The Elephant in the Room: Toward a Definition of Grey Legal Literature

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This article explores the history, definitions, and characteristics of the category of information resources known as grey literature. By applying this schema to the law, this article will propose a new definition of grey legal literature and apply it to the current lexicon of legal information resources.

Introduction

¶1 If we imagine the universe of legal information resources as a room floating in space—with four walls, a floor and ceiling, a door, and two windows (complete
with green and white polka-dot curtains)—then the axiomatic pink elephant is grey literature. This little-understood group of information resources spanning both the hard and soft sciences has a mixed presence within the legal community. It has been overlooked, minimized, and occasionally vilified—when and if it has been acknowledged at all. Labeled junk science, science for hire, corporate publishing, or worse, grey literature has oftentimes been named the chief offender in shoddy scholarship by academics that support higher standards or peer review in all areas of the law. However, despite this negative portrayal, what cannot be disputed is that with the increasing delegalization of the law at the hands of the Internet, grey literature is finding its way at a startling rate into both legal scholarship and judicial opinions.

¶2 But what is grey literature? And is the criticism of it warranted? Or has the legal community broadly painted a valuable group of resources in an undeserving negative light? Like the grey-suited faceless man in the iconic René Magritte painting, The Son of Man, grey literature is a mysterious stranger in many legal circles. Despite its somewhat negative association reminiscent of “dull and dismal grey skies,” grey literature refers to a large and amorphous group of resources that is also “grey” for being “uncertain[, vague[, and imprecis[e.]” This imprecision extends not only to the basic definition of what constitutes grey literature, but also to its value, care, preservation, and publication formats. In addition, this vagueness is complicated by the game-changing presence of the Internet and its ability to make the formerly inaccessible information suddenly accessible. However, despite its ephemeral nature, grey literature is both practical and meaningful, particularly to the legal community.

¶3 Thought of as “literature that ‘falls through the cracks’” or as “little literature,” typical examples of grey information resources include “corporate documents, discussion papers, in-house journals and newsletters, surveys, working papers, technical reports, trade association publications, institutional or association reports and bulletins [as well as] . . . conference proceedings, academic and

4. RENE MAGRITTE, THE SON OF MAN (1964); see also C.P. AUGER, INFORMATION SOURCES IN GREY LITERATURE, at viii (3d ed. 1994) (likening the negative connotation of “grey” with “men in grey suits”).
6. AUGER, supra note 4, at viii.
7. See JAMES E. BOBICK & G. LYNN BERARD, SCIENCE AND TECHNOLOGY RESOURCES: A GUIDE FOR INFORMATION PROFESSIONALS AND RESEARCHERS 137 (2011) (noting that grey literature has many definitions).
9. Dagmar Schmidmaier, Ask No Questions and You’ll Be Told No Lies: Or How We Can Remove People’s Fear of “Grey Literature,” 36 LIBR. 98, 101 (1986) (citing the 1920 quote of George Minde-Pouet: “No librarian who takes his job seriously can today deny that careful attention has also to be paid to the ‘little literature’ and the numerous publications not available in normal bookshops, if one hopes to avoid seriously damaging science by neglecting these.”).
government reports.” Others have included in the grey literature category “unpublished manuscripts . . . product catalogs . . . presentations, personal communications, . . . pre-prints, academic courseware, lecture notes, and so on.” More recent investigations have proposed pushing boundaries even further to reflect the changing electronic landscape by adding “websites of universities, major libraries, government agencies, nongovernmental organizations including non-profit research organizations, think-tanks and foundations, professional societies, corporations and advocacy groups . . . [and] documents produced by local governments,” not to mention maps, datasets, blog posts, tweets, and social media updates.

¶4 Since grey literature has historically fallen under the purview of the sciences, the legal field has understandably struggled to develop a relationship with it. While explicit references to grey literature in the law are few and far between, tending to appear mostly in the health, intellectual property, and environmental fields, grey literature as a whole represents an almost unquantifiably large group of materials. That being said, unbeknownst to most legal professionals, when the basic characteristics of grey literature are applied to those information resources used by legal scholars, collected by law libraries, and generated through the litigation process, an enormous number qualify as grey literature—handily providing us with our colorful elephant. The question then becomes, what is the relationship between grey literature and the law? Or, put another way, is there such a thing as grey legal literature? And if so, are there lessons to be learned from treating these resources as part of a larger homogenized whole? This article attempts to answer each of these questions in turn.

