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GUIDELINES ON LEGAL RESEARCH AND WRITINGS*

Abstract

There is a huge and increasing concern by scholars, judges, lawyers and even litigants over the quality of legal writings -briefs, letters, judgments, drafting, articles in learned journals or books- in the twenty first century. The problem is largely due to the decline in research and lack of quality control. A well-researched writing stands tall among others and remains impeccable and respectable. This paper is a wake-up call to law students, lawyers, judges, governments and allied stakeholders to give more attention to the issue of research in legal writings. The paper unveils the importance of research, highlights key tools or sources for research and prescribes steps and avenues for enhancing effective legal writing through research.

1.1 Introduction

In addressing the subject of legal research and writings, it is pertinent to examine a typical well researched judgment from the Supreme Court of the United States as follows:

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, *see Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438(1972); *id.* at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U. S. at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws. it perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today

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are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.¹

A well-researched brief is a precursor to a good judgment.² With the requirement of writing of briefs and judgments, clients, colleagues, society and posterity can easily trace where errors emanate from in the event of damages.³ Research is indeed a skill and it calls for an in-depth understanding of how to use this skill to enhance service delivery.⁴

Generally speaking, a research is the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions.⁵ Legal writings include letters, briefs, opinions, commentaries, reviews, judgments, drafting of agreements, articles in learned journals, books among others. There are serious concerns about the quality of research done by legal writers.⁶ The concerns actually call for a declaration of a state of emergency in the legal profession. Nancy Johnson further captures this issue as follows:

Librarians and attorneys lament the poor research skills of new attorneys. The need for improved legal research skills prompted the American Association of Law Libraries (AALL) to explore what it can do to foster and support legal research as a subject specialty, in law schools and in practice.⁷

¹Per Mr. Justice Blackmun in the U.S. Supreme Court decision in *Roe v. Wade* 410 U.S. 113 (1973). One can immediately notice that almost every assertion of the Supreme Court Justice is backed with some form of authority and Judge even emphasizes the need for research when he said, "Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws."

²Lee G. Muthoga, "Guidelines For Judgment Drafting," available at <http://kenyalaw.org/kenyalawblog/guidelines-for-judgement-drafting/>. Accessed April 27, 2016, where the learned judge emphasized among others the importance of Judges capturing the essential contributions of the briefs of Counsel in writing judgments.

³See for example, Order 39 Rules 1-3 of High Court Civil Procedure Rules; Akwa Ibom State of Nigeria which requires motions to be supported by written addresses.

⁴See Lee G. Muthoga, (n.3) where he said that, "Trial judges should support their findings with sufficient reasons to show that they are not arbitrary and capricious. One should, whenever possible, cite specifics- for example, evidence from documents, consistencies or inconsistencies in testimony, conformity to or deviation from normal human behaviour, awareness of motives for telling the truth or for concealing it etc. In other words, judges can and should reveal exactly the sort of thought processes that they followed in reaching a verdict."

⁵See generally, Nancy P. Johnson, "Best Practices: What First-Year Law Students Should Learn in a Legal Research Class." Available at <http://ssrn.com/abstract=1341118>, Accessed April 27, 2016.

⁶See generally Scott Fruehwald, "Legal Writing, Professionalism, and Legal Ethics" Available at <http://ssrn.com/abstract=#0820>, Accessed April 27, 2016

⁷Nancy P. Johnson, (n.6).

With due respect to Nancy Johnson, the problem has extended beyond law students, new lawyers to affect some old lawyers and even judges. In her own contribution to the issue of legal research, Sarah E. Valentine stated as follows:

Beyond laments about the lack of general lawyering skills, the bench and bar also routinely highlight the inadequacy of the legal research skills of recent law graduates. The growth of in school clinics, internships, and externships has also surfaced complaints about the research capabilities of law students. Dissatisfaction with legal research education has reached a point where the ABA is seriously considering introducing a legal research component on the bar exam.⁸

This paper primarily identifies the importance of legal research. It goes further to identify and remind readers and writers of some of the great tools they can use to conduct legal research. The paper also prescribes some steps for conducting legal research and the tips for effective legal writing. The paper ends with concluding thoughts and critical recommendations for all the stakeholders.

