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The Art of Persuasion Through Legal Citations

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Persuasive citation of legal authority is an essential part of legal writing. Proper citation involves knowing not only the basic form for citing cases, constitutions, statutes, rules, books, articles, and other legal authority,[1] but also requires understanding the purposes and best practices for citing legal authority. The purpose of this article is to help you develop a more persuasive and effective citation style by discussing development of a citation plan, the hierarchy of authority, the role of courts and precedent; the use of pinpoint cites, parentheticals, and signals; and placement of citations.

The primary purposes of citation are support and attribution for the propositions advanced by the author. Proper citation further requires consideration of the source of the applicable law, whether the authority is binding or merely persuasive and the credibility attributable to the author or authority cited. In short, persuading a court to follow precedent, distinguish it, or overrule it — as the case requires to advance your client's position — is in large part dependent upon credible citations and sound reasoning based upon the citations.

Developing an Outline and Citation Plan

Numerous books about effective legal writing styles are readily available.[2] Authorities on legal writing agree that the goal is to clearly and carefully guide the reader straight to your "inescapable" conclusion. Start with an introduction that includes your thesis — which announces your major conclusion — and a roadmap outlining your legal analysis, then follow that roadmap in the succeeding paragraphs by explaining and supporting your conclusion.[3] An example of such a writing style is known as the inverted pyramid. Like a newspaper article's lead paragraph, the inverted pyramid style involves a first paragraph that tells the entire story. "As the argument is developed, the paragraphs become more and more specific until the finest points and subpoints have been established."[4] Creating a masterpiece of persuasive legal writing requires planning and developing an outline of your argument.

In the same way that you plan and outline your legal argument, you should also plan and outline your citations. Review and analyze the pertinent legal authority, then select the most persuasive to include in your document. By developing a citation plan before you start writing, you will know what legal authority should be included to prove your conclusion, and you will be able to develop your legal

argument around that authority to make it more persuasive to the reader.

Choose Your Citations Based Upon the Hierarchy of Authority

The primary source of your legal authority will usually determine your most persuasive authorities. Consequently, as you develop your citation plan, you must have a clear grasp of the source of legal authority. Determine whether your case is controlled by constitutional, statutory, or common law.

The most persuasive legal authorities in Florida courts are listed below in the order of their persuasiveness:

1) *Applicable Constitutional or Statutory Provision.* If a constitutional provision, either state or federal, is directly invoked by your legal argument, it is your most persuasive authority. If your primary source of legal authority is a statute, then the statute applicable to your case will be the most persuasive authority. Florida courts apply rules of statutory construction and construe statutes in a manner that avoids inconsistency or unconstitutionality, if possible.[5]

2) *Florida Court Decisions.* In general, for questions of Florida law, decisions of the Supreme Court of Florida are most persuasive and must be followed by all lower Florida courts.[6] If the Supreme Court of Florida has not addressed the issue, decisions of the district court of appeal for the territorial jurisdiction in which the case is heard are binding on all lower courts.[7] If there is no controlling decision by the Supreme Court or the district court having jurisdiction over the trial court on a point of law, then a decision by another district court of appeal is binding.[8]

3) *Other State Court Decisions.* A case from the highest court of another state supporting your position has persuasive value provided that it is good law and in accordance with the weight of authority. In presenting out-of-state cases, the writer should explain why the majority rule used in those cases should be adopted in Florida. In this instance, multiple citations from the highest courts in the states that have adopted the majority rule may be impressive. The higher the number of cases that support the majority position, the more persuasive these citations will be, but ultimately, the soundness of the reasons supporting the view and their consistency with related propositions of Florida law will be determinative.

4) *Trial Court Decisions.* If the question is an open one, a well-reasoned trial court decision supporting the proposition will be persuasive provided that its reasoning is in accordance with the major weight of authority.

5) *Restatements and Comments.* These authorities are controlling only if the particular section has been adopted in Florida, but are generally persuasive.

6) *Treatises and Texts.* The persuasiveness of these authorities depends on the reputation of the author and publisher.

7) *Legal Encyclopedias.* Materials such as *Florida Jurisprudence 2d*, *American Jurisprudence*, and *Corpus Juris Secundem* should be used as secondary sources only. They may be cited in the following manner: “See cases collected at . . . .”

