



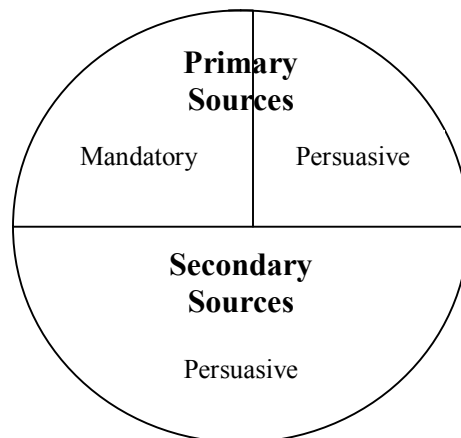
WHEN AND HOW TO USE SECONDARY SOURCES AND PERSUASIVE AUTHORITY TO RESEARCH AND WRITE LEGAL DOCUMENTS*

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The difference between persuasive and mandatory authority and secondary and primary sources can be confusing, but you can master the concepts. By understanding the differences and knowing which resources are appropriate and available, researching will be easier, and your writing will be stronger.

I. Putting the Pieces Together: The Relationship Among Primary and Secondary Sources and Mandatory and Persuasive Authority

All legal information comes from either primary or secondary sources. All primary sources are either mandatory or persuasive authority. Secondary sources are always persuasive. Consider the following diagram to understand how these concepts interact.



A. Primary Sources

Primary sources articulate the law. Primary sources include the following:

- Constitutions
- Statutes
- Cases
- Agency decisions or regulations

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Primary sources can be either persuasive or mandatory. Mandatory authority refers to cases, statutes, or regulations that the court must follow because it is binding on the court. Thus, lower courts are required to follow decisions from higher courts in the same jurisdiction.

Example 1: You are in federal District Court for the Northern District of North Carolina. The same district court ruled that all dogs get two free bites, but the Fourth Circuit held that all dogs only get one free bite. The Fourth Circuit ruling is mandatory authority; therefore, you are out of luck if your client's dog bit more than once.

Persuasive authority refers to cases, statutes, regulations, or secondary sources that the court may follow but does not have to follow. Thus, the holding from a court in another jurisdiction or a lower court in the same jurisdiction is persuasive authority.

Example 2: You are in federal District Court for the Northern District of North Carolina. The same district has not ruled on the dog issue and neither has the Fourth Circuit. The Ninth Circuit, however, has ruled that hungry dogs can bite as many times as they want, and the Fifth Circuit has held that owners must euthanize all dogs that bite even once. You will want to argue that your court should adopt the Ninth Circuit's rule; however, the district court may adopt either rule or make up its own rule.

When writing a memo or a brief, you must cite to relevant mandatory authority. However, consider citing persuasive authority if no mandatory authority exists or adding support to the mandatory authority that you cited.

As mandatory and persuasive authority are subsets of primary sources, reconsider Examples 1 and 2. In Example 1, the Fourth Circuit's holding is primary authority and mandatory on the District Court for the Northern District of North Carolina. In Example 2, the Ninth Circuit and Fifth Circuit holdings are both primary authority, although they are considered persuasive to the District Court for the Northern District of North Carolina.

B. Secondary Sources

While primary sources articulate the law, secondary sources analyze the law. For example, a Fourth Circuit case is a primary source, but an article analyzing that case is a secondary source. Secondary sources include the following:

- Treatises
- Dictionaries
- Legal Encyclopedias like AmJur 2d and CJS
- ALR
- Restatements
- Law Review Articles

Secondary sources are never binding on a court. For example, while you might cite to the Restatement in a brief, the court will only consider it as persuasive authority and not as the binding, mandatory law.

II. Putting These Ideas into Practice: Using Persuasive Authority and Secondary Sources to Make the Research and Writing Process Easier

First Year Legal Research and Writing and the USLD Program primarily focus on research and writing using primary, mandatory authority. Persuasive authority and secondary sources are often overlooked, but many writers find these tools effective.

