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Write the Cites Right—Part I

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Write the Cites Right — Part I

BY GERALD LEBOVITS

To write it right, you've got to cite the sites. Citing is more than Bluebooking. Citing is more than helping your reader find your citations. Citing is legal method. The way you cite can determine whether a court will accept your argument.

Tanbook, Bluebook, and ALWD

Cite according to the New York State Style Manual, called the *Tanbook*,¹ when you write for a New York State court. *Bluebook*² when you write for a federal court. Because the *Bluebook* miscites all its New York examples, use the St. John's Rules of Citation³ in conjunction with the *Bluebook* for New York citations. *ALWD*, pronounced "All Wid,"⁴ is a *Bluebook* rival. Now in its second edition, *ALWD* has fixed its first-edition mistakes,⁵ but it still lacks accurate New York examples for New York practitioners. *ALWD*, moreover, isn't in common use. Of New York's 15 law schools, only Fordham and New York Law Schools use *ALWD* in their first-year legal-writing programs, and even these schools' law reviews still *Bluebook*.

Headnotes & Syllabuses

Never cite headnotes or syllabuses or, worse, quote from them. But skim them to save research time.

For a case in which a court quotes a headnote, see the New York Court of Appeals's 1888 *People v. O'Brien*,⁶ an example of opinion writing from a by-gone era.

Because of the Supreme Court's 1905 *United States v. Detroit Lumber Co.*,⁷ every syllabus to a United States Supreme Court opinion includes a footnote stating that the syllabus has been prepared for the reader's convenience but is not part of the opinion.

Signals

No signal precedes a citation that supports your proposition directly. Thus, no signal after a quotation.

"*Contra*" if your citation contradicts your proposition directly.

"*See*" if your citation supports your proposition indirectly or by inference. When using "see," explain the citation in your text or in a parenthetical or bracket following your citation. Example: If you discuss the facts of your case and then cite a case, "*see*" must precede your citation at the end of your sentence because your cited case did not discuss the facts of your case.

"*See also*" before a second citation if the first citation supports the proposition directly but the second supports the proposition only indirectly. This signal is always lowercased ("*see also*") and preceded by a semicolon.

"*But see*" if your citation contradicts your proposition indirectly.

"*E.g.*" if your citation gives one or more examples to support your proposition directly. Do not write that "courts have held" or that "at least one court has held" and then cite one case only. Use "*e.g.*," or write "one court has held." Your reader might suspect that your research disclosed but one case and that you are exaggerating.

"*See, e.g.*," if your citation gives one or more examples to support your proposition indirectly.

"*Cf.*" if your citation supports your proposition by analogy.

"*Accord*" is different from "*see also*." Use "*accord*" when a citation from another jurisdiction supports your proposition. Also, use "*accord*" to cite a second authority after quoting a first authority if the second authority supports the original proposition. Example: The Court of Appeals has noted that "the appropriate date for measuring the value of marital property has been left to the sound discretion of the trial courts . . ." *McSparron v. McSparron*, 87 N.Y.2d 275, 287 (1995);

accord Domestic Relations Law § 236(B)(4)(b)."

"*But cf.*" if your citation contradicts your proposition by analogy.

"*Compare . . . with*" to compare one proposition and citation with another proposition and citation.

"*Id.*" and "*see id.*" as short-form citations that refer unambiguously to a single, immediately preceding citation.

Emphasize arguments and themes, not authority.

It's better to italicize than to underline. If you underline signals, be careful not to underline commas not italicized in signals that end with commas. Correct: "*See, e.g.,*" and "*e.g.,*" or "*See, e.g.,*" and "*e.g.,*". Incorrect: "*See, e.g.,*" and "*e.g.,*" or "*See, e.g.,*" and "*e.g.,*". The same rule applies to cases. Don't italicize or underline too much. Correct: *McSparron v. McSparron*, 87 N.Y.2d 275 (1995). Incorrect: *McSparron v. McSparron*, 87 N.Y.2d 275 (1995), or *McSparron v. McSparron*, 87 N.Y.2d 275 (1995).