1.2 Importance of Research

The proverbial adage, "look before you leap" sounds an appropriate warning on issues of research in legal writings. One can say, research before you write! Many scholars and jurists have emphasized the importance of research in legal writings.⁹ Justice Peter Akhimie Akhiero captured the point as follows:

⁸Sarah E. Valentine, "Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools." Available at <http://ssrn.com/abstract=1537871>. Accessed April 27, 2016. In fact in Kenya, the vetting Board fired 8 Magistrates and judges for inability to write well researched judgments. See Sharad Rao, "Judges who can't write a blot to law," *Daily Nation*, Friday September 11, 2015. Available at <http://www.dailynation.com/kenya/2015/09/11/judges-who-cant-write-a-blot-to-law/>. Accessed April 29, 2016. According to the paper, "Writing skills, the board said, refers to the ability of a judicial officer to use language to explain to litigants how a decision is arrived at in grammatical language. "Some of the judgments provided as the best writings of the officers lacked in structure, content and grammar,""

⁹See for example, Lisa Smith-Butler, "Cost Effective Legal Research: Redux: How to Avoid Becoming the Accidental Tourist, Lost in Cyberspace." 6 Florida Coastal Rev.101.2008.; Laurel Oates and Anne M. Enquist. "Legal writing Handbook: Analysis, Research and Writing" (5th Edition), Walters Kluwer Law & Business, University of Seattle University School of Law Research Paper No. 10-25 among others.

A legal practitioner must be a book worm. He must learn how to conduct a systematic study of legal literature. He must be conversant with his law library. He must acquire the habit of discovering the law **first hand** from the sources. A good lawyer must be personally involved in research. It is not a good habit when we consistently and personally delegate research functions to our juniors or to our seniors. When you form that habit, you isolate yourself from the sources, and the fountains of legal knowledge. You will become a stranger to the living oracles of the law, and very soon you will become a novice, there will be no difference between you and a layman.¹⁰

Professor Scott Fruewald also observes that:

Undertaking thorough legal research is one of a lawyer's ethical duties to the client. The first rule of legal ethics is that "A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Obviously, thorough legal research falls under this rule; one cannot competently advise a client unless he or she knows the law that applies to the client's situation.¹¹

From the avalanche of writings and comments on the issue of research, the importance of research in legal writings can be summarized as follows:

- i. It provides a good reference or authority for submissions that are made.¹²
- ii. Helps to trace the mischief that was to be cured by a legislation or decision.¹³
- iii. Forms a solid base for persuasive authority because it shows that what you now want has been done elsewhere.¹⁴

¹⁰Peter Akhimie Akhiehiero, The Face of Legal Research in the 21st Century, A paper presented at the law seminar held at the Conference Hall of the Edo State Ministry of Justice, on the 27th day of June, 2008. Available at <http://www.nigerianlawguru.com/articles/general/THE%20FACE%20OF%20LEGAL%20RESEARCH%20IN%20THE%2021ST%20CENTURY.pdf>. Accessed April 27, 2016.

¹¹Scott Fruewald, (n.7)

¹²See X.J. Kennedy, D.M. Kennedy and Maria F. Muth, *The Bedford Guide For College Writers*, (Bedford/ St Martins, New York 2008) P.A-3.

¹³See *Roe V. Wade* (n.2)

¹⁴John Langan, *College Writing Skills*, (New York: Mc Graw- Hill Companies Inc, 2011) pp. 78-79 where the author emphasizes the importance of Identifying Adequate Supporting Evidence that the fact in issue has occurred elsewhere.

- i. Helps to give exposition of why a proposition is faulty or credible.¹⁵
- ii. Prevents your presentation from being faulted whimsically.¹⁶
- iii. Enhances the quality of words used in submissions or decisions.¹⁷
- iv. Places the researcher in the class of people that will not be taken for granted by judges, colleagues, clients and society.¹⁸
- v. Reduces the burden of finding the law for subsequent researchers.¹⁹
- vi. Reduces injustice suffered due to ignorance of lawyers and judges.²⁰
- vii. Helps to check corruption because a good research can tie the hand of a corrupt person.
- viii. It can facilitate peaceful settlement of disputes since the end result is front loaded from your findings.²¹
- ix. It can lead to quick dispensation of justice since lawyers and judges will easily decline when they find superior and comprehensive authorities.
- x. Helps to show current trends in the law.²²
- xi. Reduces instances of plagiarism since the researcher finds out the sources of law for himself than stealing the research of others.
- xii. It is the lawyering skill that provides the knowledge necessary for other lawyering skills such as interviewing, writing, negotiation, and counseling.²³

1.3 Some Useful Tools and Sources for Legal Research

For legal research to be effective, the researcher must know and use appropriate tools in order to arrive at the desired sources of the law or to achieve the desired result.

