Are all Citator Services Created Equal?

A Comparison of Google Scholar, Fastcase, Casemaker, LexisNexis, WestlawNext, and Bloomberg

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During our live continuing legal education seminars we discuss how to use the information found in social media profiles for evidence and how to get profiles admitted into evidence. If a profile owner assumes a pseudonym, authenticating the owner of the profile has proven to be a challenge. Some courts admit the profile into evidence and some do not. For that reason, we’ve been following Tienda v. State, an unpublished Texas Appellate Court case, where a murderer appealed his conviction, arguing that the trial court erred in admitting evidence from his Myspace profile because there was no proof he had created and maintained that profile. Tienda v. State, No. 05-09-00553-CR (Tex. App.—Dallas, December 17, 2010) (do not publish), available at http://linkon.in/IhNLsK. The profile included the following information about the appellant convicted murderer: the pseudonym “Smiley,” which he was known by according to testifying witnesses; photographs of the appellant, with one photo displaying his electronic monitor and another photo displaying his tattoo; references to the murder; and email addresses that incorporated both the name “Smiley” and his real name. He asserted that the profile had not been authenticated. The appeals court rejected his assertion and affirmed the trial court’s decision that had relied in part on the following evidence:

The inherent nature of social networking websites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal backgrounds, and lifestyles. This type of individualization is significant in authenticating a particular profile page as having been created by the person depicted in it. The more particular and individualized the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information.

As we prepare for more in-person MCLE seminars around the country, we wanted to see how prevalent this line of thinking was. We also thought it would be a good opportunity to compare three of the most popular free and low-cost case law databases (Google Scholar, Fastcase, Casemaker) and their citator services, with the more expensive databases (LexisNexis, WestlawNext, and Bloomberg) and their citator services. It goes without saying that Google Scholar, Fastcase, Casemaker’s citators do not provide the editorial comment that LexisNexis, WestlawNext, and Bloomberg do. Instead, we were focusing on how well each citator worked. We decided to use the 2010 Tienda case for our test case to see if each citator listed the same citing opinions to Tienda. And, of course, we wanted to learn if the 2010 Tienda case was still good law.
In previous research, we’ve been pretty satisfied with Google Scholar, Fastcase, and Casemaker’s citators…until we ran this search.

**Google Scholar**

Using Google Scholar to update the 2010 *Tienda v. State* decision, we were informed by the “How this document has been cited” feature of Scholar’s “How Cited” citator that, “We [Google Scholar] could not find any documents that cite this one” and in the “Cited by” feature of Scholar’s “How Cited” citator that, “We [Google Scholar] could not determine how this case has been cited.” (See the illustration below.) This indicated that *Tienda* had not been appealed or cited to in another opinion, which we later learned was not correct when we decided to double-check Scholar’s “How Cited” results by running a search through the Google Scholar database using *Tienda* and *myspace* as our keywords.
In addition to finding the original 2010 *Tienda* opinion, we found two results that the Google Scholar citator service did not find:

- *Manuel v State*, a 2011 opinion that cited to the 2010 *Tienda* opinion; and

Although the 2010 *Tienda* opinion had not been reversed or overruled and was still “good law,” we were troubled that Google Scholar’s “How cited” had not found the affirming 2012 Criminal Appeals case even though both opinions are in the Google Scholar database.

The first reason we were troubled was, as we all learned in our legal research class, we need to cite to the opinion decided by the highest court and Google Scholar’s “How Cited” missed that opinion. The second reason we were troubled was that if we were in a state where we weren’t allowed to cite to an unpublished case, we never would have known that a published opinion that we could cite to even existed. Missing the 2012 opinion would have been extremely embarrassing (and possibly even malpractice).

Did Fastcase or Casemaker’s citators do any better than Google Scholar’s? No.
Fastcase

The 3rd opinion returned in the Fastcase search results list illustrated below is our 2010 Tienda Court of Appeals “do not publish” opinion. The 1st opinion is the 2012 Court of Criminal Appeals of Texas opinion which affirmed the 2010 Tienda opinion, but in the “Authority Check” columns (similar to Google Scholar’s “How cited” and Casemaker’s “Cite Check”) both opinions show “0” results, indicating to us that Tienda had not been appealed or cited to in another opinion. Unless we read each case, we would not know that one opinion had affirmed the other.

Casemaker

As noted earlier, Casemaker’s CaseCheck (similar to Google Scholar’s “How cited” and Fastcase’s “Authority Check”) did not do any better. As shown in the illustration below, as you are viewing the 2010 Tienda opinion, there is a “0” next to “Case check which indicates that Tienda had not been appealed or cited to in another opinion despite the fact that the affirming decision is also in the Casemaker database. (It’s a bit hard to see the “0”, but if you look at the grey bar below the search box, notice “Case check” (the text is orange) and next to that is the “0” In black.)
Aside from CaseCheck, Casemaker also offers a separate subscription-based product, CaseCheck +, which provides editorial treatment to alert researchers to subsequent negative treatment of any case they’re currently viewing (a green thumbs up means “No negative treatment in subsequent cases” while a red thumbs down means there is negative treatment). CaseCheck + also does not include unpublished opinions.

How Did They Miss it?

We don’t know why Google Scholar failed to find that the unpublished lower court opinion in *Tienda* was affirmed by the higher court because Google Scholar has very little documentation and no “contact us.”