¶5 To come to an understanding of grey literature and its role within the field of law, this article first reviews the history and evolution of grey literature. Next, it examines the term’s current definitions and characteristics. Following an examination of these definitions, this article then analyzes what types of legal materials qualify as grey literature to work toward the articulation of a distinct and separate category of grey literature known as “grey legal literature.” The remaining portion of this article discusses the value of categorizing these resources for the purposes of evaluating, locating, cataloging, and teaching. The article ends with a brief conclusion.

10. Merrigan & McKimmie, supra note 8, at 322; see also Irwin Weintraub, The Role of Grey Literature in the Sciences (2000).
15. Bobick & Berard, supra note 7, at 137.
16. Blog posts, tweets, and other social media updates are sometimes referred to as “grey data.” See Marcus Banks, Blog Posts and Tweets: The Next Frontier for Grey Literature, in Grey Literature in Library and Information Studies, supra note 11, at 218–23.
17. See infra ¶¶ 20–31.
18. Merrigan & McKimmie, supra note 8, at 321 (noting “grey literature may sometimes represent the majority of all information available on a given topic”).
History and Background of Grey Literature

Grey literature, as its name implies, has a shadowy if not mysterious past. Even though grey materials have always existed in library collections around the world, the development of a distinct category of “grey literature is a relatively recent phenomenon,”¹⁹ with the earliest references appearing as early as the 1920s and 1930s.® Historically, synonymous terms such as “nonconventional literature,” “ephemeral materials,” “underground literature,” and “small press” represented the same grouping of resources. Of note, the term “grey” literature harkens back to the historical color coding of literature; modern remnants of that practice are seen in our current use of the terms “white papers,” “green papers,” and “blue books.”²²

Origins of an Old/New Information Resource

Eminent scholars have divided the evolution of grey literature into five distinct time periods: years prior to 1979, 1980 to 1990, 1991 to 2000, 2001 to 2005, and 2006 to the present.²³ The rise of grey information resources is generally perceived as being derived from the latter years of the twentieth century in response to the information gathering of the Allies in the aftermath of the post–World War II atomic era and reports literature.²⁴ After 1945 but prior to 1979, the collection, cataloging, and dissemination of grey materials were ad hoc. Without the benefit of the Internet or rudimentary databases, grey literature was either “housed in ‘dark archives’”²⁶ or limited to the skills, networks, and finding aids of librarians and a few key services including the Engineering Societies Library, U.S. Government Printing Office, National Technical Information Service (NTIS), or interlibrary loan.²⁷ The term “grey literature” debuted at a 1978 conference held in York, England, and organized by the Commission of the European Communities and the British Library Lending Division, thereby ushering in the new field.²⁸

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¹⁹. Farace & Schöpfel, supra note 11, at 1 (describing the phenomenon of grey literature).
²⁰. See Schmidmaier, supra note 9, at 101.
²². Auger, supra note 4, at xiii.
²⁴. Generally the United States, Canada, and the United Kingdom.
²⁶. Bobick & Berard, supra note 7, at 139.
²⁷. Id.
Birth of the Modern Movement

¶8 The 1980s and 1990s witnessed the birth of the modern grey literature movement with the launch of various national and international programs. The now defunct System for Information on Grey Literature (SIGLE), created in 1980, was the first multinational interdisciplinary grey literature bibliographic database. Originally funded by the Commission of the European Communities until 1985, and then later by the European Association for Grey Literature Exploitation (EAGLE), SIGLE was designed to “collect and to make available grey literature produced in the countries of the European Community by the intermediary of an online database.” The database was originally formulated as a “multidisciplinary European database, covering science, technology, biomedical science, economics, social science and humanities,” with all records in English and employing its own classification codes. However, several years later, proposals were made to shift the closed database network to an open access medium, as well as institutional repositories, leading to the discontinuation of SIGLE in 2005, creation of the open access repository OpenSIGLE in 2007, followed by its successor OpenGrey in 2011.

¶9 In 1992, the Grey Literature Network Service (GreyNet) was founded as the first scholarly association dedicated to the study of grey literature. Its mission is to facilitate dialog, research, and communication between persons and organisations in the field of grey literature. GreyNet further seeks to identify and distribute information on and about grey literature in networked environments. Its main activities include the International Conference Series on Grey Literature, the creation and maintenance of web-based resources, a moderated Listserv, a combined Distribution List, The Grey Journal (TGJ), as well as curriculum development in the field of grey literature. In 1993, GreyNet held its first International Conference on grey literature in Amsterdam, with subsequent global conferences held every two years to the present. Moreover, the Grey Journal represents the only currently published scholarly journal dedicated to the field of grey literature.

