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Research Strategies Using Headnotes: Citators and Relevance

by Susan Nevelow Mart

Some kinds of research require a lawyer to find as many cases as possible on a key legal topic. A time-honored method of finding those cases is to locate one good case and then use a citator to find more cases on the legal issue. Once an attorney has one good case, both Shepard's from LexisNexis® and KeyCite from Westlaw®¹ offer the ability to use that case's headnotes to find more cases on a specific topic. In an era when both Lexis and Westlaw have more than 11 million cases in their databases, the ability to limit the results of a citator search so that only cases directly on point need to be reviewed is a real benefit. But do you get the same cases from Shepard's and KeyCite? Each of these systems uses its own unique algorithm to match headnotes from the original case to citing cases. Even if the headnotes in Shepard's and KeyCite are identical, those differing algorithms bring back very different results. This article explores this phenomenon and its effect on legal research.

An Illustration Using *Cohen*

Researchers need headnotes to tame those millions of cases. When a researcher finds an important case on a pertinent legal issue, it occupies the center of a network of citations.² But not every part of the network is relevant to the researcher. Here's an example: If an attorney is researching the contours of offensive speech protected by the First Amendment, *Cohen v. California*³ is an important case, and the cases citing *Cohen* are a potential goldmine to excavate for cases where the facts may mimic those in the client's case. For a case like *Cohen*, however, the unfiltered results of other cases that cite the decision are useless. In Shepard's citations, there are 1,152 citing decisions. In KeyCite, *Cohen* has 1,104 citing deci-

sions. This is simply too many citations to be meaningful to a researcher. Focusing on the relevant headnote, as well as an appropriate jurisdiction, is a necessary method for returning a manageable set of potentially relevant results. In *Cohen*, both Lexis and Westlaw have the identical headnote: "The mere presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." If a researcher limits the search in Westlaw's Keycite to this relevant headnote and to federal cases, there are only 8 cases. That is manageable. The same search in Lexis's Shepard's, using the same headnote, results in 15 cases.

This one search illustrates a few points about citators. When a researcher limits a search by headnote and by jurisdiction, the results are targeted enough to actually read the cases. But the number of results differs for each citator. Each result set contains both relevant and irrelevant cases, and each result set returns some unique cases.

The Concept of Relevance

Relevance is a highly contested notion. Most studies of relevance in legal databases have used an objective standard: either a case is on a predetermined list of relevant cases or it is not.⁴

In the real world, each user's research requires a unique and shifting definition of relevance. During the iterative process of research, analysis, and writing, what is relevant is constantly being refined. For the purpose of this search, the standard of relevance chosen was subjective and questioning: how does this new case being reviewed fit into the terrain of the map the author is creating of the area of law relevant to the legal argument available to my client?



About the Author

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For the results in *Coben*, a case was relevant if it discussed the constitutionality of a law limiting offensive speech in a factual scenario where unwilling listeners or viewers heard or saw the offensive speech. Applying the relevance standard to the results in Shepard's and KeyCite, the author found:⁵

- Shepard's returned 15 cases; 10 were relevant. That means that 66% of cases were relevant.
- KeyCite returned 8 cases; 6 were relevant. That means that 75% of the cases were relevant.
- The two citators found a total of 23 cases: 15 from Shepard's and 8 from KeyCite. The two systems had 3 cases in common. This is an overlap of less than 8%. It means there were 12 unique cases in Shepard's and 5 unique case in KeyCite.
- Of the 12 unique cases in Shepard's, 8, or 67%, were relevant.
- Of the 5 unique cases in KeyCite, 3, or 60%, were relevant.

It looks like using just Shepard's or KeyCite means a researcher is going to miss relevant and potentially useful cases. But this is an analysis of just one case.

Expanding the Study

To test whether these findings held up over a large number of cases, the author did an empirical study.⁶ The study took 90 cases in which both Lexis and Westlaw used the same language for a headnote of legal interest. Both Lexis and Westlaw have largely overlapping sets of cases for any given American jurisdiction.⁷

Here is how the study was set up. Research assistants used a set of 90 cases that had identical headnotes in both Lexis and Westlaw. The research assistants performed Shepard's and KeyCite searches for the headnote, using the same jurisdictional limits in each citator. To test the relevance of the results, the research assistants were trained to think of the statement of relevance as applying to an actual case they had for a client, and to take the broadest view of relevance. If a citation could be seen as potentially helpful to the legal argument, it was considered relevant.⁸

But Shepard's and KeyCite use different methods to generate headnotes. Westlaw editors create headnotes by summarizing the

legal points in a case in their own language,⁹ while Lexis uses algorithms to take the language of its headnotes directly from the language of the case.¹⁰ Both systems assign those headnotes to citing cases algorithmically.¹¹ For each citator system, limiting by headnote and jurisdiction will pull up a discrete set of new cases that, potentially, address the same point of law as the original case, but with different facts that may be more relevant to the situation the researcher is investigating.

