs to teach the idea of research analysis and planning to researchers. Second, the instructor needs to develop a means for the students to practice the skill. Finally, the instructor needs to assess the acquisition of the skills and provide helpful feedback. Using the pedagogical structure developed in the second Boulder statement, this instruction translates into providing the Surface Structure and Deep Structure of legal research pedagogy.<sup>33</sup>

### Toward a Method of Teaching Legal Research Analysis

#### Instructional Methods

Legal research instructors have a wide range of tools with which to teach legal research. These instructional tools include lectures, PowerPoint presentations, demonstrations,

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<sup>33</sup> BOULDER STATEMENT ON LEGAL RESEARCH EDUCATION: SIGNATURE PEDAGOGY STATEMENT, *supra* note 10.

in-class exercises, group activities, group presentations, reading materials and instructional videos. The instructor may need to use all of these instructional tools to teach research analysis and planning. Indeed, research indicates that learning is enhanced and a broader range of learners are reached when multiple methods are used.<sup>34</sup>

While lectures are becoming increasingly disfavored as a teaching tool for the digital generation, they still may be necessary and appropriate for certain topics and times. Current legal research instruction couples a lecture with a slide presentation of the main ideas, quotes, photographs and screenshots of the resource. Typically, these slide presentations are created in Microsoft PowerPoint although other programs exist for this application. While the slide presentations may serve as a crutch for the instructor, ideally they will serve as a learning aid for the students either by displaying difficult-to-understand concepts or providing a visual cue to reinforce the learning. Students also like to obtain a copy of the slide presentation. Some instructors may provide that presentation to the students before the lecture so that the student may add notes from the lecture to it. Other instructors may want to provide a copy of the slide presentation afterwards so that the student cannot “work ahead” through the slides during the lecture..

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<sup>34</sup> Arthur W. Chickering, *Every Student Can Learn – If...*, ABOUT CAMPUS, May-June 2006, at 9, 11.

For research methods instruction, a lecture and slide presentation is appropriate to convey the concepts and vocabulary of research analysis and planning. In a series of slides, the instructor can set out the simplified structure discussed in Part III above. He can use the “bully pulpit” of the instructor’s podium to emphasize the pitfalls of the unplanned approach and the value of analysis preceding research. This value can include the gains in research efficiency and effectiveness, the confidence researchers obtain from having a plan, and the ties of legal research analysis to legal analysis students learn in other parts of the curriculum.

The lecture can be accompanied by an in-class demonstration. At one level, the instructor can either show the research plan template as a completed, two part document, or introduce each of the parts of the plan template following the discussion of those parts. The instructor may take the demonstration one step further and show a completed research plan after providing the students with a problem to analyze.

Students will need additional repetition. The instructor may take the next step by having the students compose a research plan in class. This work is likely to take place after the instructor has introduced the concept and provided a research template. As an exercise in demonstrating the importance of the plan, it may be desirable to ask the students to complete the plan before learning about the structure and contents of the plan. However, this may backfire as students may conclude that an unplanned research session is nearly as effective as a planned one, should the problem to be researched not provide sufficient research rigor.

While asking students to compose a research plan is a helpful learning tool, the instructor may take this pedagogical tool one step further. He may direct that the students work in small groups. Research indicates that students may learn better from their peers for certain types of activities.<sup>35</sup> For new skills, the group assignment has the potential advantage of students sharing their misunderstandings of the process and by so doing, learning from one another the proper approach. The instructor can facilitate their creation of a research plan produced in class by providing the template document in an online storage folder. This may mean uploading the document to Thomson Reuter's course management system on Westlaw Next, TWEN, or providing it on Google Drive, Microsoft OneDrive or DropBox. The advantage of using Google Drive is that multiple users can edit the document at the same time. After providing the lecture and slide deck presentation, the instructor can then give a research problem to the students and direct that they work together in small groups to solve it. The instructor can use this time to answer questions and continue to reinforce learning while circulating from group to group to check on progress of the research plan development.

Group instruction yields another potential advantage. After the groups complete the plan, the instructor can reassemble the class and review the plans. This step is simplified if the instructor used Google Drive or equivalent to create the plans. The instructor can then go through the research plans, pointing out how each group

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<sup>35</sup> Daniel Boase-Jelinek, Jenni Parker & Jann Herrington, *Student Reflection and Learning Through Peer Reviews*, 23 ISSUES EDUC. RES. 119 (2013)(Austl.).

implemented the problem analysis and resource strategy to solve the legal problem.

Furthermore, the instructor can share his own research plan document to discuss with the students.

The professor may make use of the “flipped classroom” model of instruction.<sup>36</sup> Videos may be used to replace or supplement some of this instruction. Certainly, the instructor could record a video of the lecture and slide demonstration. The students could view that video before class. The instructor could answer any questions and then give the students the in-class exercise. One advantage of this approach is to save class sessions. A full lecture, demonstration and in-class exercises could take two or three class sessions. Offloading some of this online can reduce that time commitment. Plus, it will allow students to review the presentation. One disadvantage of this approach, however, is that instructor cannot alter or clarify content as questions are asked or quizzical looks appear on the faces of the students.

Finally, the instructor should have assigned reading before class. The instructor could use the presentation either from Kunz or Sloan. While neither of these methods is identical to the one presented in this paper nor even to each other, the students are likely to better learn the material if presented from two or three different points of

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<sup>36</sup> For a fuller examination of the flipped classroom model and examples of using it to teach legal research instructions, see Catherine A. Lemmer, *A View from the Flip Side: Using the ‘Inverted Classroom’ to Enhance the Legal Information Literacy of the International L.L.M. Student*, 105 L. LIBR. J. 461 (2013).



view. The instructor can then use class time reconciling the various approaches, pointing out commonalities and differences.

### Timing

Instructors face an additional consideration when teaching this content: timing. At what point in the course of the semester is this material best received by the students?

Should the material be presented during the first few classes when the instructor reviews the basic concepts of authority and publication of law? Or, is it best learned after students have used the legal research resources and techniques? Alternatively, is it best presented early in the term and then revisited toward the end of the semester?

If the content is introduced early in the semester, students become aware of the broad scope of legal research. They may be less likely to view it as a series of discrete techniques and more as an application of the legal analysis learned in other parts of the curriculum. Furthermore, teaching research analysis and planning addresses their primary concern of developing confidence in their research skills. However, the disadvantage of this early introduction is that students are only vaguely familiar with resources. Resource strategies will not be particularly robust.

If the content is introduced toward the end of the semester, the students should have learned about the various research resources. This additional learning may result in better research logs, indicating an understanding how to use all of the research tools and techniques to thoroughly research a problem. But they may not understand the

underlying theme of connectivity among those resources nor the way in which the resources are used together to find all appropriate authority to understand and answer legal questions.

The third approach is to teach research analysis and planning early and often in the class. The instructor can introduce the concepts and require application early in the course, and then revisit it later when the students have acquired more knowledge about resources and research techniques. This approach also has the advantage of reinforcing the difficult concept through revisiting content and practicing the skill.