32. About OpenGrey, supra note 30.
33. Id.
35. Farace & Schöpfel, supra note 11, at 3.
38. About OpenGrey, supra note 30.
The new millennium witnessed different challenges for the grey literature community as the years 2001 to 2005 saw the “re-launch” of the Grey Literature Network (U.S. service), a “federally funded research and development project that included five government-sponsored databases” for the housing of technical report information. Although the service was discontinued in 2007, the various databases that originally comprised the service “were [later] combined and made freely searchable by the U.S. Department of Energy (DOE). It is currently possible to search the combined search engine at [Science.gov].

Grey Literature Today

From 2006 to the present, the grey literature field has been in a state of transition characterized by definitional changes, preservation challenges, and “new cooperative research initiatives” among various groups. These collaborations are exemplified by such projects as OpenGrey and the GreyGuide, a newly launched open resource project between GreyNet International and ISTI-CNR (Pisa, Italy), focused on the sharing and development of “good practices in the field of grey literature.” Proponents of grey literature also seek larger acknowledgment of the value of the field in the recently passed Pisa Declaration on Policy Development for Grey Literature Resources, which calls for the “increased recognition of grey literature’s role and value by governments, academics and all stakeholders, particularly its importance for open access to research, open science, innovation, evidence-based policy, and knowledge transfer.” Today, the grey literature community continues to explore and challenge conventional norms through its international conference series, now in its seventeenth year, and through its publications in the Grey Journal.

Defining Grey Literature

According to experts in the field, “Grey literature’ (GL) has as many definitions as there are forms of publications.” This is true largely because of the ephemeral and changing nature of grey publication types, editions, and formats, as well as to the relative “newness” of the field. In addition, the evolving impact of the Internet since the mid-1990s has only further muddied the definitional waters. Grey literature definitions suffer from a variety of complications. First, “descriptions of Grey litera-

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41. Farace & Schöpfel, supra note 11, at 2.
42. Bobick & Berard, supra note 7, at 138.
44. Farace & Schöpfel, supra note 11, at 4.
45. About, GreyGuide, http://greyguide.isti.cnr.it/index.php/newabout (last visited Aug. 23, 2015) (This repository contains “guidelines such as those in handling theses and dissertations, how to write research reports, metadata required for working papers as well as good practices in the subject areas of agriculture, health, education, energy, environment, et cetera.”).
48. Bobick & Berard, supra note 7, at 137.
tured are [typically] phrased negatively [as] often GL is defined by contrast to other things," which may or may not be helpful from an analytical perspective. Next, existing definitions earn only dissatisfaction from the grey literature community (comprised largely of library and information science experts). A number of authors express this dissatisfaction in articles and studies that advance new, more adaptive definitions of grey literature. Third, some terms considered synonyms of “grey literature”—including “fugitive literature” and “reports literature”—themselves have mutable definitions and differing connotations. Last, definitions of grey literature vary depending on their underlying focus or perspective: “the nature of the document [itself], the source of the document, and how it has been distributed.” No wonder one author conceptualized grey literature very broadly indeed, as “a type of informal communication, which on a scale of formality fits in somewhere between conversation and normal publication.

Historical Definitions

¶13 Grey literature definitions typically are found only in specialty dictionaries, including library and information science and scientific dictionaries. Standard dictionaries such as the Oxford English Dictionary have only recently added the term. Other definitions are found in the articles of the grey literature community. Here, the scholarship highlights a wealth of different definitional permutations, with authors changing, editing, and deleting as new situations or factors present themselves.

51. Rothstein & Hopewell, supra note 13, at 104 (noting that “grey literature and fugitive literature are synonymous terms”).
52. Auger, supra note 4, at 7–15; Use of Reports Literature, supra note 25.
57. The current definition of grey literature has appeared since 2000.
58. Grey Literature, OXFORD ENGLISH DICTIONARY (3d ed. 2013), available at OED Online, http://www.oed.com (last visited Aug. 23, 2015) (the dictionary traces the etymology of the term back to 1975) (defining grey literature as “n. documentary material which is not commercially published or publicly available, such as technical reports or internal business documents.”).
59. See, e.g., Schöpfel, supra note 50, at 5.
One of the earliest definitions of grey literature is ascribed to David Wood, a British Library employee, who in 1985 described it as “literature which is not readily available through normal bookselling channels, and therefore difficult to identify and obtain.” Early definitions such as Wood’s were mono-focused; in his, for example, Wood focuses primarily on a lack of access. Other definitions attempted to encompass the entirety of the field, a near-impossible challenge as illustrated by the community’s weak acceptance of them.