8) *Law Review Articles.* These materials may be excellent research tools for finding primary authorities, but they have only moderate persuasive value.

The Role of Courts and Precedent, Stare Decisis, and Dicta

A word or two about the role of courts in the decision-making process is helpful in understanding

persuasive citation. Trial courts have two responsibilities: They decide what actually occurred in the case, and they determine what legal rules should be used to resolve the case.[9] Appellate courts, on the other hand, must accept the factual record from the trial court, so the only remaining issues are legal ones. In deciding whether to affirm or reverse a trial court's ruling, the appellate court must think about a range of facts far beyond those in the immediate case and the broader policy implications of what the trial court has done.[10] Court decisions are the precedent that we will argue is binding, persuasive, distinguishable, or in need of overruling, as the case may be.

One of the fundamental notions of our legal system is that courts should look to previous decisions on similar questions, or precedent, for guidance in deciding cases.[11] The basic premise is that issues, once properly decided, should not be decided again. Reliance on precedent creates uniformity in the law by ensuring that similar cases will be decided by the same basic principles; it lends stability to the law by assisting people in planning their activities, and it encourages confidence in the legal system.[12]

Two types of precedent exist: binding and persuasive.[13] Persuasive precedent merely requires courts to look at previous decisions for guidance. Binding precedent comes within the doctrine of stare decisis, which requires a court to follow its own decisions and those of higher courts in the same jurisdiction.[14] The concepts of precedent and stare decisis provide important checks on judicial freedom.[15] The doctrines of precedent and stare decisis are structured to motivate judges and to raise the cost of judicial error so as to make judges more careful in deciding cases and explaining the reasons for their decisions in written opinions.[16]

It is, of course, a case's holding that becomes precedent. As law students, we learn how to analyze or "brief" cases by these components: facts, statement of the legal issue presented, relevant rules of law, the holding (the rule of law applied to the particular facts of the case), and the policies and reasons that support the holding.[17] Distinguishing between the holding of a case, as opposed to dicta, which is a statement not essential to the holding,[18] is critically important. Dicta does not have precedential value, because it is not part of the reasoning process.[19] Consequently, it is imperative to distinguish between dicta and the holding of a case when citing cases, because the failure to do so decreases credibility of the citation.[20]

Selecting the Best Case Citations

First, consider the hierarchy of authority outlined previously, because the higher up on the scale, the more persuasive the citation. Also consider "freshness." More recent citations are generally more persuasive, but a seminal case that is well known for the proposition you are developing should be cited if applicable.[21]

Court decisions involving identical facts are, of course, the most persuasive. If a case involving identical facts cannot be found, a case involving similar material facts will be the most persuasive. In cases involving similar material facts, the writer must analogize the cases to prove that the material facts are similar. When the facts are not similar, the authority is less persuasive, and the argument must establish that the facts are nevertheless sufficient to support the same holding.

Do not discuss cases at random, saying "Case A says this; Case B says that; Case C says the other." Instead, organize the writing around the propositions they represent. For example, when the Supreme Court of Florida has adopted a general rule that has been applied with differing results, the cases might be analyzed as follows: "The general rule is X. The district courts have applied this rule in fact pattern Y. See Cases A and B. However, under fact pattern Z, the general rule does not apply. This is borne out by Case C." Use direct quotes on key points.

Sometimes a citation will be very complicated because of subsequent history. If the author is required to claim "abrogated on other grounds" with a complicated explanation, the author should look for a simpler citation for the same proposition, if possible, and cite the abrogated case as additional authority.

Prioritizing Florida state court decisions by court and year requires thoughtful analysis. This is an issue that typically arises in "string citations." In general, the Supreme Court cases are to be cited first, followed by cases from the applicable district court of appeal, ending with cases from other district courts of appeal. When citing multiple decisions from the same court, the most recent decisions should be cited first. However, the number of legal authorities cited for a given point should be kept to a minimum. "Usually no more than two or three are necessary, particularly if those cases cite others."[22] When a string of citations is used, it is more persuasive with proper use of introductory signals and explanatory parentheticals that explain the relevance of each citation. A lengthy list of citations might occasionally be appropriate to rebut an opposing party's assertion that a principle of law is either in doubt or not well-established, but should otherwise be avoided.