### Implementing a Problems-Based Approach to Assignments

Anyone who has attempted to learn a new skill has discovered that doing so requires a great deal of practice. In his book “Outliers,” Malcolm Gladwell reports that individuals need to practice a new skill for 10,000 hours in order to master the skill.<sup>37</sup> Consider how often professional athletes practice their sport in order to compete at the highest levels. Even the initial acquisition of a simple skill requires repetition and concentration. Legal research instructors have discovered this fact, too, and so send their students into the library or online to practice the techniques of legal research. Learning problem analysis and planning also requires practice. This practice is obtained through assignments.

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<sup>37</sup> MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008).

While legal research instruction was traditionally taught as legal bibliography, this approach proves inadequate for teaching research process.<sup>38</sup> The best approach is to ask the students to research an actual legal problem. This situates the research instruction within the context of practice and enhances learning. Adult learning theory suggests that law students will learn skills if they are taught within a context of what they are learning.<sup>39</sup>

The current trend in legal education is to create learning environments that provide students with practical skills.<sup>40</sup> Legal research instructors have an enormous opportunity to provide this experience. Indeed, legal researchers are already doing so. Within the context of this method of problem analysis and planning, legal research instructors can treat their class, in part, as a laboratory of legal practice problems. Students enjoy realistic problems. Such problems are engaging. They give the student a taste of the real work that they will be doing. Such problems move the needle from the scholarly, abstract musings of their doctrinal classes to the gritty, research challenges of their profession.

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<sup>38</sup> Paul D. Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 L. LIBR. J. 7 (2003). Callister's article provides an excellent historical review of legal research pedagogy and a fascinating account of the debate between advocates of the process-oriented approach and the bibliographic approach.

<sup>39</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 104 (2007), available at [http://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf)

<sup>40</sup> Genevieve Blake Tung, *Academic Law Libraries and the Crisis in Legal Education*, 105 L. LIBR. J. 275 (2013).

There are disadvantages, however. Real problems can be quite messy, and not contain any clean solution. Real problems may also require understanding complicated areas of law that neither students nor instructor are trained to handle. Finally, real problems may be hard to find and time consuming to research to verify their pedagogical value.

The challenge for the instructor is to develop realistic, workable problems. When developing a research problem, it is tempting to create one with an answer. For example, the instructor creates a problem where there is a case on point, or an *American Law Report* annotation that leads the persistent researcher to the Holy Grail of legal authority. Instructors may try to couch the clean problem within colorful facts and party names but at heart the problem resolves easily. While there may be a place for such problems in a legal research curriculum, it is probably not here. If the instructor lacks practice experience (or recent practice experience) it becomes quite challenging to develop a realistic problem that also meets pedagogical objectives.

### Partnering with Practitioners

One solution to this problem is to partner with practitioners.<sup>41</sup> This partnership provides several advantages. First, the practicing attorney has a large collection of legal problems on which to draw. Second, the practitioner has the expertise to solve the legal

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<sup>41</sup> David L. Armond & Shawn G. Nevers, *The Practitioner's Council: Connecting Legal Research Instruction and Current Legal Research Practice*, 103 L. LIBR. J. 575 (2011). This paper discusses a program of partnering with practitioners implemented by law librarians at the Howard W. Hunter Law Library at Brigham Young University to address the issue of academic law librarians lacking sufficient or recent practice experience.

issues addressed by the problems. This experience is golden to students as the practitioner can speak with credibility to the solutions and research methods in solving the problems. This credibility gap is sometimes a stumbling block for academics who lack practical experience. Third, many practitioners enjoy sharing their expertise with law students. At one level, it satisfies their desire to give back to the profession. Perhaps it rekindles their early interest in the law as a tool for social good. At another level, it makes the practitioner feel important and valued. Too often legal practice is more akin to a battlefield experience, and the attorney constantly deals with problems and ungrateful clients. It is much more rewarding to be appreciated by a group of attentive, eager law students. The practitioner may also gain some satisfaction by teaching a class at the local law school, particularly if that law school is highly ranked and enjoys a good national reputation. It is the type of positive, affirming experience she can share with colleagues. Plus, some firms encourage teaching as a form of community engagement. This opportunity satisfies that professional obligation. Finally, the partnership offers to both practitioner and instructor the best of what each does. The practitioner has the collection of problems and typically a narrow set of skills to research and solve that problem within the time and resource constraints of her busy law practice. The academic, on the other hand, often has the advantage of time, resources and “mental space” to consider such problems deeply and broadly, drawing upon a wide range of disciplines and experiences to address systematically pressing,

practical problems. Together, they share their expertise to improve the other's work. It can be a win-win for both practitioner and instructor.

There are disadvantages, however. Instructors should take care that the partnership produces assignments and classroom experiences that meet the pedagogical requirements of the class. It is not the practitioner's job to ensure this happens. The students will rate the instructor, not the practitioner, in their faculty and course reviews. This professional duty means that the instructor must make certain the contributions of the practitioner contribute to the pedagogy. The practitioner's practice experience may not be suitable as examples for instruction. This may occur due to the area or type of law practiced or the lack of suitable breadth of experience. For example, the practitioner may have only recently graduated from law school and simply has not worked long enough to have a wide variety of cases to share. The instructor must also make sure that the practitioner does not view the class as a forum to teach personal views of the law, to grandstand or to market her services. While the instructor wants the practitioner to share her stories about the use of research tools and techniques with the students – indeed, this is what makes the experience particularly meaningful for the students – the instructor also must make sure not to lose sight of the pedagogical goals of the class. Some practitioners are better presenters than others. Some may prove to be particularly engaging and educational. But the instructor also may end up with one who misses the mark and misleads the class. For his part, the instructor should remember that the practitioner is giving a gift of her time to the instructor. The

instructor should be sensitive to the practitioner's sacrifice of the billable hours in preparing and presenting to his class. The instructor must plan ahead and be sure to use the practitioner's time wisely. This likely means that the instructor can count only on one classroom visit by the practitioner, a problem or outline of a problem for use as an assignment, and perhaps some advice on the legal outcome of the problem.

#### Additional Assignment Considerations: Number, Content, and Time to Complete

##### *Number*

In developing assignments, instructors must take a few additional factors into account. First, the instructor must consider how many assignments need to be given in order to maximize the learning of analysis and planning skills. One assignment is likely not sufficient, especially if given toward the beginning of the semester. The resource strategy will probably not cover the full range of resources. This may be an advantage in teaching the concept, as the student will have fewer resources to draw from to solve the legal problem. But the single assignment also will not benefit from very much, if any, feedback from the instructor. Students invariably will misunderstand some aspect of developing plans and logs. Students will benefit from the feedback provided from this first assignment.

The instructor can improve the work product by requiring a second or third assignment. In the additional assignments, students have the opportunity to reinforce and improve the skill with feedback from the instructor. While the first assignment may be simpler, the additional assignment(s) can be more complicated and varied. Furthermore, the

second assignment can be given later in the semester after the students have learned more about resources and techniques, but not too late in the semester when they will become overburdened with preparing for exams and completing work for other classes.

