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Write the Cites Right—Part II

Gerald Lebovits



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Write the Cites Right — Part II

BY GERALD LEBOVITS

Last month the Legal Writer cited some rules about citing. We cite more rules to stop the *Bluebook* police from issuing citations for illegal citations.

Accuracy in Citing

Never cite as binding or persuasive an out-of-jurisdiction opinion that interprets a statute or rule different from the one you're interpreting. Be careful when citing a case affected by later statutory changes.

Never cite unpublishable opinions — those to which a court, typically a federal court of appeals, explicitly forbids, under penalty of contempt, anyone to cite — except for *res judicata* or collateral estoppel purposes.

Always alert the reader if your citation comes from a concurrence or a dissent. *Example:* Reid, J., concurring; Graffeo, J., concurring in part & dissenting in part. *Example:* *In re Notre Dame Leasing, LLC v. Rosario*, 2 N.Y.3d 459, 469, 812 N.E.2d 291, 296, 779 N.Y.S.2d 801, 806 (2004) (Ciparick, J., dissenting).

Always include in a parenthetical the court, county, department, district, and year for New York cases and the court, district, circuit, and year for federal cases.

Always include following your citation any leave (New York Court of Appeals) or certiorari (Supreme Court) granted or denied dispositions and any appeal granted or dismissed dispositions. Although the *Bluebook* tells you to add only recent certiorari denials unless the denial is relevant, adding all leave and certiorari denials proves that you shepardized your case.

Unless you must give a case's full procedural history, never cite reargument denials.

If your citation quotes another statute, case, or secondary authority,

both must be cited if you're quoting from both.¹ If you're not quoting from both, citing the cited citation is permissible. Tell your reader that your citation cites something else, but only if the citing citation doubles the bang for your buck. For example, if you cite a helpful, on-point small-claims opinion, and for its proposition that opinion cites a Supreme Court opinion not entirely on point, cite the small-claims opinion and note that it cites the Supreme Court opinion. That will signify that at least the Small Claims court believed that the Supreme Court opinion supports its position. If, however, the Supreme Court opinion is really on point, cite only that opinion.²

Although it's uncommon in New York State style, use the federal practice of alerting the reader to the weight of authority: memorandum opinion, per curiam opinion, or en banc opinion, as follows: *A v. B*, 100 App. Div. 100 (4th Dep't 1936) (mem.); *B v. C*, 101 Misc. 101 (App. Term 1st Dep't 1937) (per curiam); *C v. D*, 102 F. 102 (2d Cir. 1938) (en banc).

Don't discuss a citation you've mentioned for the first time only in your preceding parenthetical citation, whether as a sentence citation or as a citational footnote. *Not:* "To be valid, a contract requires offer and acceptance. *A v. B*, 99 N.Y. 99 (1899). In *A v. B*, the court . . ." Rather, introduce your citation in your text before you discuss it in your text. Anticipate that your citation won't be read — that your reader will read only your text. You must lay a foundation in the text, not in the citation, for anything you later discuss in the text.

Never rely on another source, even a published opinion, for your citation. Always verify independently the accuracy of your citation's numbers, quotations, and propositions.

String Citing

Limit string citing to three cases except when you must document the sources necessary to understand authority or a split in authority. Citing for completeness rather than to make your point denotes research writing that has no place in a memorandum designed to inform or a brief designed to persuade. When you string cite, separate authorities by semicolons. For obvious, threshold matters that require no elaboration, don't string cite at all. One good cite is good enough.

Ordering Authority

Which goes first: the Constitution or a U.S. Supreme Court opinion that interprets the Constitution? The Constitution, which is higher authority than a case that interprets it.

Always cite and use official citations in New York, if available.

Until this century, statutes were considered "warts on the body of the common law."³ But "most American jurisdictions are now Code states."⁴ Statutes must therefore be cited before cases. Unless a statute is unconstitutional or beyond the rule-making body's authority to enact, statutes are more authoritative than cases that interpret them.

The order of a string citation: constitutional provision before statute before rule and regulation before case; federal before state; highest court first; within co-equal courts, reverse chronological order; and secondary authority, in alphabetical order.

Pinpoint (Jump) Citations

Use pinpoint citations, even to the footnotes: *X v. Y*, 16 N.Y.2d 61, 62 n.3 (1981); *A v. B*, 91 A.D.2d 19, 19 & n.9

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(1st Dep't 1991) (mem.) (noting that rule against perpetuities is still alive), *rev'd on dissenting opn. below*, 91 N.Y.2d 19 (1991). New York trial-court opinions often omit pinpoint citations. Most full New York appellate opinions, and all federal opinions, include pinpoint citations.

Use pinpoint citations even if your proposition is on the first page, and even if your case has only one page: *X v. Y*, 16 N.Y.2d 61, 61 (1961).

The same rules about pinpoint citations apply to secondary authority, for which you must always give the author's full name: Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 464 (1993) (explaining how to become legal-writing mavens); Ralph Slovenko, *Plain Yiddish for Lawyers and Judges*, [June 1986] Trial 92, 93 (same); Gerald F. Uelman, *Plain Yiddish for Lawyers*, 71 A.B.A. J. 78, 79 (June 1985) (same).

