

THE ART OF SELECTING CASES TO CITE

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Handbooks like the Harvard Law Review's *A Uniform System of Citation* exist to show the proper methods of cite form. However, little is said of the selection of cases to cite. Thus, while legal writers and editors have clear guidance concerning *how to* cite legal authority, there is no comparable guidance concerning *what to* cite in the first place. However, as a reader, I am rarely as concerned with whether the writer put his citations in the correct form as I am about whether the cases cited will convince me of the law. Sloppy cite form is generally only annoying, but inaccurate selection of cases can destroy the credibility of a legal argument.

Nevertheless, we seem to take it for granted that a legal author knows what cases are most appropriate to include in his or her document to support a given proposition. Advice to “use the highest and most recent authority” and to “avoid string citations” is commonly all that is said concerning the selection of cases to cite. However, legal readers know that string citations are as common as the advice to avoid them, and there is often little rhyme or reason why the author chose to cite *Jones*, *Smith*, and *Miller*, rather than some other combination of like cases to support a common proposition of law.

Most legal writers seem to have developed an instinct for which cases to pick and which to discard. Moreover, the considerations that the writer consciously or subconsciously brings to bear on which cases to include in legal citation are more complicated than merely citing to the most recent case from the highest court. These considerations probably begin with an informal categorization of all the cases found in the process of researching a given issue.

Categorizing Your Cases

The cases supporting a given proposition of law might roughly be categorized as follows:

Seminal Case--This is generally the first case from the highest court to have decided the issue and stated the proposition of law in question. If the proposition was itself a reversal or revision of earlier authority, the seminal case is the reversing or revising case. As the first case to have stated the proposition in question, the seminal case has generally gone into some depth in analyzing the issue and the court's rationale in a manner that might not be repeated in later cases.

Parrotting Cases--With a common proposition of law, numerous cases will have simply parroted the language of the seminal case, adding little or nothing to the analysis.

Bolstering Cases--In addition to parrotting seminal authority, the bolstering case adds new reasoning and analysis to support the underlying proposition of law.

Reformulation Cases--These cases take the proposition of the seminal case and either restate it in different terms or refine the analysis in some way that may be more or less helpful to the reader. When, for example, the seminal case was written in the legalistic jargon of the past, the reformulation case may delete the jargon and restate the proposition in plain English.

Pseudo-Seminal Case--When the seminal case has been forgotten or lost in the chain of citation, a more recent case will often emerge as the one most courts presently cite as the oldest or most reliable case to support the given proposition. This case effectively takes the place of the lost seminal case.

Companion Cases--As I use the term here, companion cases (not to be confused with the more technical use of this term) are parrotting cases that have over time been so consistently cited together with the seminal (or pseudo-

seminal) authority that they achieve a certain perceived legitimacy and it would now seem awkward to break the habit of citing the companion case together with the seminal authority.

Parallel Cases--Occasionally, separate lines of authority for the same proposition develop without any common source; or, perhaps more likely, the original source or seminal case is buried so far back in the chain of citation that it has been all but forgotten. This then leads to two or more lines of cases standing for the same proposition, with different courts typically preferring one or the other of the parallel lines of authority.

Storehouse Cases--It sometimes happens that, when there are multiple parallel cases with no clear seminal or pseudo-seminal case to which they all refer, somewhere down the road a particular case will attempt to collect or "storehouse" all of the parallel lines. If this storehouse case is reliable, it is a prime candidate to be cited from then on as pseudo-seminal authority.

Application Cases--Some cases that have only marginal value as support for an abstract proposition of law, have great value in their application of the proposition to facts similar or analogous to the facts of your own case.

GUIDELINES FOR SELECTING YOUR CITATIONS

Once you have collected and grouped all of the cases that your research provides with regard to a given proposition, you must begin the difficult task of selecting and organizing the cases that you will cite in your legal document. You might start this process with some reflections on the purpose of citations. You are not writing an encyclopedic collection of all cases that ever cited the given proposition of law. If your proposition is settled law, you are generally not even concerned with providing the reasoning behind the proposition. Rather, your citations are a research aid for the reader. If he or she looks up your cited cases, they should support the proposition for which they are cited, and, in addition, provide a solid foundation for him or her to do independent research to find out whether that proposition is an accurate statement of the law.

Some of the more specific guidelines that you might consider in selecting cases to cite include the following:

Provide Both Seminal and Recent Authority

Ideally, you should provide both the seminal case and the most recent case from the highest court to have recently stated the proposition. However, citation to the most recent case may not be necessary when the proposition is so common and accepted that it could not be overruled without widespread notice. (*e.g.*, if the standard of appellate review for legal sufficiency were drastically changed, it is hard to imagine that any lawyer in the jurisdiction would not soon hear about it). In that case, only a reference to the seminal case is necessary. Nevertheless, when the proposition is not so common that its overruling would be universally noticed, you should also include a recent case to show that it has not in fact been overruled. While the seminal case shows the genesis and original reasoning behind the proposition, the most recent case confirms that it is still good law.