### *Content*

Each assignment needs to consist of a fact pattern to require that the students produce a written plan, log and memo. The plan and log should contain the elements discussed in Part III of this paper. These two documents enable the instructor to peer into the thought process of the student and assess how well the student has understood how to use the range of resources and research techniques.. For example, the student may have uncovered a case that addresses the legal issue, but comes from a persuasive jurisdiction. The research log can reveal if the student thought to use KeyCite or the Topic and Key Number system to use that case to locate authority in the binding jurisdiction. Without a sufficiently annotated research log, the instructor cannot determine if that skill was properly acquired.

The instructor also should require a written memo. This memo is the Research Product document of the research process. It serves as both the starting point and goal of the legal research process. It completes the process. It is in the research product that the learning about the law and its application to this particular problem are communicated. The memo need not be very long. It should not be a research narrative, in which the student simply tells the story of the research process and what she discovered. This type of narrative may have a place in learning research as it forces the student to



vocalize her research process, but that produces a different learning outcome than a memo. It also does not have to be a formal memo such as the student encounters in a legal writing class. It should share its structure but need not be overly formalistic. This is a research class, not a writing class, and the objective is not to assess writing skill, but research skill.

Many law librarians may not feel comfortable assigning and grading memos. After all, many librarians lack this skill set to teach even if they have law degrees and have practiced law. In such cases, the law librarians can partner with a legal writing professor and invite her into the class to review memo writing and provide other writing tips as appropriate. In order for the legal writing professor's contribution to be helpful, the law librarian instructor should be certain to meet with the legal writing professor before class to explain the scope of the instruction and its purpose. To put this meeting in perspective, think of the difficulty a law librarian would have in preparing a presentation on "legal research" without getting any particular focus for the lecture.

#### *Time to Complete*

Finally, the instructor should be sensitive to the amount of time it takes law students to complete such assignments. This may be the most challenging part as the instructor and expert in research and this particular problem may not be aware of how much time it will take an inexperienced researcher to complete the work. It may seem easy to the instructor, but the students are not only new to the work, but have many other things to do beside complete this assignment. It is very difficult to estimate how much time it will

take to complete an assignment, and the instructor may not be able to do it. The instructor may spend hours developing the problem, and once developed,, it may seem easy to do the research. But instructors forget what they know about the problem that the students do not know. The instructor knows the answer to the assumptions built into the problem. He knows which case is good and which is to be avoided. It is difficult to think like the law student and make the mistakes a law student may make.

Furthermore, for some students, their legal analysis skills are not that well developed. They may not be clear about what type of law is produced by which branch of government. They may have forgotten how to expand case law research using case headnotes and the Topic and Key Number system. They get lost in the complexity of the research and forget simple concepts like binding versus persuasive authority. All of these problems compound the amount of time to complete what may seem like a straight-forward research assignment. Finally, instructors should not forget that students are dealing with confusion in learning a new skill. They may or may not get it. This is likely to cause frustration, particularly in students who are generally very smart and very successful.

Instructors should not forget the competitive nature of the grading process and the added grade compression resulting from curving grades, a requirement at most institutions. Students will work hard to get a slight edge over other students so that they can get the higher grade in class. Students will complain if the class is perceived as

too much work for the credits received. The more that is required of them to do, the less time they have to read and prepare for their doctrinal classes.

### Putting it All Together in an Advanced Legal Research Class

In teaching my Advanced Legal Research over the past several years, I have experimented with a variety of assignment solutions. I have given as few as one general assignment and as many as three. The former simply was not sufficient for students to learn and recall the process of analysis and planning. The latter number was too many and demanded too much time from a two credit class. I also have intermixed short answer assignments evaluating particular research skills with one general methods research assignment.

I do partner with practitioners. Initially, I relied on them to provide a glimpse into legal research in the law practice environment. In more recent classes, I partnered with them in providing a realistic legal problem drawn out of their experience. I modify their problem usually embellishing it with additional facts. I may introduce that problem early in the semester and teach to it over the course of covering primary and secondary authority. Or, I may use it as the basis for assignments. Either way, I hope to obtain a problem that covers the three primary sources of authority, and has been treated in the secondary authority, even one in which forms or other practice materials are available to address.

The capstone assignment of the course is a service project with the Colorado Legal Services (CLS).<sup>42</sup> CLS provides legal services to the poor. Their offices are located throughout the state of Colorado. About half of their funding comes from the federal government. Their attorneys have legal research issues which they simply lack the time and resources to answer. I invite two of their attorneys to speak to my class about CLS. At the conclusion, we assign the students a research problem from one of their attorneys. The students are required to apply this method of research analysis and planning to produce a written plan, log and memo. The three documents are delivered to the CLS attorney and to me. This situation is a win-win for all parties. The students gain real world research experience and develop or add to their professional network. The attorneys receive much needed research assistance. And I have access to real research problems.

### Assessment and Grading

In order for the students to learn the process of legal research, they need to practice it. They also need constructive feedback. While formal assessment occurs after assignments are graded, feedback can begin while the students are learning the process when completing the group exercises. This feedback may come from either the instructor clarifying questions or from other students.

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<sup>42</sup> COLORADO LEGAL SERVICES, <http://www.coloradolegalservices.org> (last visited January 20, 2015).

## Assessment

The instructor can give more formal assessment after the first assignment is completed.

This assessment can take the form of margin notes, general statements of advice given to a student on their paper, a grading memo and an in-class review of the assignment with completed research plan and log. Instructors may need to resort to using all of these feedback mechanisms to guide the student in developing these documents and acquiring this new skill. But what does this feedback consist of?

At a basic level, the instructor is assessing whether the student properly developed the research plan. Did the student include both a research analysis and resource strategy? Did the student use the Interrogative Pronoun method to develop a usable list of keywords? Did the student set out a realistic, even if vague, listing of resources to answer the legal question presented? Did the student identify the jurisdiction and a likely area of law for this problem? These are easy to spot and the instructor can use margin notes to point out deficiencies.

Ultimately, did the student appropriately analyze this problem and present a logical strategy to solve it? Did they find the right authority? Did they provide a coherent, defensible answer? These last three questions are the most crucial and speak to the goal of the research analysis and planning process.

At a higher level, the instructor is assessing whether the student included sufficient detail in the research log. The rule of thumb for research logs is that they contain

sufficient information such that someone else could continue researching the problem using the plan and log without retracing steps. Can the instructor determine which resources were consulted? Which search terms were used in that resources? What value that resource contained in leading the researcher to the proper answer? Did the researcher note the date of the research, the currency of the tool or the validity of the authority? More advanced researchers will use the log as a task list, in which new discoveries and authorities to be consulted are clearly marked and entered as a new line item in the log for further research.

