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CLASSICAL CITATION

David S. Coale*

I. INTRODUCTION

Legal citation provides the foundation for a legal argument and helps form the overall "look and feel" of the brief containing that argument.[1] This article suggests that writers can improve their use of the specialized language of citation by recalling Aristotle's classical rules for effective advocacy.[2] Under his framework, an effective work of advocacy employs *logos*, *ethos*, and *pathos*. *Logos* is the persuasive force of the reasoning and facts, *ethos* is the personal credibility of the advocate, and *pathos* is the emotional appeal of the argument.[3] This article briefly surveys each of these classic principles in the specific context of legal citation. It concludes that while *logos* is the traditional focus for selecting citations, the concepts of *ethos* and *pathos*, too often overlooked, deserve attention, as their use may dramatically enhance a brief's persuasiveness.

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1. *See generally* Ursula Weigold, *A New Approach to Legal Citation Form*, 13 Appellate Advocate 17 (Fall 2000) (*The Appellate Advocate* is the quarterly report of the State Bar of Texas Appellate Section.) (copy on file with *The Journal of Appellate Practice and Process*).

2. The author is indebted to Herbert Stern's excellent application of these principles to trial practice. *See* Herbert J. Stern, *Trying Cases to Win* ch. 4 (John Wiley & Sons, Inc. 1991).

3. Aristotle, *On Rhetoric: A Theory of Civic Discourse* (George A. Kennedy trans., Oxford U. Press 1991). For a general overview of the roles of *ethos* and *pathos*, the "nonrational means" of persuading legal audiences, see Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85 (1994).

II. LOGOS, ETHOS, AND PATHOS

Logos—logic—is the most intuitively useful of the Aristotelian principles in the context of citation selection. A brief argues that a court should apply precedent in a certain way; citation supports that argument by establishing what the precedent is. Without citation, there is simply no traditional legal argument.

Ample literature explains how to identify the precedent and apply it to the facts of a case. Among the universe of pertinent precedents, some are controlling while others are merely persuasive.[4] Within an opinion that is a controlling precedent, a statement "necessary" to the result is a binding "holding," while other statements not affecting the outcome are "dicta," which may persuade but do not control.[5] The question of what is "necessary" then turns on the definition of the facts of the dispute before the court.[6] Citation that follows these established principles will likely satisfy the guideline of "logos."

Ethos—personal credibility—is not as obvious to readers of a specific legal argument as is the logical structure of that argument. Over the context of an entire brief, however,

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4. *See generally* 21 C.J.S. *Courts* §§ 150-60 (1990) (describing the precedential effect of opinions issued by different tribunals).

5. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *see also Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reache[s] . . . is entitled to greater weight . . . ."); John Chipman Gray, *The Nature and Sources of Law* 261-62 (1921) ("Judicial Precedent . . . must be an opinion the formation of which is necessary for the decision of a particular case; in other words it must not be *obiter dictum*."); *see generally* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy & Adjudication*, 74 Chi.-Kent L. Rev. 655, 709-29 (1999) (summarizing ways to distinguish dicta from holdings).

6. *See generally* Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 18-19 n. 21 (1989) (summarizing a classic debate about the identification of "material facts"). Karl Llewellyn has artfully noted that a judge can adhere with "mandarin" strictness to the distinction between holding and dicta, confirming a prior case so tightly to its facts that it "holds only of redheaded Walpoles in pale magenta Buick cars," or sweeping broadly to any attractive language, to say that "[n]o matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held." Karl N. Llewellyn, *The Bramble Bush* 67-68 (Oceana Publications 1951).

credibility may be the most significant part of the advocate's work, even if the reader never consciously focuses on it.[7]

The concept of *pathos*—emotional appeal—may at first glance seem unrelated to the formalities of citation. Attention to *pathos* in the citation context, however, allows an advocate to develop an argument into more than a dry discussion of holdings.[8] The argument can then become more interesting and ultimately more persuasive.[9]