Citation Placement

It's not graceful to place a citation at the beginning or in the middle of sentences. Doing so is the sign of an insecure scholar. Emphasize arguments and themes, not authority. Cite the source in a separate sentence that consists solely of the citation. Cite only to support your arguments and themes — or to contradict the other side's arguments and themes.

Citing in separate citational sentences assures that the rules from the cases, not the cases themselves, are stressed: Lawyers and "judges too often fail to recognize that the decision consists in what is done, not in what is said by the court in doing it."⁸ Over-reliance

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on authority spells a positivist approach to the law in which cases count for more than reason, distinctions among cases are ignored, and reasoning is hidden by long, dull discussions of authority. Over-reliance on authority also leads to disorganized legal writing in which the factual minutiae of cases are discussed paragraph after paragraph and in which citations are strung together at length. Unless the weight of the authority is important, cite cases for their rules, not as ends in themselves. Then discuss the facts of cases only to distinguish or analogize them to the facts you're arguing.⁹

Cite only to support your arguments and themes — or to contradict the other side's arguments and themes.

Relying on cases instead of arguments will mislead or miscue your reader to your client's detriment. Not all precedent is binding, and not all statutes can be interpreted at face value. As Illinois Chief Justice Schaefer explained, "lawyers tend to treat all judicial opinions as currency of equal value Yet, when the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equal value"

And droning on about cases is stultifying. After all, "few things [are] more boring than . . . page after page of case discussion in which each paragraph begins: 'In *A v. B* . . .'; 'In *C v. D* . . .'; 'In *E v. F* . . .'. By the third one, the reader feels like saying 'who cares?'"¹⁰

Explanatory Parentheticals

Use a parenthetical following your case citation if your citation reference is unclear, such as when your reference supports your proposition inferentially or indirectly and you don't explain the reference in your text. Use a parenthetical to explain the point you make in the preceding sentence of your text. Don't use a parenthetical to add infor-

mation that doesn't explain your preceding sentence. *Correct*: "Defendant committed a tort. *See X v. Y*, 1 N.Y.3d 1, 11 (2011) (listing elements of tortious wrongs)." *Incorrect*: "Defendant committed a tort. *X v. Y*, 1 N.Y.3d 1, 11 (2011) (observing tartly that 'torte' means 'pie' in French)."

Use a parenthetical following your cited authority if a fact from your case precedes the citation. It's bad form to compose the following sentence and then append the following citation: "Petitioner is not yet entitled to attorney fees. *Solow v. Wellner*, 86 N.Y.2d 582, 589 (1995)." The citation needs a "see" and a parenthetical to explain why the author cited *Solow*. The sentence and the citation should read: "Petitioner is not yet entitled to attorney fees. *See Solow v. Wellner*, 86 N.Y.2d 582, 589 (1995) (holding it premature to review award for attorney fees when case is remitted to recalculate abatement award)." Remember, however, to "[u]se an explanatory parenthetical only for information that is simple and not part of the argument. And resist the temptation to use explanatory parentheticals to avoid the hard work of explaining complicated and important authority."¹¹

Avoid using articles in your citation parentheticals, but use articles if the parenthetical reads poorly without them.

If the entire parenthetical is a quotation, (1) the parenthetical should begin with a capitalized first letter, even if a bracketed alteration is required; (2) a period or four ellipses should go at the end of the parenthetical before closing the quotation if the quotation is an independent clause; and (3) a final period should follow the closing parenthetical.

Begin explanatory parentheticals with a lowercase present participle or gerund ("finding," "holding," "noting," "stating," "ruling"). This technique is harder than writing whatever comes to mind, but introductory present participles or gerunds focus explanatory parentheticals. Parentheticals beginning with present participles or gerunds are rare in New York

but standard in federal court. Key present participles or gerunds for parentheticals:

"Finding" (fact or law that leads to a holding).

"Holding" (essential factual and legal findings that lead to the final determination and the conclusion itself).