The instructor also will need to review the research memo. Again, for this class, it is meant to demonstrate research, not writing skill. The instructor should look to this document to determine if the student used authority uncovered in the research process. Are there cases or other authority in the memo which do not appear in the log? Alternatively, does the memo reflect the assumptions used in developing the plan and shortcomings uncovered during the research process? For example, did the researcher cite to a case from a non-binding jurisdiction and also explain in her research that there were no binding cases? This information is helpful to the reader. It builds confidence in the research result. It also builds confidence in the researcher, who often is unsettled when no authority can be found. Did she note that she used the digest or citator to locate that binding authority? At a more basic level, does the memo use a sound structure, presenting the reader with a question presented, brief answer and explanation? Instructors may require proper Bluebook or ALWD citation format, but

that requirement is likely to distract the researcher from realizing the primary purpose of the memo – to convey understanding of the law derived from the research process.

While margin comments can be helpful to give guidance to individual students, the instructor may need to produce a memo summarizing errors and giving advice gleaned from reading all of the papers. Students are always curious how other students have fared. While not giving detailed grading information, the instructor can use this memo to indicate generally what types of work earned the higher grades in the class.

The instructor may find it useful to share with the class his own research plan and log. Students can learn from him how he approached the problem, the resources he consulted, and the difficulties he ran into. The students can then ask the instructor about specific issues they encountered and given the right classroom setting, the students can share with each other the problems they encountered and how they thought the law should come out. As with evaluating writing, some instructors may be intimidated by this step. The students will be able to judge whether or not the instructor uses the methods he teaches and understands the law well enough for the problem. It is of little consolation to the students when the instructor informs them that the right legal answer is less important than the process.

### Grading

The instructor also should prepare a research plan and log to assist in the arduous process of grading the assignments. As noted, grading is complicated by the need to

grade on a curve. Some of the following grading issues would be resolved if the class were graded as a Pass-Fail class. Nonetheless, some grading issues would remain.

The first step is developing a point value for each of the elements in the plan, log and memo. The instructor should consider how much toward the final grade a well-developed factual analysis is worth. Furthermore, the instructor needs to determine if it is worth more or less than a well-developed resource strategy. How important is identifying the proper jurisdiction? How much is the Issue Statement in the memo worth? What is the value of developing a robust list of keywords but not creating helpful search phrases? The instructor can assign point values to each of these items.

But the instructor will face a more challenging problem; how to fairly compare the work product of one student to that of another student? Some students really get it. They enjoy the process of legal research and thrive in the structure provided by a research plan and log. Other students are hard workers, are driven to do well and will richly develop the plan and annotate the log with meaningful, useful information. These students are easy to identify and easy to grade highly. On the other hand, there are students who either did not understand what is expected of them, did not have the time to produce quality work, or simply did not care. But within this range of responses, the instructor needs to create a fair comparison of the work product of the one to the other. Is the student with the well-developed keyword list a better researcher than the student with a more poorly developed list but better resource strategy? Should the student with the weakly analyzed problem and vague resource strategy but well-written and



researched memo grade better than the student who did a thorough job planning and researching the problem but a poorer job analyzing and conveying the results? Should the student who created the amazingly detailed research log but who failed to note if they validated any of their authority be graded lower than the student who did capture validation data but neglected to list all resources consulted and findings from those resources?

These questions are hard to answer and too often make for uncomfortable grading. Grading on a curve complicates the problem. Without the curve, the only grading stress the student encounters is to produce a good enough work product to pass the class. With the curve, the student tries to deconstruct the instructor's grading values and hopes to pull the right levers to get the high grades. Often, only slight differences exist between students' grades. Furthermore, it is difficult for the instructor to explain that to the students. Unless students choose to share the information, they do not know how other students fared and why. A student may make great improvements from one research assignment to the next but only see a slight grade increase because her peers also improved their work.

## Part V: Validity and Criticisms of the Process

The challenges in assessing and grading the plan, log and memo raise more interesting questions. Does the process work? Can it be useful for teaching research? Is it worth

the effort? And, more importantly, is research analysis and planning a critical skill in a Google world?

### Benefits of the Process

The first trio of questions can be answered in the affirmative. By working the process and requiring creation of the three documents, instructors will have a useful instructional and evaluation tool. The process of drafting a plan and creating a log really exposes students' ignorance of research methods and resources. In as much as writing a memo highlights deficiencies in students' writing abilities, so does the plan and log reveal deficiencies in students' understanding of legal authority, its publication into print and online resources, and the proper methods needed to research individual resources and the system as a whole.

In grading the plan and log, the instructor will immediately see where students failed to grasp aspects of the research methods or resources. For example, the instructor will tell that a student did not understand how to or even the need to update a statute or a regulation as there will be no entry in the log. Students will reveal they did not get the point of the Topic and Key Number system when they fail to use it to locate additional cases on the same point of law or cases from another jurisdiction. The instructor will discover that students use the same strategy over and over again to answer different questions, thus revealing they did not understand the value or variety of available resources. The single strategy usually will be either to search Google first or always to use the same secondary authority (or all of the secondary authorities) even when the

problem presents a statutory citation among its facts. Without requiring students to complete a log and engage this analysis and planning process, instructors would miss these deficiencies. And students would be poorer researchers for it.

Or not. While a poorly crafted plan or log may indicate failure of comprehension on the part of the student, it may also indicate a failure of the instrument itself. It is time consuming to produce the documents. There is also room for students to generate a vague resource strategy and convey a weak problem analysis, but then do a fine job researching the resources and answering the question. For that student, she has done sufficient analysis to understand the problem well enough and find the answer. It is likely that student's grade will not be as high as her more conscientious classmate, but it worked for her.

### Problem Analysis and Research Planning in a Google World

The second query is whether research analysis and planning are critical skills in the current research environment. Certainly, legal analysis skills are necessary and required. But is it necessary for researchers to engage in this process of resource identification and research techniques? Does "good enough" research skill produce "good enough" legal research? In a nod to actual research practice among law students, some legal research instructors are advocating the "search and sort" method of legal research.<sup>43</sup> In this "method," students enter some keywords into the search box of the

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<sup>43</sup> See AMY E. SLOAN, *supra* note 23; see also Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117, 154

search engine of their choice, and then sift through the results to find the helpful law. Students are not encouraged to engage in any pre-search analysis or planning, other than to jot down a few keywords and identify a jurisdiction. The instructor's job then is to help the students sort the pile of results (presumably using the system's post-search filters) to identify the good authority from the bad authority. I am unclear how this process increases a student's confidence in her results but it is a lot less effort than doing the hard work of problem analysis and resource strategizing. But perhaps it is good enough. In this approach, the goal of legal research instruction is less about the research and more about understanding the authority. I suspect the legal profession will learn the answer to that question as law is made and applied, cases decided, statutes drafted and the law evolves to produce a more or less just, civil and livable society.

## Conclusion

The genesis of this effort was to address the research deficiencies of legal research students. Research analysis and planning are noted by legal education professionals as critical skills but treated lightly in the recent academic literature. Yet, research plans

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(2013). In Sloan's textbook, she refers to this method as the content-driven approach in which the researcher performs a broad keyword search in an online database such as Lexis Advance or Westlaw Next and then uses the post-search filters to find relevant content. *See also* Ellie Margolis and Kristen E. Murray, "Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm," 38 Univ. Dayton L. Rev. 117, 154 (2013). In this article, these authors review the results of a survey of literacy skills of incoming law students. Based these findings, the authors advocate that legal research instructors encourage their students to "jump into researching and then to teach them about analysis and evaluation of those results."

and research logs are important tools to help researchers build confidence in their results. And written memos, as part of the research process, help researchers fully understand their research work. The paper has presented a simplified but comprehensive model through which researchers can conduct research and by which instructors can teach and evaluate research learning. While recent trends in research pedagogy may suggest an abandonment of research analysis and planning, these skills will remain valued assets of legal professionals. Legal research instructors are encouraged to teach these skills and use these tools as a means to evaluate legal research comprehension.