The most widely accepted definition of grey literature was created by the Third International Conference on Grey Literature (Luxembourg, 1997), which the Sixth International Convention (New York City, 2004) expanded to jointly read: “[Grey Literature is] that which is produced on all levels of government, academics, business and industry in print and electronic formats, but which is not controlled by commercial publishers,” i.e. where publishing is not the primary activity of the producing body.” The Twelfth International Conference (Prague, 2010) put forth a new definition of grey literature that moved away from the more economic-driven Luxembourg/New York model; it sought to add four new “attributes to the New York definition,” including the (1) character of the document; (2) the presence of intellectual property protection; (3) a threshold level of quality review; and (4) overall collectability. The new definition was articulated as follows:

Grey literature stands for manifold document types produced on all levels of government, academics, business and industry in print and electronic formats that are protected by intellectual property rights, of sufficient quality to be collected and preserved by library holdings or institutional repositories, but not controlled by commercial publishers i.e., where publishing is not the primary activity of the producing body.

Other definitions of note include that of the U.S. Interagency Grey Literature Working Group: grey literature is “foreign or domestic open source material that usually is available through specialized channels and may not enter normal channels or

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61. Schöpfel, supra note 50, at 5 (citing Joachim Schöpfel & Dominic J. Farace, Grey Literature, in ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCES (Marcia J. Bates & Mary Niles Maack eds., 3d ed. 2011)); see also Marzi et al., supra note 49, at 20 (discussing the original language from the 1997 Convention). There is some discrepancy as to whether governments constitute commercial publishers, although most definitions exclude them as such.


Contrary to popular belief, grey literature is subject to a review process. Many types of grey materials, such as patents and standards, undergo vigorous scrutiny through the process of establishing and passing the requirements of application and acceptance by experts in the discipline(s) they represent. The same is true for technical reports, as these digests from the field are vetted by the academy and the government agencies and corporations that fund them. A survey conducted in 2004 on tracking developments in the field of grey literature notes that 44.2% of respondents agreed that grey literature is always subject to a review process. BOBICK & BERARD, supra note 7, at 139.

64. Schöpfel, supra note 50, at 15.
systems of publication, distribution, bibliographic control, or acquisition by booksellers or subscription agents.  

Grey Literature Characteristics

§16 Despite its various definitions, grey literature has some unifying characteristics. It does not easily fit into defined categories, having “variously [been] described as fugitive, unpublished, invisible, non-conventional, ephemeral, informal, and not commercially available.”

It typically is “not controlled by commercial publishers,” lack[s] . . . bibliographic control,“ is “produced in small quantities,” and is “not widely distributed, and not listed in commonly used abstracts and indexes.” Therefore, in many ways, it is more useful to characterize what grey literature is as “specialists in the field generally [tend] . . . to describe grey literature rather than define it.”

This is appropriate since it is generally recognized that researchers “can recognize a piece of grey literature when they see it, but it is not easy to write an explanation which covers all the exceptions.”

Furthermore, functional definitions of grey literature have also emerged whereby, except for books and journal articles, “all documents . . . that appear in widely known, easily accessible electronic databases [can] be considered grey literature [on account that] all are in danger of being overlooked by research synthesists if they rely exclusively on searches of popular electronic databases to identify relevant [information].” By extrapolation, this could come to mean that sources not easily accessible through Internet search engines—such as books—could eventually be considered grey literature.

Speculation aside, based on the examples and definitions just discussed, certain characteristics of grey literature, once articulated, can provide a useful analytical framework. Below is a list of the most recognizable characteristics.

Q: Who can author grey literature?
A: Anyone. Any individual person, group, organization, nonprofit, or otherwise, including but not limited to academia, governments, and corporations.

Q: What is the content of grey literature?
A: Anything. Any pictorial representation (usually written) of facts, ideas, opinions, thoughts, or sentiments.

65. Dominic J. Farace & Joachim Schöpfel, Channels for Access and Distribution of Grey Literature, in GREY LITERATURE IN LIBRARY AND INFORMATION STUDIES, supra note 11, at 111.
66. Devi Tella, supra note 54, at 5.
68. Bobick & Berard, supra note 7, at 137.
71. Auger, supra note 4, at 4.
72. Bryna Coonin, Grey Literature: An Annotated Bibliography (2003) (on file with author) (noting that “[v]irtually everything we read outside of journals and books can be considered grey literature.”).
73. Rothstein & Hopewell, supra note 13, at 105.
Q: What formats can grey literature take?
A: Any print or electronic format, excluding audio and visual images that do not convey information.