The following examples illustrate the use of these concepts in citation selection. They show that while the use of logically correct citations can build credibility, an unnecessary credibility issue can arise if logic is the sole focus. Similarly, citation that may not contribute to the strict logic of an opinion can enhance its credibility and overall appeal.[10]

A. Seminal Cases

Advocates frequently cite seminal cases such as *Erie*[11] and *Celotex*.[12] Some citations to these well-known cases may well be

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7. *See* Douglas K. Norman, *The Art of Selecting Cases to Cite*, 63 Tex. B.J. 340, 341 (Apr. 2000); *see generally* Stern, *supra* n. 2, at 13 (defining the establishment of personal credibility as "Rule One" of advocacy).

8. *See* Elizabeth Fajan & Mary R. Falk, *Shooting from the Lip:* United States v. Dickerson*: Role [Im]morality and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1, 21 (2000) ("Emotional appeal plays a role in the persuasive process because of the vital impact it has on our intellectual convictions and our will to act.")

9. *See* Stern, *supra* n. 2, at 87 (noting the search, in the trial context, for ways "to make the case bigger than its facts").

10. The same considerations affect citation form and placement. *See* ALI Citation Format Committee, AALL Task Force on Citation Formats, *Report of March 1, 1995*, 87 L. Libr. J. 581 (1995), available at <http://www.aallnet.org/committee/citation/task_force.html> (accessed Nov. 16, 2001) (advocating the development of "universal" citation format, which retrieves sources without regard to the medium in which they appear); Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 L. Libr. J. 148 (1982). Others have theorized that citation placement—within the text or in footnotes—affects a reader's reaction to forms of persuasive writing. *Compare* Bryan A. Garner, *The Citational Footnote*, 13 Appellate Advocate 2 (Winter 2000) *with* Mark E. Steiner, *Without Precedent: Footnotes in Judicial Opinions*, 12 Appellate Advocate 3 (Fall 2000) (copies on file with *The Journal of Appellate Practice and Process*).

11. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (establishing application of federal common law in cases in which jurisdiction is based upon diversity of citizenship).

12. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319-20 (1986) (describing the procedure for a "no evidence" summary judgment against a party with the burden of proof on an issue).

"makeweight" references.[13] It is also true, however, that citation to a well-known opinion shows that the author knows about the history of the issue, and can thus enhance his credibility—or *ethos*—as a knowledgeable advocate.

Citation to the "right" case or article can also, in the appropriate context, help ground an argument in a tradition larger than the case and enhance its *pathos*.[14] For example, a citation to *Erie* in a state law case in federal court serves little purpose as a matter of logic, but it does serve to remind the reader that the choice of state law to govern a dispute is a serious matter that has received intense attention from the courts over the years. The same is true of using a citation to *Celotex*, which reminds the reader of the importance the Supreme Court places on the summary judgment procedure.

B. Sound Bites

Lawyers often use two or more citations to support a proposition. When well-chosen language from the second source reinforces the point made by the first, the persuasive effect is enhanced. The following example illustrates the appeal of a well-phrased "sound bite."[15] The second case improves the overall force of the citation, even though its formal holding is wholly redundant of the first:

> *See e.g. Azar v. Hayter*, 874 F. Supp. 1314, 1317 (N.D. Fla. 1995) ("Plaintiff's FDCPA claim has nothing to do with whether the underlying debt is valid. An FDCPA claim concerns the method of collecting the debt. It does not arise out of the transaction creating the debt. . . ."), *aff'd*, 66 F.3d 342 (11th Cir. 1995); *accord Berrios v. Sprint Corp.*, 1998 U.S. Dist. LEXIS 6579, at *26 (E.D.N.Y. Mar. 16, 1998) ("All reported cases on the issue have found that a defendant's counterclaims for payment of an overdue debt

13. *See generally* J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 Chi.-Kent L. Rev. 843, 861 (1996) (explaining the frequent citation of certain law review articles with the principle: "Write icons, not articles.").

14. *See* Norman, *supra* n. 7, at 341.