## Appendix 1 – Sample Research Plan

**This research plan and research log which appears in Appendix II are based upon the following fact pattern. This fact pattern was introduced in two parts over the first half of the semester, with the second part building upon the first. The plan and log address this particular issue: Will the trustee succeed at having the matter heard by the bankruptcy court?**

### Part I

Our client, Laura L. Lord has asked us to represent her in pending litigation with a former tenant. Lord owns a rental property in Boulder. This is a multi-unit property consisting of one and two bedroom apartments. Lord and her son Lonzo manage the property. After the tenant vacated the property, Lord kept the tenant's security deposit. The tenant is suing for return of the security deposit.

When I spoke with Lord this afternoon, I learned that she is also having financial difficulties. While occupancy at her rental property is pretty good, her auto glass repair and emergency unlocking service isn't succeeding. We helped her with this business plan and you can check that file for complete details. Briefly, she contracted with Douglass Truck Bodies to retrofit two Chevrolet Silverado 3500 trucks for commercial service. That typically means adding steel frames to mount ladders and large sheets of materials and locking compartments to hold tools though I'm not certain of the exact modifications to her trucks. She borrowed the funds from Real-E-Fine Financing which took a security interest in the trucks as collateral. As business is doing badly, she is falling behind in payments to Real-E-Fine. Lucy has been having other financial difficulties and has consequently run up debt on credit cards and a line of credit she holds with Rocky Mountain Bank to make ends meet. Her cousin loaned her \$5,000 so she could fix the roof on her rental property. I don't know what the status is of that debt.

### Part II

During the course of the bankruptcy proceeding, our debtor Laura Lord informs us that she has outstanding accounts receivable with Front Range Auto Club (Front Range), a client of her auto unlocking business. She entered into a contract with Front Range in which she provides unlocking services to Front Range's club members for a flat fee of \$2,500 per month. Front Range has fallen behind in its payments and now owes Lord \$10,000. The bankruptcy trustee wants those funds to be part of the debtor's estate to

help pay the creditors' claims. As such, the trustee has brought an adversary proceeding against Front Range pursuant to F.R.B.P. 7001 by filing a complaint with the United States Bankruptcy Court in Denver, as part of the existing Chapter 13 bankruptcy. In its answer, Front Range denies that the bankruptcy court has jurisdiction over the matter, and asserts that this breach of contract claim is not sufficiently related to the bankruptcy proceeding.

## Problem Analysis

- I. Factual Analysis
  - a. What
    - i. Chapter 13 bankruptcy – petition filed, etc.
    - ii. Debtor has outstanding accounts receivable for her auto unlocking business
    - iii. Contract – breach of contract; failure to make payments on contract; contract required that Front Range make payment to Auto Unlocking business for service provided to its members
    - iv. Adversary Proceeding pursuant to FRBP 7001
    - v. Front Range owes \$10,000 to Debtor
  - b. Who
    - i. Client – Debtor – Business Owner of auto unlocking business – Laura Lord
    - ii. Trustee in Bankruptcy – bringing lawsuit on behalf of the bankruptcy estate and creditors
    - iii. Front Range Auto Club – defendant in action; owes money to debtor on contract
  - c. When
    - i. Contract entered into before debtor filed for bankruptcy
    - ii. Breach of contract probably arose prior to filing for bankruptcy
    - iii. 2013-2014
  - d. Where
    - i. Colorado
    - ii. Federal Bankruptcy Court Denver Colorado
  - e. Why
    - i. Trustee would like to make accounts receivable part of the bankruptcy estate so to pay down creditor's claims
    - ii. Defendant claims federal court has no authority to bring the action into federal court
- II. Issue
  - a. Whether the bankruptcy court may hear a state-based breach of contract accounts receivable claim as part of a Chapter 13 bankruptcy action
- III. Jurisdiction
  - a. Federal – action is brought in federal court
- IV. Area of Law
  - a. Bankruptcy (statutes)
  - b. Civil / Bankruptcy Procedure (statutes, court rules)



- c. Contracts – common law (cases)
- V. Keywords
  - a. Search Terms –
    - i. Chapter 13 Bankruptcy,
    - ii. FRBP 7001; Adversary Proceeding;
    - iii. Breach of Contract; Accounts Receivable; monies owed; proceeds
    - iv. Not sufficiently Related; ancillary; tangential
  - b. Search Phrases
    - i. Chapter +1 13 (searching within Bankruptcy database)
    - ii. FRBP +1 7001
    - iii. Breach /2 contract /5 accounts +1 receivable
    - iv. Unrelated not +1 related ancillary tangential
- VI. Questions
  - a. Does it make any difference that we’re in a Chapter 13 bankruptcy?

### **Research Strategy**

1. Federal Rules of Bankruptcy Procedure (Westlaw or USCA)
  - a. Find Rule 7001
  - b. Read commentary
  - c. Note references to secondary authority; cases
2. AmJur
  - a. Search Bankruptcy and Adversary Proceeding (Index)
3. USC
  - a. Is there an applicable statute?
  - b. Search “breach /2 contract” in Title 11 statutory text
  - c. Search “accounts +1 receivable” in Title 11 annotations
4. Case law
  - a. Read cases reference by code section, if any
  - b. Validate
5. Bankruptcy Treatise
  - a. Collier’s or Norton
  - b. Search “accounts +1 receivable and unrelated not +1 related and jurisdiction and dispute”
  - c. Search Scan table of contents or index
6. ALR (Westlaw)
  - a. Is there an ALR on-point?