Q: Who is the audience for grey literature?
A: Anyone. Any individual person, group, organization, nonprofit, or otherwise, including but not limited to academia, governments, and corporations. Note that the audience of grey literature is normally not the general information-consuming public.

Q: What is the lifecycle of grey literature?
A: From the author’s perspective, grey literature is usually authored for a specific purpose, so its intention is normally short or limited, although the long-term value is largely dependent on the researcher.

Q: Is grey literature subject to normal bibliographic controls?
A: No. Due to its amorphous nature, grey literature is not standardly indexed or abstracted.

Q: How is grey literature distributed?
A: By any means, electronic, print, or otherwise that does not involve normal commercial distribution channels.

Q: How is grey literature located?
A: There is no standard means of locating and identifying grey literature as by its nature it is difficult to find or lacks any means of permanent access.

¶19 As these characteristics illustrate, grey literature is the chameleon of information resources in that it can constitute virtually anything and be written for and by anyone in almost any format. However, in developing a definition of grey literature that applies to legal materials, because of the subject matter, the most helpful features listed here include author, audience, content, and, to a lesser extent, distribution. Therefore, in evaluating whether a distinct category of grey legal literature exists, it is to these characteristics that we should look to find the most guidance.

**Toward a Definition of Grey Legal Literature**

¶20 Like the playwright Molière, whose character M. Jourdain marveled that for more than forty years he had been speaking prose without knowing it,74 lawyers, judges, law librarians, and law students alike have been using and citing grey literature in all its forms for years without recognizing it. From litigation docu-

74. Jean-Baptiste Poquelin (Molière), Le Bourgeois Gentilhomme act 2, sc. 4 (1670) (Par ma foi, il y a plus de quarante ans que je dis de la prose, sans que j’en susse rien. (“Good heavens! For more than forty years I have been speaking prose without knowing it.”)), translation courtesy of Marie Stefanini Newman, Director, Pace Law Library).
ments, to administrative materials, to websites and more, the legal field is replete with information resources that justify the creation of a distinct group of grey legal literature that should be considered, if not taught, alongside the traditional primary and secondary legal sources. However, before we can consider the emergence of a distinct information resource group known as grey legal literature, it is helpful to examine the existing role of grey literature in the legal community.

Grey Literature in the Legal Community

Notably, the field of law does not generally recognize the term “grey literature,” much less “grey legal literature.” As of the date of this article, only two known law dictionaries include definitions of grey literature. Even more significant is that virtually all legal research textbooks, guides, study aids, and treatises are also silent on the issue. Furthermore, references to grey literature in legal materials are scarce, with only four reported cases and proportionally few law review articles.

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76. Compare Peter Groves, A DICTIONARY OF INTELLECTUAL PROPERTY LAW 145 (2011) (grey literature defined as “[d]ocuments produced by government, academia, or business and industry, in print or electronic form, but not published commercially. May include technical reports, standards and specifications, and translations. Difficult to access because of inconsistent methods of publication and dissemination, but potentially fatal to a patent application if the examiner finds it.”), and NICHOLAS A. ROBINSON & TARYN L. RUCINSKI, ENVIRONMENTAL LAW LEXICON, at G10 (1992 & 2015 Supp.) (grey literature defined as “this group of information resources is largely used in the health and environmental fields and refers to informal publications produced by governments, academics, business and industry in print and electronic formats, that is not controlled by commercial publishers. Examples of grey literature include but are not limited to: corporate documents, discussion papers, newsletters, surveys, working papers, technical reports, trade association publications, conference proceedings, and even maps, data sets, websites, blog posts, tweets, and social media updates.”), with BALLENTINE’S LEGAL DICTIONARY/THESAURUS (1995); BLACK’S LAW DICTIONARY (10th ed. 2014); BLACK’S MEDICAL DICTIONARY (Harvey Marcovitch ed., 42d ed. 2009); James J. King, THE ENVIRONMENTAL REGULATORY DICTIONARY (4th ed. 2005).