15. Sound bite—"[A] brief recorded statement (as by a public figure) broadcast especially on a television news program; *also* : a brief catchy comment suitable for use as a sound bite." Merriam Webster Online, *Merriam Webster's Collegiate Dictionary* <http://www.m-w.com/cgi-bin/dictionary> (accessed Nov. 20, 2001).

are distinct from, and not logically related to, a plaintiff's FDCPA claim based on improper debt collection practices.").[16]

By emphasizing the fact that "[a]ll reported cases" reach the same conclusion, the writer gives that conclusion greater weight and emphasis (*pathos*), since it suggests that a significant number of courts have both considered the issue and taken the time to write a published opinion about it. The writer's conclusion also seems more credible (*ethos*) because of the unanimity of the opinions that have considered the issue, even though as a matter of strict logic, that should not matter.[17]

In the same vein, compare the effect of a simple citation to the holding of an ERISA benefits case with that of a citation providing an additional comment by the court about the intended force of that holding.

Example 1:

See Toulson v. Avondale Indus., 141 F.3d 604, 611 (5th Cir. 1998) (affirming an administrator's discretion to interpret the phrase "mental and nervous condition" in an ERISA plan).

Example 2:

See Toulson v. Avondale Indus., 141 F.3d 604, 611 (5th Cir. 1998) (affirming an administrator's discretion to interpret the phrase "mental and nervous condition" in an ERISA plan, and warning "that fomenting and prosecuting

16. The example uses an unpublished opinion as the source of the "sound bite." Quoting an unpublished opinion may violate court rules in some jurisdictions, and the practice may weaken the brief writer's credibility even in those jurisdictions that do not prohibit such citations. *Compare Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000) (holding unconstitutional the Eighth Circuit's rule prohibiting citation of unpublished opinions), *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (former opinion vacated on mootness grounds, leaving open the question of the rule's constitutionality) *with Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (holding that Ninth Circuit's no-citation rule does not violate Constitution's Article III).

17. *See e.g.* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 Wm. & Mary L. Rev. 1143, 1212 (1999) ("When many circuits consider an issue and all rule the same way, the case for following their lead becomes very strong indeed."); *but see generally* Ralph Waldo Emerson, *Self Reliance*, in *Essays* 51-52 (Riverside Press 1883) ("Whoso would be a man must be a nonconformist.").

litigation of this ilk . . . could result in sanctions more severe than mere assessment of costs").

The second statement, rather than just announcing a holding, reveals that the holding is particularly significant and should not be questioned lightly. Citing such a statement reinforces the logical force and appeal of the citation because it signals that the earlier court had particular confidence both in the importance (*pathos*) and the correctness (*ethos*) of its conclusion. Indeed, there is ample evidence that courts not only quote their earlier statements along these lines, but that they expect advocates to acknowledge the weight of such precedent, even when none of it is from the controlling jurisdiction.[18]

C. *Overcitation*

Overcitation is a temptation derived from the powerful research software that makes massive amounts of case law available.[19] If a brief provides too many citations, even if all of

18. *See e.g. Towers v. City of Chicago*, 173 F.3d 619, 626 (7th Cir. 1999) (affirming the dismissal of a due process claim arising from a forfeiture, observing that the Supreme Court had earlier recognized "a long and unbroken line of cases" rejecting similar claims) (quoting *Bennis v. Michigan*, 516 U.S. 442, 444-45 (1996)); *Smith v. Cromer*, 159 F.3d 875, 879 (4th Cir. 1998) (rejecting an argument about a federal employee's obligation to testify because of that court's previous recognition of "an unbroken of line of authority" to the contrary) (quoting *Boron Oil v. Downie*, 873 F.2d 68, 70 (4th Cir. 1989)); *U.S. v. Hunt*, 117 F.3d 1414, 1997 WL 381859, *2 (4th Cir. 1997) (table) (rejecting an argument about the operation of a Sentencing Guideline, citing an earlier case rejecting the same argument as one that "borders on the frivolous") (quoting *U.S. v. Gordon*, 895 F.2d 932, 936-37 (4th Cir. 1990)).