Use Pinpoint Citations

Identifying the precise location in the source material you are relying on by pinpoint citation of the exact page within the authority enables the reader to locate the support for your proposition quickly, especially when the authority is lengthy or the proposition is in a footnote.[23] When pinpointing a reference to the first page of the document, the practice is to repeat the reference to the first page for your pinpoint cite.[24] As a persuasive writer, you must realize that if you cite material from a lengthy dissent, the reader will likely not take the time to read the entire dissent to confirm your point.[25] Pinpoint references give the writer credibility, because the failure to pinpoint makes it difficult for the reader to determine the argument's validity. "Good research is identified openly. Poor research is presented obscurely."[26]

Use Parentheticals

Regardless of the type of authority you are citing, it is often helpful to include additional information to explain the relevance or weight of the legal authority.[27] For instance, if the citation is to a plurality, concurring or dissenting opinion, which has less weight, then that information should be included in an explanatory parenthetical after the end of the citation, but before any subsequent history.[28] Decisions by the full court, as opposed to a panel of judges, have more weight and should be identified with an "en banc" parenthetical.[29] When a case is cited for a proposition that is not the single, clear holding of the majority of the court, such as an alternative holding, a holding by implication, or dicta, that fact should be included in an explanatory parenthetical.[30] Parentheticals, unless they consist of a direct quote, should begin with a present participle, that is, an "-ing" word, and should take the form of a phrase.[31]

Placement of Citations

Providing legal authority in court documents is essential; nevertheless, problems can arise when citation placement intrudes on the sentence's meaning, or when long quotations create stumbling blocks for the readers.[32] To eliminate awkward placement of a citation, consider moving the citation into a prepositional phrase or to the end of the sentence. Also avoid ending one sentence with a citation and starting the next sentence with another citation.[33]

As for long quotations, a persuasive writer should question each one to determine if all the language is necessary for the particular point. Consider whether *all* the language furthers your analysis based on your own fact pattern, or if all the language takes the reader away from your facts and into facts in

some other case. Too many long quotations is a signal of a hurriedly written legal discussion or a cut-and-paste job; both reduce your credibility. Consequently, consider quoting only the most essential elements and paraphrasing the rest of the section.[34]

Appropriate Use of Signals

Learn the correct use of signals and use them consistently in your legal writing. Use of the correct signal to show the relationship between the textual sentence and the cited material can quickly convey important meaning to the reader and bolsters the writer's credibility. Signals are divided into four categories: 1) Signals that indicate support (no signal, see, e.g., accord, see, see also, and cf.); 2) signals that suggest a useful comparison (compare (case) and (case) or compare (case) with (case)); 3) signals that indicate contradiction (contra, but see, but cf.); 4) the signal that indicates background material (see generally).[35]

For instance, using no signal means the cited authority "(i) directly states the proposition, (ii) identifies the sources of a quotation, or (iii) identifies an authority referred to in the text."[36] "See" is used when the cited authority clearly supports the proposition but is not directly stated by the cited authority.[37] Omitting a signal — which thereby suggests to the reader that the case directly states the proposition — when some other signal should be used, such as "see" or "see also," undermines the credibility of the citation. For this reason, proper use of signals is essential to building credibility.

Conclusion

Persuasive legal citation generates more persuasive legal writing. Careful attention to this aspect of legal writing is appreciated by judges and staff attorneys who are the intended readers of your writing. More effective citation will often lead to better results for your client because a court is more willing to do what you ask if you provide precedent and sound reasoning.

[1] Citation form has been addressed by the authors of this article in previous writings and is not a primary topic of this article. Susan W. Fox & Wendy S. Loquasto, *Citation Form: Keeping Up with the Times,* 81 Fla. B. J. 23 (Jan. 2007); Susan W. Fox, *Citation Form: Getting It Right,* 74 Fla. B. J. 84 (March 2000). As explained in this article, Florida lawyers have two main sources of citation forms. Fla. R. App. P. 9.800 sets forth Florida's Uniform System of Citation and *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n *et al*. eds., 18th ed. 2005) as the two main sources of citation rules. Rule 9.800 specifies citation forms that must be used in Florida appellate courts and directs that citations not covered in the rule should follow *The Bluebook.* A third, less-utilized source for citation formatting rules is the *Florida Style Manual* published by the Florida State University Law Review, which is most frequently used for legislative materials and state and local government documents.