- b. Search: bankruptcy and accounts receivable OR bankruptcy and adversary proceeding OR bankruptcy and breach /2 contract

## Appendix 2 – Sample Research Log

Step	Resource / Terms	Findings / Value	Next Steps / Citations Found	Date / Status
1	USCS (on Westlaw) Search: FRBP 7001	FRBP 7001(1) AP ... a proceeding to recover money or property ...  Other 10 categories of AP probably don't apply here  Litigation under bankruptcy action ... rules same or similar to FRCP	Consult more general secondary authority on AP  And on Breach of Contract AR in particular	<ul style="list-style-type: none"> <li>• 3/12/2014</li> <li>• No Negative Treatment</li> <li>• Current through 2/24/14</li> </ul>
2	AmJur (On Westlaw)  Search "Adversary Proceeding" in the Index  See Bankruptcy  Use adversary +1 proceeding	<p>Generally, Sec. 87</p> <ul style="list-style-type: none"> <li>• Commenced by complaint</li> <li>• Order issued by bankruptcy court is binding (unless appealed etc)</li> </ul> <p>Rules, Sec 22</p> <ul style="list-style-type: none"> <li>• No value</li> </ul> <p>Objections, Sec 2644</p> <ul style="list-style-type: none"> <li>• How objection is made to claim</li> <li>• Motion</li> </ul>	<p>TKN – Bankruptcy, K2156</p> <p>Cite: 5 ALR Fed 2d 31 (Ch. 11 and sanctions – probably of little value)</p> <p>Cite: 11 USCA 502(b) Cite: 443 BR 645</p>	<ul style="list-style-type: none"> <li>• 3/12/2014</li> <li>• Updated Feb. 2014</li> </ul>
	11 USC 502(b)	502(a) – all claims allowed unless party objects	Not helpful at this time. Categories apparently don't apply to the matter at hand	<ul style="list-style-type: none"> <li>• 3/12/2014</li> <li>• Pending Legislation</li> </ul>

3	<p>Secondary Sources on Bankruptcy Norton Bankruptcy Law &amp; Practice 3d</p> <p>Search: breach /2 contract /10 accounts +1 receivable (0 docs)</p> <p>Search: breach /2 contract /p accounts +1 receivable (1 doc)</p>	<p>Sec 4:69 – Determine of “core” status by the bankruptcy judge Bank judge can determine whether or not proceeding is “core”</p> <p>Non-Article III judicial officer – bankruptcy courts are Art I courts and therefore lack authority to bind parties in non- bankruptcy proceedings – Northern Pipeline</p> <p>Core v Nexus</p> <p>Primary Source of Law Test – Moody Inextricably tied – Kaiser – fraudulent conveyance case</p>	<p><b>New Search Term: core proceedings</b></p> <p>TKN – Bankruptcy K2043(2)</p> <p>28 USC 157(b)(3) 28 USC 1334(b) – jurisdictional nexus? 28 USC 157(c)(1) – authorizes judge to hear a related proceeding</p> <p><i>Northern Pipeline - US Matter of Wood (825 F2d 90) – define not a core proceeding – 5<sup>th</sup> Cir. Moody v Amoco Oil Co – 7<sup>th</sup> Cir. 734 F2d 1200 Kaiser – 2<sup>nd</sup> Cir; 722 F2d 1574</i></p> <p>Bankruptcy Desk Guide, 1:98, 7:67</p> <p>Circuits are split. What does the 10<sup>th</sup> do?</p>	<ul style="list-style-type: none"> <li>• 3/12/2014</li> <li>• Updated Jan. 2014</li> </ul>
	<p>Bankruptcy Desk Guide Search: 1:98 Search: 7:67</p>	<p>1:98 – abstention from hearing – no value</p> <p>7:67 – bank judge determination</p>	<p>28 USC 1334</p> <p>Two Step Analysis</p> <ol style="list-style-type: none"> <li>1. Is matter Core or Non-Core? If Core, judge can hear matter. If non-core, step 2</li> <li>2. Is matter sufficiently related?</li> </ol> <p>What is a state breach of contract claim for AR? Core? Sufficiently Related?</p>	<ul style="list-style-type: none"> <li>• 3/12/2014</li> <li>• Updated March 2014</li> </ul>

4	ALR – Westlaw Search: core +1 proceeding and breach /2 contract	<p>“Action for breach of contract as core proceeding in bankruptcy under 28 USCA 157(b)” 123 ALR Fed 103 (1995)</p> <p>“Action for collection of account receivable as core proceeding in bankruptcy under 28 USCA 157(b)” 124 ALR Fed 531 (1995)</p>	124 ALR Fed 531	<ul style="list-style-type: none"> <li>• 3/12/2014</li> <li>• Current through weekly addition of cases?</li> <li>• Current through 3/14/14?</li> </ul>
	124 ALR Fed 531 Search – citation	<p>Contrast 157(b) – core proceedings -- with 157(c) – not core but “related” proceedings</p> <p>Action to collect AR is a breach of contract action</p> <p>Northern Pipeline –</p> <p>Congress amends 1978 Bankruptcy Act with Bankruptcy Amendments and Federal Judgeship Act of 1984</p> <ul style="list-style-type: none"> <li>• If non-core proceeding, Bank cts can only make proposed findings of fact and conclusions of law to district court</li> </ul> <p>“In cases where the defendant in an adversary proceeding brought on behalf of the estate to collect a <b>prepetition account receivable</b> has not filed a proof of claim in the bankruptcy proceeding or a counterclaim to the adversary proceeding, the courts have reached differing results with respect to whether or not the</p>	<p>Northern Pipeline v Marathon 458 US 50 (1982)</p> <ul style="list-style-type: none"> <li>• Non-Art III court could NOT consider bankrupt estate’s state-law contract claim</li> </ul> <p>Bankruptcy Amendments and Federal Judgeship Act of 1984</p> <p><b>Do we have a prepetition or postpetition AR contract? (Yes - assumed)</b></p> <p><b>Are any of these AR postpetition? (Unknown ... assume prepetition but are they still owed?)</b></p> <p><b>Did Front Range file a claim in the bankruptcy proceeding? (No)</b></p> <p>In ALR – Sec 3[a] or 3[b] or 7[a] or 7[b]</p> <p>Tenth Circuit Cases ...</p> <ul style="list-style-type: none"> <li>• <a href="#">In re American Freight System, Inc., 164 B.R. 341 (D. Kan. 1994) — 3[a], 3[b]</a></li> </ul>	<ul style="list-style-type: none"> <li>•</li> </ul>

