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The Subtext of Citation: Helping First-Year Law Students Understand the Substance of Legal Citation

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I. Introduction

Given the many important concepts that legal writing instructors must cover in the first-year curriculum, it is understandable that we commonly focus on the more technical aspects of citation, such as how to cite properly and when to include a citation. Students must learn and develop a variety of skills quickly, including an understanding of how to conduct legal research, how to analyze legal authority and synthesize rules, and how to write using a particular analytical paradigm (i.e., CREAC, IRAC, CRuPAC, etc.). While students strive to master *The Bluebook's* mechanical rules for citing to legal authority in support of their analysis, the substantive information that citations convey may be overlooked or underemphasized. In fact, legal citations convey critical substantive information to the law-trained reader beyond simple support for a legal proposition. They can communicate the longevity of a particular proposition in a given jurisdiction, the scope and availability of authority in support of a particular legal argument, and the student's understanding of the weight of different authorities. As we know,

there are circumstances where legal citations can demonstrate the trends in the law better than the words on the page and in a more efficient manner than through textual explanations. Teaching students to recognize the many roles that citations play in crafting a legal argument can help enhance the overall quality of their work product, both in their legal writing courses and in their future careers.

This article is based upon a presentation given at the Capital Area Legal Writing Conference held earlier this year at the George Washington University Law School. The need to develop an exercise designed to help students see the information-or "subtext"-that their legal citations convey became apparent after reading their draft open memoranda in the fall semester. In addition to their multiple technical Bluebook errors, we noted that students often times did not choose the best authority to cite for a particular proposition. We decided that one of the most effective ways to impart upon students the importance of legal citation, beyond simple support for a proposition, was to take some examples from their own drafts and annotate them to explain the substantive content conveyed to the law-trained reader. This exercise made sense from several standpoints: 1) the students had intimate familiarity with the law on the subject after having several weeks to complete the research; 2) we could teach them this concept using their own drafts, and thus they had an incentive to understand and improve upon their mistakes before the final submission; and 3) it involved minimal effort on our part to create the annotated citations with potentially a big payoff to the students and to us in grading their final memoranda and legal citation.

By way of background to the legal problem, the students' open memo involved the enforceability of

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a non-competition clause contained in a contract that memorialized an employee's sale of a 5-percent ownership interest in a business back to his former employer under North Dakota law. A North Dakota statute prohibits the use of non-competition clauses generally, but recognizes two narrow exceptions.¹ One exception allows non-competition clauses when the contract involves a substantial sale of a business's goodwill.² North Dakota law had very broad ranges for what constituted "substantial" goodwill: In one case, .5 percent was deemed too small, but 50 percent was deemed sufficient. In light of this broad range, students looked outside the jurisdiction, particularly to California, where several cases dealt with smaller percentages closer to the students' fact pattern and were cited favorably by the North Dakota Supreme Court.

We have divided the examples into four general categories that represent the most common problems we observed in our students' drafts.³ Following each example, we include a short explanation of the context conveyed to the law-trained reader by the citation. In Part II, we discuss the ability of citations to convey the strength and longevity of a particular rule of law in a given jurisdiction. Part III considers the different messages that string citations can communicate to the law-trained reader and offers suggestions for managing multiple authorities in a citation sentence. In Part IV, we highlight the role of persuasive primary authorities in supporting a legal argument and provide examples of both effective and ineffective references to these types of sources. Finally, Part V examines the need for very careful deliberation with respect to citing secondary authorities in a legal document.

II. Strength and Longevity of a Legal Rule

Students learn in their first-year Civil Procedure and Constitutional Law courses that a state's highest court is the final arbiter of issues involving that state's statutes and constitution.⁴ Decisions by the highest court in a jurisdiction carry greater weight because of this finality.⁵ In addition, citing cases from a wide time span can indicate the durability of a given proposition within the jurisdiction. For these reasons, we should encourage students to appreciate the way their citations reflect their understanding of the comparative value of cases decided within the binding jurisdiction. We also want our students to understand the persuasive effect of highlighting a jurisdiction's long-standing commitment to a particular rule or policy. The examples below demonstrate an effective handling of these issues through citation.