[2] For example, John C. Dernbach, Richard V. Singleton II, Cathleen S. Wharton, & Joan M. Ruhtenbert, A Practical Guide to Legal Writing & Legal Method (Fred B. Rothman & Co. 2009); Terri LeClercq, Guide to Legal Writing Style (Aspen Publishers 2007); Bryan A. Garner, Legal Writing in Plain English: A Text With Exercises (Univ. of Chicago Press 2001); Stephen V. Armstrong & Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing & Editing (Practising Law Inst. 3d ed. 2009).

[3] John C. Dernbach & Richard V. Singleton II, A Practical Guide to Legal Writing & Legal Method 93 (Fred B. Rothman & Co. 1981) (hereinafter Dernbach & Singleton, A Practical Guide to Legal Writing).

[4] Philip J. Padovano, Florida Appellate Practice §15:18, at 300-01 (Thomson Reuters/West 2009 ed.).

[5] *State v. Giorgetti,* 868 So. 2d 512, 518 (Fla. 2004) ("We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional.").

[6] *See Hoffman v. Jones,* 280 So. 2d 431, 440 (Fla. 1973).

[7] *See Pardo v. State,* 596 So. 2d 665, 667 (Fla. 1992) ("[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.").

[8] *See Brannon v. State,* 850 So. 2d 452, 458 (Fla. 2003).

[9] Dernbach & Singleton, A Practical Guide to Legal Writing, at 6.

[10] *Id.* at 6-7.

[11] *Id.* at 21.

[12] *Id.*

[13] *Id.* at 22.

[14] *Id.*

[15] *Id.*

[16] Richard A. Posner, How Judges Think 39 (Harvard Univ. Press 2008).

[17] Dernbach & Singleton, A Practical Guide to Legal Writing at 7.

[18] "Dicta" is defined as "Opinions of a judge which do not embody the resolution or determination of the court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases." Black's Law Dictionary 236 (abridged 5th ed. 1983).

[19] Dernbach & Singleton, A Practical Guide to Legal Writing 22. *See also State ex rel. Biscayne Kennel Club v. Board of Business Reg. of Dep't of Business Reg.,* 276 So. 2d 823, 826 (Fla. 1973) (stating that obiter dictum "was not essential to the decision of that court and is without force as precedent").

[20] "Interpretative issues" arise in the domain of precedent, usually in the form of a judge's attempt to distinguish the holding from dicta. Although the distinction would seem essential to the case law system, the current trend makes less of this distinction. Posner, How Judges Think at 192 (Harvard Univ. Press 2008).

[21] Bryan A. Garner, The Redbook: A Manual on Legal Style 107 (West Group 2d reprint 2003) (hereinafter Garner, The Redbook).

[22] Robert L. Stern, Appellate Practice in the United States §7.25, at 297 (BNA Books 1981).

[23] Garner, The Redbook at 108.

[24] For example, *Morrow v. Sam's Club*, 17 So. 3d 763, 763 (Fla. 1st D.C.A. 2009).

[25] Garner, The Redbook at 108.

[26] *Id.* at 109.

[27] The Bluebook: A Uniform System of Citation §§B11 & B5.1.4, at 22 & 10 (Columbia Law Review Ass'n *et al*. eds., 28th ed. 2005) (hereinafter The Bluebook).

[28] Garner, The Redbook at 110-11; The Bluebook §B11, at 22.

[29] Garner, The Redbook at 110; The Bluebook §10.6.1, at 91.

[30] The Bluebook §10.6.1, at 91. *See, e.g.*, *Hale v. Shear Express, Inc*., 946 So. 2d 94, 97 (Hawkes, J., dissenting).

[31] The Bluebook §B11, at 22.

[32] Terri LeClercq, Guide to Legal Writing Style 40 (Aspen Publishers 2007).

[33] *Id.* at 40-41.

[34] *Id.* at 42.

[35] The Bluebook §1.2, at 46-47.

[36] *Id.* at §1.2, at 46.

[37] *Id.*

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