		<p>adversary proceeding is a core proceeding under <a href="#">28 U.S.C.A. § 157(b)</a>.</p> <p><u>PRO VIEW</u>  Courts which have held that such proceedings are core proceedings (<a href="#">§ 3[a]</a>, infra) have generally held that the changes made by the Bankruptcy Amendments and Federal Judgeship Act of 1984 in the organization of the Bankruptcy Courts solved the constitutional infirmities in their organization under the Bankruptcy Act of 1978 and have interpreted the categories of core proceedings set forth in <a href="#">§ 157(b)(2)</a> literally and expansively.”</p> <p><u>CON VIEW</u>  Courts which have held that actions by a debtor-in-possession or bankruptcy trustee to collect prepetition accounts receivable are not core proceedings under <a href="#">§ 157(b)(§ 3[b]</a>, infra) have generally taken the view that the changes in the organization of the Bankruptcy Courts made by the Bankruptcy Amendments and Federal Judgeship Act of 1984 did not resolve the constitutional limitations on non-Article III courts described in the Marathon case and that the categories of core proceedings set forth in <a href="#">§ 157(b)(2)</a> must, therefore, be interpreted narrowly</p> <p><u>10<sup>th</sup> Circuit Cases</u>  PRO –</p> <ul style="list-style-type: none"> <li>• Bucyrus – Kansas (1986)</li> <li>• American Freight – Kansas (1994)</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="#">In re Hedged-Investments Associates, Inc.</a>, 163 B.R. 841 (Bankr. D. Colo. 1994) — <a href="#">3[b]</a></li> <li>• <a href="#">In re Sunbelt Freight, Inc.</a>, 162 B.R. 878 (Bankr. N.D. Okla. 1994) — <a href="#">3[b]</a></li> <li>• <a href="#">American Community Services, Inc., In re</a>, 86 B.R. 681 (D. Utah 1988) — <a href="#">3[b]</a></li> <li>• <a href="#">Associated Grocers of Colorado, Inc., In re</a>, 97 B.R. 39 (Bankr. D. Colo. 1988) — <a href="#">3[b]</a>, <a href="#">6[a]</a></li> <li>• <a href="#">Bucyrus Grain Co., Inc., In re</a>, 56 B.R. 204 (Bankr. D. Kan. 1986) — <a href="#">3[a]</a>, <a href="#">3[b]</a></li> <li>• <a href="#">Gardner, In re</a>, 913 F.2d 1515 (10th Cir. 1990) — <a href="#">3[b]</a></li> <li>• <a href="#">Nell, In re</a>, 71 B.R. 305 (D. Utah 1987) — <a href="#">3[b]</a></li> <li>• <a href="#">P &amp; P Oilfield Equipment, Inc., In re</a>, 71 B.R. 621 (Bankr. D. Colo. 1987) — <a href="#">3[b]</a></li> <li>• <a href="#">United Methodist Youthville, Inc., In re</a>, 289 B.R. 754 (Bankr. D. Kan. 2003) — <a href="#">3[b]</a></li> </ul>	
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		<p>CON –</p> <ul style="list-style-type: none"> <li>• Nell – Utah (1987)</li> <li>• American Com – Utah (1988)</li> <li>• P&amp;P Oilfield – Col (1987)</li> <li>• Associated Grocers – Col (1988)</li> <li>• Sunbelt – Okla (1994)</li> <li>• Sender – Col (1994)</li> </ul>		
5	Gardner, 913 F2d 1515 (1990)	<p>While bank courts have jurisdiction over matters related to the debtor to resolve bank estate, once matters leave bank estate and not part of debtors estate, bank courts no longer have jurisdiction.</p> <p>Does not address AR claim directly</p>	In re Hildebrand, 205 BR 278, Bank D. Colo, 1997	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Possible Negative Analysis</li> <li>• Dist. By Hildebrand, American Freight Sys</li> </ul>
	Hedged Investments, 163 BR 841 (1994)	<p>Ch. 7 case Fraudulent Transfer case All state law issues Not core, but related only</p>	TKN – Bank – State Law Claims, 51k2049	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• No Neg Treatment</li> </ul>
	P&P Oilfield, 71 BR 621 (1987)	<p>Accounts Receivable case</p> <p>The Bankruptcy Court, Roland J. <a href="#">Brumbaugh</a>, J., held that: (1) action for breach of contract and to recover account receivable was not “core proceeding” for bankruptcy purposes</p> <p>The complaint will be dismissed because it involves a “non-core” matter over which this Court declines to exercise jurisdiction pursuant to 28 U.S.C. § 157 or under</p>	TKN – Bankruptcy ... Core or Related Proceedings – 51k2048.2	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Disagreed with by Total Transp, (Minn), Leco Ent (NY)</li> </ul>

		<p>General Procedure Order 1984–3. Section 157 must be read in light of the United States Supreme Court opinion in <i>Northern Pipeline Co. v. Marathon Pipe Line Co.</i>, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 785 (1982). The Court notes that the Trustee did not specify which subsection of § 157 applies here, which makes no difference because none of them are applicable to the instant case.</p> <p>This Court reads <i>Marathon</i> in a narrow sense especially in light of the legislative action and judicial interpretation found in the wake of that landmark case.</p> <p>The reasoning behind this approach is supported by a careful analysis of the applicable statutory sections which arguably could confer jurisdiction on the Court. These sections are § 157(b)(2)(A) and (O).</p> <p>Core proceedings include but are not limited to—</p> <p>(A) matters concerning administration of the estate; ...</p> <p>(O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or equity *623 security holder relationship, except personal injury tort or wrongful death claims.</p>		
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		<i>In re P &amp; P Oilfield Equip., Inc.</i> , 71 B.R. 621, 622-23, 16 Collier Bankr. Cas. 2d 691, 15 Bankr. Ct. Dec. 1021, Bankr. L. Rep. P 71732 (Bankr. D. Colo. 1987)		
	Associated Grocers, 97 BR 39 (1988)	<p>Accounts Receivable Case</p> <p>Roland J. <b>Brumbaugh</b>, J., held that debtor's action for collection of postpetition accounts receivable was core proceeding over which bankruptcy court had subject matter jurisdiction.</p> <p>The rule in this district regarding pre-petition accounts receivable was clearly set out in <i>In re P &amp; P Oilfield Equipment, Inc.</i>, 71 B.R. 621 (Bankr.Colo.1987). The court in that case indicated that the collection of pre-petition accounts receivable was not a core proceeding and that mandatory abstention under 28 U.S.C. § 1334(c)(2) was required. The question of whether the collection of post-petition accounts receivable is a core proceeding has not previously been addressed in this district. Other districts have addressed this question, and the majority have found that it is a core proceeding.</p>	<p>TKN – Bankruptcy ... Core or Related Proceedings – 51k2048.2</p> <p><b>In Colorado, prepetition AR NOT core proceeding. Affirms P &amp; P Oilfield.</b></p> <p><b>Next Steps:</b></p> <ul style="list-style-type: none"> <li>• Read Marathon</li> <li>• Digest Search - 51k2048.2</li> </ul>	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Negative Treatment – Ralls (MA) and Palmer Trucking (MA)</li> </ul>

		<u>In re Associated Grocers of Colorado, Inc.</u> , 97 B.R. 39, 40, 1988 WL 149494 (Bankr. D. Colo. 1988)		
	Digest – Federal – 10 <sup>th</sup> and SCT Search: TO(51k2048.2) – 23 cases  Search Within – accounts +1 receivable (3 cases)	New Case – In re Levine (Col. 1989) <ul style="list-style-type: none"> <li>• Ch. 7 case</li> <li>• Judge Brooks</li> <li>• Fraudulent concealment / fraudulent transfer case</li> <li>• Is CORE or Related proceeding</li> <li>• Cites Associated Grocers, Marathon</li> <li>•</li> </ul>	CORE Proceeding but not a AR case	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Some Negative Treatment – VA case</li> </ul>
	Cases – 10 <sup>th</sup> and US SCt Search: TO(51k2049)	In re United Methodist Youthville, 289 BR 754 (Bank Ct Kan) <ul style="list-style-type: none"> <li>• State law prepetition AR non-core</li> <li>• A “related to” proceeding</li> <li>• Bank ct can hear the case but cannot enter judgment on case</li> <li>• Unless parties consent</li> <li>• Otherwise, motion to dismiss granted</li> </ul>	Follows Marathon, P&P Oilfield, and Associated Grocers.	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Dist by Pixius Com – Kan. 2005</li> </ul>
	Marathon, 458 US 50	Art I judges cannot decide non-core matters under 1978 Bankruptcy Act		<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Negative treatment but not overruled</li> </ul>
6	28 USCA 157(b) Search – citation	Procedures ... <b>(a)</b> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or	Credits - (Added <a href="#">Pub.L. 98-353, Title I, § 104(a)</a> , July 10, 1984, 98 Stat. 340; amended <a href="#">Pub.L. 99-554, Title I, §§ 143, 144(b)</a> , Oct. 27, 1986, 100 Stat.	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Current through P.L. 113-74</li> </ul>