One federal district court imposed Rule 11 sanctions on counsel who ignored such non-mandatory authority, remarking:

> [H]ad counsel conducted even the most fleeting review of Thirteenth Amendment caselaw, he would have soon discovered an unbroken line of cases to the contrary. Although this line of cases contains no controlling decisions by the Court of Appeals for this circuit, the sheer volume of uniformly contrary decisions from other courts, as well as dictum from leading Supreme Court opinions, constituted more than adequate authority to put plaintiff's counsel on notice that his Thirteenth Amendment assertions were not well grounded in law and that sanctions would be in order unless counsel bolstered his assertions with at least a modicum of argument for extension, modification, or reversal of existing law.

Matthew v. Freedman, 128 F.R.D. 194, 201-202 (E.D. Pa. 1989) (footnote omitted), *aff'd*, 919 F.2d 135 (3d Cir. 1990).

19. *See* Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 Ohio St. L.J. 405, 407 (1994); *see generally* Susan W. Brenner,

them support the argument as a matter of pure logic, that brief may divert the reader's attention to the amount of research rather than the argument. It will then be harder for the reader to focus on the key points. Compare these examples:

Example 1:

The defense of quasi-estoppel does not require proof of detrimental reliance. *See e.g. Bristol-Myers Squibb Co. v. Barner*, 964 S.W.2d 299, 302 (Tex. App.–Corpus Christi 1998, no pet.);[20] *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.–Corpus Christi 1994, writ denied); *Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App.–Austin 1994, no writ); *New Braunfels Factory Outlet Ctr., Inc. v. IHOP Realty Corp.*, 872 S.W.2d 303, 306 (Tex. App.–Austin 1994, no writ); *Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765-66 (Tex. App.–Texarkana 1992, writ denied); *Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. App.–Houston [14th Dist.] 1991, no writ); *Arrington v. County of Dallas*, 792 S.W.2d 468, 472 (Tex. App.–Dallas 1990, writ denied); *Stimpson v. Plano Indep. Sch. Dist.*, 743 S.W.2d 944, 946 (Tex. App.–Dallas 1987, writ denied).

Example 2:

The defense of quasi-estoppel does not require proof of detrimental reliance. *See e.g. Bristol-Myers Squibb Co. v. Barner*, 964 S.W.2d 299, 302 (Tex. App.–Corpus Christi

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Precedent Inflation (Transaction Publishers 1992). Even in the days before computerized research facilitated the finding of widely scattered authority, David Mellinkoff decried "the law's bellowing redundancy" in searching for and citing multiple precedents for a proposition of law:

> In these ever more mountainous reports, lawyers continue to stalk the elusive law, with a now traditional faith that he who hunts long enough will find the law he wants. No matter that it lurks in some improbable cranny between law and equity, in some remote and dozing jurisdiction, covered with cosmic or atomic dust. Armed with *Shepard's* and a digest, the good lawyer will track down the law, drag it out, and parade it in triumph as a hand-bagged precedent. So strong is this faith that it fires counsel on opposite sides of most issues, and so rich is the accumulation of precedent that usually the faith of each is justified.

David Mellinkoff, *The Language of the Law* 374 (Little, Brown & Co. 1963).

20. The unusual citation form follows certain conventions peculiar to Texas. *See Texas Rules of Form* 22-25 (Tex. L. Rev. Assn., eds., 8th ed., U. Tex. Austin Sch. L. Publications, Inc. 1992).

> 1998, no pet.) ("Misrepresentation by one party, and reliance by the other, are not necessary elements of quasi-estoppel."); *Stimpson v. Plano Indep. Sch. Dist.*, 743 S.W.2d 944, 946 (Tex. App.–Dallas 1987, writ denied) ("[T]he courts have developed the related concept of 'quasi-estoppel,' in which false representation and detrimental reliance need not be shown.").

This example illustrates that it can be counterproductive to simply amass citations on an issue, even if they are logically relevant. By piling citation upon citation, the advocate risks reducing his credibility by appearing to be citing cases without truly having mastery of their holdings. And the emotional appeal of a crisp quotation is reduced by surrounding it with an excessive number of symbols and page numbers.