We were, however, able to talk to the CEOs of both Casemaker and Fastcase for an explanation as to why their databases failed to find that the lower court opinion in *Tienda* was affirmed by the higher court. Although the affirming court refers to the lower court opinion by name and docket number, Fastcase’s CEO Ed Walters explained that, “The reason in Fastcase is that Authority Check is algorithmic — we show later citations to cases, and that currently relies on the citation — so unpublished opinions don’t get represented” (emphasis added). Authority Check does not editorially flag negative treatment — instead, it shows...
all later-citing cases, and pulls out the citing paragraph, so you can see the court’s treatment at a glance. Authority Check is an automated system that identifies later-citing cases, but it is not a citator (emphasis added), and does not include editorial information telling you whether your case is still good law. Before relying on the continuing validity of cases, we recommend that you use Shepard's ($) or KeyCite ($). These services are available online by subscription and at your local law library.” (AUTHOR’S NOTE: Shepard's and KeyCite are not available by subscription as stand-alone products. You would have to subscribe to Lexis and Westlaw to use their citators. Both databases in the past year or so have also discontinued their credit card service, so you can no longer Shepardize or KeyCite on an ad hoc basis.)

Dave Harriman, Casemaker’s CEO explained that Casemaker also doesn’t include unpublished opinions in CaseCheck or in its separate subscription-based product, CaseCheck +. CaseCheck + only shows negative history, so even if Casemaker’s CaseCheck + did include unpublished opinions, we would not have learned about the affirming 2012 Tienda opinion since it was positive history.

Even for published opinions, merely looking for “negative” history is troubling to us for the two reasons we noted earlier in our Google Scholar discussion. However, Casemaker’s CaseCheck + will eventually include positive history. This is being worked on now and Texas opinions will be the first ones to show positive history. This still doesn’t solve our unpublished opinions problem.

**LexisNexis/Shepard’s, WestlawNext/KeyCite, and Bloomberg/BCite**

LexisNexis, WestlawNext, and Bloomberg (and their citator services) all found that the Criminal Court of Appeals Court of Texas affirmed the Texas Appellate Court’s 2010 Tienda opinion. They also found that the 2011 Manuel v State opinion cited to the 2010 Tienda opinion.
See the next two illustrations below for the LexisNexis and Shepard’s results (research and illustrations provided by Cookie Lewis, M.S.L.S., Askinfomania, www.askinfomania.com):
See the next two illustrations for WestlawNext’s KeyCite (research and illustrations provided by Kevin Gerson, UCLA Law Library Director and Lecturer in Law, gerson@law.ucla.edu):
See the next illustration for Bloomberg’s BCite (research and illustrations provided by Kevin Gerson, UCLA Law Library Director and Lecturer in Law, gerson@law.ucla.edu):

Citator Conclusion

So, what’s a legal researcher to do if they don’t have access to LexisNexis, WestlawNext, or Bloomberg’s citator services? While we recommend NOT relying entirely on any of the citator services provided by Google Scholar, Fastcase, or Casemaker, legal researchers can still use these databases to learn if their cases are still good law by taking the extra step to run a search using the party names as keywords (e.g., tienda and state). This will find all opinions with those same party names. You’ll need to read the resulting cases (but only those decided after your case was decided) and then discern for yourself how the subsequent cases treated your case.

If there are too many results because one or both of the party names are common names (e.g., state), add a unique keyword from the opinion to your search just as we did when we added myspace to our Tienda keyword search (e.g., tienda and myspace). However, if a higher court reversed or overruled Tienda but did not mention myspace, then we would have missed this. So, a
better tactic might be to do a broad search for the party name and just review the opinions that were decided after your case’s decision date.

For Casemaker, there is a combined search option (see illustration below) that includes a Case Name search box (in addition to keyword, date, etc.). So instead of searching *tienda* as a keyword, you could enter *tienda* into the Case Name search box and enter *myspace* into the Keyword search box. We would even add dates to the Date search boxes (e.g., 1/1/2010 to 11/28/2012 (or the date you run your search) to limit the search. Once again, see the caveat (above) about entering the word *myspace* into the Keyword search box. You might be safer to just enter the case name and the date range. Google Scholar and Fastcase do not offer Case Name searches.

![Casemaker search interface](image), showing the combined search option.

For a state case, run the search in the state’s case law database and also in the U.S. Supreme Court’s case law database (in case it was appealed to and decided by the U.S. Supreme Court). For federal cases, run the search in the federal case law database (U.S. District, Appellate, and Supreme Court).
Social Media Profile Authentication Conclusion

For those following social media profile authentication cases and wondering what the 2012 Court of Criminal Appeals of Texas *Tienda* court held, they affirmed the unpublished 2010 opinion:

This combination of facts—(1) the numerous photographs of the appellant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring; (2) the reference to David Valadez's death and the music from his funeral; (3) the references to the appellant's "Tango Blast" gang; and (4) the messages referring to (a) a shooting at "Rumors" with "Nu-Nu,"(b) Hector as a "snitch,"[49]and (c) the user having been on a monitor for a year (coupled with the photograph of the appellant lounging in a chair displaying an ankle monitor) sent from the MySpace pages of "ron Mr. T" or "MR. SMILEY FACE" whose email address is "ronnietiendajr@"—is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them...

Because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be—MySpace pages the contents of which the appellant was responsible for—we affirm the trial judge and the court of appeals which had both concluded the same.

The Court of Criminal Appeals of Texas 2012 *Tienda* opinion acknowledged that the Maryland opinion upon which the court of appeals had relied upon in a case with similar facts, has since been reversed [*Griffin v. State*, 419 Md. 343, 19 A.3d 415 (2011)], but stated:

Nevertheless, as we have explained, there are far more circumstantial indicia of authenticity in this case than in Griffin—enough, we think, to support a prima facie case that would justify admitting the evidence and submitting the ultimate question of authenticity to the jury. We hold that the court of appeals did not err to conclude that it was within the trial court's discretion to admit the MySpace postings, notwithstanding that the persuasive authority it relied upon for that proposition has since been overruled.