¹⁵*Ibid.*

¹⁶Nancy Johnson (n.6)

¹⁷A. Denning, *The Discipline of law*, (Butterworths, London: 1979) p.5 where the learned jurist said, "To succeed in the profession of law, you must seek to cultivate command of language. Words are the lawyer's tools of trade."

¹⁸Laurel Oates and Anne M. Enquist, "Legal writing Handbook: Analysis, Research and Writing" (5th Edition), Available at <http://ssrn.com/abstract=1649049>. Accessed April 27, 2016. There the authors stated as follows, "One final point about your role as a legal writer: Every piece of writing you create in your role as a lawyer reflects on your professionalism. Words are the tools of your trade, so how you use words represents how seriously you take your work."

¹⁹Anne M. Enquist, "Unlocking the Secrets of Highly Successful Legal Writing Students." Available at <http://ssrn.com/abstract=969526>. Accessed April 28, 2016.

²⁰Peter Akhimie Akhiehiero (n.11)

²¹Scott Fruewald (n. 7) "After conducting legal research, the lawyer concludes that the client cannot win at trial, and the plaintiff will recover the requested damages. I tell the students that rather than litigating the case, the lawyer should try to settle the case."

²²Ronald E. Wheeler, "Does Westlaw next Really Change Everything: The Implications of Westlaw next on Legal Research." Available at <http://ssrn.com/abstract=1773767>. Where the author stated, among others, that, "Research on the current law, research on the law in other jurisdictions, research on trends in the law, and research on proposed or pending law are what the practice of law is built upon."

²³Sarah Valentine, (n.9)

Nancy Johnson, rightly observed that, "For students to relate to legal research, they must know how and when to use the materials."²⁴ Knowing the tools themselves and how to use them is a skill by itself. This is because the subject of legal research in the 21st Century has gone beyond the manual search of a physical library. It has been made sophisticated, or rather complicated, by the influence of technology. *Sarah Valentine buttressed this point as follows:*

...[T]he growth of the Internet and computerized research has broadened both the type of information courts rely on and the type of research lawyers routinely undertake. Attorneys now research in ways they never learned in law school, and this change is primarily driven by technology. The explosion of easily accessible information makes information literacy a required component of law school legal research classes.²⁵

Tools generally relate to the materials used to find where the sources or authorities can be found. For example the internet can be used to trace what statute applies or to search sections of a statute. The sources of law or core authorities could be the Statutes themselves or cases. However, there are instances where the tools themselves can be seen as the sources. Example when one is doing a research on law reports. The law report itself could become the source material for the research. Thus, it may be merely an academic exercise to create compartments for tools and sources of legal research. The skill then lies in the ability of the researcher to know when and how to use what to do what or get what. Thus, the tools and sources which one could engage for purposes of legal research could be primary or secondary in nature.²⁶

1.3.1 Primary Tools and Sources

i. **Statutes:** Statutes are the strong materials for research. It is sometimes good to carefully examine previous, current, local, foreign and international statutes to arrive at a balanced conclusion of any legal research or writing in that regard.²⁷

ii. **Cases:** Cases are the strong materials for research. It is also good to carefully examine previous, current, local, foreign and international cases to arrive at a balanced conclusion of any legal research or writing in that regard.²⁸

²⁴ Nancy Johnson, (n.6)

²⁵ *Sarah Valentine* (n.9)

²⁶ Christopher Wren and Jill Wren, *The Legal Research Manual* (Second Edn., Legal Education Publishing, Madison 1986) 41.

²⁷ *Ibid.* p.42-49.

²⁸ (n.27) 49:60.

1.3.2 Secondary Tools and Sources

i. **Text books:** Text books by reputable scholars or a respective subject can be a useful source. The fact is that a text book should ordinarily contain more materials. The danger in text books is that some of them are not reviewed by peers or other superior scholars. It is always a good practice to compare views in textbooks. The updates on the law from when the text was written are also necessary so that views expressed may not be obsolete.²⁹

ii. **Journals:** Articles in standard journals are usually peer reviewed and constitute a great and dependable source for research.³⁰

iii. **Indexes:** Indexes are basically reference guides. They save time because the cases, statutes or subjects of research are often chronologically arranged. They also help the researcher to see at a glance the aspects already dealt with so that he or she can expand his research or narrow same.