D. Policy

Just as citation to a leading article enhances an advocate's credibility, citation that describes the policies or the broader principles behind a legal rule can enliven a logically sound but otherwise dull discussion of that rule. For example:

> The benefits of having more minority supervisors do not justify imposing a racial classification with such a loose connection to remedying past discrimination. *Croson*, 488 U.S. at 495-99; *see also* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n. 26 (1974) ("[S]pecial scrutiny in the suspect classification context has in fact consisted not in weighing ends but rather in insisting that the classification in issue fit a constitutionally permissible state goal with greater precision than any available alternative.").[21]

Citing a general treatise's explanation of a critical concept can have the same effect:

> Plaintiff's alleged waiver of its rights after the contract was signed cannot expand Defendant's obligations under the contract. *See Bourland v. Choctaw, O. & G. Ry.*, 99 Tex. 407, 90 S.W. 483, 484 (1906) ("[T]he rights and liabilities of the parties are fixed by the contract and the

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21. *Black Fire Fighters Assn. v. City of Dallas*, 19 F.3d 992, 997 n. 20 (5th Cir. 1994).

circumstances known to them when it is made, and cannot be increased by notice of other facts subsequently given."); 28 Tex. Jur. 3d, *Damages* § 97, at 83-84 (1996) ("Damages to persons not parties to the contract ordinarily cannot be considered as the natural consequence of its breach).

This kind of citation can bolster the logic of an argument, as well as the advocate's credibility and the overall appeal of the argument. As with a citation to the "leading" case, citation to policies and treatises signals the brief writer's thorough preparation (*ethos*) as well as underscoring the social or moral importance of the issue at hand (*pathos*).

E. Absence of Precedent

Sometimes there is no precedent to cite, and thus there is little for advocates to rely upon other than the logical force of their arguments, enhanced by their credibility and emotional appeal. In 2000, Cable News Network (CNN) applied for permission to broadcast the oral argument before the Supreme Court in *Bush v. Palm Beach County Canvassing Board*.[22] Its brief provides an excellent example of advocacy based almost entirely upon *ethos* and *pathos*.[23] CNN relied upon three Supreme Court cases: two dealing with the televising of criminal trials[24] and a third about the right to observe a criminal trial.[25]

As a matter of logic, none of these cases dealt with the issue of how the Supreme Court should conduct its own proceedings. The brief reasoned almost entirely from the policy of openness involved in the cited cases, and the unique significance of the Florida election dispute. From a citation perspective, however, the strategy CNN followed illustrated a wise approach to the situation in which there is little or no controlling precedent. CNN did not try to make more of the available cases than they fairly allowed, and it avoided citing

22. No. 00-836 (U.S. 2000). This was the first Supreme Court appeal relating to the 2000 election, before the one that ultimately led to Al Gore's concession. *Bush v. Gore*, No. 00-949 (U.S. 2000).

23. *Application of Cable News Network to Broadcast Oral Argument and Motion for Expedition with Respect Thereto* (Nov. 27, 2000), *Bush v. Palm Beach Canvassing Board*, No. 00-836 (U.S. 2000) (on file with author).

24. *Estes v. Texas*, 381 U.S. 532 (1965); *Chandler v. Florida*, 449 U.S. 560 (1981).

25. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

marginally relevant cases simply to be citing something. In other words, it carefully selected its citations to maximize the credibility of its advocacy, while at the same time appealing strongly to the emotions unique to that highly charged case.

III. CONCLUSION

Aristotle's principles remind us that even the sometimes dry exercise of selecting supporting citation is part of the centuries-old craft of advocacy. Logic plays a powerful role in the choice of citation, but it is not the only criterion. Citation choice should also consider how to enhance the credibility of the advocate and the emotional appeal of the argument. An advocate who considers all three of Aristotle's elements in choosing authority and constructing citations is likely to produce briefs with additional persuasive power.