78. For example, advanced searches conducted on July 1, 2015, on WestlawNext and Lexis Advance, yielded no results for the term “grey legal literature” (WestlawNext) and “gray legal literature” or “grey legal literature” (Lexis Advance). Minimal results were found for the terms “grey literature” (WestlawNext) and “gray literature” or “grey literature” (Lexis Advance). The results for WestlawNext were: Cases (4), Administrative decisions and guidance (5), Secondary sources (80), Briefs (8), Trial court documents (10), Expert materials (48), Proposed & adopted regulations (5). The results for Lexis Advance were: Cases (5), Statutes & legislation (4), Administrative codes & regulations (74), Administrative materials (32), Secondary materials (64), Brief, pleadings & motions (116), Expert witness analysis (12), Directories (7), Legal news (7), Science (6580). Searches with zero results or the response “get documents” on Lexis Advance were omitted.

mentioning the term.\textsuperscript{80} What may be just as telling is that in looking to the field of grey literature as a whole, virtually no articles discuss whether legal documents qualify as grey literature,\textsuperscript{81} instead only discussing issues of law in terms of copyright and access.\textsuperscript{82}

\textsuperscript{82} Moreover, historical references to “grey legal literature” are virtually nonexistent. The term appears to have first been used in the work Indonesian Law 1949–1989: A Bibliography of Foreign Language Materials with Brief Commentaries on the Law.\textsuperscript{83} However, the first time grey legal literature was discussed as a distinct category was August 2006, by the Canadian online legal magazine Slaw,\textsuperscript{84} which dedicated a series of blog posts in a “grey legal literature” theme week led by Michael Lines, law librarian and information coordinator at the Canadian Forum on Civil Justice.\textsuperscript{85} In a series of eleven posts,\textsuperscript{86} the blog provides a basic definition (“inform...
formation produced on all levels of government, academics, business and industry in electronic and print formats not controlled by commercial publishing, i.e. where publishing is not the primary activity of the producing body\(^{87}\) and then proceeds to ask key questions, such as: What constitutes commercial publishing? Is case law a form of grey literature? What about peer-reviewed e-journals? Or legal institute publications?\(^{88}\) As a blog series this discussion is remarkably provocative; however, on review, the posts are incomplete. For that reason, to arrive at a viable definition of grey legal literature, we must look to synthesize all of the above within the context of the field of law.

Grey Legal Literature’s New Definition

\(\S 23\) To craft a new definition of grey legal literature, the most important thing to consider is the fundamental nature of the law itself. What is the law? What constitutes the legal community? What groups, actors, and/or individuals are involved? What types of information resources are generated about the law or created as a result of the administration of the law? After taking into consideration these questions, and working off the consensus Prague definition of grey literature,\(^{89}\) a new definition of grey legal literature emerges: "Grey legal literature stands for manifold document types produced on all levels of government, academics, business and industry in print and electronic formats, which inform or are produced by entities affiliated with the law, as part of, or in furtherance of the legislative, executive, and/or judicial administration of the law at the international, federal, state, and/or local level. Grey legal literature is not typically indexed or abstracted but is of sufficient quality to be collected and preserved by government agencies, law libraries, or other interested organizations, but is not controlled by commercial publishers, i.e., where publishing is not the primary activity of the producing body.\(^{90}\)

\(\S 24\) In comparing the characteristics discussed in \(\S \) 12 to 19, issues of format, lifecycle, indexing, and research largely remain the same between grey literature and grey legal literature. However, characteristics concerning author, audience, content, and, to a lesser extent, distribution diverge greatly with grey legal literature. The characteristics of grey legal literature may be articulated as follows.

Q: Who can author grey legal literature?
A: Anyone. Any individual person, group, organization, nonprofit, or otherwise, including but not limited to academia, governments, and corporations. Individuals and organizations within the legal community are typically the authors of grey legal literature.

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87. Lines, Introducing Slaw’s Theme Week on Grey Literature, supra note 86.
88. Id.
89. See supra \(\S \) 15.
90. See Marzi et al., supra note 49.
Q: What is the content of grey legal literature?
A: Anything related to the law or that is produced as a result of the administration of the three branches of government at the international, federal, state, or local level. This includes any pictorial representation (usually written) of facts, ideas, opinions, thoughts, or sentiments.

Q: What formats can grey legal literature take?
A: Any print or electronic format, excluding audio and visual images that do not convey information.

Q: Who is the audience for grey legal literature?
A: Anyone. Generally the legal community, although any individual person, group, organization, nonprofit, or otherwise, including but not limited to academia, governments, industry, and corporations. Note that the audience of grey legal literature is normally not the general information-consuming public.

Q: What is the lifecycle of grey legal literature?
A: From the author’s perspective, grey legal literature is usually authored for a specific purpose so its intention is normally short or limited, although the long-term value is largely dependent on the researcher.