Example #1: In North Dakota, statutes to tailor the effects of non-competition clauses have been enacted in an attempt to provide the community with access to goods and services, to provide for a competitive market, and to secure the employment of North Dakota citizens. See *Warner & Co. v. Solberg*, 634 N.W.2d 65, 70 (N.D. 2001) ("It is the right of the public's access to the services offered by the employee that is more significant than the employee's interest."); *Mapes v. Metcalf*, 88 N.W. 713, 714 (N.D. 1901).

Explanation #1: The citation sentence is used to support the writer's articulation of North Dakota's public policy. By including *Warner & Co v. Solberg*, a 2001 North Dakota Supreme Court case, the citation indicates that this policy has been recently recognized by the highest court in the jurisdiction. By also including *Mapes v. Metcalf*, a 1901 North

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¹ N.D. Cent. Code § 9-08-06 (2006).

² *Id.*

³ To the best of our knowledge, all legal citations in the annotated examples conform to the technical requirements of the 19th Edition of The Bluebook.

⁴ *Montana v. Wyoming*, 131 S. Ct. 1765, 1773 n.5 (2011) (“The highest court of each State, of course, remains ‘the final arbiter of what is state law.’” (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940))).

⁵ See *id.*

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Dakota Supreme Court case, the citation indicates that this policy has a long-standing history within the state. Because a signal is used, the explanatory parenthetical quoting from the *Warner* case adds depth to the general proposition that the public policy is to promote competition.

Example #2: For the goodwill exception to apply, the sale of interest must be significant enough to constitute the sale of the business’s goodwill and be collateral to the non-competition clause. *Warner*, 634 N.W.2d at 74 (“[T]he sale of only a small amount of stock may not be sufficient to qualify for the goodwill exception. . ..”); see *Mapes*, 88 N.W. at 714 (interpreting the predecessor to section 9-08-06 that similarly contained the same recognized exception).

Explanation #2: Similar to the previous example, using two cases from the North Dakota Supreme Court from different time periods indicates the longevity of the rule within the jurisdiction. The signal and explanatory parenthetical with the *Mapes* case clarifies for the reader that this statute has been recodified, but without substantive differences with respect to the goodwill exception. Some students only cited to *Mapes* for this proposition, leading the reader to question whether the student had adequately researched the law on this issue given the age of the case, as well as question whether the case was still good law in light of the current governing statute.

III. Issues with Rule Synthesis and String Citations

Rule synthesis is perhaps one of the most difficult concepts for first-year law students to fully grasp and apply in legal writing. String citations can further muddle this issue if students do not fully understand the different types of information conveyed to the law-trained reader. For example, a citation to only one authority indicates that no rule is synthesized; rather, it tells the reader that there is one clear rule for that particular legal issue. However, a string citation does not necessarily convey the opposite—that multiple cases are synthesized to create a single rule. String citations, which are generally disfavored

by legal writing texts,⁶ can be used to indicate an appropriate rule synthesis, the strength and longevity of a particular rule,⁷ or simply that several cases apply the same rule (e.g., to show a circuit split, recent trend, or a majority rule). Incorporating explanatory information either in the subsequent text or through explanatory parentheticals will inform the reader which situation is intended through the citation and why multiple citations are necessary or helpful. Example 1 demonstrates an effective use of multiple citations to support a rule synthesis. Example 2 demonstrates a common misuse of multiple citations that leaves the reader wondering how the cases actually support the legal proposition.

Example #1: To be reasonable, a non-competition clause must be limited in duration and geographic scope. *Hawkins Chem., Inc. v. McNea*, 321 N.W.2d 918, 920 (N.D. 1982) (limiting the enforcement of a non-competition clause to one county); *Igoe*, 134 N.W.2d at 513 (finding a non-competition clause enforceable for the duration of ten years).