Some legal writers seem to have an unfortunate tendency to cite only the most recent authority and to overlook the seminal case. However, this tends to obscure the chain of authority, increase the difficulty of research, and, if practiced over time in judicial opinions, encourage the loss of the seminal authority and its replacement with parallel or disorganized lines of authority. In other words, if only the most recent case is cited by each succeeding case, the seminal authority is eventually buried by a long string of cases without any consistent, unifying element. Future researchers then face the cumbersome task of hopping back from case to case in search of that lost unifying element. By merely including a citation to the seminal case, however, you simplify the research task and avoid these problems. In a judicial opinion, a reference to the seminal case places the present case clearly within a chain of authority that can easily be found.

In some instances, the seminal case may have already been buried and effectively replaced by pseudo-seminal authority. You can probably rely on a citation to the pseudo-seminal case if it has become generally recognized and cited as the accepted authority for your proposition. However, if there is any *342 question or uncertainty about its acceptance or if there are parallel or competing lines of authority, include a citation to the true seminal case as well.

Generally Omit Parrots

If 20 cases parrot the seminal case's statement of the proposition, your reader can find them by a citator if he or she really wants to read them all. There is little reason for you to increase the size and bulk of your legal document, and thereby decrease its readability, by including unnecessary parroting authority. It is, of course, hard to discard cases that you worked so hard to find and read. But, discarding them is often the kindest thing you can do for your reader. Accordingly, you should only include these parroting cases in your document if there is some important, articulable reason to call attention to them.

Use Vertical Strings To Show Continuity Within a Court

A vertical string includes two or more recent cases from the same court stating the same proposition of law. There is generally no reason to show that the court followed its own recent precedent. However, if the proposition of law is novel, conflicts with other courts' statements of the law, or there is some other reason to believe that it may be merely an aberration that would be overruled on closer scrutiny, you may want to cite another case from the same court repeating the proposition. After all, courts occasionally are careless and say things that they will later retract. However, the more times a particular proposition is restated, the more compelled the court will be to follow its own precedent. Citing more than one recent case from the same court shows that the proposition has been consistently followed by that court.

Use Horizontal Strings To Show Continuity among Courts

A horizontal string includes cases from co-equal intermediate courts. When an issue of law has not been decided by the highest court, or by the intermediate court within your jurisdiction, you must depend upon cases from other intermediate courts that have stated the proposition in question. A string citation to a number of these cases adds credibility to your statement of the law. It matters whether one court, two courts, three courts, or more, have decided the issue in the same manner. If only one other court has stated the particular proposition of law, it is much easier to argue that this decision is wrong and should not be followed, than if 10 other courts of appeals agree with the proposition.

Accordingly, no matter how cumbersome, it may be necessary to cite to a case from each intermediate court that has agreed on the proposition. However, if you are fortunate enough to find a recent storehouse case that has already collected the cases from the various courts, you can cite to the storehouse case alone and let the reader use that as a starting point for researching the other cases.

Reconcile Parallel Lines of Authority

Occasionally, two parallel lines of authority arise that have no common ancestor, in which case it may be particularly important to draw them together and show that the two lines are really pointing to the same legal proposition and should be conformed into one. More often, however, if you trace them back far enough, the two lines have a common ancestor from which both sprang. That ancestor was lost over time and now some of its offspring exist without acknowledging each other. The danger here is that the two lines will slowly begin to grow into separate tests or expositions that must eventually be reconciled, probably by pointing back to the reasoning of the seminal ancestral case.

Use Bolstering and Reformulation Cases to Strengthen and Better Explain

Bolstering and reformulation cases add something to either the analysis or the exposition of the stated legal proposition, and thus are a valuable addition to your citation. A bolstering case gives the reader additional reasons to support or understand the proposition in question. A reformulation case provides fresh language to state the proposition in a more understandable or efficient manner.

Use Application Cases For Similarity and Analogy

Some cases may be cited not as authority for a legal proposition itself, but to show the manner in which that law is applied to the particular facts of the case. If those facts are similar or analogous to the facts of your case, the application case may then be a valuable cite, along with an explanation of the similarity or analogy.

CONCLUSION

The selection of cases to cite for any given proposition is not always easy. It involves judgment and discretion. Sloppy selection frustrates the research efforts of the reader and may, in some cases, cause him or her to reject the underlying legal proposition. Thus, while good cite *form* is important, good cite *selection* is critical.

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