Q: Is grey legal literature subject to normal bibliographic controls?
A: No. Due to its amorphous nature, grey legal literature is not standardly indexed or abstracted. However, grey legal literature often has clearly marked citations.

Q: How is grey legal literature distributed?
A: By any means, electronic, print, or otherwise that does not involve normal commercial distribution channels.

Q: How is grey legal literature located?
A: There is no standard means of locating and identifying grey legal literature as by its nature it is difficult to find or lacks any means of permanent access. However, grey legal literature may be accessible through fee-based subscription databases in limited runs or on an ad hoc basis.

¶25 Practically speaking, the addition of “law” or that which is “legal” provides us with two main categories of grey legal information resources: (1) materials that would typically be labeled as grey literature that either discuss a legal topic or are produced by an entity that is affiliated with the legal community, and (2) materials that are produced as part of the administration of the three branches of government at the international, federal, state, or local level. The first group is the simplest to identify as it relates directly to the guidance provided by the library and information science field. In this context, grey legal literature is grey literature that contains legal subject matter or is produced by an entity affiliated with the law as part of its normal course of business (i.e., law schools, law firms, bar associations
and other professional groups and organizations, legal advocacy groups and non-profits, and international and nongovernmental organizations). The various types of grey legal information that resources may include, but are not limited to, are shown in Table 1.

¶26 The second group of grey legal materials is at once more elusive and more relevant to legal scholars. These are information resources that are not included in general discussions of grey literature but that are of particular importance to legal professionals. While not exhaustive, a list of resources produced as part of the legislative, litigation, and regulatory processes that fall within the proposed definition of grey legal literature are shown in Table 2.

¶27 However, just as with “regular” grey literature, the types of legal resources listed in Tables 1 and 2 reflect a spectrum. This spectrum is directly impacted by technology, ease of access, preservation efforts, and the role of fee-based purveyors of subscription legal information databases.

¶28 For example, at one extreme, hard-to-find state trial court briefs from before the Internet era clearly qualify as grey legal literature while, on the opposite end of the spectrum, U.S. Supreme Court briefs may not, since several print or microfilm series capture this information.91 Legislative histories are also very much a part of this spectrum. Here, bill text and amendments for individual laws are now readily available on websites such as Congress.gov92 while references to the Congressional Record and Federal Register can be found on the U.S. Government Publishing Office’s FDsys website.93 However, reports, transcripts, hearings, and testimony become more difficult to locate as the researcher moves further back in time, requiring access to specialized series, compiled legislative histories, or subscription websites like Westlaw, LexisNexis, HeinOnline, and Bloomberg Law. In some instances, primary law such as local ordinances may also be considered grey legal literature, especially if the only copies are kept on file with the clerk’s office or local library. Access issues, link rot, and the exclusivity (and high cost) of subscription databases may also impact the metes and bounds of this group of resources as it continues to evolve.

The Value of Grey Legal Literature

¶29 To many, the carving out of a new type of legal information resource to add to the legal resource lexicon of primary and secondary sources may be perceived as an empty exercise. After all, in the truest sense, grey literature in any form is a type of secondary source. However, for legal researchers in particular, secondary sources are taught at the law school level as a limited group that is dominated by a handful of commercial publishing houses. These resources span the gamut reflecting a print-heavy lineage of legal encyclopedias, dictionaries, treatises, hornbooks, law journals, legal newspapers, nutshells, and more. But juxtaposed against primary law—constitutions, statutes, regulations, and case law on one side, and the standardized concept of a secondary source on the other—where does that leave the legal field’s “little literature”?94 Or, for that matter, how should researchers approach

91. See, e.g., U.S. SUPREME COURT REP., LAWYERS’ ED.; LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES.
94. Schmidmaier, supra note 9, at 101.
### Table 1

**Types of Grey Legal Information Resources**

<table>
<thead>
<tr>
<th>Archives</th>
<th>Client alerts</th>
<th>Legal notices</th>
<th>Reports</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blogs</td>
<td>Conference materials</td>
<td>Logs</td>
<td>Social media</td>
</tr>
<tr>
<td>Bulletins</td>
<td>Conflict alerts</td>
<td>Memoranda</td>
<td>Statistics</td>
</tr>
<tr>
<td>Business records</td>
<td>Correspondence</td>
<td>Minutes &amp; agendas</td>
<td>Surveys</td>
</tr>
<tr>
<td>Bylaws</td>
<td>E-mails &amp; text messages</td>
<td>Model laws</td>
<td>Websites (archived versions)</td>
</tr>
<tr>
<td>CLE materials</td>
<td>Forms (nonstatutory)</td>
<td>Newsletters</td>
<td>Working papers</td>
</tr>
</tbody>
</table>