iv. **Proceedings of legislative Houses:** This helps in knowing the intention of the legislature, the issues that were considered, the diversity of opinion and the sentiments addressed among other factors.

v. **Law library:** The library is a one stop shop for gathering as much information. Whether the library is on-site or on-line, it is always a great place to find most of the resources.

vi. **Forms and precedents:** These serve as useful guides to know what one is expected to do and how it has been done. Some Rules of Court contain forms and precedents. Some forms and precedents are actually published by scholars.³¹

vii. **Interviews:** Interviews with experts in a field can help to widen perspectives or scope of a research. In some cases, interviews could reveal the mind set of the people who are designed to benefit from one project or programme.

viii. **Reports of findings of administrative or related legal bodies:** Reports of legal and administrative bodies often contain useful information that can help one to understand the root causes of certain behavioral patterns or the challenges involved in carrying out some activities.

ix. **Legal encyclopedias and dictionaries:** Reputable encyclopedias and dictionaries often contain an assemblage of definitions or clarifications distilled from books, journals,

²⁹ Darby Dickerson, *ALWD Citation Manual* (Third Edn., Aspen Publishers, New York 2006) 201-205

³⁰ *Ibid.*

³¹ Law Quest Limited, *Procedure & Precedent Manual* (Law Quest Limited, Lagos 2006) 70-363.

judgments, legislative debates and other great sources. It constitutes a one stop shop for appreciating the subject matter under review.³²

x. **Classified Internet Sources:** Example, websites of Courts, legislative houses, justice departments, international bodies, multinational law organizations. Reputable e-libraries like Lexis-Nexis, Westlaw next, LexisNexis®, Loislaw, VersusLaw, Westlaw, Law Pavilion, legal Soft among others.³³

1.4 Steps to Effective Legal Research

There is no hard and fast rule about how to conduct legal research, the approach is largely dependent on the nature of the writing that a researcher or writer is handling.³⁴

However, it is pertinent for a researcher to be well organized, emotionally and structurally, if excellent results are to be attained. Here are a few guides that can be useful in conducting research for most legal writings:

- i. Develop a research culture and mind set for every issue.³⁵
- ii. Choose a topic to research into if there is no given topic. If one is writing a long essay, it may be pertinent to get into a cutting edge area that will meet particular needs of the moment and it should be a subject that will sustain the passion of the researcher.
- iii. Write down each legal issue as a sub-heading to be researched into.
- iv. Set down a time frame for conclusion of research and commencement of writing.³⁶
- v. Proceed to use the most effective research tools and sources at your disposal. For internet sources make effective use of the search engine by typing in the key words you intend to research into. You can also type in the name of a familiar author who is an authority in that field. You can also filter your search and narrow to the exact areas after having a broad perspective. Start taking notes or saving principles or relevant authorities in files that you can use subsequently.

³²*Ibid* at 230-232

³³Laurel Oates and Anne M. Enquist. (n.19)

³⁴For example Nancy Johnson, (n.6), observes that many research professors recommend that new researchers start by using the secondary sources of law, like text books, journals among others to find the applicable primary sources such as Statutes and cases.

³⁵Peter Akhimie Akhiero (n.11), where the learned jurist counseled that, "Legal practitioners must not be caught unawares, we are members of the learned profession and we must take the bulls by the horns and equip ourselves for the challenges of the age. Moreover, we must be in the vanguard in the pursuit of knowledge in the society,"

³⁶Without setting a time frame the danger is that the researcher can get distracted, bored or may end up bringing out results that do not meet the need of the moment.

- vi. Record your opinions or queries for further research if necessary.
- vii. Provide the references in full. Note differences when citing statutes, cases, books, journals, reports, newspapers, interviews, conference papers, thesis, websites and the rules on use of abbreviations and cross references.³⁷
- viii. Note the date of your research for future referencing.
- ix. Start framing your writing layout to see if when you have gathered reasonable materials and remain open for further research.