Using pinpoint citations will assure your readers that you didn't simply forget to use a pinpoint citation and that you knew you should always use a pinpoint citation. Your readers will know that you read the cited authority and that your proposition is accurate. Most important, your reader will be able to find quickly the exact proposition for which you cited your authority. Using pinpoint citations also forces you to read your case. That will control your citation and make it accurate. That will also lead you to other authorities, and perhaps better ones. Pinpoint citing therefore inhibits boilerplate.⁵

If several pages of your case support a proposition, avoid pinpoint citing to a broad spectrum of pages, such as 61–68. Instead, narrow your proposition and thus your pinpoint citation. Or use *passim* to note that the entire authority supports your proposition: *X v. Y*, 16 N.Y.2d 61, *passim* (1981). “Passim” usage is rare; legal writers are unfamiliar with it.

Parallel Citing

It's unnecessary in New York to give parallel citations. But if you do, always cite and use the official citation (Misc. 3d; A.D.3d; N.Y.3d), if available,⁶ down to the pinpoint citation. The Bluebook's advice that writers cite only the unofficial reporter (N.E.2d, N.Y.S.2d) is wrong. Most New York judges don't have the unofficial (West) volumes. If you cite only the unofficial version, you'll force the judge to convert your citation, thus making it harder for the judge to rule for you. Moreover, the official version is often different from the unofficial version. The New York State Law Reporting Bureau carefully edits the official reports, and before official publication judges have an opportunity to revisit their opinions. The unofficial reporter doesn't always pick up the edits and revisions. Why would any lawyer cite or use an imperfect version of a case?

Don't write “__Misc. 2d__,” “__A.D.2d__,” or “__N.Y.2d__” if your cited case isn't yet officially reported, even if you expect it to be reported officially. All Appellate Division opinions will be reported in the A.D.3d reporter, and all Court of Appeals opinions will be reported in the N.Y.3d reporter. It's unnecessary to use the

“__A.D.3d__” or the “__N.Y.3d__” format to tell a reader that these opinions will be published officially. Conversely, most trial term and Appellate Term opinions published in the *New York Law Journal* or elsewhere won’t be reported in the Misc. 3d reporter, although newer cases might be reported online in Westlaw and LEXIS as New York Slip Opinions. In Westlaw, look up the NY-ORCSU database. Westlaw will tell you whether the opinion will be reported officially by writing “__N.Y.S.2d__” at the top of the opinion. Opinions in NY-ORCSU won’t be reported officially.

Citing as Brevity

Citing doesn’t merely enable your reader to find your authority. Citing also condenses your writing. Unless you need to explain procedural history in your text, let your citation speak for you. Unnecessary history: “After the Appellate Term, Second Department, decided *Smith v. Jones* in 1997 in a per curiam opinion that reversed in part and affirmed in part a 1996 judgment of the New York City Civil Court, Queens County, the Appellate Division, Second Department, granted leave and reversed in 1998 in a memorandum opinion, and then the Court of Appeals granted leave in 1999 but dismissed the appeal in 2000.” *Becomes: See Smith v. Jones*, N.Y.L.J., Apr. 1, 1996, at 9, col. 1 (Civ. Ct. Queens County), *aff’d in part & rev’d in part*, 199 Misc. 2d 911, 119 N.Y.S.2d 911 (App. Term 2d Dep’t 2d & 11th Jud. Dists. 1997) (per curiam), *rev’d*, 191 A.D.2d 919, 119 N.Y.S.2d 919 (2d Dep’t 1998) (mem.), *app. dismissed*, 191 N.Y.2d 191, 919 N.E.2d 919, 999 N.Y.S.2d 999 (2000).

Citations enable the reader to find the source. They also credit the source, convey the source’s persuasiveness, and demonstrate whether law supports an argument. To help a court to rule for you, cite it right.

has written *Advanced Judicial Opinion Writing*, a handbook for New York’s trial and appellate courts, from which this column is adapted. His e-mail address is GLebovits@aol.com.

1. See *The Legal Writer, You Can Quote Me — Part II*, 76 N.Y. St. B.J. 64, 57 (A. v. B. and B. v. A. examples).
2. This is how to cite a citing reference that adds critical information: *In re Marino S.*, 100 N.Y.2d 361, 369 n.3, 795 N.E.2d 21, 25 n.3, 763 N.Y.S.2d 796, 800 n.3 (2003) (Kaye, C. J.) (citing Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights*, 73 N.Y. St. B.J. 41 (May 2001)).
3. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 89 (1930).
4. Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 Harv. J.L. & Pub Pol’y 35, 35 (1988).
5. See generally Bryan A. Garner, *The Redbook: A Manual on Legal Style* 108–09 (2002).
6. *Disenhouse Assocs. v. Mazzaferro*, 135 Misc. 2d 1135, 1137 n.*, 519 N.Y.S.2d 119, 120 n.* (Civ. Ct. N.Y. County 1987) (urging all attorneys not to cite “the unofficial reports only”) (citing CPLR 5529(e), which proves that in their appellate briefs, attorneys who cite New York cases must cite the Official Reports, if available); *accord In re Bernstein v. Luloff*, 34 A.D.2d 965, 965, 313 N.Y.S.2d 949, 949 (2d Dep’t 1970) (mem.) (admonishing counsel to cite official reports); *La Manna Concrete, Inc. v. Friedman*, 34 A.D.2d 576, 576, 309 N.Y.S.2d 711, 713 (2d Dep’t 1970) (mem.) (same); *People v. Matera*, 52 Misc. 2d 674, 687, 276 N.Y.S.2d 776, 789 (Sup. Ct. Queens County 1967) (“[W]e are required, in the rendition of our opinions, to cite New York decisions from the official reports, if any, as the counsel themselves are bound to do in their briefs on appeal.”).

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he