### Table 2

**Materials Produced as Part of the Three Branches of Government**

#### Legislative Process

<table>
<thead>
<tr>
<th>Amendments</th>
<th>Bills (text)</th>
<th>Memoranda</th>
<th>Transcripts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill jackets &amp; compiled legislative histories</td>
<td>Hearings</td>
<td>Reports</td>
<td>Voting records</td>
</tr>
</tbody>
</table>

#### Litigation Process

<table>
<thead>
<tr>
<th>Affidavits</th>
<th>Consent decrees</th>
<th>Jury instructions</th>
<th>Slip opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Awards</td>
<td>Dockets Exhibits</td>
<td>Motions</td>
<td>Transcripts</td>
</tr>
<tr>
<td>Bail determinations</td>
<td>Exhibits</td>
<td>Oral arguments</td>
<td>Unpublished opinions</td>
</tr>
<tr>
<td>Briefs (&amp; amicus curiae)</td>
<td>Expert reports</td>
<td>Petitions</td>
<td>Verdicts</td>
</tr>
<tr>
<td>Complaints</td>
<td>Interrogatories</td>
<td>Settlement agreements</td>
<td>Work product</td>
</tr>
</tbody>
</table>

#### Required by Statute or Regulation

<table>
<thead>
<tr>
<th>Applications</th>
<th>IRS determination orders</th>
<th>Orders</th>
<th>Rulemaking comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensive plans</td>
<td>IRS tax filings</td>
<td>Patents</td>
<td>Rulemaking petitions</td>
</tr>
<tr>
<td>Environmental impact statements &amp; assessments</td>
<td>Letter rulings</td>
<td>Permits</td>
<td>SEC filings</td>
</tr>
<tr>
<td>Inspection documents</td>
<td>Memoranda</td>
<td>Reports</td>
<td>Zoning maps</td>
</tr>
</tbody>
</table>

#### Other Documents

<table>
<thead>
<tr>
<th>Arbitration documents</th>
<th>Executive directives</th>
<th>MOUs/IMAs</th>
<th>Reports</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contracts</td>
<td>Guidance documents</td>
<td>Petitions</td>
<td>Signing statements</td>
</tr>
<tr>
<td>Court rules (nonstatutory)</td>
<td>Medical malpractice premium rates</td>
<td>Planning materials</td>
<td>Wills</td>
</tr>
</tbody>
</table>

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a. Types of documents included here would be anything that requires community participation in terms of regulation.

b. **Bobick & Berard, supra** note 7, at 137 (noting that patents are sometimes included in definitions of grey literature).
the law’s reports, forms, administrative materials, and litigation documents? In attempting to answer these questions and others, the creation of a new group of grey legal documents fills this gap admirably.

¶30 Functionally, grouping all of these grey legal resources together almost as a “secondary source—other” category also makes sense because of the particular research strategies that need to be employed to locate them. Instead of the illustrative Google or Westlaw/LexisNexis/Bloomberg legal database search that has become the new norm in the legal field, grey literature requests require an added level of knowledge and skill to locate and retrieve, thus supporting the idea that grey legal literature should be a separate and distinct collection.

¶31 As one colleague recently noted in response to viewing this list, trying to track down the resources enumerated in ¶¶ 23 to 28 constitutes some of the most difficult questions that a researcher might face. While much legal research can be represented in some form as a scavenger hunt, the grey legal information resources offered above generally require more complicated research strategies, access to non-traditional libraries or databases, and/or the use of extensive consortium contacts or networks to locate. What is more, even those documents that are readily available online today via the Internet may become lost over time as evidenced by periodic attempts to shut down the National Technical Information Service and mismatched court efforts at preserving URLs in court decisions. Finally, logistical lessons may also be learned by grouping these materials together with respect to developing unified cataloging, finding aids, and even research guides.

Conclusion

¶32 Whether we categorize our almost primary and our not quite secondary resources as grey legal literature, our existential elephant remains. As the Internet continues to expand and our citations to grey and delegalized materials increase, the relevancy of grey legal literature will become even more important to researchers, practitioners, and students. However, by articulating a distinct definition of grey legal literature, we may offer these future researchers a new tool to add to their research toolbox, which will provide them with a useful framework for legal research instruction, strategy development, and information retrieval. After all, the world of legal information has been historically portrayed as black and white; perhaps what we need now is a new shade of grey.