A. Researching With Secondary Sources

Secondary sources are a helpful place to start research, especially if the assigned topic is unfamiliar. Writers can save a time researching because secondary sources provide an overview of the legal issues and point to relevant primary authority.

Remember: No matter how promising the secondary sources may appear, you are never excused from reading and evaluating primary sources for yourself. Authors of secondary sources are not infallible; the source may be biased or incomplete.

Hornbooks: A hornbook will give you an overview of the relevant cases, regulations and statutes for virtually any area of the law. Don't forget to check the hornbook's table of cases/statutes for citations to primary authority.

Legal Encyclopedias: Like hornbooks, legal encyclopedias like CJS and AmJur 2d will provide useful background, inform the researcher of major cases and acquaint the reader with useful terminology. State-based encyclopedias have the advantage of focusing on the law in a particular jurisdiction.

American Law Reports (ALR): ALR is a collection of well-annotated subjects. While not all legal issues are included, an on-point annotation can be very helpful by pointing you to multiple relevant cases. West Publishing has put out many editions of ALR - ALR5th (Fifth Series) is the most up-to-date and is significantly different from ALR4th, and ALR Federal includes only federal cases.

Periodicals:

- If you are looking for information on a specific area of the law, you may want to start by looking for relevant articles on the subject. Indexes are a fast way to find relevant periodical articles. Some helpful indexes are the Index of Legal Periodicals (ILP), Index of Foreign Periodicals (IFLP) and the Legal Resource Index (LRI), which can be accessed through the library website, Lexis or Westlaw. Each index entry will contain a short summary of the article's contents and a citation.

- Once you find helpful articles, most will contain in-depth citations to relevant cases and secondary sources relating to the subject. But be careful, some articles might be out of date.

People: Don't forget that professors, attorneys and other students can also be excellent resources.

B. Using Persuasive Authority and Secondary Sources in Writing

You can cite to secondary sources and persuasive authority in legal documents but must know when it is appropriate.

If there is no mandatory authority in your jurisdiction, look to persuasive authority. The strongest persuasive authority will likely be primary authority from a higher court or a court of the same level. Keep in mind, authority from some jurisdictions might be more persuasive than authority from other jurisdictions.

Example 3: You are preparing your brief for the Second Circuit. You have a case from the Southern District of New York and a case from the District of Vermont. Both courts sit in the Second Circuit, but district court cases are not binding on the circuit courts. The Second Circuit is likely to find the case from the Southern District of New York more persuasive because rulings from that court are generally well respected.

On a political note, decisions from conservative circuits might not be well received in liberal circuits, while decisions from liberal circuits might not be very persuasive in conservative courts. For example, the Fourth Circuit and the Ninth Circuit might not give much weight to each other's decisions.

If you can find a relevant primary source, either mandatory or persuasive, it is generally not a good idea to cite to secondary sources. However, if there is no primary authority on the subject, you may use secondary sources. Some sources are particularly persuasive:

Example 4: You might cite Wright and Miller's Federal Practice and Procedure when litigating a civil procedure issue.

Example 5: The Restatement of Foreign Relations Law is highly persuasive when arguing in the amorphous field of international law because it is often difficult to find binding sources of international law.

Example 6: Courts consider Warren and Brandies' "The Right to Privacy" law review article persuasive when determining Constitutional privacy issues because the article was the first substantive analysis of the right to privacy.

You can use other secondary sources for background information, but you should not cite to them in a memo or brief:

Example 7: Do not cite to Examples and Explanations (even Glannon!).

Example 8: No court or partner in a law firm will take a citation from any Nutshell seriously.

Using persuasive authority and secondary sources is always a judgment call. If you are not sure about a particular authority, consider asking a professor or the person who you work for about what sources are appropriate.

Additional Resources on Secondary Sources and Persuasive Authority

ROBERT C. BERRING & ELIZABETH A. EDINGER, FINDING THE LAW (11th Ed. West Publishing Co. 1999).

ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS (2d Ed. West Publishing Co. 2000).