Explanation #1: The explanatory parentheticals after each case citation provide direct support for the time and location restrictions mentioned in the preceding textual sentence. The student synthesized the principles from both cases to create one overall rule regarding the reasonableness of a non-competition clause.

Example #2: For the goodwill exception to apply, the sale of interest must be significant enough to constitute the sale of the business’s goodwill and be collateral to the non-competition clause. *Warner*, 634 N.W.2d at 74; *Igoe v. Atlas Ready-Mix, Inc.*, 134 N.W.2d 511, 515 (N.D. 1965); *Bessel v. Bethke*, 215 N.W. 868, 869 (N.D. 1927); *Mapes*, 88 N.W. 713, 714 (N.D. 1901).

⁶ See, e.g., Linda H. Edwards, *Legal Writing & Analysis* 257–58 (3d ed. 2011) (cautioning against string citations because they “impair readability” and “seldom add[] much to the legal analysis”); Terri LeClercq, *Guide to Legal Writing Style* 54 (1995) (cautioning against the use of string citations because “too many citations in prominent places impel readers to disregard the whole string”).

⁷ See *supra* Part II; see also Edwards, *supra* note 8, at 258 (recognizing the value of string citations when the “reader needs every relevant authority” or when showing “the overwhelming strength of support for the proposition”).

Explanation #2: Without additional clarification in the subsequent text or explanatory parentheticals following each case citation, the reader cannot know whether all of the cases in the string citation support the same component of the rule or whether they simply demonstrate the application of the rule over a wide time span.⁸ The student can create a stronger, more effective rule by clarifying each case's contribution or simply citing to the best authority for the proposition if no rule synthesis is involved.

IV. References to Persuasive Primary Authority

A common dilemma facing first-year students is when and how to use non-binding or persuasive primary authority to support their legal arguments. This would include citations to federal cases if the student is researching a state substantive law issue, citations to primary authority outside of the jurisdiction, and citations to non-precedential cases.⁹ If done carefully and thoughtfully, citing to these authorities in a legal document can bolster a novel argument. If done inadvertently or hastily, citing to such authorities can be extremely damaging to the value of the student's legal analysis. Some students will cite to non-binding primary authority without fully understanding its impact on their legal arguments or explaining its relevance to the reader. We should remind our students to carefully consider citing persuasive primary authority in their legal writing. Example 1 demonstrates an effective handling of this issue; whereas Examples 2 through 4 represent common citation problems with respect to non-binding primary authority.

Example #1: California courts follow a similar non-competition statute and often view non-competition clauses in the same light as North

Dakota courts. *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d 473, 476 (N.D. 1986) (finding that because section 16600 of the California Business & Professional Code and section 9-08-06 of the North Dakota Century Code are derived from the same field code, California court decisions, while not binding, are highly persuasive and should not be ignored); see *Hill Med. Corp. v. Wycoff*, 103 Cal. Rptr. 2d 779, 784 (Ct. App. 2001) (setting out California's general rule regarding covenants not to compete and explaining its origin).

Explanation #1: The citation indicates that California law on the issue of goodwill is highly persuasive because California has a similar statutory provision. Importantly, the student explains the reliance on persuasive authority by first citing to a decision in which the North Dakota Supreme Court spoke approvingly of the use of California case law. This technique helps convince the reader of the highly persuasive value of the California law that the student cites later in the citation sentence.

Example #2: Further, the California Court of Appeals found that in determining enforceability based on public policy, courts also take into account whether the non-competition clause would prevent the employee from establishing gainful employment. See *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr.2d 573, 577 (Ct. App. 1994).

Explanation #2: The student includes this citation to a decision from the California Court of Appeals without indicating in the text or in an explanatory parenthetical why the case is relevant for determining the public policy in North Dakota. The reader is left wondering why this case is relevant to the particular issue and may question the thoroughness of the student's research.

