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David J.S. Ziff
University of Washington School of Law

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Strategic Citations: Beyond the Bluebook

David Ziff

Professor David Ziff is a lecturer at the University of Washington School of Law. He teaches in the first-year Legal Analysis, Research and Writing program.

Lawyers love thinking about writing. We love it so much that this issue of the *Litigation and Trial Practice-Staff Council Committee Newsletter* is devoted to writing tips. And for good reason. Words are our business, so we want to ensure that we're using them as effectively as possible.

Often, however, when lawyers discuss writing, we ignore an important part of what we write. Sprinkled throughout our carefully crafted prose, legal writing includes other, uglier sentences—sentences with their own grammar of sorts, those little clumps of italicized case names, the reporter numbers and abbreviations, often with multiple parentheticals at the end. Legal writing includes citations.

Don't worry, I'm not going to discuss the dreaded *Bluebook*, or whatever citation rules your jurisdiction has adopted. At this point in your career, your citation format is most likely good enough to avoid the ire of punctilious judges or law clerks.

But citation format is only the tip of the iceberg. More important, and perhaps less obvious, are the subtle choices of citation style and substance. Lawyers should

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be thinking strategically about their citation-related writing decisions, perhaps as much as their prose-related decisions. In that spirit, I offer four writing tips for your consideration: (1) Strategically Communicate Source-Related Information; (2) Focus on "Bad" Cases; (3) Consider the Moral Dimension of Precedent; and (4) Think More About Citation Style.

1. Strategically Communicate Source-Related Information

Legal citations are complex. They need to be. Unlike other fields, legal citations serve two separate purposes: they tell the reader how to locate a source and they provide information about the source's authority.

For example, consider this citation: *Cantor v. Aleph*, 314 F.4th 15, 92 (9th Cir. 2023). To locate the source, all you need are those clunky reporter numbers, 314 F.4th 15, 92. But the rest of the citation conveys additional relevant information to the reader. The case name provides an easy shorthand reference. The "F.4th" conveys that the source is a reported and precedential federal appellate opinion. And the parenthetical conveys that the case was recently issued by the Ninth Circuit Court of Appeals.

Since the citation itself conveys that information to the reader, your prose need not do that work. Unless you want it to. Compare these four sentences and citations:

A. In *Cantor v. Aleph*, the Ninth Circuit Court of Appeals held that a hot dog is a sandwich. 314 F.4th 15, 92 (9th Cir. 2023).

B. The Ninth Circuit recently held that a hot dog is a sandwich. *Cantor v. Aleph*, 314 F.4th 15, 92 (9th Cir. 2023).

C. *Cantor v. Aleph* stands for the proposition that a hot dog is a sandwich. 314 F.4th 15, 92 (9th Cir. 2023).

D. A hot dog is a sandwich. *Cantor v. Aleph*, 314 F.4th 15, 92 (9th Cir. 2023).

Each pair of sentences conveys the exact same information. The first three versions, in different ways, emphasize some authority-related information in the prose, while leaving other information for the citation. The fourth version simply states the legal proposition and lets the citation do the authority-conveying work.

None of the options is wrong. But as a legal writer, you should strategically choose which information will be brought to your reader's attention.

2. Focus on "Bad" Cases

Every motion or appeal involves so-called "bad" cases—the cases where the law seems to go against you, where the language undermines your argument,

or where the party in your client's position lost. You might feel compelled to bury these cases. Don't.

Remember that for the judge, there are no "good" or "bad" cases. Rather, the judge is concerned with *precedential* cases, regardless of which side they happen to support. By diminishing a bad case, you forfeit the opportunity to help the judge understand why the case, despite being precedential, doesn't compel a bad result for your client.

You can help the judge by addressing that case directly. Your opponents are certainly going to rely on the case. So steal their thunder. You might even want to use sentences like Example A or Example C above, specifically calling out the "bad" case by name and explaining why it's not so bad after all.

3. Consider the Moral Dimension of Precedent

When you cite a precedential authority in support of your argument, you are making a specific request of the court: "In the past, a court issued a judgment resolving a dispute. Our case is like that prior dispute. And because of the prior judgment, you should issue a judgment in our favor in our case." Ultimately, you want the court to agree with your argument and grant your request. But moral considerations can get in the way. A court may be less willing to rely on prior case if the prior case involves immoral or abhorrent reasoning.

Consider the argument offered by the defendant in *Johnson v. North Carolina Department of Cultural Resources*, which involved a family's claim against the state for return of their ancestor's documents. The collection of historically significant documents had been loaned to the state a hundred years earlier. The state argued that the original loan was a bailment and that the bailment terminated with the ancestor's death, at which time the state obtained full ownership of the collection. In support of this claim, the state cited an 1856 case, *Largent v. Berry*.

Largent did involve a bailment. And it was a binding decision from the state's highest court. But the property at issue in *Largent* was an enslaved person, not a collection of documents. The Court of Appeals therefore refused to apply the holding of *Largent*, concluding that it was limited to the then-applicable law of slavery, and not relevant to bailments generally in the current century.

Under the most-recent version of *The Bluebook*, these so-called "slave cases" require a parenthetical indication. But the problem of immoral precedent likely extends beyond the slavery context. Therefore, be wary of thoughtlessly relying on ancient cases that often get cited simply because they are old. Judges who read the

underlying facts and reasoning of those cases may hesitate to incorporate them into their own decision. If the judges are not relying on those cases, then they can only distract from the argument in your brief.

4. Think More About Citation Style

I've chosen a few quick tips for this article. But I'll conclude with a meta-tip: When you're looking for writing advice, make sure you include advice about selecting, formatting, and strategically constructing your citations. Much to Bryan Garner's chagrin, we don't put our citations in footnotes. Citations therefore become part of our writing, skimmed over, but absorbed nonetheless. They deserve our attention.

Here's a good place to start: Professor Alexa Chew's *Stylish Legal Citation*. Yes, it's a law review article. But the final twenty-five pages are presented like a writing guide for citations. When and how should you use string cites? Where should you place your citations? Should you use explanatory parentheticals? Your answers to these questions will affect the readability and persuasive force of your writing. You should therefore care about the answers.