The Survey Says

So, when you compare the results of these two sets of identical searches over a large number of cases, does the *Coben* model hold up? The short answer is yes. Although the numbers are not identical, the conclusions hold: (1) each citator returns unique results, (2) each citator contains unique relevant results, and (3) there is not that much overlap between the two sets of results. Either the different algorithms used to match headnotes to citing references, or the different ways in which headnotes are generated, or both, provided unique cases in both citators.

The most surprising thing about the results of the 90-case survey was how few cases each citation system had in common; there was not that much overlap in the cases found using Shepard's and those found using KeyCite. As the algorithms are currently configured, each citation system still has a large percentage of cases linking to relevant cases not found by the other citation system: the percentage of overlap between the two systems is only 33%.¹²

That means each system had a very high number of unique cases. For Shepard's, 42% of the cases were unique and relevant;¹³ for KeyCite, 31% of the cases were unique and relevant.¹⁴ Each citator system returned relevant results, but Shepard's returned 15% more relevant results. Of course, in each citator, the researcher must review irrelevant results, as well.

Drawing Conclusions

Using both citators for comprehensive research would seem like the best way to get full results, but one feature of legal research systems has always been their built-in redundancy. If a researcher uses enough resources, eventually all relevant resources will be located. That is the long-standing answer to the question "When am I done with my research?" The research is complete when the same sources start showing up. Every research tool is part of a larger

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research universe and sits at the center of a network of information.¹⁵ Using a variety of resources is a hallmark of good legal research, and the use of citators to find more cases on your legal topic is a necessary but not sufficient research strategy. Both Lexis and Westlaw are structured to accommodate multiple kinds of search strategies, and there are legal resources provided by many other publishers. The lesson is not necessarily to think that one has to use both citator systems, but simply to understand that any one legal resource is only going to show a researcher part of the picture. It is important to know the limits of the legal tools lawyers use.

Notes

1. LexisNexis's Lexis Advance and Thomson/Reuters's WestlawNext are referred to as Lexis and Westlaw, respectively.
2. Malmgren, "Towards a Theory of Jurisprudential Relevance Ranking: Using Link Analysis on EU Case Law," *Master of Laws Thesis* 38 (Stockholm Univ., Sept. 4, 2011).
3. *Cohen v. California*, 403 U.S. 15 (1971).
4. Mason, "Legal Information Retrieval Study: Lexis Professional and Westlaw UK," 6 *Legal Info. Mgmt.* 246, 248 (2006).
5. These searches were performed on February 15, 2015.
6. Mart, "The Case for Curation: The Relevance of Digest and Citator Results in Westlaw and Lexis," 32 *Legal Reference Services Q.*13 (2013).

7. The cases within a specific jurisdiction are substantially similar. Each database provider has the same published cases; there is some variation in the unpublished opinions.

8. For those concerned with the details of the empirical study, the determinations the research assistants made of relevance were subjected to review; their findings of relevance were validated. Mart, *supra* note 6 at 27-28.

9. The "editor's own language" does sometimes parallel the exact language of the court, but Westlaw editors are free to, and do, summarize legal concepts in their own words. Cohen *et al.*, *How to Find the Law* 84 (9th ed., West Publishing Co., 1989).

10. *Id.*; Mart, *supra* note 6 at 19.

11. Mart, *supra* note 6 at 21.

12. The research assistants reviewed 1,075 cases from Shepard's searches and 1,130 cases from KeyCite searches. There were 549 cases that appeared in both citators. So, there was a total of 1,656 unique cases (549/1,656 = 33%). The full data are on file with the author.

13. There were 456 unique and relevant cases out of a total of 1,075 cases. The full data are on file with the author.

14. There were 318 unique and relevant cases out of a total of 1,130 cases. The full data are on file with the author.

15. Berring and Edinger, *Finding the Law* 335-36 (12th ed., Thomson/West, 2005). ■



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