	<p>arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.</p> <p>28 U.S.C.A. § 157 (West)</p> <p><b>(b)(1)</b> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.</p> <p>28 U.S.C.A. § 157 (West)</p> <p><b>(2)</b> Core proceedings include, but are not limited to--</p> <p><b>(A)</b> matters concerning the administration of the estate;</p> <p><b>(E)</b> orders to turn over property of the estate;</p> <p>28 U.S.C.A. § 157 (West)</p>	<p>3096; <a href="#">Pub.L. 103-394, Title I, § 112</a>, Oct. 22, 1994, 108 Stat. 4117; <a href="#">Pub.L. 109-8, Title VIII, § 802(c)(1)</a>, Apr. 20, 2005, 119 Stat. 145.)</p>	<p>approved 1-16-14</p> <ul style="list-style-type: none"> <li>• RED FLAG</li> <li>• In Re International Auction and Appraisal (Bank MD PA held section preempted)</li> </ul>
<p>28 USC 157(c)(1) Search – citation</p>	<p><b>(c)(1)</b> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district</p>	<p>If non-core, then bank judge can hear it but cannot enter final judgment</p>	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Negative treatment ... see note above</li> </ul>

		judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected. 28 U.S.C.A. § 157 (West)		
	28 USC 157(c)(2)	<b>(2)</b> Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title. 28 U.S.C.A. § 157 (West)	Bank judge can hear case and enter judgment if the district court sends it to bank court AND all parties agree to it	<ul style="list-style-type: none"> <li>• 3/13/2014</li> </ul>
7	In Re International Auction, 493 BR 460 (2013)	US Bankruptcy Court, M.D. PA  <b>Holdings:</b> The Bankruptcy Court, <a href="#">Mary D. France</a> , Chief Judge, held that: <u>1</u> bankruptcy court, as non-Article-III court, did not have constitutional authority to enter final decision without parties' consent on fraudulent transfer claims; <u>2</u> court had implied authority to issue proposed findings of fact and conclusions of law; and <u>3</u> allegations in trustee's complaint stated plausible claim for relief.	Create a KeyCite Alert for this Case  28 USC 157(b)(2)(H) deals with fraudulent conveyances.  Our AR action would fall under 28 USC 157(b)(2)(E) or 157(b)(2)(A)	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• No Negative Treatment</li> </ul>

		Held Unconstitutional 28 U.S.C.A. § 157(b)(2)(H)		
8	AmJur Search: collection /s accounts +1 receivable (16 docs)	Sec. 1608 – divergent conclusions <ul style="list-style-type: none"> <li>• Turnover provision – 11 USC 542</li> </ul> Sec. 1642 – core nature of turnover proceedings  Sec. 755 – relationship to state law – collection of AR	<a href="#">In re National Equipment &amp; Mold Corp., 60 B.R. 133 (Bankr. N.D. Ohio 1986)</a> (rejected by, <a href="#">In re Nell, 71 B.R. 305 (D. Utah 1987)</a> ).	<ul style="list-style-type: none"> <li>• 3/13/2014</li> <li>• Updated Feb. 2014</li> </ul>
9	11 USC 542 Search – citation	<b>(b)</b> Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.  11 U.S.C.A. § 542 (West)	<b>CREDIT(S)</b> <a href="#">(Pub.L. 95-598</a> , Nov. 6, 1978, 92 Stat. 2595; <a href="#">Pub.L. 98-353, Title III, § 457</a> , July 10, 1984, 98 Stat. 376; <a href="#">Pub.L. 103-394, Title V, § 501(d)(16)</a> , Oct. 22, 1994, 108 Stat. 4146.)	<ul style="list-style-type: none"> <li>• 3/14/2014</li> <li>• Current through P.L. 113-74 approved 1-16-14</li> </ul>
	In re National Equipment & Mold, 60 BR 133			<ul style="list-style-type: none"> <li>•</li> </ul>
	AmJur, Sec. 1608 Search by Citation	Divergent conclusions exist as to whether proceedings for the collection of accounts receivable are turnover proceedings which are core in nature. There is authority that a debtor's claim for collection of accounts receivable is not	<b>Nothing really new here. Cites same divergent views.</b>  <b>In Re Nat'l Equipment</b>	<ul style="list-style-type: none"> <li>• 3/14/2014</li> <li>• Updated Feb. 2014</li> </ul>

		<p>a turnover proceeding within the core jurisdiction of the bankruptcy court unless and until the debtor's claim is liquidated by a court of competent jurisdiction or by agreement.<sup>1</sup> Thus, an action for the collection of prepetition accounts receivable has been held not to constitute a core proceeding.<sup>2</sup> However, contrary authority has held that a suit to collect on an account receivable is a turnover action which constitutes a core proceeding.<sup>3</sup> An action seeking turnover of the debtor's accounts receivable which were collected by a secured creditor prior to the filing of the debtor's bankruptcy petition has therefore been held to be a core proceeding.<sup>4</sup></p> <p>9A Am. Jur. 2d Bankruptcy § 1642</p>		
	<p>AmJur Sec. 755 Search by Citation</p>	<p>No clear consensus</p> <p>Some courts have held that an action to collect on a debtor's account receivable is a core proceeding.<sup>2</sup> Actions to collect an account receivable have been found to be core under various of the subparagraphs of 28 U.S.C.A. § 157(b)(2) which enumerates particular matters and proceedings as included within the list of core proceedings</p> <p>9 Am. Jur. 2d Bankruptcy § 755</p>	<p><b>Nothing really new.</b></p> <p><b>28 USC 157(b)</b></p> <p><b>In re Metropolitan, 293 BR 896 (2003)</b> – Ohio</p> <p><b>In Re Total Transp, 87 B.R. 568 (1988)</b> - Minn</p>	<ul style="list-style-type: none"> <li>• 3/14/2014</li> <li>• Updated Feb. 2014</li> </ul>

		<p>Some courts have rejected a per se approach in determining whether proceedings to collect accounts receivable are core proceedings and have instead advanced a case-by-case analysis in which the court looks to the timing of the accrual of the debt to determine whether the underlying action is core or noncore.<sup>9</sup> Thus, a proceeding to collect accounts receivable in which the underlying transaction occurred prepetition may be found to be only "related to a case under Title 11" and therefore noncore since the matter giving rise to the complaint was actionable before the bankruptcy case was commenced, while an action based on a postpetition debt may be found to be core as, for example, constituting an "administrative activity of a debtor-in-possession" so as to be a core proceeding under 28 U.S.C.A. § 157(b)(2)(A)</p> <p>9 Am. Jur. 2d Bankruptcy § 755</p>		
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