Example #3: In determining whether to enforce a non-competition clause that falls within either statutory exception, North Dakota courts look to the reasonableness of the clause. *CDI Energy Servs., Inc. v. West River Pumps, Inc.*, 567 F.3d 398, 404 (8th Cir. 2009).

Explanation #3: The citation to a federal court of appeals case here is problematic because it is only persuasive authority on the substantive state

⁸ See *supra* Part II. If the student intended to use the string citation to demonstrate the rule's longevity, two cases would likely be sufficient, not four as cited in this example.

⁹ See Amy E. Sloan, *Basic Legal Research Tools & Strategies* 4–10, 83 (4th ed. 2009). Professor Sloan discusses in her textbook why “non-precedential” is a more accurate term than “unpublished” to categorize those cases that are not given precedential weight by the courts. She also discusses the recent shift in the Federal Rules of Civil Procedure to allow citation to non-precedential cases, even though those cases are generally afforded little persuasive value.

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law issue under discussion—the reasonableness of the terms in a covenant not to compete. In addition, the Eighth Circuit opinion cited in this legal citation actually cites to several North Dakota Supreme Court decisions in support of the proposition, indicating that the student has overlooked these more preferable authorities or does not understand the comparative weight of federal and state cases in this situation. This citation also indicates to the reader that the rule is supported only by federal court cases, which is inaccurate and misleads the reader.

Example #4: By contrast, a non-competition clause is unreasonable if it stands against public policy, creates an undue hardship on the employee, or is offensive to good morals. See *EOG Resources Inc. v. Badlands Power Fuels, L.L.C.*, 2009 WL 3857191, at *2 (D.N.D. Nov. 17, 2009) (“Public policy, with respect to contract provision, is a principle of law whereby a contract provision will not be enforced if it has a tendency to be injurious to the public or against public good.” (quoting *Johnson v. Peterbilt of Fargo, Inc.*, 438 N.W.2d 162, 163 (N.D. 1989))).

Explanation #4: This citation conveys several errors on the part of the student’s selection of authority. First, the student cites to a non-precedential decision from a federal district court even though the issue concerns state law. Second, the student’s parentheticals actually cite to and quote from a binding North Dakota Supreme Court case. This oversight indicates that the student does not understand the comparative weight and priority between the two decisions or did not make the best choice when selecting the authorities to cite in support of this proposition.

V. References to Secondary Sources

Students are drawn to secondary sources because they provide quick, coherent summaries of complex issues that are often easier to understand than most primary authorities. Because secondary sources are always persuasive authority,¹⁰ using them alone in a citation sentence can seriously undermine both

the credibility and effectiveness of the legal writer. The example below reconfigures the last example from the previous section to demonstrate this issue.

Example #1: By contrast, a non-competition clause is unreasonable if it stands against public policy, creates an undue hardship to the employee, or is offensive to good morals. [Restatement \(Second\) of Contracts, § 188 \(1981\)](#).

Explanation #1: The student does not indicate either in the text or in the citation whether the Second Restatement of Contracts has been adopted in North Dakota (it had, in fact, been adopted), yet it is cited here as authority. Thus, this citation indicates that only secondary, persuasive authority is available to support this rule. In actuality, plenty of North Dakota court cases communicate this same proposition and should be cited here instead.

VI. Conclusion

To the law-trained reader, legal citations convey much more information than simply support for or opposition to a particular legal principle. However, to a first-year law student, the subtextual information conveyed through legal citation beyond the basics of providing general support for a statement and technical information to locate the particular authority is often overlooked or underemphasized. Students need to use either text or explanatory parentheticals to help the reader understand what they intend to convey through their citations and selection of authority. By using examples from students’ first drafts of their open memoranda and annotating particular citations that indicate a misunderstanding of the weight, role, and precedential value of different authorities, legal writing instructors can provide helpful feedback on why legal citation is so important to the law-trained reader. If we can challenge students to more carefully select the authorities they include in their legal citations to showcase their research and analytical skills, they will be in much better positions as students, legal interns, and future lawyers.

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¹⁰ See *id.* at 5.