"Stating" (dictum or concurrence). Contracts "provide" and statutes "create," "abolish," "prohibit," "define," and "provide." Neither contracts nor statutes "state" or "say."

"Ruling" (non-case-specific announcement of legal standard).

"Arguing" (concurrence or dissent; neither majority appellate opinions nor trial judges "argue").

"Contending" (judges, including dissenters, never "contend").

Note: Don't use the vague "indicating" in a citation parenthetical.

Preferred Citations

Prefer a higher court to a lower court. In New York, prefer the Court of Appeals most of all. If you cite a Court of Appeals or Appellate Division opinion on point, you'll rarely need to cite a trial-court opinion.

In New York, prefer a New York State court to a federal court (unless your issue raises a federal constitutional question and the federal courts have set a threshold).

In New York, prefer the Second Circuit to another federal circuit.

In New York, prefer any federal court to any non-New York State state-court.

In New York, prefer your Appellate Division Judicial Department or Appellate Term Judicial District to another Appellate Division Department or Appellate Term District.

Prefer a court of coordinate jurisdiction in your appellate jurisdiction to a court of coordinate jurisdiction in another appellate jurisdiction.

Prefer fully affirmed opinions to those modified on other grounds.

Prefer unanimous opinions to majority opinions.

Prefer majority opinions to plurality opinions.

Prefer plurality opinions to concurring opinions.

Prefer concurring opinions to dissenting opinions.

Prefer a case on all fours to a case with distinctions.

Prefer most cases to most secondary authority.

Prefer signed opinions to memorandum opinions.

Prefer memorandum opinions to per curiam opinions, except when the per curiam opinion allows no reservations and contains no wriggle room.

Prefer unanimous authority to split authority.

Prefer newer cases to older cases, unless the older case is seminal authority. Then site the seminal authority and the new case.

Prefer a case that goes your way to a case that goes the other way, even when citing black-letter law.

Prefer a famous, highly regarded judge or author to a less highly regarded judge or author. Cite a disgraced judge's opinion only if you have no other authority on point, and even then beware.

Prefer a holding to a finding.

Prefer ratio decidendi to obiter dictum.

Prefer a published opinion to an unpublished opinion.

Prefer an officially reported opinion to an unofficially reported opinion, such as a *New York Law Journal* opinion. When you cite a *New York Law Journal* opinion, always verify whether the opinion has been reported officially and whether the decision has been reversed.

Prefer a constitution to a statute.

Prefer a statute to a rule or regulation.

Prefer a statute to a case, but cite both (citing the statute first) if the case explains how to apply the statute.

Prefer a reference in the text of a case or secondary authority you're citing to a reference in a footnote of a case or secondary authority.

Next month: Accuracy in citing, string citing, ordering authority, pinpoint citations, and parallel citing.

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1. To download a free copy, visit <courts.state.ny.us/reporter/Styman_Menu.htm>.
2. The Bluebook: A Uniform System of Citation (17th ed. 2000).
3. St. John's Law Review, New York Rules of Citation (4th ed. 2001).
4. Association of Legal Writing Directors & Darby Dickerson, ALWD Citation Manual: A Professional System of Citation (2d ed. 2002).
5. For a comparison of the *Bluebook*, the *Tanbook*, ALWD (first edition),

- and the *St. John's Rules of Citation*, see Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002). ALWD's second edition repaired its New York errors, not by fixing them, but by deleting them without replacing them with correct ones.
6. 111 N.Y. 1, 56, 18 N.E. 692, 706 (1888) (Ruger, Ch. J.).
7. 200 U.S. 321, 337 (1905).
8. Cuthbert W. Pound, *Defective Law — Its Cause and Remedy*, 1 N.Y. St. Bar Ass'n Bull. 279, 282 (Sept. 1929).
9. See Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 41–B50 (1999) (explaining how to fuse cases to note governing rule or pattern).
10. Paula Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. Pitt. L. Rev. 149, 159 (1984).
11. Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* § 17.4, at 244 (4th ed. 2001).