1.5 Tips for Organizing Legal Writing

It is one thing to have an excellent research and yet another thing to present it in a comprehensible form. Indeed, a research result that is presented poorly may bring to question the quality of the research done by the researcher. For example, in writing judgments, Lee G. Muthoga said:

In order to draft a good judgment and arrive at a reasonable conclusion, it is important to: Establish a logical and coherent judgment outline; Develop a good mastery of the actual issues to be resolved; Conduct a thorough analysis of the evidence presented in light of the applicable law and; Properly articulate the reasoning behind the final judgment³⁸

The writing must have an order so that it will ease reading and comprehension, because the writer will not always be there to explain his writing to readers. As much as possible, a researcher should ensure that there is a good introduction which must state the issues at stake, what he or she wants to do and how to do it. The main body must do what was planned in the introduction. In the main body the researcher is expected to bring out, as much as possible, the major concerns or opinions and then take a position or make submissions on all the core issues. The conclusion is expected to be a brief review of what has been done in the writing and it reinforces the proposition in the introduction. Here are some guides on how a work may be ordered.

³⁷There are some useful websites and materials to guide citation:

http://www.cc.utah.edu/~u0384504/universal_content/research_tools/HowtoCiteLegalSources.pdf;

2. <https://www.law.cornell.edu/citation/>; J.A.W. Hefferman and J. E. Lincoln, *Writing. A College Hand Book* (2nd Ed) (United States of America: W. W. Norton & Co, Inc, 1986) pp 30-31; Meredith and T. Endicott (eds), *Oscola, 2006. The Oxford Standard for Citation of Legal Authorities* (University of Oxford, Oxford 2006).

³⁸Lee G. Muthoga, "Guidelines For Judgment Drafting," available at <http://kenyalaw.org/kenyalawblog/guidelines-for-judgement-drafting/#sthash.BqhhbUH6.dpuf>. Accessed April 27, 2016

- i. **Chronological order:** Based on how events occurred in time.
- ii. Cause and effect order: Explaining one point or action as the reason for another.
- iii. **Climatic order:** In order of ascending importance, from least to most important.
- iv. Oppositional order: Here a researcher is expected to state the contention of the opposition and then state his or her dissension. This type is very suitable for replies and rejoinders on points of law.³⁹

A very crucial point to note is the need to eliminate all discernable errors in legal writings. Legal writings are professional writings and they must meet a certain standard of scholarship. Laurel Oates and Anne M. Enquist rightly observed as follows:

The emphasis on professionalism also means that mistakes such as poor citation form; the misspelling, especially of a name; and grammar, punctuation, and proofreading errors matter more than they do in other kinds of writing. Being accurate, precise, and polished in written documents are all critical parts of being professional that legal readers expect.⁴⁰

1.6 Conclusion and Recommendations

The main task of this paper was to stir up the minds of stakeholders in the legal profession on the need for legal research and writings in order to secure more comprehensive and qualitative materials. The importance of research has been highlighted and the basic tools and sources for research have been identified. The readers are encouraged to study more and make good use of the referenced materials. Each university should integrate into its curriculum legal research and writing as a core component. As Nancy Johnson testified, “we have one hour each week for twelve weeks to teach students not only the process of legal research, but also the materials needed to conduct legal research.”⁴¹ Research and writing, should not only be a once-off course in universities, lawyers and judges should be made to have compulsory continuing education in this regard to cope with the dynamic trends in technology and multi-facets of professional demands in the 21st Century. Private law firms, the judiciary and legal institutions should be encouraged to float peer reviewed publications as a booster and the publications should be used as a criteria for certain benefits.

³⁹J.A.W. Hefferman and J. E. Lincoln (n.38)

⁴⁰Laurel Oates and Anne M. Enquist. (n.18)

⁴¹Nancy Johnson. (n.6) She wrote about the practice in Georgia State University College of Law.

criteria for certain benefits. Furthermore, legal practitioners in less developed climes should be encouraged and sponsored for training in climes there are good research and writing experts. Governments should invest a lot of money in updating legal research data base in public libraries so that less privileged legal researchers can have access to research and write. As much as possible, there should be publication of the judgments of inferior courts so as to challenge the judges in those courts to improve their writing skills and to also discover hidden talents of writers in such courts. Lawyers, law firms and Judges should encourage and sponsor legal essay competitions among law students to stir up the research and writing spirit among law students. As we know a good student will make a good lawyer, a good Bar makes a good Bench. It is expedient to state the words of Scott Fruehwald who cautioned that:

We need to instill in our students the need to develop their legal research skills and to be thorough when they do legal research. It may be tedious to look through all the periodical indexes or to fully shepardize cases, but such diligence wins cases. The diligent lawyer can beat the smart but lazy lawyer most of the time.⁴²

The above words of Scott Fruehwald is not only apt for students, it should be the life time code for all those in the legal profession- whether at the bar or bench.

⁴²Scott. Fruehwald. (n.7)